

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2020 No. 595 JR]**

**BETWEEN**

**N.P. (A MINOR) SUING BY HER MOTHER AND NEXT FRIEND B.P.**

**APPLICANT**

**AND**

**THE MINISTER FOR EDUCATION AND SKILLS**

**RESPONDENT**

**JUDGMENT of Mr. Justice Meenan delivered on the 24th day of September, 2020**

**Introduction**

1. The role which the Leaving Certificate examination plays in Irish life, almost since the foundation of the State, cannot be underestimated. The Leaving Certificate examination provides a pathway for the vast majority of young people who have completed second level education to go onto further education and careers beyond. The Leaving Certificate examination is also a pathway for more mature people who may wish, at a later stage in their lives, to embark on a new and different career. Though the financial resources available to those sitting the Leaving Certificate examination differ greatly, giving some an undoubted advantage over others, the Leaving Certificate is corrected and the grades are awarded on an entirely anonymous basis. This correction and grading is carried out according to guidelines which, prior to their adoption, have been considered in detail by the relevant experts.
2. In the absence of an effective cure or a vaccine, the measures taken to combat the COVID-19 virus have been directed towards halting or reducing its spread. This has necessitated strict limitations on the numbers of persons congregating in indoor settings. One such setting was the examination halls up and down the country where the Leaving Certificate examination was due to take place in June, 2020. With what, I would imagine, was considerable reluctance, the Leaving Certificate examination of 2020 was cancelled. However, an alternative system had to be put in its place so as to enable the class of 2020 to advance to further education, should they so wish. The complexity and difficulty involved in establishing and running such a system was daunting.
3. One of the complexities and difficulties was to provide a fair and equitable system for all those who intended to sit the Leaving Certificate examination of 2020. The vast majority of those were educated in schools. However, a minority, including the applicant, received their education at home. The provisions made for such persons are the subject of this application.

**Calculated Grades**

4. The alternative system devised and adopted by the respondent involves the giving of a calculated grade to each student in their chosen subjects. The first step in the giving of a calculated grade is the award of an estimated percentage mark in each subject by a teacher involved in the education of the student. The awarding of an estimated percentage mark necessarily involves knowledge of the capacity and ability of the student in question, requiring a look back at relevant past performance. Having awarded an

estimated percentage mark, there is a further “*alignment process*” in the school. After the alignment process, there is a further standardisation process carried out by the Department of Education. Ultimately, the calculated grade is awarded.

5. The respondent published two documents setting out the provisions that apply for the award of calculated grades. The first of these documents covered students who were attending school (the school document). The second document, which covers the applicant’s situation, dealt with “*out-of-school learners*” (the out-of-school document).
6. It was correctly recognised that both school students and “*out-of-school*” students had to be dealt with, as far as reasonably possible, fairly and equally. The out-of-school document states: -

“Fairness and equity: The system for calculated grades for out-of-school learners must ensure fairness and equity within this group but also in relation to all other Leaving Certificate students. The system must be such that it neither advantages nor disadvantages, through any grades ultimately awarded, any student in the 2020 Leaving Certificate cohort in its approach and delivery of calculated grades. The arrangements must be as consistent as possible with the general system to ensure fairness and equity.”

The “*fairness and equity*” of the system, as regards out-of-school learners, was recently considered by this Court in *Elijah Burke v. The Minister for Education* [2020] IEHC 418.

#### ***Elijah Burke v. The Minister for Education***

7. In this case, the applicant was taught in the home by his mother. The respondent refused to accept the estimated percentage marks awarded by his mother on the basis that she had a conflict of interest. Unlike the provisions made for a conflict of interest that occurs in a school, no such provision was made in the case of a home educated student. The Court stated: -

“58. I am satisfied that a non-conflicted or independent teacher(s) ought to be involved in the place of the applicant’s mother in the system for the award of an estimated percentage mark in each of the applicant’s Leaving Certificate subjects. Should it be possible to award such percentage mark(s), then the process set out in the ‘*out-of-school learners*’ document for the awarding of a calculated grade can operate for the applicant.”

8. In the event “*independent teachers*” were involved and, apparently, the applicant was awarded calculated grades that gave him 577 points. It should be noted that the respondent has appealed this decision.

#### **The Applicant**

9. The applicant is the third of nine children, all of whom have been educated at home by their mother with the help of her husband and other tutors. The applicant had been attending a national school but was taken out to be home schooled. In an affidavit filed in these proceedings, the applicant’s mother stated that she followed the Department of

Education curriculum and that the structure of the home schooling “*in many ways mirrored the in school structure*”.

10. The applicant’s mother engaged Mr. Simon O’Neill and his wife, Mrs. Tatenda O’Neill, to assist in giving grinds to the applicant. These tutors had previously assisted in the education of other members of the family. Mr. Simon O’Neill holds a Bachelor of Engineering from the Waterford Institute of Technology and works as a mechanical engineer. In his affidavit, he stated that he provided grinds in maths and a number of other subjects to the applicant. Mrs. Tatenda O’Neill holds a PhD in Biomedical Chemistry and tutored the applicant in biology.
11. Neither Mr. Simon O’Neill nor Mrs. Tatenda O’Neill are “*registered teachers*” under the provisions of the relevant legislation.
12. On or about 1 July 2020, Mr. Simon O’Neill forwarded a Form A1 to the respondent setting out estimated percentage marks for the applicant in Irish, English, mathematics, geography, biology and home economics.
13. In response to these forms, the respondent sought from Mr. O’Neill a Teaching Council number which he would have were he a registered teacher.

#### **Decision of the Respondent**

14. The applicant was refused calculated grades as communicated in an email, dated 11 August 2020, with an attached letter, which stated as follows: -

“The purpose of this letter is to provide you with the decision of the CGEO that it will not be possible to provide you with a calculated graded in Irish, English, mathematics, geography, biology and home economics, in which you were entered for the 2020 Leaving Certificate examinations. This is due to the absence of satisfactory, credible evidence from an appropriate source on which to base an estimate. The reason for the decision is as follows:-

- (1) While you have engaged in private tuition with a tutor, the tutor does not meet the criteria of being a previous or currently registered teacher.”

This decision was repeated in a letter from the respondent’s Solicitor, of 27 August 2020.

#### **Application for Judicial Review**

15. On 31 August 2020, the High Court (Keane J.) granted leave to the applicant to apply by way of judicial review for the following reliefs: -

- (i) An order of *mandamus* compelling the respondent to consider and determine, within a reasonable time, the applicant’s application for calculated grades;
- (ii) An order of *certiorari* quashing the decisions of the respondent to refuse to provide a calculated grade for the applicant, dated 11 August 2020 and 27 August 2020;

- (iii) An injunction by way of judicial review restraining the respondent, her servants or agents, from taking any steps to refuse the applicant a calculated grade;
  - (iv) A declaration by way of judicial review that the refusal to provide a calculated grade, in any circumstances where the applicant is home schooled and the applicant's parents/teacher is not a registered teacher, is irrational, arbitrary, unfair and contrary to constitutional justice; and
  - (v) Further and other relief.
16. It was correctly accepted by the respondent that the applicant had established arguable grounds for the Court to grant leave. Due to the urgency of the application, a hearing date was fixed for the application to be heard on 15 September 2020. Statements of Grounds and Opposition were duly filed together with a number of affidavits.

**Submissions by the Applicant**

17. Mr. Paul O'Higgins SC (with Mr. Brendan Hennessy BL), on behalf of the applicant, made clear that the applicant was not claiming that she was entitled to a calculated grade but, rather, that she should be allowed to be considered for a calculated grade. Reliance was placed on the provisions of Article 42 in the 1937 Constitution: -

"Education

Article 42

- 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.
- 3.1 The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State. ..."

This Article, it was submitted, should be seen in the context of Article 40, which provides, *inter alia*: -

"Personal Rights

Article 40

- 1 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."

The applicant submitted that as there was a constitutional right to be educated within the home, it followed that, for the purposes of the award of a calculated grade for the Leaving Certificate of 2020, home educated students should be treated equally with school educated students.

18. Mr. O'Higgins submitted that the calculated grades system as designed by the respondent makes provision for four different routes for a home educated student to be considered for a calculated grade. If, as in the case of the applicant, they do not come within the provisions of the four different routes, then they are excluded from the system. It was submitted that this was arbitrary and unfair but easily remediable without the entire system being compromised.
19. The applicant submitted that the rules for out-of-school students are inflexible and involve restrictions that are not imposed on students who attend schools. The "*school document*" does allow for an estimated percentage mark to be given by a non-registered teacher, which would then be reviewed by a registered teacher. However, no such provision is made for the out-of-school student. This, it was submitted, was unfair and unreasonable given that a home educated student would not have other teachers available as a school educated student would.
20. Mr. O'Higgins relied upon the earlier decision of this Court in the *Elijah Burke* case and pointed out that following the decision of the Court Mr. Elijah Burke was assessed by an independent school teacher(s) and principal and awarded calculated grades that gave him 577 points with no difficulties arising to the overall system.

#### **Submissions of the Respondent**

21. Ms. Nuala Butler SC (with Mr. Brian Kennedy SC and Mr. Joseph O'Sullivan BL), on behalf of the respondent, emphasised that the calculated grades system was an emergency response to the COVID-19 pandemic which had led to the cancellation of the June, 2020 Leaving Certificate examination and should be considered to be only a temporary, and not a permanent, measure. Ms. Butler submitted that no such system could cover the particular circumstances of each and every candidate, numbering some 62,000, for the Leaving Certificate examination of 2020. In drawing up the system for the awarding of calculated grades, the respondent and the Government did make specific provision for those educated within the home. Ms. Butler further submitted that, in any event, the Leaving Certificate examination would be held commencing 16 November 2020, which the applicant could sit.
22. Ms. Butler submitted that the applicant was, in effect, seeking a system for herself which was not available to other students seeking calculated grades. If such a facility was made available to the applicant, then it would have to be made available to all others, amounting to some 62,000 students. In support of this submission, Ms. Butler relied on an affidavit of Mr. Dalton Tattan, Assistant Secretary of the Department of Education and Skills.

23. Ms. Butler emphasised the fact that the system for the awarding, initially of an estimated percentage mark, and then of a calculated grade, relies upon the professionalism of the teachers involved, underlined by those teachers being registered. In support of this, reliance was placed on the following extract from the out-of-school document: -

“... Consideration of out-of-school learners in this process requires reliance on alternative forms of oversight and assurance, chief amongst which reliance on registered teachers where tuition has been provided in centres of education which are not authorised to hold the Leaving Certificate examinations. ...”

24. Ms. Butler sought to distinguish the instant case from the case of Mr. Elijah Burke claiming that in the *Burke* case, as the parent involved was (or had been) a registered teacher, there was credible evidence available from an appropriate source on which to base estimated percentage marks.

### **Legal Authorities**

25. The applicant has referred to the provisions of Article 42 of the Constitution which provide, *inter alia*, that parents shall be free to provide education in their homes. In my view, what is in issue here is the constitutional right to equality, Article 40.1, as it applies to students who are educated in the home or educated in schools. The applicant maintains that the provisions concerning the awarding of calculated grades to students educated in schools confer on them an advantage which is not available to students educated in the home. I refer to the following passage from the judgment of McKechnie J. in *Kelly v. The Minister for Environment* [2002] 4 I.R. 191: -

“... the State must... ensure that with any provisions passed into law the guarantee of equality as contained in Article 40.1 of the Constitution will be respected. It cannot therefore, by any provision of a statute, or by the manner and way in which it might implement such a provision, cause unjustified advantage to accrue to one person, class or classes of the community as against, or over and above, another person or class of that same community. Equals must be treated equally.”

26. I also refer to *The State (Kenny) v. Minister for Social Welfare* [1986] I.R. 693. This case concerned the provisions of the Social Welfare (Consolidation) Act, 1981, which provided that a social assistance allowance be paid to “*an unmarried mother*” in certain circumstances. The relevant regulations (1973) provided that a “*woman is to be regarded for the purposes of the [Act of 1981] as being an unmarried mother if, not being or having been a married woman, she is the mother of a child that has not been adopted*”. Ms. Kenny was a divorced woman with one child born outside marriage and was held by the relevant social welfare officers to be ineligible for the social assistance allowance because she was excluded by the said definition of “*unmarried mother*”. In giving the judgment of the High Court, Egan J. held that it would be oppressive and unfair if one class of mother were excluded from such benefits to which other classes of mother were entitled, where such exclusion was never intended by the legislature: -

“Could Parliament have intended that one single class of mother should be excluded from the same benefits as those to which other classes of mothers would be entitled? Was it intended that such a mother should be punished together with her child or children because her marriage had been dissolved? I think not. To repeat the words of Henchy J. it would be ‘oppressive’ and ‘unfair’.”

27. As in *Elijah Burke v. The Minister for Education*, the legal principles which ought to apply in an application such as this are set out in the oft cited passage of Henchy J. in *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642, where he stated: -

“...whether the conclusion reached in the decision can be said to flow from the premises. If it plainly does not, it stands to be condemned on the less technical and more understandable test of whether it is fundamentally at variance with reason and common sense. ...

I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted *ultra vires*, for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, *inter alia*, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision.”

More recently, I refer to the following passage of Fennelly J. in *Meadows v. Minister for Justice* [2010] 2 I.R. 701 where he states:-

“(449) I prefer to explain the proposition laid down in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 and *O’Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 retaining the essence of the formulation of Henchy J. in the former case. I would say that a court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied, on the basis of evidence produced by the applicant, that the decision is unreasonable in the sense that it plainly and unambiguously flies in the face of fundamental reason and common sense. ...”

### **Consideration of Issues and Conclusions**

28. As referred to previously, the applicant is not making the case that she is entitled to a calculated grade but, rather, that she should be allowed to be considered for a calculated grade. The reason for her exclusion from the process is the absence of a registered teacher involved in her education in the home.
29. In order to maintain integrity in the system for the awarding of calculated grades, it was reasonable and proper for the respondent to have a requirement that registered teachers would play a central role in the awarding of estimated percentage marks. As is stated in “*the school document*”: -

"The cornerstone of the Calculated Grades model is a reliance on the professional judgment of teachers, including principals and deputy principals, in providing the best possible estimate of how each student is most likely to have performed in the examination if the disruptions caused by the COVID-19 virus had never arisen."

30. A starting point for the awarding of a calculated grade is the giving of an estimated percentage mark in each of the subjects chosen by a student. It is necessary to look at the role of the registered teacher as set out in the "school document" and the "out-of-school document".

**"The School Document"**

31. This document states: -

"11. The in-school alignment process

...

The professional judgment of the individual teachers is the most important input to the alignment process. However, crucially, once the alignment process is complete, the estimated percentage marks and the class rank orders are considered to represent the collective professional judgment of all those involved, rather than solely the professional judgment of *an individual teacher*. Once the principal is satisfied that the oversight process has completed as described in Section 15, these marks and rankings represent the collective professional judgment of the school. The estimated mark that is transferred to the Department is the school's estimated mark." (*Emphasis added*)

and: -

"11.2. Who is involved in the alignment process?

...

In the case of a subject for which there is only one teacher with a class for the 2020 examination, the alignment process will be carried out with the deputy principal or with another teacher of the same subject in the school, who does not have a Leaving Certificate class in 2020, subject to the agreement of the school principal."

As to whether "*an individual teacher*" has to be registered, a letter, dated 9 September 2020, from the Chief State Solicitor's Office, appearing on behalf of the respondent, stated: -

"While there is no specific reference to a teacher being a registered teacher within the guide, teachers had to engage in this rigorous three stage process of teacher professional judgment; in-school alignment; and oversight by the principal. Even if it were the case that the teacher providing the initial estimate was, for some reason, not a registered teacher, which is a remote possibility for the reasons



outlined below, teacher professionalism is ingrained through the three stage process."

In answer to a question by the Solicitors for the applicant as to the number of in-school teachers providing estimated percentage marks who were not registered with the Teaching Council, the answer was: "*the requested information is not available*".

32. It is, therefore, the case that a non-registered teacher can provide an estimated percentage mark for a student attending a school but this estimated percentage mark is subject to an oversight process by a principal, who would be a registered teacher.

**"The Out-of-School Document"**

33. This document provides four routes for an out-of-school learner, such as the applicant, to be awarded a calculated grade. As with the school going student, the first step in the process will be the award of an estimated percentage mark. Route three is the one that is relevant to the applicant, and states: -

*"Route three:*

You may have engaged in tuition with a registered teacher (currently or previously registered) outside of any centre of learning. In this instance, the teacher may submit an estimated percentage mark provided they are satisfied that there is satisfactory, credible evidence on which to base the estimate."

Therefore, it is clear that as the applicant was not "*engaged in tuition with a registered teacher*", she could not be given an estimated percentage mark. This had the consequence that the applicant was excluded from the system under which she could be awarded a calculated grade.

34. It is, therefore, clear that the requirement by the respondent that the applicant, a home schooled student, is taught by a registered teacher(s) puts the applicant at a considerable disadvantage compared to a student taught in school who is subject to no such requirement. Unlike the home schooled student, a student in school has access to other teachers, vice principal(s) and a principal. In my view, this is clearly an unfairness. The "*out-of-school document*" does not live up to its own stated principles of "*fairness and equity*" where it states: -

"The system for calculated grades for out-of-school learners must ensure fairness and equity within this group but also in relation to all other Leaving Certificate students. The system must be such that it neither advantages nor disadvantages, through any grades ultimately awarded, any student in the 2020 Leaving Certificate cohort in its approach and delivery of calculated grades. ..."

35. Students who were educated in the home are entitled to sit the Leaving Certificate examination and have their exam papers marked or assessed like every other student. When the Leaving Certificate examination of 2020 was cancelled, the cohort of home educated students were entitled to be put in the same position, as far as practicable, as

those students who attended school. I put in the qualification as there may well be some out-of-school students, not including the applicant, for whom it is not possible to give an estimated percentage mark and, thus, who cannot be awarded a calculated grade. Insofar as Article 40.1 of the Constitution can be relied upon by the applicant, this should mean that the system for the giving of estimated percentage marks ought to be as inclusive as possible.

36. In my view, this issue of unfairness could have been readily addressed by the respondent making provision for the involvement of an outside registered teacher in the process, which may result in the award of a calculated grade for a person in the applicant's position. The respondent argued that such would be contrary to the basis of the calculated grades system in that it would be making an "*individualised assessment*" of the applicant. I do not accept that this is the case for the following reasons: -

(i) A teacher, in giving an estimated percentage mark, will be obliged to apply his/her professional judgment to the "*data and factual information*" concerning the student involved. As is stated in the "*out-of-school document*": -

"6.1 The estimation process

As part of the estimation process, your teacher/tutor will consider all evidence available to them in order to arrive at an estimated percentage mark of your expected performance in the subject to which they provided tuition. ... They will also be required to confirm that you engaged in tuition with them, regularly over a sustained period. ..."

(ii) I do not believe that an outside registered teacher, in giving an estimated percentage mark to a home educated student such as the applicant, is required to do anything or take any step that would be materially different from that done by a registered teacher(s) engaged in the oversight of an estimated percentage mark awarded by a non-registered teacher in a school.

37. The decision of 11 August 2020 refers to "*the absence of satisfactory, credible evidence from an appropriate source...*". In this case, the "*source*" is an unregistered teacher. In my view, this amounts to giving a judgment on the evidence based not on its contents but, rather, its source. This would not arise in a school situation as, though the source may be an unregistered teacher, it would be subject to review by a principal who would be a registered teacher. Such a process ought to have been made available to a student in the position of the applicant by way of the involvement of an outside registered teacher(s). The absence of such a process resulted in the respondent deciding that there was no satisfactory and credible evidence, when that evidence had never been looked at. In my view, the decision of 11 August 2020 was legally in error.

38. The respondent submitted that the applicant may sit the Leaving Certificate examination due to commence on 16 November 2020, as may any other student dissatisfied with the calculated grades awarded. I do not accept that this is an answer to the applicant's case. The applicant is not in a similar position to a student that is dissatisfied with a calculated

grade awarded in that she was unlawfully excluded from the system for the awarding of calculated grades from the start. Further, the holding of the Leaving Certificate in November, 2020 will depend upon the public health circumstances at the time which may, or may not, allow the holding of the examination.

39. In reaching this decision, I have applied the same principles as I did in the *Elijah Burke* case. These cases are similar insofar as the respondent dealt with a similar situation as may arise in a school or an out-of-school setting in a dissimilar way. The failure to provide a system for the awarding of an estimated percentage mark to a person in the position of the applicant is unreasonable and irrational and, thus, unlawful. The respondent submitted that the *Elijah Burke* case could be distinguished as, in that case, there was “credible evidence” as the teacher involved in the education of Elijah Burke was (or had been) a registered teacher. In my view, there is no basis for this submission in that in the *Elijah Burke* case the stated reason given by the respondent for refusing to award a calculated grade was: -

“...due to the absence of satisfactory, credible evidence from an appropriate source on which to base the estimate. ...”

This is precisely the same wording as was used in the instant case.

40. It is to be noted that, though the *Elijah Burke* case is apparently under appeal, the involvement of other teacher(s) in his case led to the award of calculated grades giving him 577 points.

### **Conclusion**

41. By reason of the foregoing, I will grant an Order of *certiorari* quashing the decision of the respondent of 11 August 2020, and repeated on 27 August 2020, refusing to provide a calculated grade to the applicant.
42. I will also grant a declaration by way of judicial review that the refusal to provide a calculated grade, in any circumstances where the applicant is home schooled by a teacher(s) who is not a registered teacher(s), is irrational, arbitrary, unfair and unlawful.
43. I will hear the parties as to any consequential orders. I will list the matter for 30 September 2020.