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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)**

**IN THE MATTER OF APPLICATION BY LUCY PAYNE FOR LEAVE TO APPLY
FOR JUDICIAL REVIEW**

AND

**IN THE MATTER OF DECISIONS OF ST MARY'S GRAMMAR SCHOOL,
MAGHERAFELT, THE COUNCIL FOR THE CURRICULUM, EXAMINATIONS
AND ASSESSMENT AND THE BOARD OF GOVERNORS OF ST MARY'S
GRAMMAR SCHOOL, MAGHERAFELT**

**Steven McQuitty (instructed by MKB Law) for the applicant
Fiona Fee (instructed by Elliott Duffy Garrett) for the first and third respondents
Donal Sayers QC (instructed by Carson McDowell) for the second respondent**

SCOFFIELD J

Introduction

[1] By these proceedings the applicant seeks to challenge the award to her of a particular A-level grade. The applicant has recently completed her A-levels at St Mary's Grammar School, Magherafelt, securing grades AAB, with the grade B in chemistry. The applicant has been offered a place to study dentistry at the University of Leeds ('the University') but required to secure grades AAA to take up this place. The University has indicated that it will only keep her place open until today, 8 September. The applicant is concerned that she has wrongly been awarded a grade B in chemistry and, therefore, will be unable to take up the offer of study in the course of dentistry, which is her preferred course of university study.

[2] The first proposed respondent is the relevant examinations centre, namely the applicant's school ('the Centre'). It is the initial awarding authority in respect of her A level grades. The applicant challenges the Centre's initial award of the B grade in chemistry and its decision to maintain that grade in a review decision. The second proposed respondent is the Council for the Curriculum, Examinations and Assessment (CCEA) to which an unsuccessful appeal against the initial grade awarded by the Centre was made. The third proposed respondent is the Board of Governors of the applicant's school, whose decision it was to adopt the policy which gave rise to the award of the initial B grade by the Centre. I return to the terms of this policy - the 'Policy for Centre Determined Grades: Summer 2021' ('the CDG policy') - below.

[3] The applicant was represented by Mr McQuitty, of counsel. The school, in its various guises as both first and third proposed respondents, was represented by Miss Fee, of counsel. The second proposed respondent was represented by Mr Sayers QC. In light of the impending expiration of the applicant's University offer, this case was brought on for a rolled-up hearing at considerable speed. I am grateful to all counsel, and indeed to those instructing them, for the significant efforts made to facilitate the early and expeditious hearing of this case. A great deal of work was undertaken by each party in a very short timeframe. As appears further below, this has had some impact on the depth of the evidence which has been presented; but all parties acknowledged that, due to the time pressure which arose from the University's timescales (which are in turn driven by the high level of demand for courses such as dentistry and the need to award places in sufficient time for the start of the academic year), preparation and presentation of the evidence in this case was bound to be less than optimal.

[4] As judgment has been given very quickly upon the conclusion of the hearing yesterday, the discussion and reasoning set out below is also necessarily attenuated to some degree.

Factual Background

[5] The applicant has just recently completed her secondary education at St Mary's Grammar School. She received her final A-level grades on 10 August, receiving grades AAB. The B grade was in chemistry; but this means that she does not have the grades to take up an offer of a place to study dentistry at the University of Leeds, which required AAA grades. The University has informed the applicant that they would keep her place open for her until no later than 8 September 2021, after which she would lose this place. The applicant says this would be devastating for her as she has wanted to study dentistry for many years now. She also says that it would likely mean that she would have to repeat all her A-levels and not just chemistry (although no further explanation was provided as to why this would be so); and that many dental schools do not consider candidates who have repeated A-level modules to have achieved the requisite grade for entry.

[6] Much of the applicant's case focuses on the circumstances surrounding her chemistry assessment in September 2020. She says that the period following her return to school in September 2020 was a particularly difficult period for her. Her aunt had been diagnosed with cancer shortly beforehand and sadly died at the end of September, which was a huge shock and a devastating loss to her family. Around this time her father also contracted Covid-19, which also added further disruption and difficulty to family life. The applicant herself had to self-isolate at home for a period at the start of October 2020. Further details of these issues were provided in her evidence and had previously been provided to her school.

[7] The applicant was disappointed to secure a score of only 51% (grade C) in her September 2020 assessment (Assessment 1). This mark was itself adjusted upwards by 4% to allow for the special considerations arising due to the death of the applicant's aunt. (It was assessed that no adjustment was required in relation to the Covid-related issues). Notwithstanding this C grade in her first assessment, the applicant was still predicted a grade A in chemistry for the purpose of her UCAS application in mid-October 2020. Although she had initially been predicted a grade B in the subject, her school agreed to revise this to an A grade prediction.

[8] The applicant then sat mock examinations in December 2020, on 9 and 11 December respectively (Assessment 2). In this assessment, she scored 52% (grade C). The paper was marked with a note saying that there had been a lack of revision apparent. The applicant contends that this is an indicator that her actual ability was higher and simply reflected a lack of work at that time. The applicant explains this on the basis that, during her first term of this academic year, she had been "putting most of [her] efforts into studying for the UCAT and BMAT exams..." These are examinations set by dental schools which form part of their own assessment process in order to determine whether they will offer a student a place. The applicant sat the UCAT on 14 September 2020 and the BMAT exams on 4 November 2020. She candidly accepts that she focused on these examinations rather than her subject work at school, noting that, at that time, she still did not know that the September and December 2020 assessments would be used towards the assessment of her final A-level grade. It was only on 6 January 2021 that the ordinary A-level examinations which had been planned for 2021 were cancelled by the Education Minister. It was then only in April 2021 that her school published the policy which indicated how her final A-level grades would be determined.

[9] The applicant then sat the CCEA assessment in chemistry in April 2021 (Assessment 3). She achieved a much higher score in this assessment, namely 80% (which equates to an A* grade). She contends that this score properly reflects her true ability. Aside from an online chemistry assessment which had been marked by her teacher in February 2021 (in which she scored 95%), she says that the April 2021 exam was the only proper assessment of her ability this year. She also points to a number of homeworks which were undertaken in chemistry which were marked in class, in respect of which her average score was 93.5%. As to these homework scores, the applicant contends that her teacher failed to record and collect this data,

which represents a failure to take relevant matters into account, particularly whenever the CCEA policy allowed for homework to be used as evidence when determining a final grade.

[10] On 10 August 2021 the school awarded the applicant a grade B in her chemistry A-level. She says that she was “completely gutted” with this result; and felt that the most recent and contemporaneous evidence showed that she was performing at A* level. The applicant sought a review of this decision and, on 18 August 2021, the Centre maintained that grade B upon formal review.

[11] In the meantime, the applicant had sought further information and documentation from the school. A response was provided by the school dated 13 August 2021 (from R McKernan, Exams Officer). This email referred to the three assessments discussed above and also noted as follows:

“Holistic judgment was used in the determination of her grade. No specific weightings were applied to individual assessments in line with CCEA Guidelines.”

The applicant accepts that it was proper for the school to apply a holistic judgment; but contends that the issue of weighting has not been approached correctly. In simple terms, she contends that her excellent result in Assessment 3 ought to have been given much more weight, so that it outweighed the less impressive performance in Assessments 1 and 2. She relies upon the email of 13 August 2021 as evidence that the Centre, in breach of relevant policy (she contends), failed to apply any weighting to the three assessments.

[12] After the unsuccessful Centre review, that decision was then appealed to the CCEA, which made a decision on 20 August 2021 to maintain the grade B. The applicant’s appeal was mounted on the basis that the Centre did not follow its procedure and/or had carried out an unreasonable exercise of academic judgment (in respect of both the Centre’s selection of evidence on which to base the grade and in its determination of the relevant grade).

The parties’ respective cases

[13] The applicant pleaded a wide range of grounds of challenge. In relation to the initial decision to award a grade B, the applicant contends that this is unlawful for inadequate reasoning; that it is in breach of her rights under Article 2 of the First Protocol to the European Convention on Human Rights; that it is unlawfully discriminatory against her contrary to Article 14 ECHR on the basis of differential treatment between the applicant and those who, unlike her, were not graded by reference to assessments carried out before the relevant student knew that the assessment would count towards their final A-level grade; that the Centre has failed to follow and apply relevant policy; that the Centre fettered its discretion in the way in which the grade was determined; that a variety of relevant factors were left out of

account; and that the grading decision is irrational. These grounds were refined and focused in the applicant's skeleton argument and in Mr McQuitty's oral submissions. As the case was presented yesterday, the key issues were (a) the applicant's reasons challenge; and (b) the way in which the assessments were weighted, having regard to the content of the relevant policies published by the Centre and by CCEA. The Convention arguments were pursued only faintly (and properly so, for the reasons explained below).

[14] The central crux of the applicant's case is that the latest assessment undertaken by her in chemistry in April 2021, along with other supportive evidence, was plainly enough to outweigh her relatively poor performance in the earlier assessments; and that, had the proper element of judgment been applied in accordance with the appropriate policies, this would have been recognised. The applicant relies on the fact that the assessment in April 2021 was both the most recent and also covered a greater range of topics within the subject area.

[15] The same grounds are essentially also relied upon in respect of the key decision made by the CCEA; and also the decision of the Board of Governors of the school in adopting the initial assessment policy. The Board of Governors' decision is also challenged on the basis that it represents an improper fettering of discretion and that it has given rise to an inconsistency of approach between local schools.

[16] Unsurprisingly, the respondents emphasised that a large element of the applicant's challenge relates to the exercise of academic judgement, and expert academic judgement at that. In such circumstances, the respondents contend that the court's role is extremely limited. For CCEA, Mr Sayers emphasised that its role on appeal was even more limited than that of the Centre; and submitted that there was no basis for a finding that CCEA had been wrong to conclude that the Centre had correctly followed the CDG policy and had exercised reasonable academic judgment.

[17] Insofar as the applicant's challenge is directed towards her school's policy for the determination of grades as set out in the CDG policy, the third respondent contends that her challenge is out of time because this policy was published in April 2021 and these proceedings were only commenced on 3 September 2021.

The relevant policies

The CCEA policy

[18] There are two policies on which the applicant relied in order to give foundation and shape to a challenge which would, otherwise, have been liable to be condemned as a pure merits challenge. The first was published by CCEA on 15 March 2021 and is entitled, 'GCSE, AS and A Level Awarding Summer 2021: Alternative Arrangements - Process for Heads of Centre' ('the CCEA Arrangements'). The purpose of this policy was to give guidance to examination

centres on how grades should be assessed for students who would ordinarily have been sitting examinations in the first part of 2021 but in circumstances where those examinations had been cancelled as a result of the Covid-19 pandemic.

[19] The process this year was to be different from the process adopted last year, which had proven contentious. Broadly speaking, last year teachers had been asked to predict prospectively what grade a student would obtain in the event that they sat the relevant examinations. This year, the assessment was to be “based on teacher professional judgments, with moderation” with centres asked “to use a range of evidence to arrive at a professional and academic judgment of the standard at which each student is performing in the context of the specification for which they are entered...” Thus, although teachers’ judgment was central, this was to be an evidence-based assessment. A key question, therefore, is what evidence the teacher(s) in each case should, or should not, consider.

[20] The CCEA Arrangements set the framework for the process; but with two important further steps. First, CCEA committed to publishing subject-specific guidance, which it later did. I have been provided with a copy of this but it is for present purposes essentially duplicative of the higher level policy. Second, each centre was then required to produce its own policy setting out how it would determine pupils’ grades, taking into account the CCEA guidance. By this means, it was hoped that centres would broadly adopt a consistent approach (based on the overarching CCEA guidance) but with each centre having some leeway to tailor its own process to what it considered to be the best way to determine grades. The CCEA Arrangements described the basic process in this way:

“Each Centre Determined Grade is a judgement of the final grade for a qualification. It must be based on a holistic review of a student’s performance as indicated by assessment evidence, gathered and retained at centre level. In the interests of fairness within and across centres, each Centre Determined Grade must be a realistic evidence-based judgement of the standard at which a student is performing, i.e. their demonstrated knowledge, understanding and skills in the content of the specification they have covered...”

[21] In light of the CCEA Arrangements, each Head of Centre was then required to develop their own CDG policy outlining the approach which that centre (here, the applicant’s school) would take. Amongst other things, this policy was required to include an indication of “what evidence will be considered in arriving at grades that will be recorded in the Departmental Assessment Evidence Grid that will form part of the evidence base”.

[22] An important portion of the CCEA Arrangements on which much emphasis was placed at hearing is section 5, entitled ‘Preliminary Considerations Before

Reviewing Evidence.’ This seems to me to primarily give guidance to Centres on what type of evidence should be used in order to inform the judgment of grades to be awarded; but also to give some guidance as to how that evidence should be addressed when such judgments are being made. It states:

“In arriving at a Centre Determined Grade for a student, it is not necessary to assess every aspect of the specification exhaustively. A selection of key tasks or assessments carried out under appropriate conditions and with a suitable level of demand, which allows the teacher to authenticate the work as the student’s own, will give a good indication of the standard at which the student is performing in the qualification.

To make accurate judgements, teachers must have a clear understanding of:

- the range of skills, knowledge and understanding covered by the specification;
- the assessment requirements and the structure of the specification;
- the grade descriptions at key grades;
- the level of demand of the qualification assessments; and
- the weighting of each component/unit and the type of assessment.

Information on these aspects can be found in each specification...”

[23] Mr McQuitty relies strongly on the final bullet point in the portion of the CCEA Arrangements set out above. He submits that this indicates that each piece of evidence should be weighted (and teachers must clearly understand how that is to be done); and that different types of assessment should be weighted in different ways. Further information on this is then given in the following portion of the text, which states that:

“When judging evidence you should consider its value, both in terms of the individual pieces of evidence and as part of the overall judgement for each student. You should exercise caution where work completed has been unsupervised. This work should not be discounted, but it must only be used as evidence when reliably authenticated as the student’s own work...”

A piece of evidence has high validity and reliability if a student who performs well in the task would reasonably be expected to perform equally well in the qualification as a whole. Some considerations that may impact on evidence are noted below.”

[24] The considerations then mentioned include specification coverage (how many ‘units’ within the subject specification are covered); similarity to actual qualification assessments (with evidence similar to a CCEA assessment being more useful); controls (the stringency of conditions under which the assessment was undertaken); level of demand (the difficulty of the assessment); and when the evidence was generated. In relation to the last of these, on which the applicant particularly relies, the supporting text is as follows:

“It should be borne in mind that a student’s knowledge, understanding and skills may develop over the period of a course of study; you should consider when any piece of evidence was generated and ensure, if possible, that evidence generated recently is taken into account.”

[25] Further detail is provided in section 7 of the CCEA Arrangements as to evidence which should be used to inform centre determined grades. First, the evidence used must be at the level of the qualification being graded “and generated during the teaching period of the specification.” For A level grading, AS level evidence may be considered alongside A2 evidence if this is deemed appropriate or necessary, but some caution is urged in relation to this. In simple terms, therefore, the evidence to be considered for A level grades is likely to be that from the pupil’s last year of schooling (A2 evidence). Further guidance is in the following terms:

“You should consider all the key evidence you have for each student and reflect on how much it tells you about the student’s standard of performance, as measured against the requirements of the relevant specification. For example, this could be, but is not limited to:

- the consistency of a student’s practical or performance evidence;
- their depth or breadth of knowledge and understanding in relation to questions on key topics;
- their degree of analytical or evaluative skills demonstrated on key topics; and/or
- quality of student responses to discriminating questions or tasks.

Centres should be clear in their policy what types of evidence will be used in determining the grade. Centres

should also be clear with students the evidence that will be used to determine their grades. Where possible, centres should aim to use consistent sources of evidence for a qualification cohort...”

[26] The final passage cited makes clear that it is for the relevant centre to make clear in its own CDG policy exactly what evidence it will use in determining grades.

The school's policy

[27] As required, the school developed its own CDG policy. This was adopted by the school's Board of Governors on 12 April 2021. It is plainly based upon, and draws heavily upon, the CCEA Arrangements. In the course of the examination of this document at hearing, I did not discern any intention to depart from the assessment framework set out in the CCEA arrangements in any material way.

[28] The school's CDG policy addresses the appropriate evidence which will be used in order to inform teachers' judgement as to appropriate grades. It initially does so in broad terms, in the following way:

“St. Mary's Grammar school may use some of the following examples of candidate evidence in arriving at Centre Determined Grades:

- CCEA (or other awarding body) assessment resources for 2021.
- CCEA (or other awarding body) past papers.
- mock examinations, which relate to the CCEA (or other awarding body) specifications.
- coursework or controlled assessments, even where not completed – if applicable to the subject.
- class tests.
- homework

St. Mary's Grammar School will base all evidence on the relevant CCEA qualification specifications as set out in the **CCEA Alternative Arrangements - Process for Heads of Centre**. For other awarding bodies, the school will follow the guidance provided.”

[29] This passage indicates the type of evidence which, in principle, will be acceptable. However, the particular evidence to be used for each subject area was spelt out in further detail in Appendix 1 to the CDG policy. In addition, the policy provided that candidates were to be made aware of the particular evidence which would be used in determining their grades (as set out in Appendix 1) by way of email from the Head of Centre as early as possible in the third term. Appendix 1 of

the document outlines the evidence which will be used to determine grades in chemistry A level as follows, namely (i) "CM1: Isomerism, Aldehydes and Ketones, Carboxylic Acids, Carboxylic Acid Derivatives, Kc and Ka"; (ii) "Mock Examination (A2 1 and A2 2)"; and (iii) "CCEA Assessment." These correspond to the three assessments discussed at paragraphs [7]-[9] above.

[30] As to the process of determining grades, the school's CDG policy contains some wording which appears to have been lifted directly from the CCEA Arrangements and which is in similar terms to those portions of the CCEA policy quoted at paragraphs [20] and [22] above.

[31] There is also a section of the school CDG policy entitled, 'Recording Decisions and Retention of Evidence and Data'. It contains the following statements:

"It is fundamental that teachers and Heads of Department maintain records that show how Centre Determined Grades have been produced and internally standardised, including the rationale for decisions in relation to individual marks/grades. All evidence used to support the grade determined for each candidate will be retained securely.

It is essential that there are robust, accurate and secure records of decisions and retention of evidence to comply with data protection legislation and in anticipation of centre moderation and the CCEA Review of Evidence and Award process and potential appeals. When requested, evidence will be uploaded via the CCEA application used to submit the Centre Determined Grades. The following CCEA documentation must be fully and accurately completed and retained securely:

- Candidate Assessment Records.
- Head of Department Checklists and Departmental Assessment Evidence Grid.
- Head of Centre Declaration."

Discussion

[32] The applicant contends that she has not been provided with adequate reasons for the initial grading decision made by her school; nor for the rejection of her review request; nor for the rejection of her appeal to CCEA. In order to succeed in any of these aspects of her challenge, the applicant must establish a relevant duty to give reasons, a failure to give adequate reasons, and some significant prejudice arising from that failure. The second and third of these requirements shade into each other

but arise from the now well-known and often applied statement of Lord Brown in *South Bucks District Council v Porter (No 2)* [2004] UKHL 33, at paragraph [36], that:

“A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.”

[33] There remains no general duty to give reasons in public law. I find it hard to see how there could be a duty to give reasons at common law for the award of a particular A-level grade. Mr McQuitty relies upon the importance of this determination for the applicant’s future career. However, that arises from the particular circumstances of her chosen course, the requirements of Leeds University for her to take up her offer and the fact that her present grade means that she has missed out on the requirements for this offer by one grade. (I assume that the applicant has no other offer of a place on a dentistry course at another university, since there is no suggestion of that in the evidence.) Those circumstances are peculiar to the applicant’s case and certainly would not arise in every case where grades are being awarded.

[34] Since the award of a particular grade is essentially an exercise of academic judgment, that is a further basis in my view on which it is unlikely that the common law would require reasons to be given. First, because such a decision is inherently insusceptible to challenge by way of judicial review (and reasons are often required in order to identify whether there is some legal error which ought to be corrected by way of judicial review); and, second, because matters of such judgment are generally difficult to explain in a scientific or structured fashion. Put simply, the context of teachers making such judgments does not appear to me to be one into which the common law would reach by way of an obligation to provide reasons.

[35] I am more attracted by the applicant’s case that her school was required to give reasons for her grade as a result of the policy which it voluntarily adopted in this regard, which would give rise to a legitimate expectation on her part that reasons for a particular determination of grade would be given. That is on the basis of that portion of the CDG policy which is set out at paragraph [31] above. Ultimately, however, on a close reading of that section of the policy, it appears to me that it is neither intended nor designed to confer on a pupil a right to receive reasons for a particular grading assessment. Rather, it is a direction to the relevant academic staff that particular records must be created and retained in order to establish an audit trail for a particular grading decision for the purposes of centre moderation and further appeals. The system is designed so that the rationale for a decision should be evident from the CDG policy itself, in conjunction with the Candidate Assessment Record and Departmental Assessment Evidence Grid – each of which has been completed in this case and disclosed in the course of these proceedings. I do not consider that the CDG policy confers upon the applicant a right to a detailed narrative of how each piece of evidence was weighted and assessed. The discussion

below as to the adequacy of the reasons provided is without prejudice to my conclusion that the applicant is not entitled to the type of reasoning for which she contends.

[36] The applicant asserts that the only information provided to her in order to explain the initial award of a grade B was reference to the three assessments which she had undertaken. She took from this that her result had been arrived at in a mechanistic way, essentially by adding together the scores achieved in each of the three assessments and then dividing by three. This exercise would have provided an average score of 61%, which would equate to a grade B. Some further detail in relation to the assessment which was conducted is contained in the affidavit of Mr Frank Dunlop, the Acting Principal of St Mary's Grammar School and the Head of Centre. In particular, paragraph 23 of his affidavit contains the following averment:

"I know that [the applicant] disputes that a holistic judgement was used in arriving at her grade, and fears that a simple average was taken across the 3 assessments. This is not correct. I have spoken to [the applicant]'s teachers and no mechanistic calculation or weighting was applied. The teachers applied the CCEA approved approach of looking at the grades obtained in the three component assessments and taking a holistic view of her performance as indicated by the assessment evidence."

[37] This averment, which the applicant is not in a position to controvert, makes clear that the process which she feared had been adopted was not in fact adopted by the teachers who initially assessed her appropriate grade. It remains unclear from Mr Dunlop's averment precisely how each of the three assessments which were used as the relevant evidence were weighted and/or weighed against each other. This is unfortunate but appears to have arisen, at least in part, through the speed with which the first respondent's affidavit evidence had to be produced (in circumstances where, I understand, there were significant competing pressures on the deponent's time as a result of Covid-19 related issues which required to be dealt with at the school). The issue of the correct approach to weighting is discussed further below.

[38] Nonetheless, Mr Dunlop's evidence contains a good deal of additional information about the circumstances of this case which are raised in the applicant's grounding affidavit. In particular, he makes clear that, in light of the cancellation of examinations last year, the school was at pains to make clear to students in September 2020 they should take particular care with all of their work in the forthcoming academic year, including mock examinations and school assessments, as there might well be further disruption to the normal academic examinations this year. I accept the school's evidence that pupils were well warned about the possibility of their work throughout the year potentially being used as the basis for assessment of their grades. This significantly undermines the applicant's case that

the first two assessments which were used as part of the evidence base for the determination of her grade ought not to have been so used in light of the fact that she had not been advised formally in advance that they would be used for this purpose.

[39] Although the applicant relies on the fact that she was predicted an A grade in chemistry for the purposes of her UCAS application, the evidence also shows that she was initially predicted a grade B at that stage. She requested a change in this predicted grade on the basis that AAA was required for applying to dentistry. Her school agreed to change her predicted grade on this basis. The school principal has candidly dealt with this in his affidavit by explaining that the school does not wish able students to unnecessarily miss out on offers for competitive university courses due to predicted grades, particularly in the context of Covid-19. In short, the applicant was predicted a grade A in chemistry in order to preserve the possibility of an offer of a dentistry course but in circumstances where it was recognised that this was a subject which required the applicant to further apply herself and where, objectively, the relevant teachers' view was that a B grade was a more robust prediction at that time.

[40] The Candidate Assessment Record which has been completed contains some further information as to how the extenuating circumstances relied upon by the applicant were taken into account. Full discussion of this aspect of the evidence is unnecessary for present purposes; but it is clear that the Covid-related disruption to the applicant's learning was carefully considered and, for reasons which have been explained in the evidence, resulted in a determination that no adjustment was required to her Assessment 1 or Assessment 2 marks on that basis. In contrast, an adjustment was made to her Assessment 1 marks on the basis of the additional family circumstances on which she relied. The maximum allowance for special consideration is 5%, on a tariff from 0-5%. The applicant's family situation was assessed as being a "very serious problem", meriting an additional 4% allowance. Before this was applied, the applicant had secured a grade E in Assessment 1. Once the allowance was applied, the applicant's mark was increased to 51%, which was a grade D. The school's internal boundaries were subsequently amended in line with CCEA historical grade boundaries and this resulted in the applicant's grade being raised to a C.

[41] No adjustment was considered necessary in relation to the applicant's mock exams in December 2020; and, indeed, the applicant appears to have performed well in the BMAT and UCAT examinations in advance of that. As noted above, she has candidly accepted that she devoted a considerable amount of her efforts towards the performance in those exams and attributed her poor performance in her mock examination in December to this. However, the school's evidence indicates both that pupils were acutely aware that their assessments throughout the year may well have to be used for A-level grade assessment and that many other pupils, like the applicant, also had to cope with the competing demands of university course

entrance procedures (including interviews and/or admissions tests) and their A-level studies.

[42] Returning to the issue of weighting – which was really the key issue advanced by the applicant in her oral submissions – the question is how the three assessments which were considered in determining the applicant’s grade were weighed against each other. It is clear from the school’s evidence that the mechanistic approach (of adding together the three scores and then dividing by three) was not adopted. I read Mr Dunlop’s averment, which is set out at paragraph [36] above, as meaning that there was neither mechanistic calculation nor mechanistic weighting applied in that manner. It also seems to me that the email of 13 August 2021 which says that “no *specific* weightings were applied to individual assessments in line with CCEA guidelines” is to be read in that light. (This is consistent with the statement of the Education Minister on 2 February 2021 that there was “no *prescribed* weighting for any piece of evidence). Both the email and the affidavit evidence placed before the court emphasised that “holistic judgment” was used or a “holistic view” of the applicant’s performance was taken; and that the assessment was made in line with the guidance contained in the CCEA Arrangements. This approach is also consistent with guidance published by CCEA on its website, in a ‘Question and Answer’ format, which stated that the use of holistic judgment does not mean that teachers are asked “to carry out a calculation” but rather are asked to assess a student’s performance “across all the evidence available and arrive at a grade in that way”. It continued:

“Taking this approach means that just because you performed poorly in one assessment does not mean you cannot access a higher grade, so even if performance in one assessment is not in line with expectations, there may be good evidence to support the award of a higher grade in other pieces, for example in a mock examination or CCEA assessment resource.”

[43] The school’s evidence is to the effect that the applicant has two chemistry teachers. Both of these teachers are extremely experienced and are, in fact, two of the five members of the school’s senior leadership team. The fact that there are two experienced teachers, both of whom had also taught the applicant at AS-level, was suggested in itself to be a moderating factor. In light of the knowledge and experience of the teachers concerned, including their knowledge of the school’s CDG policy (which faithfully reflected the CCEA policy guidance) and the detailed specification for chemistry A-level, I cannot accept that they would have simply given each of the three assessments the same weight in forming their judgment about the appropriate grade for the applicant to be awarded. Doing so would effectively be to adopt the approach of taking a ‘simple average’, which has been specifically disclaimed in Mr Dunlop’s affidavit evidence. The result is that, in my view, the teachers – and indeed the experienced examiners who considered the

matter on the CCEA appeal – must have taken a more nuanced approach to the evidential value of each of the three assessments.

[44] The applicant’s case rests on a number of factors which suggest that the result of the third assessment should have been given the most weight. The strongest of these is that it was the most recent in time. Initially, a suggestion was made that it also involved the greatest subject coverage (that is to say, that it assessed the greatest number of assessment units or assessment objectives within the subject specification). The Departmental Assessment Evidence Grid form suggests that this is not in fact correct and that, rather, it was the applicant’s mock examinations in December 2020 which had the greatest subject coverage. The applicant’s initial suggestion that Assessment 1 was also not conducted under a high level of control has also been shown to be incorrect and has not been pursued.

[45] I have already observed that it is unfortunate that there is no clear explanation from the two teachers who made the assessment as to precisely how they weighed the three relevant assessment results against each other. Taken as a whole, however, I consider that it is clear that the ultimate judgment reached by them was simply that the applicant’s excellent performance in Assessment 3 was not sufficient to justify an award of grade A in light of her poorer performance in Assessments 1 and 2. This is precisely the type of judgment which is permissible taking a “holistic approach”, as required by the relevant policies. It is also precisely the type of judgment which this court is manifestly ill-equipped to overturn on its merits. If authority in respect of this proposition were required, it may be found (by way of example) in the observations at paragraphs [43]-[45] of *Kwao v University of Keele* [2013] EWHC 56 (Admin), citing with approval the judgment of Sedley LJ in *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988. Any judgment I might purport to make on this issue would be jejune.

[46] The applicant’s insistence that the result of Assessment 3 in April 2021 ought to have been given determining weight rests on two features of the policies referred to above. The first is that the date of evidence being generated is a feature which should affect the value of the assessment in the CCEA Arrangements. The passage set out at paragraph [24] above makes clear that evidence generated recently should be taken into account – as it was in this case. It does not suggest that it is necessarily to be preferred above all or other evidence relevant to the assessment. A range of other factors have to be taken into account. The second is the reference in a number of places to the assessment being one of how the student “is performing”, which suggests that the assessment should be directed towards current performance (so that the evidence gathered closest in time to the grade determination exercise should be the most persuasive). This is allied to the recognition in the CCEA policy that some room for progress during the school year must be made. I see some force in this point, which is a reason why the relevant teachers would be entitled to give some additional weight to the result of the April 2021 assessment.

[47] However, read as a whole, both the CCEA and school policies plainly require consideration of a robust evidence base over the period of teaching for the relevant qualification. In the same way that a student who had performed very strongly in earlier assessments in their final year would not expect to have their grade determined solely by their latest assessment if their performance took a noticeable dip in that assessment, so too a student in the applicant's position cannot expect their earlier assessment results to be ignored or readily marginalised. The use of a range of evidence over a period of time is indicated by the CCEA Arrangements' requirement that the evidence used must be "generated during the teaching period of the specification". The fact that AS evidence may be considered alongside A2 evidence if necessary or appropriate clearly indicates that earlier, more historic assessments are not excluded (particularly where other factors identified in the policy favours their consideration). The reference in section 7 of the CCEA Arrangements to consideration of the consistency of a student's performance also strongly supports this approach.

[48] In summary, it is not the case that the teachers applied a blunt calculation, rather than a holistic judgment, as the applicant has suggested. The applicant has not made out her case that the teachers failed to apply the policy and properly weigh the results of the three assessments to be used as evidence. Although the precise approach to that has not been explained in fine detail – assuming that is possible – I have not been persuaded on the balance of probabilities that the teachers have fallen into error in this regard. Their judgment, in light of the factors identified above, that the applicant's result in her third assessment was not enough to bring her performance up to a grade A standard overall appears to me to have been open to them both as a matter of rationality and applying the process set out in the CCEA and school policy documents.

[49] I am fortified in this conclusion by the fact that the CCEA personnel who considered the matter on the applicant's appeal reached the same conclusion. The affidavit of Mr John Trueman, the Business Manager within the Standards, Data Science and Assessment Development Unit of CCEA, provides some further detail about that appeal. An appeal may be advanced on the basis that the centre made an administrative error; that it did not follow its procedure in arriving at the grade; and/or that it made an unreasonable exercise of academic judgment (by selecting evidence that was not included in their CDG policy or, more appropriately in this case, by assessing the evidence unreasonably in determining the pupil's grade). The applicant's appeal was considered by an independent reviewer, who was an experienced assistant examiner who has taught GCE Chemistry for approximately 30 years. Their consideration of the appeal was also undertaken under the supervision of the Chair of Examiners for GCE Chemistry (who is the most senior examiner for the specification and has also taught A-level chemistry for approximately 30 years). The outcome of the appeal was that the school had followed its CDG policy correctly; that the evidence selected by the school was appropriate; that the grade awarded by the school was reasonable; and that there was no clear and compelling evidence which justified a change of grade. Although

the threshold for intervention on academic judgment is a relatively high one on appeal ('clear and compelling evidence'), the appeal procedure involves an important safeguard for students in that it allows a review of academic judgment by persons well placed to identify error.

[50] The applicant has noted that the centre review process is a very limited exercise, with candidates only able to seek a review on a limited number of grounds (generally where there has been an administrative error and/or a failure to follow procedure). She also complains that there was an absence of reasoning provided by the school in respect of the review decision. I am more sympathetic to the contention that, at this point, where a review is mounted on specific available grounds, some reasoning ought to be provided as to why the review request has been either successful or unsuccessful. Indeed, the relevant *pro forma* provides a space for the school to provide "a short explanation of the evidence that you reviewed" and to "outline the centre's findings from the centre review including, where appropriate, rationale for any proposed grade change". This box was left entirely blank by the school. Nonetheless, even assuming that a duty to give reasons arose at this point and that the school did not provide adequate reasons contemporaneously, it seems to me that the school's decision at this stage was in any event overtaken by the later appeal decision made by CCEA on essentially the same issues. In addition, given the limited basis on which a review may be successful, I do not consider that there is any substantial prejudice to the applicant arising from the lack of reasons provided at this point. Although the applicant relied on both administrative error and the centre not following its procedure, the representations did not really amount to a contention of administrative error; and the claim that the centre did not follow its procedure was really mounted on the basis that the centre should ignore the subject-specific specification of relevant evidence in Appendix 1 to its CDG policy in favour of a broader discretion to consider a wide variety of evidence. That contention is a misreading of the CDG policy; and it is clear that the school simply did not agree with it.

[51] Although pithy, I do not consider the reasons provided by the CCEA on appeal to be inadequate. The key conclusions on the appeal were clear. Not every aspect of the applicant's submissions was dealt with in detail; but they were not required to be. Many of those submissions were, in fact, directed to seeking to persuade the CCEA to step outside the CDG policy and take into account new and different evidence which was not the evidence specified in Appendix 1. That was to misunderstand the nature and purpose of the limited appeal procedure.

[52] As to the suggestion that the evidence identified in the school CDG policy (as the evidence which would be taken into account for assessment of the applicant's grade in chemistry) was too restrictive, I accept the third respondent's contention that it is now too late for the applicant to make this case. Schools are given considerable leeway, within the framework of the CCEA Arrangements, to select the appropriate evidence for use in each subject area. In this case, the evidence to be used for assessing A-level chemistry grades was identified and agreed upon by the

school's chemistry teachers and the head of department collectively. There was a rational basis for this selection and the CCEA has approved it as appropriate. Each of the three assessments was carried out under a high degree of control, essentially under exam conditions. They were selected in order to provide reliable evidence which was fair to the cohort as a whole.

[53] More importantly, however, pupils were initially informed about the evidence which would be used by email on 15 April 2021. Appendix 1 to the CDG policy clearly set out the three assessments which would be used as the evidence base for grade determination at chemistry A-level. At that point, the applicant would have been aware that she had performed disappointingly in the first two assessments and that, in light of that, it was going to be a very significant uphill struggle to achieve an A grade overall (whether or not Assessment 3 was to be weighted in the way in which she contends it ought to be). Insofar as her contention is that the evidence base was artificially or improperly restricted, that was a case which was open to her to make at that stage. In judicial review terms, that ground of challenge first arose in mid-April 2021 for the purposes of RCJ Order 53, rule 4.

[54] I have some sympathy for the applicant's suggestion that she could not be expected to litigate immediately upon learning of the evidence which would be used to assess her grade. At that particular point in time, she was no doubt devoting her energies to preparing for the CCEA assessment which she sat on 30 April 2021. However, at no point then or thereafter, up until the point at which she learned of the award to her of a grade B in chemistry, did she or her parents make any attempt to raise this issue. This is also a point which is likely to have wider application and significance. Mr Dunlop has explained in his affidavit that, as a general principle, many of the subjects across the entire school used mock examinations and the CCEA assessment, plus one other school assessment (in many cases, CM1), to constitute the evidence required to assess a student in the subject in which a grade required to be determined. It was and is plainly in the interests of legal certainty and good administration that any challenge to this approach should have been made expeditiously. A challenge to the CDG policy itself could have been made at any time up until mid-July. These proceedings were only lodged on 3 September 2021. No good reason has been proffered as to why time should be extended (indeed, no extension of time has formally been sought), other than the assertion that the applicant could not have been expected to mount a challenge in April; but she has failed to do so since, even after her school term ended and when it was clear to her that, on a simple average approach, it would be impossible for her to score highly enough in Assessment 3 to raise her overall grade to a grade A in light of her results in Assessments 1 and 2. I accept Ms Fee's submission that this element of the claim is out of time.

[55] The applicant's contention that relevant considerations were left out of account is essentially a collateral challenge to the CDG policy, since it involves a contention that additional evidence should have been considered which was not identified as the relevant evidence in Appendix 1. Although there appears to have

been a residual discretion to resort to other evidence where the identified assessment results were not available (for instance, if they had been missed by a student through Covid-related absence), that does not arise in this case.

[56] In my view, Mr McQuitty realistically did not press the applicant's pleaded Convention grounds. This is not a case, in my view, which arguably raises a breach of A2P1 ECHR in light of the nature and limitations of that right. If and insofar as the case is within the ambit of the applicant's A2P1 rights, there is nonetheless not a sustainable Article 14 case on the evidence furnished to date. No clear comparator was provided; much less any firm evidence of less favourable treatment; and the asserted 'status' on which the alleged unlawful discrimination was based was one which appeared to me to be unlikely to be a status protected by Article 14 or, if so, was one in respect of which there could be ready justification. The applicant's contention was essentially that it was unfair for her school to adopt a particular approach to the evidence to be used in its grade determination assessments when another local school used a different approach. However, the CCEA Arrangements expressly allow for this, partly in recognition that schools will be best placed to judge for themselves (knowing how their pupils have been taught and assessed, and under what conditions) what evidence is likely to be the most appropriate in their own particular circumstances. In any event, this challenge could and should also have been mounted once the applicant's school's approach was made known.

Conclusion

[57] By reason of the foregoing, I propose to dismiss the applicant's application for judicial review. I recognise that this will be a further disappointing outcome for her; and sympathise with the predicament in which she may now be placed as a result of the failure of her attempt to overturn and increase her chemistry A-level grade which this decision entails. However, this flows largely from the limitations on the court's role in a field such as this. The school published its policy outlining the evidence which it would take into account in April of this year and that policy was not challenged at the appropriate time. In my view, and that of CCEA, the school has properly followed its policy. There is some room for weighting of the various pieces of identified evidence within that policy; but the appropriateness and extent of that is a matter of academic judgement in respect of which the court has no expertise or constitutional function.

[58] I accept that the teachers who determined the applicant's grade, and the examiners in CCEA who considered that determination to represent a reasonable exercise of academic judgement, were acting conscientiously and in good faith. There is certainly nothing to suggest the contrary. Teachers have been placed in a difficult position both last year and this year through the absence of the normal examination processes as a result of the pandemic. In the current arrangements, it is incumbent upon them to exercise their judgment professionally and dispassionately in order to ensure that the integrity of the grade determination process is maintained. It will be a feature of such determinations that some pupils will be

disappointed, particularly where (as here) there is evidence of the pupil making significant progress throughout the course of the year but where that progress is not adjudged sufficient to decisively outweigh earlier more disappointing performance. But a teacher's sympathy is not evidence justifying the award of a grade other than that which the teacher considers, in the exercise of their judgment, to be the appropriate one; and judicial sympathy is likewise an insufficient basis for the court's intervention.

[59] I wish the applicant well in her further studies, wherever and in whichever subject they may be, and in the pursuit of her chosen career. The A grades she has achieved in her other two subjects, and the result of her CCEA assessment in chemistry, demonstrate her high academic potential; and I encourage her to continue to strive towards her career goals.

[60] As to disposal of these proceedings, however, I will grant the applicant leave to apply for judicial review in respect of her reasons challenge against the first and second respondents and in respect of her challenge to the first respondent's compliance with the relevant policies; but dismiss the substantive application against both the first and second respondents; and refuse leave to apply for judicial review against the third respondent on the basis of delay.

[61] I will make an order for one set of costs against the applicant to be shared equally between the first, second and third respondents (amounting to two-thirds to the school and one-third to CCEA) - but not to be enforced without further order of the court in light of the fact that the applicant is in receipt of legal aid. I will also order legal aid taxation of the applicant's costs.