



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 162

Record No. 2018/415

2018/416

**Peart J.
McGovern J.
Baker J.**

BETWEEN

REBECCA CARTER

RESPONDENT

- AND -

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

APPELLANTS

- AND -

UNIVERSITY COLLEGE DUBLIN

NOTICE PARTY

JUDGMENT of Mr. Justice McGovern delivered on the 29th day of May 2019

1. This is an appeal against the judgment of Humphreys J. delivered on 3rd October, 2018. The background to this judicial review hearing concerns the appeals process in respect of the Leaving Certificate Examination results and how the time in which that process is completed affects access to third level education for the current academic year.
2. The respondent had long desired to study veterinary medicine and in the years 2016/17 she completed the practical work experience required for admission to veterinary medicine at University College Dublin ('UCD') by working in a vet's clinic. In 2017 she sat the Leaving Certificate examination and when the results were published she was twelve points short of the required level to qualify for the course. She decided to re-sit her Leaving Certificate examination the following year. On 15th August, 2018 she received her results which showed that she had obtained 554 points. On 20th August, 2018 the first round of offers was made by the Central Applications Office (CAO) and the applicant found that she was six points short of the course requirement for veterinary medicine in UCD which was 560 points. On 28th August, 2018 second round offers were made and the course requirement dropped to 555 points leaving the applicant one point short.
3. Having reviewed her examination scripts, the respondent realised that there had been a computation error in the score awarded to her in the business paper on which she had been examined and she realised that if this error had not occurred it would have entitled her to a Higher 1 Grade (H1) rather than the lower H2 Grade actually awarded. The higher grade would have qualified her for the veterinary medicine course in UCD.
4. As the State Examination Commission ('SEC') deemed the error not to be a "clerical error" it required the respondent to go through the formal appeals process. The effect of this decision was that the respondent would not have obtained a decision on her appeal until 10th October, 2018, which was outside UCD's cut-off date of 30th September for admission of students for the current academic year, which meant that even if her appeal were successful she would have had to defer the commencement of her chosen course until September 2019.
5. It is important to note, in the context of this appeal, that in 2018 UCD changed the cut-off date for the admission of students and it did not inform the SEC. This was not in dispute. It is accepted by the parties to this appeal that if UCD had not made that change to its admissions process that the respondent's successful appeal would have been determined in time for her to commence the course at the beginning of the UCD academic year in the autumn of 2018.
6. As a result of these proceedings the respondent was admitted to the UCD veterinary medicine course in the autumn of 2018, albeit a number of days after the academic year had commenced.
7. In this appeal the appellants challenge findings made by the High Court Judge of a constitutional right of access to higher education which they say were made in error and have significant implications for the system of admission to third level education, the rights of students and the obligations of the appellants which go beyond this particular case. It is agreed by the appellants and the notice party, UCD, that they do not seek to interfere with the respondent's position as a student on the veterinary medicine course in UCD and that the result of this appeal will not have any bearing on her status as a student on that course.
8. On 7th September, 2018 leave to apply for judicial review was granted by Creedon J. on the grounds set out in para. E of the statement of grounds which include the following:-

- the appellants misconstrued and/or misapplied their own policy;
- the decision of the appellants is unfair and lacking in proportionality and reasonableness;
- the decision of the appellants amounts to a breach of fair procedure and of the respondent's rights to natural and constitutional justice; and

- the respondent has been denied fair procedures.

9. The matter came back before the High Court (Humphreys J.) on 11th September, 2018 and on that date the Minister was released from the proceedings with the consent of the other parties. Thereafter the Minister had no involvement in the proceedings. This matter is of significance in view of certain findings made by the trial judge on the question of whether there exists a constitutional right of access to higher education and vocational training. No claim was made by the respondent that such a right existed and the respondent declined an opportunity to make that case when invited by the trial judge. These findings or observations were made after the Minister had been released from the proceedings and in circumstances where he had no notice that any such claim was being advanced. During the appeal there was some debate as to whether the trial judge's remarks on this issue were *obiter* or whether they amounted to findings and this issue will be discussed later in the judgment. But the Minister asserts that, in any event, the issue should not have been canvassed in his absence and in circumstances where it did not form part of the statement of grounds but came into the case as a result of judicial intervention.

The SEC and the Leaving Certificate appeals system

10. The SEC is an independent body established under the powers granted to the Minister for Education and Skills by s.54 of the Education Act 1998, and created by the State Examination Commission (Establishment) Order 2003 (S.I. 373/2003) ('the Establishment Order'). Pursuant to Art. 6, the SEC has responsibility for the delivery of the state certificate examinations.

11. The SEC organises the holding of state examinations, involving the preparation of examination papers and materials along with the prescribing of procedures for examinations and arranging for the marking of work and the issuing of results. Within that remit it organises the holding of both the Leaving Certificate and Junior Certificate examinations on an annual basis. By virtue of Art. 6(1)(f) of the Establishment Order the SEC is required, *inter alia*, to:-

"determine procedures to enable the review and appeal of results of examinations at the request of candidates..."

12. So far as these proceedings are concerned the applicable arrangements for the Leaving Certificate, including the processes applicable for viewing scripts and the appeal process, were contained in the 2018 candidate information booklet. The results of appeals made in 2018 were due to be published in mid-October 2018.

13. If a student wishes to question a mark given to him/her, he/she is entitled to:-

(i) have the marking of the script reviewed through the appeals process; and/or

(ii) seek rectification outside the appeals process.

They are separate processes. One is clerical in nature and the other more substantive. The rectification outside the appeals process ('ROAP') is a process through which certain limited errors may be corrected and so may be rectified by clerical action. As outlined in the candidate information booklet the ROAP mechanism is specifically precluded from applying to questions of interpretation relating to disallowed questions, computation of marks, the application of the marking scheme and claims that the work has not been fully marked.

14. The purpose of the Leaving Certificate examination is to satisfy the achievement of completing second level education. While the CAO and the Higher Education Institutions ('HEIs') use the results of that examination to regulate entry into higher education, the regulation of entry to third level studies is not the primary purpose of the examination. The SEC does not control the system for entry to third level education. The HEIs have full autonomy in that regard and are not subject to control by the Minister or by the SEC. The entry requirements for third level education, the deadlines for entry onto a course and any consequent matters are for the HEIs and they deal with these matters through the central applications process operated by the HEIs in line with their own individual decisions.

15. It is the CAO which manages the system by which a student is admitted to third level education in the State. The CAO is owned and directed by certain HEIs in accordance with arrangements published in the relevant CAO handbook. It has its own handbook to deal with the "offer season" which ended in 2018 on the 17th October at 5.15 p.m. The SEC does not operate the system of entry of students to third level education in the HEIs. A proper understanding of the respective roles of the SEC, the CAO and the HEIs and the leaving certificate appeals system is important in order to properly consider the issues arising on this appeal.

The High Court Order of 26th September 2018

16. The written judgment of the Court was delivered on the 3rd October, 2018 following the making of orders on the 26th September, 2018 in the light of what was perceived as the urgency of the case. Paragraph 76 of the judgment states:-

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

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

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

17. There is no appeal against that part of the order as a decision has been taken by the appellants that the appeal should not interfere with the position of the respondent so far as the offer of a place in UCD faculty of veterinary medicine is concerned.

18. The core issue in this appeal so far as both appellants are concerned is the underlying reasoning of the trial judge and whether the appeal system operated in respect of the Leaving Certificate engages any constitutional rights vested in the respondent and, in the case of the SEC, whether that appeal system is a proportionate and rational exercise of its powers.

19. Since both appellants maintain that the High Court Judge premised his findings on the existence of a constitutional right to third level education (whether on a stand-alone basis or as an element of the constitutional right to work) it is necessary, in the first place, to determine whether, in fact, the judge made such findings or whether he made remarks touching on those issues which were merely *obiter*.

20. In the original statement of grounds, the issue of an un-enumerated constitutional right of access to third level education was not raised, whether as an aspect of the right to earn a livelihood or otherwise. An amended statement of grounds was delivered on the 25th September, 2018 which again made no such claim. In a further amended statement of grounds on the same date at para. 30a, it was alleged that the impugned system and the decision of the SEC (the Minister having been let out of the proceedings) breached *inter alia* the applicant's constitutional right to earn a livelihood. The trial judge in the course of argument on the 26th September, 2018 suggested to the respondent that she take the opportunity to amend her statement of grounds so as to plead that she had a constitutional right of access to third level education which had been violated. Having taken instructions on the matter, counsel

informed the judge that she wished to "rest on the case as advanced to date". At that time the third statement of grounds had set out the nature of the constitutional case being advanced and it was confined to alleged breaches of the following constitutional rights of the appellant namely:-

- (i) the constitutional right to fair procedures;
- (ii) the constitutional right to equality and freedom from discrimination; and
- (iii) the constitutional right to earn a livelihood.

Findings of law or *obiter dicta*?

21. In the course of his judgment the trial judge discussed the question of whether there is a recognised constitutional right of access to higher education or vocational training and whether this should be recognised as a stand-alone right rather than merely as an aspect of the right to earn a livelihood. This can be found in paras. 33-44 of the judgment and later in the summary. The following heading appears before para. 33: "The applicant's fundamental rights are engaged by the process of admission to higher education." The text of the heading suggests that what is to follow is a finding by the judge. In order to determine whether the judge's observations on the issue of a constitutional right of access to higher education are findings or merely obiter it is necessary to quote extracts from this part of the judgment.

22. In para. 34 he stated:-

"While the recognition of the constitutional right to higher vocational training was left open in *Bloomer v. Incorporated Law Society of Ireland* [1995] 3 I.R. 14, in the modern world it is difficult and in some spheres impossible, to earn one's livelihood without access to higher education or vocational training. He or she who wills the end must will the means. The recognised constitutional right to earn a livelihood would be meaningless without the concomitant recognition of a right of reasonable access to available higher education and vocational training commensurate with the ability of the citizen. **Therefore the latter right must be regarded as a constitutional right that flows from the former right.**...There may of course be qualifications and conditions that can safely be left to another case, such as the extent to which that right is positive rather than negative, and questions regarding the costs to the student of availing of such education and training." [emphasis added]

23. In para. 36 he stated:-

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

Humphreys J. proceeded to outline, in the following paragraphs, various authorities and articles and extracts from the Universal Declaration of Human Rights and Art. 2 of Protocol 1 to the ECHR in support of this thesis. Having done so he concluded para. 41 of his judgment by saying:-

"...If a right to access to higher education and training is recognised as a separate right both in International and European law, there does not seem to be a compelling need to conceptualise it differently for the purposes of the doctrine of unenumerated rights under the Irish Constitution."

And he continued in para. 42:-

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

24. Perhaps realising that he expressed these views in circumstances where the Minister had been released from the proceedings before such issues were raised by the judge himself, and not the respondent, he noted that:-

"...In any event the relevant emanation of the State was a respondent, and Mr. Power made no submission to me that the applicant's rights could not be vindicated pending the joining of the State as such."

This was a reference to the SEC.

25. At para. 44 of the judgment he stated:-

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

In the following paragraph he remarked that:-

"...On the premises, set out above, that the process of admission to higher education engages the applicant's constitutional rights, any procedure for such admission must not unfairly interfere with the substance of those rights..."

26. Moving on to the summary at para. 73 that section commences with the statement:

"Without taking from the more specific terms of the judgment, an attempt can be made to broadly summarise the **major legal conclusions** arrived at, as follows..." [emphasis added]

27. Para. 73(v) reads as follows:-

"The recognised constitutional right to earn a livelihood would be meaningless without the concomitant recognition of a right of reasonable access to available higher education and vocational training, commensurate with the ability of the citizen. **Therefore the latter right must**

be regarded as a constitutional right that flows from the former right. There may of course be qualifications and conditions that do not fall for decision here and can safely be left to another case.” [emphasis added]

28. At para. 73(vii) he stated:-

“Given the intimate connection between access to higher education and the rights that are specifically relied on by the applicant, including the right to earn a livelihood, **the applicant’s fundamental rights are engaged in the question of her admission to higher level education** and therefore in the process and timescale for informing her of the outcome of her appeal against her Leaving Certificate grades.” [emphasis added]

29. In considering those parts of the judgment referred to above, it is undoubtedly true that in the course of his judgment the judge stated that the matters which he canvassed can safely be left for further discussion in later cases. But whatever way one reads these extracts, the judge has, at the very, least created an ambiguity as to whether he made a finding of a stand-alone constitutional right of access to higher education commensurate with the abilities of the citizen rather than merely as an aspect of the right to earn a livelihood. For example, when one reads para. 34 of the judgment it seems clear that he made a finding of a constitutional right and what was left over for consideration in another case was not the existence of the right itself but rather the qualifications and conditions to be attached to such a right. In my view those parts of the extracts above which I have highlighted bring me to the conclusion that he did make a finding that there exists a constitutional right of access to higher education either as a stand-alone right or one flowing from the right to earn a livelihood. His overall conclusions are significantly influenced by this finding.

Discussion

30. It is clear that the judge’s finding that there exists an independent un-enumerated constitutional right of access to higher educational and vocational training is something that was not claimed in either the original statement of grounds or the two subsequent amendments. It is also clear that the respondent did not seek to make that case, because when invited to do so by the judge she declined to take up that offer. The concept came into the case by way of judicial intervention alone. Judicial activism of this sort has not found favour with the Supreme Court who have called for a degree of judicial restraint in identifying un-enumerated constitutional rights. See *I.OT v. B* [1998] 2 I.R. 321 per Hamilton C.J. at p. 345 and Keane J. at p. 470.

31. At no stage up to the time he was released from the proceedings was the Minister notified that either the respondent or the judge had concerns that the existence of a constitutional right of access to higher education and vocational training as an independent un-enumerated right was a live issue in the proceedings. Order 84, r. 23(1) of the Rules of the Superior Courts (‘RSC’) prohibits an applicant for judicial review from relying on any grounds or seeking any relief except the grounds and relief set out in the statement of grounds which has been served. An application to amend the statement of grounds can be made under Ord. 84, r. 23(2) on notice to all the other parties. That never happened in this case so far as the argument regarding the existence of an un-enumerated constitutional right was concerned.

32. In *Keegan v. An Garda Síochána Ombudsman Commission* [2012] 2 I.R. 570 the Supreme Court held that an amendment to a statement of grounds may be permitted when it is in the interests of justice, but suggested that the appellant would be required to explain the necessity for the amendment and the failure to include it in the original application. A similar approach was taken in the High Court by Costello J. in *Wordperfect Translation Services Ltd. v. Commissioner of An Garda Síochána* [2015] IEHC 668. Although the issues raised by the trial judge by way of suggested amendments were legal issues not requiring further affidavits, the appellants were not put on notice of these issues even though they significantly broadened the scope of the judicial review and were never pleaded or raised in the original statement of grounds.

33. In my view, the trial judge was in error in making a finding of that there exists an un-enumerated constitutional right of access to higher or vocational education when such relief was never claimed.

34. But the problem goes further than that. At para. 43 of his judgment the judge stated that in an ideal world the determination of questions of the interpretation and scope of constitutional rights would take place where Ireland and the Attorney General were parties to the proceedings. He went on to say that it was certainly not the law that a court cannot vindicate rights “...unless the State proper is a party.” He equated the SEC as “...the relevant emanation of the State...”. But the SEC is an independent body established under powers granted to the Minister for Education and Skills and its function is to organise the holding of State Examinations and it is not concerned with such issues as to whether or not a constitutional right of access to higher education exists. On the other hand, the existence of such a right would have been of obvious interest and concern to the Minister and the Attorney General.

35. Quite apart from the fact that such relief was never claimed in the statement of grounds, the appropriate party to make representations on the issue was either the Minister or the Attorney General. On the basis that none of these parties were heard on the issues I would allow the appeal of the Minister on that ground alone.

36. No argument was made before the High Court judge relating to the existence of a constitutional right of access to third level education, either as a stand-alone right or as an aspect of the right to earn a livelihood. While the third amended statement of grounds did invoke a constitutional right to earn a livelihood, it was not argued on behalf of the respondent that there existed a right to third level education as an element of that right to earn a livelihood. After the release of the Minister from the proceedings, no submission was made to the High Court judge that the further presence of the Minister or the Attorney General was required because no argument was made to the High Court judge which would require such attendance.

37. In the High Court the respondent did not develop or advance in oral argument the issue of the right to earn a livelihood although it was pleaded in the third statement of grounds. It is clear from the nature of the proceedings that the respondent was not seeking the right to work but rather to be admitted to a course in veterinary medicine in UCD.

38. Insofar as the courts have engaged with the issue of a constitutional right to earn a livelihood, this right has been held not to be an unqualified right nor is it a right to any particular livelihood. It is a right which may be subject to legitimate legal restraints. See *Attorney General v. Paperlink Limited* [1984] I.L.R.M. 373. In *Greally v. Minister for Education (No. 2)* [1999] 1 I.R. 1 Geoghegan J. held that the right to earn a livelihood does not include a right to receive employment in a particular field and in *Nurendale v. Dublin City Council* [2013] 3 I.R. 417 McKechnie J. held that the right is not an absolute one but is narrow in its scope:-

“It is not a right to earn a livelihood from performing a particular job or task. It is merely a right not to be prevented from working.”

But since the respondent was not seeking the right to work it seems to me that the High Court judge should not have held that the constitutional rights of the respondent were engaged.

Was the appeal system employed by the SEC a proportionate and rational exercise of its powers?

39. The trial judge held that the lawfulness of the appeal system operated by the SEC fell to be addressed by reference to the principles of proportionality identified in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 rather than the *O’Keeffe* standard of rationality.

40. In *Sinnott v. Minister for Education* [2001] 2 I.R. 545 the Supreme Court held that the right to primary education provided for in Art. 42.4 of the

Constitution applies only to children and not to adults.

41. The finding of the trial judge that the relevant test was one of proportionality flows from the finding that the constitutional rights of the respondent were engaged in the manner described by the trial judge. Since that finding cannot stand for the reasons expressed earlier in this judgment, it follows that his application of the proportionality test is incorrect as a matter of law. See *Fleming v. Ireland* [2013] 2 I.R. 417 at para. 101 where the Court held that it was only after it is satisfied that a constitutional right exists, does the principle of proportionality arise. Furthermore, the trial judge fell into error in holding at para. 46 of his judgment that the burden of showing the proportionality of a measure rested on the SEC. (See *O'Connor v. DPP* [2015] IEHC 558 per O'Malley J.).

42. I accept the submission made on behalf of SEC that the proper standard against which the appeal system should be assessed by the Court is one of rationality. The trial judge did not apply that test. There was no evidence that the SEC exercised its powers in operating the appeals system in a manner which was irrational. In order to do so the respondent would have to establish that the principles in *O'Keeffe v. An Bord Pleanala* [1993] 1 I.R. 39 or *State Keegan v. Stardust Victims Compensation Tribunal* [1986] I.R. 642 were breached. The SEC published the arrangements for appeals in the candidate information booklet and adhered to the proceedings set out therein. There was no evidence of irrationality that would satisfy the *O'Keeffe* or *Keegan* tests.

43. So far as it is alleged that the SEC failed to take relevant matters into account, the High Court Judge identified the decision of UCD to change its cut-off date for new students to the 30th September, 2018 as a "material consideration" and concluded that the appeal system is flawed "because the SEC failed to have due regard to, or alternatively to make itself aware of, the fact that a system would be an ineffective remedy for anyone hoping to attend a course at the country's largest university in the current year".

44. Two points arise out of this finding. In the first place it misunderstands the role of the SEC. Secondly, it is not in dispute that the SEC was never told by UCD of its change of policy that year and it can hardly be criticised for not doing something to ameliorate a situation of which it was not aware. The High Court judge appears to have misunderstood the role of the SEC. I am satisfied that he was in error in finding that the appeal system operated by the SEC fell to be assessed by reference to the principle of proportionality or that it failed to take relevant matters into account. I would therefore allow the appeal of the SEC.

Conclusion

45. The appellants have not appealed against the curial part of the order made on the 3rd October, 2018 as expressed and amended in para. 76 of the written judgment. The appeal brought by both appellants is against the finding of the trial judge in respect of the engagement of an un-enumerated constitutional right to third level education.

46. For the reasons set out above I would allow the appeal of both appellants in respect of the judge's findings in regard to such an un-enumerated constitutional right. In my view, this Court should not express any view on whether such a right exists as it was not claimed by the respondent nor were the parties who were necessary to be heard on such an issue before the court. It should not have formed any part of the High Court judge's decision and therefore this Court should not express any view on the merits of such an argument.

47. I would also allow the appeal of the first named appellant in respect of the findings of the High Court Judge based on proportionality and the failure to take relevant matters into account.

48. Apart from the matters referred to at para. 44 above, I would direct that the findings of the High Court judge should be set aside. In the particular circumstances that arise in this case I see no reason to send the matter back to the High Court for further consideration.