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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR183
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Frank O'Donoghue QC and Leona Askin (instructed by Fitzsimons Mallon) for the Applicant
Aidan Sands (instructed by O'Reilly Stewart) for the first proposed Respondent
Donal Sayers QC and Denise Kiley (instructed by Carson McDowell) for the second proposed Respondent

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HUMPHREYS J

Introduction

[1] The class of 2020 had an educational experience like no other in living memory. In March 2020, the Covid-19 pandemic resulted in the last year of their schooling coming to a halt with all the attendant uncertainty and social isolation. The opportunities to participate in concerts and plays, to attend formals, play sport and celebrate the end of their school careers were all denied to them. They also faced the prospect of having their futures determined by a system of assessed grades. It is a credit to the resilience of this cohort of young people, and to the teachers who dedicated themselves to their continued education, that so many of them overcame these challenges.

[2] The applicant in this case is a member of the class of 2020. Not only did she face the same issues as her contemporaries, she has also coped remarkably with a debilitating medical condition. It is for this latter reason that the court granted her anonymity in respect of this application for judicial review. In order to maintain this anonymity I have also chosen not to name the school involved in these proceedings.

[3] The applicant was due to sit her A levels in June 2020 but instead was subject to the system of Centre Assessed Grades ('CAG's') introduced by the Minister of

Education in March 2020 and to be implemented by the Council for the Curriculum, Examinations and Assessment ('CCEA'). As originally planned, this system entailed the school, or exam centre, submitting assessed grades for each candidate, in rank order, which would then be subjected to standardisation by CCEA before results issued to candidates on 13 August 2020. The role of the teachers was to exercise their holistic professional judgement on the question of what grade a student would most likely have achieved had they sat the summer 2020 examinations.

[4] The applicant studied biology, chemistry, mathematics and Irish and was awarded three 'A' grades and one A* by CCEA. This was disappointing for her since she had hoped to achieve A* grades in all her subjects. As a result, the applicant and her parents sought to challenge these grades and engaged in what became a lengthy drawn out process. All those avenues having been exhausted, the applicant has now brought these proceedings, seeking leave to apply for a judicial review.

The Impugned Decisions

[5] The applicant is seeking to challenge three separate decisions:

(i) The failure by the school to appeal her grades to CCEA;

(ii) The decision by the school not to allow her internal appeal; and

(iii) The decision of CCEA not to uphold her complaint of malpractice.

[6] In order to understand how these decisions were arrived at, and how they interact, it is necessary to rehearse the factual background in some detail.

[7] The day after results day, 14 August 2020, the applicant was informed that the three A grades had not been affected by the standardisation process, i.e. the grades assessed by the school were the same as the final grades issued by CCEA. The parents sought from the school, as a matter of urgency:

(i) The methodology used to arrive at the assessed grades;

(ii) The ranking; and

(iii) The methodology used to arrive at the ranking.

[8] The following Monday, 17 August, the Minister for Education announced a change in policy in that all candidates would be awarded the higher of either the grade submitted by the centre or that calculated by CCEA. That evening, the school informed the family that its internal appeals policy would need to be updated and the information sought would emerge as part of the appeal process.

[9] On 19 August the principal wrote:

> "We have spoken to CCEA who have confirmed that candidates may not appeal against their CAG on the basis of teacher academic judgement – only on the basis of perceived bias/discrimination."

[10] On 20 August CCEA communicated with all examination centres that appeals to it could only be made on the following grounds:

(i) CCEA had used the wrong data to calculate the grade;

(ii) CCEA allocated the wrong grade due to administrative error;

(iii) CCEA communicated the wrong grade;

(iv) CCEA had failed to follow proper and fair procedures;

(v) Where a centre's internal complaints process concludes that a student's assessment outcome was affected by discrimination or bias.

[11] It was made clear that no appeal would lie where a centre sought to revise a CAG on the basis that the professional judgement was wrong. However, in a media communication issued that same day, CCEA included the following caveat which did not appear in its email to centres:

> "…unless new evidence to support this can be provided by the school at individual candidate level."

[12] On 21 August 2020 the school released the rankings used by it, albeit that the standardisation process was no longer of relevance.

[13] The applicant's parents then invoked the school's internal appeals process in relation to each of the CAGs in biology, chemistry and mathematics. In summary, the grounds put forward were:

(i) In each case, the applicant ought to have been assessed as an A*;

(ii) The grades were occasioned by a 'discredited model' adopted by CCEA;

(iii) Internally, the school did not consistently adhere to the model;

(iv) The failure to use GCSE marks as part of the assessment was discriminatory;

(v) Some students had previously seen and completed the 'mock' papers sat at Christmas and used as evidence;

(vi) Extra-curricular activity had adversely affected the applicant's performance in AS level examinations and the failure to recognise this was discriminatory;

(vii) The applicant's performance in class tests and self-assessed work merited an A* grade;

(viii) Insufficient account was taken of the applicant's medical condition and its impact on her ability to study;

(ix) The applicant's chemistry teacher was guilty of unconscious bias towards her.

[14] On 2 September, the parents were informed that the internal appeals had been rejected and no evidence found of bias or discrimination. The school's Senior Leadership Team ('SLT') noted that the applicant's grades had been assessed using her AS grades and A2 tracking average, together with special consideration in respect of her medical condition. In each case, the SLT found that the Head of Department had carried out the task rigorously and meticulously.

[15] On 3 September the 'new evidence' caveat referred to at paragraph [11] above came to the attention of the applicant's parents. As a result, updated grounds of appeal were furnished to the school on 10 September, referencing inter alia the United Nations Conventions on the Rights of the Child and Persons with Disabilities, human rights legislation, Wednesbury unreasonableness and departures from CCEA guidance and the failure to take into account all relevant evidence.

[16] A second internal appeal panel meeting took place on 14 September at which the fresh appeals were rejected. In particular, the panel found:

(i) It was correct not to take account of extra-curricular activities in relation to AS grades;

(ii) There was no requirement to use GCSE grades in order to generate A level grades;

(iii) An appropriate range of data had been used to inform the teachers' professional judgement;

(iv) An additional 4% had been allocated on foot of special consideration;

(v) The panel had a high level of confidence in the grading and ranking and in the robustness of the school's procedures.

[17] On 17 September the applicant and her parents made a formal complaint in relation to the failure to handle the appeals fairly. A sub-committee of the Board of Governors was convened to consider the complaint brought by the applicant's parents in relation to the CAGs. It concluded that the complaints were not made out and that they were satisfied the internal appeals panels had addressed the matters fairly. The sub-committee was also satisfied that the CAGs were accurately arrived at and that there existed no grounds to pursue an appeal to CCEA.

[18] The applicant and her parents then took legal advice and this precipitated a number of requests for documentation and data in relation to the applicant. It also led to a complaint being made to CCEA's Compliance Team in relation to the manner in which the school had conducted itself. This was rejected by CCEA on 25 November 2020 when it concluded that there was insufficient evidence to make any finding of maladministration or malpractice. The applicant instigated an appeal against that determination.

[19] Ultimately, on 15 December, the school provided a breakdown of the tests and examinations used by it in arriving at the CAGs.

[20] On 12 February 2021 CCEA communicated that a 'fresh consideration' of the maladministration/malpractice complaint had resulted in the original decision of the complaints committee being upheld.

[21] With the benefit of detailed written and oral submissions, the appeal hearing before the CCEA Malpractice Appeals Panel proceeded on 28 April 2021. On 29 April the applicant's parents were informed that the appeal was unsuccessful. It was stated that a draft report containing further details of the decision would issue within 28 days. Such a draft was provided and subjected to detailed tracked changes by the applicant's parents. The final version issued on 1 July 2021. It rehearsed the submissions of the parties and recorded that the Panel had taken into account all the evidence presented. The decision of the panel was as follows:

> "The Panel agreed to reject the appeal and in doing so confirmed that the Centre and CCEA had followed their own procedures and that no evidence of bias and/or discrimination against the candidate had been found."

The Grounds for Judicial Review

[22] In relation to the first decision under challenge, the applicant asserts that the school failed to inform her of an "additional temporary appellate scheme created by the Department of Education/CCEA" and which, it is claimed, was available between 13 and 17 August 2020. The applicant says that this appeal route entitled candidates, via their examination centres, to present additional evidence not previously taken into account.

[23] The applicant states that this failure was procedurally unfair since other candidates in Northern Ireland were informed of this appeal mechanism and availed of it.

[24] In relation to the second decision, the failure to allow the internal appeal, the applicant argues that this was also vitiated by procedural unfairness since the school failed to provide her with all the necessary information to understand how her CAGs had been arrived at.

[25] The applicant also contends that the approach of the school was illegal in that her rights under article 14, read with article 2 of the First Protocol of the European Convention of Human Rights ('ECHR'), were breached by the school. Her case is that the failure by the school to take proper account of her disability in arriving at the CAGs constituted unlawful discrimination.

[26] It is also argued that the school failed to take into account material considerations, including the CCEA guidance of 20 August, and acted contrary to the CCEA Extraordinary Regulatory Framework General Qualifications, and failed to recognise the substantive legitimate expectation of the applicant in relation to the provision of information.

[27] In relation to the third decision, it is said that the rejection of the applicant's appeal by CCEA was a breach of the guidance in the General Qualifications and was itself a breach of the applicant's ECHR rights. Issue is also taken in relation to the adequacy of the reasons provided by the CCEA Panel for its decision.

The Legal Principles

(1) The Test for Leave

[28] Firstly, the court recognises that this is an application for leave to apply for judicial review and the test requires an applicant to show *"an arguable ground for judicial review on which there is a realistic prospect of success"*, per Nicholson LJ in *Re Omagh District Council's Application* [2004] NICA 10.

(2) Delay

[29] In a series of recent cases, including *Re Watterson* [2021] NIQB 16, *Re Tracey* [2021] NIQB 104 and *Re Lavery* [2022] NIQB 19, this court has emphasised the need for practitioners to be conscious of the issue of delay in judicial review proceedings.

[30] Order 53 rule 4 of the Rules of the Court of Judicature (NI) 1980 provides:

> "An application for leave to apply for judicial review shall be made within three months of the date when grounds

> for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

[31] In this case, the sub-committee of the school's Board of Governors made its determination on 15 October 2020. The grounds to challenge the outcome of the school's internal appeals process first arose on that date (and earlier in respect of the failure to bring an appeal to CCEA). These proceedings were not issued until 28 July 2021, a delay of over six months.

[32] The leading case in this jurisdiction on the question of delay and the extension of time is *Re Laverty's Application* [2015] NICA 75. The Court of Appeal stated at para [21]:

> "The Court may extend time for good reason. Although not stated in legislation in this jurisdiction, consideration of good reason would include consideration of the likelihood of substantial hardship to, or substantial prejudice to the rights of, any person and detriment to good administration. Also included would be whether there was a public interest in the matter proceeding."

[33] The Court of Appeal also made it clear in that case:

> "If there has been delay, the application for leave should include (a) an application to extend time stating the grounds relied on and (b) an affidavit explaining all aspects of the delay."

[34] There is no application in this case to extend time, nor is there any evidence upon which such a case can be grounded. In oral submissions, counsel alluded to the fact that the applicant was exhausting her remedies through the CCEA system before issuing legal proceedings. Judicial review is properly recognised as a remedy of last resort and the fact that an applicant was pursuing an available alternative remedy may often provide a good reason and therefore a basis for an extension of time by the court.

[35] In *Re Allister* [2022] NICA 15, the Court of Appeal noted that the first set of appellants had failed to seek an extension of time as part of their pleaded case despite the fact that any assertion that the claim was brought in time was "doomed from the outset", nor had they placed before the court any evidential material upon which the discretion could be exercised. This fell to be contrasted with the position of Clifford Peeples, the co-appellant, who had sought an extension of time pursuant to Order 53 rule 4 and adduced evidence on the issue. This was a course of action described as "wise" by the court. Ultimately, despite the obvious failing, the court determined that an extension should be granted in both cases because of the

significant issues of constitutional importance and the public interest in their resolution.

[36] It should not be assumed that *Allister* represents authority for the proposition that applicants for judicial review will be granted extensions of time in the absence of any formal application or evidential basis. There is no substantial public interest at play in the instant case.

[37] In relation to the proposed second respondent, CCEA, any challenge to its appeal process is also out of time. The process was first outlined by CCEA on 23 June 2020 and then again on 20 August 2020. In *Re OV* [2021] NICA 58, the Court of Appeal held that, in respect of a school's admission process, time began to run when the admissions criteria were published, not when the outcome of the process was known, albeit in that case an extension of time was granted. No such extension has been sought in this case.

[38] The challenge to the decision of the CCEA Malpractice Panel is in time.

[39] On the basis of delay alone, I refuse leave to apply for judicial review, save for the claim in relation to the CCEA Panel decision. However, having heard full argument on the issues I propose nonetheless to address the merits of each of the pleaded claims.

(3) The Standard of Review

[40] In *Re Payne's Application* [2021] NIQB 77, Scoffield J considered a challenge to the outcome of Centre Determined Grades (CDGs) in the 2021 A level assessment. He noted that this process, in keeping with that in 2020, required an exercise of professional judgement by teachers and noted "the limitations on the court's role in a field such as this" and in relation to the weighing of evidence:

> "the appropriateness and extent of that is a matter of academic judgement in respect of which the court has no expertise or constitutional function." [para 57]

[41] It must be recognised that judicial review will not lie against the merits of a decision made in respect of an academic award. Such questions permit of only a light touch, irrationality based standard of review which represents a high hurdle for an applicant. For these reasons, this applicant's case must focus on the fairness of the procedures adopted by the proposed respondents and on the legality of the actions taken.

(4) Procedural Fairness

[42] In relation to the first decision under challenge, there is simply no evidence that any 'window of opportunity' which existed between 13 and 17 August was

closed unfairly to the applicant. The material before the court demonstrated that the closing date for appeals to CCEA was, and remained, 17 September 2020. It was a matter for the school to decide if such an appeal should be pursued. Ultimately, any appeal would have been decided on its merits according to the CCEA rules and there is no evidence whatsoever that had an appeal been launched in this particular period that the applicant would have been in a better position. What happened on 17 August is that the standardisation process was effectively abandoned and candidates awarded the higher of the two marks. On that basis only, the appeal process changed from that date forward.

[43] Ultimately the school decided not to pursue an appeal since it formed the view that the grounds did not exist for its pursuit. This position would have been no different if made in the few days immediately after the promulgation of the A level results. I have therefore determined that this challenge is unarguable.

[44] The claim that the school's internal appeals process was vitiated by unfairness is equally unarguable. The appellant, through her parents, was able to present detailed written submissions to ground the case being made in relation to the CAGs. No stone was left unturned in the analysis presented to the school's SLT, including the 'new evidence' analysis presented to the second hearing upon discovering the caveat in CCEA's appeal criteria of 20 August.

[45] The internal appeal consisted of two separate hearings before the SLT and an appeal to the nominated sub-committee of the Board of Governors. I accept that the applicant could, and should, have been provided with the information in the school's letter of 15 December 2020 at a much earlier date. There was no basis in law or in fact to withhold this from the applicant and her parents. In the event, however, it cannot be shown that the absence of this information caused any harm or unfairness to the applicant in the pursuance of the internal appeal.

(5) Illegality

[46] Article 14 of the ECHR prohibits discrimination in the enjoyment of the rights and freedoms of the Convention. Discrimination in this context means treating people differently without objective and reasonable justification.

[47] In *Tlimmenos v Greece* [2001] 31 EHRR 15, the Strasbourg court confirmed that this extends to the failure by a State to treat different people differently without objective and reasonable justification.

[48] In *Re DA and DS* [2019] UKSC 21, Lady Hale set out that in cases involving allegations of breach of article 14 the court should ask itself four questions:

(i) Does the treatment complained of fall within one of the Convention rights?;

(ii) Is that treatment on the ground of some 'status?';

(iii) Is the situation analogous to some other person who has been treated differently? and

(iv) Is the difference justified?

[49] Article 2 of the First Protocol states:

> "No person shall be denied the right to an education."

[50] In *A v Lord Grey School* [2006] 2 AC 363, a case concerning exclusion from school, Lord Bingham stated:

> "The guarantee is, in comparison with most other Convention guarantees, a weak one, and deliberately so. There is no right to education of a particular kind or quality, other than that prevailing in the state. There is no Convention guarantee of compliance with domestic law. There is no Convention guarantee of education at or by a particular institution. There is no Convention objection to the expulsion of a pupil from an educational institution on disciplinary grounds, unless (in the ordinary way) there is no alternative source of state education open to the pupil." [para 24]

[51] Article 2 is concerned with the right of access to education. Is it apparent in this case that the applicant has had such access and has performed at a very high level throughout her school career. In line with the analysis of Lord Bingham, it is evident that article 2 does not guarantee any particular system of assessment of attainment, nor does it guarantee results for students. The applicant's Convention rights are not therefore in play, and no issue of discrimination under article 14 can arise. This ground of challenge is also unarguable.

[52] Had I determined otherwise, the remaining questions would have fallen for consideration. The applicant was treated differently in that she was awarded extra marks, not available to a hypothetical candidate not suffering from any comparable disability.

[53] Properly analysed, the applicant's complaint is one of a lack of reasonable adjustment to accommodate her disability, although no such freestanding ground exists.

[54] In the unusual circumstances prevailing in 2020, no special consideration or access arrangements were applied by CCEA. Instead, the exam centres were obliged to take into account what would have been applied by way of special consideration

when arriving at the candidate's CAGs. In the event, the applicant was awarded 4% extra on each of her marks to reflect her circumstances. This is entirely in keeping with what would have been awarded by an exam board when considering a special consideration application. It must be recognised that the highest uplift available is 5% which is restricted to the most serious cases of terminal illness of a candidate or parent. The reasonable adjustments were therefore made.

[55] Insofar as the applicant seeks to contend that the choice of evidence placed her at a disadvantage because of her disability, I cannot be satisfied that this case is arguable. In any event, the school was exercising its holistic professional judgement and in line with the decision in *Payne* this is not something which is susceptible to review by the courts.

[56] A judicial review court cannot descend into the detail of class tests, the answers provided or the circumstances in which they were taken. Even if article 14 were engaged, the Supreme Court has recently confirmed in *Re SC* [2021] UKSC 26 that the margin of appreciation in this area is wide.

[57] For these reasons, the Convention right challenge against the decision of CCEA must also fail as being unarguable.

(6) Failure to take guidance into account

[58] The applicant relies on two Conditions in the Regulatory Framework, namely GQCov 5.4 and GQCov 6. The former provides that centres must operate an internal process whereby the decision not to appeal to CCEA can itself be appealed. The latter states:

> "CCEA AO must take all reasonable steps to ensure that a Centre has in place effective arrangements for a learner to apply to the Centre for it to request information … and an appeal on the learner's behalf … and appeal any decision by the Centre that such a request should not be made."

[59] The evidence before the court confirmed that the school did have arrangements in place for information to be sought and appeals advanced. The applicant was able to avail of two hearings before the SLT and one before the sub-committee of the Board. There is no basis to contend these were not 'effective arrangements' or that CCEA in some way failed to ensure that these steps had been put in place. Whilst the applicant was undeniably disappointed with the outcome, this does not demonstrate that there was any failure to follow the guidance.

[60] The argument that CCEA failed to put in place any appeal system relating to access arrangements or special consideration fails to recognise that these did not play a part in the 2020 assessments. Such appeals were not necessary or appropriate since the teachers carrying out the assessment exercise were directed to take special

consideration into account when arriving at the CAGs. It is clear that this was part of the holistic professional judgement of the teachers in the applicant's case.

(7) The duty to give reasons

[61] In *Re Payne* Scoffield J recognised that there is no general duty to give reasons at common law. However, such an obligation may arise in certain circumstances but is subject to the important proviso 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" (per Lord Brown in *South Bucks DC v Porter (No 2)* [2004] UKHL 33, at para [36]).

[62] The categories of case in which an obligation to give reasons has been found, outwith some statutory requirement, include where a legitimate expectation has arisen by reason of an established practice or where reasons are necessary in order not to frustrate a right of appeal – see, for example, *Oakley v South Cambridgeshire DC* [2017] EWCA Civ 71.

[63] This case does not fall neatly into one of these categories. Even if it did, it is evident that the CCEA Panel did give reasons, albeit ones which are pithily expressed. Moreover, simply being disappointed by an outcome does not of itself meet the threshold of 'substantial prejudice' alluded to in *South Bucks*.

[64] This ground of challenge is also unarguable.

Conclusion

[65] For all these reasons, the application for leave to apply for judicial review is dismissed. I make no order as to costs inter partes.

[66] I recognise that this will be disappointing for the applicant and her family. No stone has been left unturned in their quest to challenge the grades which were awarded to the applicant in 2020. This court was, however, never in a position to upset the professional judgement of the teachers at her former school. A judicial review court exercises a supervisory jurisdiction over public authorities in the event of irrationality, illegality or procedural unfairness. None of those existed in the circumstances of this case. It is remarkable that the applicant has overcome the challenges which she has faced and attained a place on a demanding course at a top university. It is obvious that she is a young woman of considerable ability and character and I am sure that she will succeed in whatever career she chooses to pursue.