

**THE HIGH COURT  
JUDICIAL REVIEW**

[2018 No. 784 JR]

**BETWEEN****GAVIN MORRISSEY****APPLICANT****AND****THE MINISTER FOR DEFENCE, THE ATTORNEY GENERAL AND IRELAND****RESPONDENTS****EX TEMPORE JUDGMENT of Mr. Justice MacGrath delivered on the 19th day of October, 2018.**

1. This is an application for judicial review in which the applicant claims various orders and reliefs against the respondents including an order of certiorari quashing the decision of the respondents to reject his application for a place in the cadet school of the military college established and operated by the first respondent. He seeks declarations that the respondents, in refusing him a place in the cadet school on the basis that he did not obtain all the necessary academic qualifications in a single sitting of the Leaving Certificate, have acted in a manner contrary to his legitimate expectations, contrary to natural justice, and was irrational and disproportionate in the circumstances.

2. The applicant was born on 10th November, 1998. He sat his Leaving Certificate in 2017 and repeated it in 2018. It was his wish and desire to become an officer of the Permanent Defence Forces and to this end, on 1st April, 2018, he applied for entry into the cadet school at the military college. The college is responsible for the training and education of officers in the Defence Forces and in the context of this case, the army.

3. On 3rd April, 2017, the applicant attended an open day for the Defence Forces at Stephens Barracks, Kilkenny. He says he was informed by a member of the Defence Forces that he required a third language in his Leaving Certificate, and that the Leaving Certificate subjects required did not have to be passed at a single sitting of the examination. It was his understanding based on this conversation that a candidate could count certain subjects which he passed in a previous Leaving Certificate sitting towards the fulfilment of the cadet school's subject requirements.

4. The applicant did not achieve the necessary standards in the various subjects required for entry into the cadet school in his Leaving Certificate in 2017. He decided to repeat his Leaving Certificate in 2018, which according to communications and correspondence opened to the Court (and in particular a letter of 23rd August, 2018, sent at his behest by his father to the Defence Forces), he did so solely in order to meet the entry requirements for a cadetship. He commenced studying a third language and a new subject after carrying out research on the defendant's website, [www.military.ie](http://www.military.ie). He wished to ensure that he would fulfil the entry requirements. He enrolled in Yeats College in Waterford, a private school providing grinds specifically for repeat Leaving Certificate students, which cost almost €7,000.

5. In January, 2018, following consultation with the school principal and a career guidance teacher, he dropped mathematics from his studies in order to focus on studying his other subjects and to improve his grades generally. He avers that during the course of the 2018 academic year he consulted the Defence Forces website which indicated, under the section entitled "*Naval Service FAQ*" that "*the specific subjects listed need not be in a single sitting...*". He maintains that the Defence Forces website contained no indication that the required Leaving Certificate subjects all had to be obtained within the same year. He avers that it was in reliance on these representations that he, in consultation with his school guidance counsellor, decided to drop mathematics from his studies. His intention was to carry over the 2017 grade in mathematics in order to fulfil the subject requirements for admission to the cadet school in 2018.

6. On 1st April, 2018, the day that the competition opened, the applicant submitted his online application. This required the completion of a form requesting information including whether he intended to sit for the Leaving Certificate or national equivalent examination in 2018, to which he replied in the affirmative. The last paragraph of the form contained the following declaration:-

*"I hereby declare that all the particulars supplied in connection with this application are true, accurate and complete to the best of my knowledge and belief. I hereby declare that I have read and that I fulfil all the requirements set out in the Governing Terms and Conditions for this position and that the information given in this form is correct..."*

To this, he answered "Yes". The applicant completed the form at 16:46 on that day.

7. In May, 2018, the applicant undertook an online psychometric evaluation. He underwent a further group psychometric competition on 26th June, 2018 and was interviewed by representatives of the military college on 13th July, 2018. He underwent a medical examination on 26th July, 2018. The applicant successfully passed all of these tests. Therefore, the only outstanding matter was his Leaving Certificate results, and based on these, he hoped to secure a place in the cadet school for the academic year commencing on 25th September, 2018.

8. By email of 9th June, 2018, the respondent sent a bundle of documents to the applicant which included a document entitled "*Terms and Conditions and General Information Regarding Officer Cadetships in the Defence Forces 2018*" ("*the 2018 terms and conditions*"). This document is dated 29th March, 2018 and was published on the Defence Forces website on the morning of 1st April, 2018. It appears that it should have been available to download and read when the applicant completed his application on that day. Mr. Morrissey avers that he did not read the 2018 terms and conditions document closely when he received the email in June, 2018. The Leaving Certificate Mathematics Papers I and II examinations took place on Friday 8th June, 2018 and on Monday 11th June, 2018.

9. It was believed by the applicant that through a combination of the Leaving Certificate results for the 2017 and 2018, he had achieved the minimum educational requirements set out in the 2018 terms and conditions. However, as a result of not sitting the mathematics examination in 2018, he was informed by the respondent by email, on 22nd August, 2018, that he had not been accepted into the cadet school.

10. On the hearing of this application, it became evident that the only matter which stands in the way of the applicant securing a place in the cadet school for this current year is that he did not sit the Leaving Certificate mathematics examination this year but is relying on the results of the Leaving Certificate examination in mathematics obtained in 2017.

11. The 2018 terms and conditions, as in the case of the terms and conditions in previous years, are divided into a number of parts. Part I contains the governing conditions, rules and qualifications required for the award of cadetships in the Defence Forces. The relevant paragraphs of the terms and conditions which have been relied upon by the parties include para. 2 of Part I. Paragraph 2 is entitled "*MINIMUM EDUCATIONAL QUALIFICATIONS*", and states as follows:-

*"a. Army (Line) and Army (Equitation School)*

*School Leaver/Non-Graduate Candidates who sat their Leaving Certificate Examination in 2017 or who are sitting this examination in 2018, must possess a minimum of Grade H5 in 3 Higher Level papers and Grade O6/H6 in 3 Ordinary/Higher level papers.*

*A minimum of Grade O6/H6 is required in the following Ordinary/Higher level subjects:*

*(1) Mathematics.*

*(2) Irish. NUI matriculation exemptions apply.*

*(3) English. Candidates whose first language is not English must satisfy the English language requirements in accordance with NUI Matriculations Regulations.*

*(4) Third language accepted for NUI Matriculation Registration purposes. NUI matriculations exemptions apply.*

*(5) Any two Matriculation subjects not already selected.*

*b. Army (Line) and Army (Equitation School)*

*Graduate Candidates must possess a minimum of Grade D3 in the following Ordinary/Higher level subjects:*

*(1) Mathematics.*

*(2) Irish or English.*

*(3) Any four Matriculation subjects not already selected.*

*AND*

*Candidates must have successfully completed a Bachelor Degree programme at Level 8 of the National Framework of Qualifications."*

A footnote to this paragraph indicates that the minimum educational qualifications which apply to candidates who sat the Leaving Certificate examination prior to 2017 are to be seen in an addendum to that document.

12. In so far as application to the naval service is concerned, the minimum education qualifications are outlined in para. 2(e) which states that school leavers/non-graduate candidates who sat the Leaving Certificate examination in 2017 or who are sitting this examination in 2018, must possess a minimum of grade H4 in four higher level papers and grade O2/H2 in two ordinary or higher level papers. It thereafter prescribes a minimum of grade O6/H6 in a number of subjects including Mathematics, Irish, English and any three matriculation subjects.

13. At the end of p. 6 of the 2018 terms and conditions, the following important notice appears:-

"PLEASE NOTE:

*• A Candidate must meet the Minimum Educational Qualifications, as specified for all competitions above, in a single sitting of the Leaving Certificate Examination."*

14. Counsel for the applicant, Mr. Quinn S.C., pointed to two essential differences between the wording of the 2018 terms and conditions and those contained in the 2017 version. Under the heading "GENERAL QUALIFICATIONS", a note advises that the upper age limit will be reduced on a phased basis to "under 27 years of age" for the 2018 cadetship competitions and to "under 26 years of age" for the 2019 cadetship competition. He relies upon this note as evidence not only of an example of the respondent changing qualification criteria, but also of the understanding that notice of changes should be given.

15. Paragraph 2 of the 2017 terms and conditions in so far as is relevant states as follows:-

*"a. Army (Line) and Army (Equitation School) and Air Corps (Pilot)*

*School Leaver/Non-Graduates must possess a minimum of Grade C3 in 3 Higher Level papers and Grade D3 in 3 Ordinary/Higher level papers in a single sitting of the Leaving Certificate examination. Leaving Certificate Applied does not qualify for this competition.*

*A minimum of Grade D3 is required in the following Ordinary/Higher level subjects:*

*(1) Mathematics.*

*(2) Irish. NUI matriculation exemptions apply.*

*(3) English. Candidates whose first language is not English must satisfy the English language requirements in accordance with NUI Matriculations Regulations.*

(4) *Third language accepted for NUI Matriculation Registration purposes. NUI matriculations exemptions apply.*

(5) *Any two Matriculation subjects not already selected*

*b. Army (Line), Army (Equitation School) and Air Corp (Pilot)*

*Graduates must possess a minimum of Grade 3 in the following Ordinary/Higher level subjects:*

(1) *Mathematics.*

(2) *Irish or English.*

(3) *Any four Matriculation subjects not already selected."* [emphasis added]

16. The 2018 terms and conditions do not include the words "*in a single sitting*" at para. 2(a). It is the applicant's case that these are significant changes to the wording of the minimum educational requirements as apply in his case. Further, he relies on the contents of the recent website publications which contains the wording of the 2017 terms and conditions but not the wording of the 2018 version. It is therefore contended that both the 2017 terms and conditions and the website indicate that while passing grades must be obtained in six higher or ordinary level subjects in a single sitting, it is not necessary to fulfil the minimum grade of D3 or equivalent requirement in the required Leaving Certificate subjects in a single sitting. Further, it is contended that the 2016 terms and conditions contain precisely the same information as those contained in 2017 document.

17. The applicant places significant emphasis on the contents of the respondent's website, [www.military.ie](http://www.military.ie). It is submitted that there are at least two documents contained on the website which reflect an interpretation of its terms and conditions by the respondent, consistent with the applicant's understanding that one can achieve the minimum educational qualifications otherwise than in a single sitting. To this end, reference has been made to the following documents.

#### **The "Frequently Asked Questions" document**

18. This document appears to relate to the entry requirements to the navy. One of the questions and answers proceeds as follows:-

*"Must these results be at a single sitting of the Leaving Cert?*

*You must have obtained a minimum of 3 Higher Grade Cs, and 3 Ordinary level Ds in a single sitting of the Leaving Cert. However, the specific subjects listed need not be in a single sitting. For example, if you obtained 3 Higher Cs and 3 Ordinary Ds in one year, but they did not include (for example) Irish, and you sat and obtained an Ordinary D in that subject in another year, that is acceptable."*

19. The respondent also relies on notes contained in the 2018 terms and conditions which specifically advise future candidates as follows:-

*"These conditions apply for the 2018 Cadetship Competitions only and are due for review in advance of any future competition."*

A similar note is contained in the 2017 terms and conditions. It appears that this note is replicated in the terms and conditions from year to year. The respondents maintain that by the inclusion of the notice in the terms and conditions, there can be no expectation, let alone a legitimate expectation, on the part of any potential candidate, that the rules will not change in the year in which he seeks to apply to become a member of the cadet force.

#### **Educational requirements document**

20. A further document appearing on the website under the heading "**EDUCATIONAL REQUIREMENTS**", is dated either 1st October, 2018 or 10th January, 2018 (it appears that the American English format of "01/10/18" may have been used to date the document). Under the heading "*Minimum Educational Qualifications*", the wording employed corresponds with that which is contained in the 2017 terms and conditions in so far as that it includes the wording "*in a single sitting*". Such wording is not employed in the 2018 terms and conditions. Again, this is a document which is currently on the respondent's website.

21. On the hearing of this application, it emerged that there was a difference of view between the parties as to whether the terms and conditions had in fact changed between 2017 and 2018. It also emerged that there is a degree of confusion within the staff and ranks of the respondent as to whether such change had in fact been effected. Thus, at para. 17 of the statement of opposition delivered on 15th October, 2018 it is pleaded that:-

*"...insofar as it is alleged that the 2017 Terms and Conditions state that the minimum conditions can be fulfilled over two years, this is clearly incorrect as the 2017 Terms and Conditions state on their face that grades must be obtained in a 'single sitting of the Leaving Certificate'. Furthermore, insofar as the Defence Forces website is concerned, the only portion of the website that stated specific subjects need not be passed at a single sitting was in relation to Naval cadetships, and not the Army."*

22. Mr. Stephen Hall, principal officer in the Department of Defence, in his affidavit sworn on 15th October, 2018, avers that although similar language was used in both the 2017 and 2016 terms and conditions (referring to "*a single sitting*"), it was decided in 2018 to change the presentation in the 2018 terms and conditions to make it clear that the minimum qualifications had to be obtained in one sitting of the Leaving Certificate. Nevertheless, his understanding is that in previous years some applicants were successful by combining results from different years.

23. This is further explained by Commandant Gillian Collins, acting officer in charge of the recruitment and competitions section, in an affidavit sworn by her on 15th October, 2018. At para. 6 she avers to what had been the recruitment and competition section's interpretation of the terms and conditions, prior to 2018:-

*"The Recruitment & Competitions Section interpretation of the Terms and Conditions prior to 2018 has been that the three D3s in Higher level papers and the three C3s in Ordinary level papers is required in a single sitting. Mathematics, Irish, English or a foreign language could be brought in from a previous sitting. Due to a change in the presentation in*

*the Terms and Conditions as set out in the 2018 form it became evident to Recruitment and Competitions Section that the minimum educational qualifications had to be achieved in a single sitting."*

This averment clearly evidences the understanding of an important section within the Defence Forces dealing with applications from cadets, being the recruitment and competitions section, as to the proper interpretation of the 2017 terms and conditions. On the basis of this affidavit, either that section of the respondent misunderstood, misinterpreted or misapplied the terms and conditions prior to 2018, or alternatively, there was in fact a change not only in presentation but in substance when it came to the publication of the 2018 terms and conditions.

24. The applicant also refers to communications during the course of what might be described as political representations made by and on behalf of the applicant, prior to the institution of these proceedings. Thus, in a letter sent via email from the first respondent to Mr. Morrissey's father, dated 6th September, 2018, the Minister sought to distinguish between the "*Frequently Asked Questions*" in respect of positions in the army as opposed to naval cadetships.

25. A briefing note was prepared by a private secretary to the Minister, Ms. Cliona O'Sullivan of the conciliation and arbitration branch, presumably to inform the Minister that if any discrepancies were present on the Defence Forces website they had been corrected.

26. Another document, upon which significant reliance has been placed by the applicant in particular, is what appears to be a draft email to the applicant's father prepared by Ms. O'Sullivan. It is undated but contained within that briefing note is a statement to the following effect:-

(i) The terms and conditions relating to the minimum educational qualifications for school leavers/non-graduates applying for an army cadetship were not changed in the middle of the academic year. The specific requirements for Leaving Certificate results to be obtained in a single sitting had not been changed for a significant period of time.

(ii) Ms. O'Sullivan attached copies of the terms and conditions for 2016, 2017 and previous years. She stated that the wording had been consistent for quite some time.

(iii) And importantly, it is stated in that draft email as follows:-

*"As there were no substantive change to the Terms and Conditions for the 2018 competition, I can confirm that no specific communication was made to schools in this regard".*

The applicant places significant emphasis on the fact that reference is made to communication to schools in the context of the prospective future alteration of terms and conditions.

27. Mr. Morrissey contends that the change to the rules towards the end of the academic year is unfair and irrational and has exposed him to severe prejudice. At para. 12 of his affidavit sworn on 1st October, 2018, he avers:-

*"In circumstances where I had made my decisions about which subjects to take in 2018 based on the representations made, when I received a document entitled 'Terms and Conditions and General Information Regarding Officer Cadetships in the Defence Forces 2018' by email on or around the 9th June 2018, I did not examine it too closely, as I was at that time in the middle of the application process for a cadetship, and I believed I would satisfy all of the academic requirements, as I understood them."*

28. He avers, however, that by the time he received this document in June, 2018, it would have been too late to sit the examination, Mathematics Paper I having already taken place.

29. The respondent emphasises the online application form and a declaration of the applicant that he had read and fulfilled the requirements set out in the governing terms and conditions, something he ought to have done.

### **Legal Submissions**

30. In written submissions to the Court, counsel for the applicant made it clear that it is the process by which his application was assessed by the first respondent that is being challenged, not the terms and conditions themselves or indeed, the Minister's entitlement to change such terms and conditions. If there was to be such a fundamental change in the nature of the minimum educational qualifications and how they might be achieved, he submits that it is something which should have been flagged in a timely manner and in advance of the change.

31. Mr. Quinn S.C. further submits:-

(i) The decision of the Minister to refuse the applicant his cadetship was contrary to his legitimate expectation, and disproportionately affected Mr. Morrissey's constitutional rights and, in particular, his right to earn a livelihood and to have reasonable access to higher education commensurate with his abilities.

(ii) In rejecting the applicant's application, the first respondent has acted unreasonably, irrationally, unfairly and has failed to vindicate the applicant's right to fair procedures and natural and constitutional justice. In so doing, it is contended that the first respondent acted *ultra vires* his powers under the Defence Acts.

(iii) Replying to the respondents' pleading that the application is out of time, it being in essence a challenge to the terms and conditions published on 1st April, 2016, counsel argues that the applicant seeks no relief in respect of the promulgation of those terms and conditions. However, he submits that if he is incorrect in this regard, there are good and sufficient reasons for the application to extend the time in which to seek leave. This is because the applicant acted in good faith and on express representations from the respondents. The first occasion on which he was provided with a soft copy of the terms and conditions was 10th June, 2018, at which time the mathematics examinations had already commenced. Further, he contends that he believed that he had fulfilled the admission criteria until the decision of the first respondent was communicated to him on 22nd August, 2018. Rather than proceeding immediately to court, he had sought to make representations to attempt to resolve the issue.

32. Reference is also made by the applicant to the decision of Humphreys J. in *Carter v. Minister for Education and Skills* [2018] IEHC 539. On this see my observations at para. 77 below.

33. Counsel emphasises that the lack of a clear warning to proposed changes may in certain circumstances constitute a breach of natural and constitutional justice and reliance is placed on the decision of the High Court and of the Supreme Court in *TV3 v. Independent and Radio Television Commission* [1994] 2 I.R. 439.

34. It is fundamentally submitted that based on the information provided by the first respondent, the applicant had a legitimate expectation that he would meet the minimum educational requirements for entry into the cadet school. He relies on dicta in *Power v. Minister for Social and Family Affairs* [2007] 1 I.R. 543. There, MacMenamin J. applied the test for legitimate expectation outlined in *Glencar Exploration p.l.c. v. Mayo County Council (No. 2)* [2002] 1 I.R. 84 at p. 556 as follows:-

*"The first point which must be made is that what was in issue here is a non-statutory discretionary power. Secondly, the statement that a legitimate expectation will arise only if the court thinks that there is no good reason of public policy why it should not is certainly applicable in the instance of a discretion or power made pursuant to a statute or statutory instrument which is exercisable for the good of the public or a specific section thereof. Thirdly, it is clear that the court must ultimately carry out a balancing exercise between the interest to the applicant and the public interest in the unfettered exercise of the decision maker's discretion. Finally, the first applicant here is seeking the application to himself of a principle already enunciated and clearly applicable to his particular situation and to a well defined and categorisable group. The booklet in its terms cannot be seen as a mere general statement of policy particularly so when taken in conjunction with the application form which creates an individualised clear and unequivocal relationship between the applicant and the respondent thus having regard to the circumstances it is fair to see that the relationship created in the instant case is more akin to an individualised promise and representation rather than the mere enunciation of a general policy."*

35. Reference is also made to the decision in *Curran v. Minister for Education* [2009] 4 I.R. 300, where Dunne J. considered the effect of an administrative circular in the context of those who wished to apply for early retirement from post primary teaching. It had been expressly stated that the scheme would operate for 2008/2009 but in November, 2008, because of the parlous circumstances of the State's finances, the Minister for Education announced that the scheme was to be withdrawn. The applicant was denied the opportunity to apply for the scheme and Dunne J. held that in normal circumstances it was difficult to see how the applicants could be held not to have had a legitimate expectation. The reliefs were refused, however, because of the overwhelming public interest in managing State finances.

36. Counsel also relies on the decision of Clarke J. in *Glenkerrin Homes v. Dun Laoghaire Rathdown County Council* [2011] 1 I.R. 417. That case concerned the legal entitlement, if any, of the defendant to alter the previously existing practice of issuing letters of compliance in relation to the payment of financial contributions under a planning permission, which were designed to satisfy purchasers of the fact that the financial contributions had been paid. The issue which arose between the parties were inextricably linked to the requirements placed upon developers under the Planning and Development Acts to contribute to the provision of social and affordable housing. The dispute stemmed from the absence of an agreement between the parties as to how those obligations were to be met. The defendant Council had maintained that in the absence of such agreement it was under no obligation to provide letters of compliance. The court had to consider whether the plaintiff had a legal entitlement to have a letter of compliance issued. It was common case that there was no such statutory entitlement but the plaintiff maintained that it had a legitimate expectation to receive such a letter of compliance.

37. Clarke J. referred to the decision in *Glencar and Abrahamson v. Law Society of Ireland* [1996] 1 I.R. 403, in which McCracken J. stated as follows:-

*"1. It is now well established in our law that the courts will, as a general rule, strive to protect the interests of persons or bodies who have legitimate expectations that a public body will act in a certain way.*

*2. In protecting those interests the court will ensure that, where that expectation relates to a procedural matter, the expected procedures will be followed.*

*3. Where the legitimate expectation is that a benefit will be secured, the courts will endeavour to obtain that benefit or to compensate the applicant, whether by way of an order of mandamus or by an award of damages, provided that to do so is lawful.*

*4. Where a Minister or public body is given by statute or statutory instrument a discretion or a power to make regulations for the good of the public or of a specified section of the public, the court will not interfere with the exercise of such discretion or power, as to do so would be tantamount to the court usurping that discretion or power to itself and would be an undue interference by the court in the affairs of the persons or bodies to whom or to which such discretion or power was given by the legislature."*

38. Referring to *Glencar*, Clarke J. was satisfied that a promise or representation to be relied upon, may be either express or implied. He was also satisfied that an implied representation can derive from a universal following of a particular practice for a prolonged period of time. Nevertheless, he accepted the executive body exercising a statutory role enjoyed an entitlement to alter the policy within which they were exercising their statutory functions and that, therefore, one could not argue that a legitimate expectation arose to the effect that a policy would not be changed. At p. 426, he stated as follows:-

*"However where third parties reasonably arrange their affairs by reference to such a practice it seems to me that such third parties are entitled to rely upon an expectation that the practice will not be changed without reasonable notice being given. The notice that would be required is such as would reasonably allow those who have conducted their affairs in accordance with the practice to consider and implement an alternative means for dealing with the issues arising. On the facts of this case a reasonable period would need to be given to enable those involved in conveyancing (and, in particular, the conveyancing committee of the Law Society) an opportunity to consider and make recommendations as to the manner in which conveyancing issues arising in relation to planning in respect of newly built homes should be dealt with in the absence of certificates of compliance."*

39. For the purposes of determining the extent of the legitimate expectation which the plaintiff might have in that case, Clarke J. thought it important that there did not appear to have been any general publication of the intention to limit the practice of giving certificates of compliance in cases where the defendant was not satisfied that appropriate arrangements to fulfil the social and affordable housing requirements were in place. Ultimately, he held that it was necessary, before introducing a significant variation in a practice, for the local authority to give sufficient public notice to allow those intimately involved in the process, such as developers and conveyancers, to work out reasonable alternative means for providing satisfactory evidence of compliance with permission

conditions. The expectation of the plaintiff was not an absolute one and the defendant remained entitled to refuse to give a certificate of compliance where there was a good reason for doing so.

40. Counsel for the applicant relies upon this decision as authority for the proposition that while a public authority, and in this case the Minister, can change policies, reasonable notice must be given to enable persons to arrange their affairs. It is submitted that the first respondent failed to do this. It is further argued that the 2017 terms and conditions and those published in earlier years meant that one could carry forward the subject specific requirements from earlier Leaving Certificate examinations. There was no statement in those terms and conditions that the subject specific requirements were required to be obtained in a single sitting. It is submitted that the predictable consequence of this was that people would carry forward results in subjects and not resit them. He submits that this is the interpretation shared by all those involved in the process, including Commandant Collins, the representatives at the open day and by those charged with the publication of material on the website.

41. For this reason, counsel argues that the Minister must be taken to have known that the system was operated on his behalf in such a manner. The sequence of events which occurred in this case indicated that the person in charge of administering the process and placing information on the website did not initially realise that the rules had been changed. If they had, he submits, they would have changed the entries on the website.

42. It is also argued that no explanation had been proffered by the respondent as to why the rules had been changed nor why there was no notification of such change. He thought a likely explanation to be that the Minister did not actually realise that he had changed the rules because the officials in his department were not in contact with officials operating the system on the ground. There was, therefore, at best, a misunderstanding of the rules. On that basis, he suggested it was unfair to attempt to criticise his client for not having fully understood or appreciated that which department officials had not understood.

43. Applying *Glenkerrin*, he submits that it is clear that when important legal rights are at stake, as they are here, the person who has those rights has an entitlement to expect fair and reasonable notice of the change. He believes that this is not a concept that is disputed by the Minister and points particularly to the letter to which I referred to earlier, addressed to Mr. Morrissey and signed by Ms. Cliona O'Sullivan, the Minister's private secretary. This, he suggests, is an acknowledgment on the part of the first respondent that if there had been a substantive change to the rules, schools would have been so informed in advance.

44. Mr. Leonard S.C., representing the respondents, submits that this application should be refused because any representation that the applicant purports to rely upon falls very far short of that which is necessary to ground a claim for legitimate expectation. Thus, it is argued that in so far as any representation was made at the open day, this was made in April, 2017 in the context of the 2017 competition and the terms and conditions of which were published on 22nd March, 2017. No representations were made or could have been made in relation to the future.

45. In so far as the website is concerned, it is submitted that the passage relied upon by the applicant refers to the navy and not the army, and that this was relied on in advance of the publication of the 2018 terms and conditions. Fundamentally, he argues that the applicant must have known, even from a perusal of the 2017 terms and conditions, that they could be changed, and that the 2018 terms and conditions might only be published in or around March or April, 2018.

46. The applicant when completing the application had stated that he had read and fulfilled the terms and conditions, and thus is bound by them. Further, it is submitted that he is out of time to bring this application for leave to apply for judicial review. Counsel also places significant emphasis on the note contained in the 2018 terms and conditions to which reference has previously been made that the minimum educational qualifications must be met in a single sitting of Leaving Certificate examination.

47. The respondent, therefore, submits that the 2018 terms and conditions only apply to applications submitted and to be considered in 2018. It is argued that this is the same in every year.

48. The 2018 terms and conditions were published prior to the applicant submitting his online application and he did not consider them until 22nd August, 2018. It is contended that this is unreasonable conduct on the part of the applicant.

49. Counsel for the respondents argues that even if there was a mistake in the frequently asked questions section of the website, this could not, of itself, be said to override the 2018 terms and conditions. He relies on the *dicta* of Fennelly J. in *Glencar* that the representation must be one to create an expectation reasonably entertained by the person or group that the public authority will abide by such representation to the extent that it would be unjust to permit the public authority to resile from it. Fennelly J. also stated that any such representations must be qualified by considerations of public interest, including the principle that the freedom to exercise properly a statutory power must be respected. It is submitted that there cannot be any reasonable expectation by the applicant that any previous practice would be continued into 2018. The applicant must have known that the 2018 terms and conditions might differ from the 2017 terms and conditions.

50. Counsel also submits that in *Abrahamson*, the court was concerned with a representation of a different type and quality. The court there stated that the representations were made to the applicants that certain exemptions would be given by the Law Society to graduates who fulfilled certain conditions. The applicants in that case were able to point to certain publications of the Law Society which stated that graduates with particular degrees would be exempt from passing the Society entrance examination. By contrast, the documentary material in this case clearly provided that the terms and conditions were subject to review from year to year. Further, the documentary material in *Abrahamson* was in the form of an official publication, something far removed from the nature of a website entry. For my own part, I find it difficult to see that the material relied upon in *Abrahamson* is so far removed from the material relied upon in this case as to make *Abrahamson* irrelevant or an authority which might not be relied upon.

51. It is also submitted that if the applicant's claim for legitimate expectation fails, the only remaining issue to be addressed is whether the respondent had acted reasonably in exercising his powers and in applying the 2018 terms and conditions. This issue must be addressed in accordance with the ordinary principles of judicial review involving the application of *dicta* of the Supreme Court in *Meadows v. Minister for Justice* [2010] 2 I.R. 701. It is not an appeal. The decision is one for the decision maker. It is further submitted that even if the Court might think it preferable to have published the 2018 terms and conditions earlier than April, 2018, this does not avail the applicant. This Court should not interfere with the decision of the Minister save in accordance with the well established principles applicable in judicial review proceedings and outlined in cases such as *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 at p. 664 that attested whether the decision taken "*plainly and unambiguously flies in the face of fundamental reason and common sense*". In this case, it is submitted that there is nothing irrational, unreasonable or indeed disproportionate in the publication of the terms and conditions on 1st April in any given year. The terms and conditions apply not only to Leaving Certificate candidates but also to others. However, the Minister is entitled to make a decision as to the number of candidates required, their division between army, navy and air corps, and as to whether any candidates might, in any given year, be

required or accepted into the service. All of these matters are within the first respondent's powers.

52. It is submitted that there is no evidence that the applicant actually read the 2017 terms and conditions and had he done so, he would have known that the respondent reserved the right to change those terms and conditions. The respondent points to a number of changes which occurred between 2017 and 2018 terms and conditions generally. In addition, he submits there is no evidence that the applicant in this case ever read the 2018 terms and conditions, though it should be noted that, as Mr. Quinn S.C. submits, the online application form does not refer to a specific year when it refers to the and conditions.

53. Reliance is placed on *Wiley v. Revenue Commissioners* [1989] I.R. 350 and *Glencar* at authority for the proposition that there must not only be a reasonable expectation but it must also be legitimate. Significant emphasis is placed by the respondent on *Palmer v. Minister for Defence* [2014] IEHC 446.

54. It is instructive to look in some detail at *Palmer*. In that case, the applicant was a serving private in the army. He was nominated to undergo training with a view to qualify for promotion to the rank of non-commissioned officer. He commenced training and underwent necessary medical examinations. Two days after commencing training, an inquiry was made into his age. As he was over 40 years of age, he was informed that he was too old for the course and was excluded from it on that ground. Mr. Palmer was extremely disappointed and sought leave to apply for judicial review of the decision to remove him from the course on age grounds. He argued, *inter alia*, that he had a legitimate expectation to be on that course.

55. Cross J. observed that first question to be addressed was whether the applicant had an expectation within the meaning of established case law that he would be allowed to remain on the course notwithstanding his age. I think it is important to record that on the facts in that case, it was the respondent's contention, as accepted by the trial judge, that the decision to admit the applicant onto the course was due to an unfortunate administrative error. He further noted that the respondent had relied upon the decision in *Daly v. Minister for the Marine* [2001] 3 I.R. 513 that the notion of fairness had within it "*the idea that there was an existing relationship which would be unfair to alter*" and that the mere fact of an expectation would not suffice. On the facts, Cross J. was not satisfied that it had been established that the plaintiff knew or ought to have known that an absolute 40 year 'cut off' was applicable. Nevertheless, he was not willing to hold that the fact that in previous years, two persons who were over 40 years of age were accepted on the course was anything other than the Minister making a similar administrative error. In those cases, the Minister had not discovered the error until after the promotions were made. He was not satisfied that the applicant had established an expectation. He described the respondent as having made a significant error which had not created an expectation in the first place. The fact that the applicant had been accepted onto the course did not mean that he had suffered in the manner which was adverse to his interests. At para. 31 of his judgment, he stated:-

*"I do not find in this case that there was any promise or any representation made by the respondents. What occurred was a mistake by them as to the applicable criteria and the applicant did nothing to his legal detriment in order to invoke the operation of the doctrine even accepting Denning M.R.'s view as I do that mistake can result in the legitimate expectation operating."*

56. It seems to me that the facts in *Palmer* are removed from the facts of this case. In *Palmer*, there was what can only be described as an admitted error on the part of the respondent, one of which he was unaware. It was an error which was individual specific. For example, Cross J. stated that even if he was incorrect that the respondent had no expectation, he was satisfied that there was no legitimate expectation because the applicant was never eligible for inclusion in the course and he did not satisfy the criteria set out in the "*Joining Instructions*". Therefore, Cross J. was satisfied that the applicant could never have had a legitimate expectation about the course. Here, if there was any error, which I do not accept that there was, it was one which was made by the respondents as a result of an informed interpretation, or perhaps misinterpretation of its own criteria. It is further noted that Cross J. also came to the conclusion that if he was incorrect in the rejection of the claim that there was a legitimate expectation, the operation of a reasonable policy by the Defence Forces to apply and override limits, superceded any legitimate expectation the applicant might have. In that regard, perhaps he was echoing the sentiments of Dunne J. in *Curran* that even where a legitimate expectation might be established, overriding considerations of public policy (in that case based upon the state of the country's finances) might have the effect of negating any such expectation.

57. It is submitted on behalf of the Minister that the terms and conditions apply on an annual basis and that there is no guarantee or representation made that they will not change. It is also submitted that the Minister is entitled to change or alter those terms and conditions in the year in which they apply. A striking feature of this submission is that if correct, it would mean that no prospective Leaving Certificate candidate could ever know what the first respondent's requirements are before commencing the Leaving Certificate cycle. The same might be said for a prospective candidate at the beginning of his Leaving Certificate year. It would effectively mean that the first respondent might change the requirements in April of the year in which a person is sitting the Leaving Certificate examination, which would give any such candidate little, if no, time to alter course, take on a new subject or study differently.

58. If the first respondent is correct in the absolute position taken in the submissions made to this Court, then expressions such as those contained in Ms. O'Sullivan's letter to Mr. Morrissey "[a]s there were no substantive changes to the Terms and Conditions for the 2018 competition, I can confirm that no specific communication was made to schools in this regard", would appear meaningless.

59. The Minister states that he is entitled to change the terms and conditions relating to the minimum educational qualifications in any given year. In my view, he is correct in this submission. I do not believe that it is open to the applicant to challenge the Minister's entitlement to stipulate entry criteria. The applicant does not seek to make that case. He contends that if the Minister wishes to change the requirements in a fundamental manner, then reasonable notice must be given. It is suggested by the respondent, for example, that there has been no pre-engagement between the parties. It seems to me that this is an artificial analysis in the context of an open competition which is specifically stated to apply to Leaving Certificate students in any given year. The applicant submits, and I accept, that the Minister himself must have been aware that where fundamental changes might occur within the next few years, notice should be given of such changes. Evidence of this is to be garnered from the contents of the terms and conditions in so far as they warn about future age requirements and indeed from the letter referred to above, concerning notification to schools.

## **Decision**

60. This is an application for judicial review in which the applicant who wishes to become an officer in the permanent Defence Forces, and to this end has applied for entry into the cadet school at the first respondent's military college, challenges the decision not to admit him. He claims various orders and reliefs against the respondents including an order of certiorari quashing the decision of the respondents to reject his application for a place in the cadet school of the military college established and operated by the first respondent. He seeks declarations that the respondents in refusing him a place in the cadet school on the basis that he did not

obtain all the necessary academic qualifications in a single sitting of the Leaving Certificate, have acted in a manner which is contrary to his legitimate expectations, contrary to natural justice, is irrational and disproportionate.

61. The respondents fully contest the application, pleading that it is out of time as it is in essence a challenge to the terms and conditions themselves, which were published on the first respondent's website, [www.military.ie](http://www.military.ie), on 1st April, 2018. The respondents contend that the applicant was aware of the contents of the terms and conditions and that in any event, such representations as are alleged to have been made, can have no application in his situation because the terms and conditions are published on an annual basis, apply to the year of the application, and those terms and conditions state that they are subject to review in advance of future competition. It is further argued that because the applicant acknowledged in the online application that he had read the terms and conditions, he is now estopped from making this claim. The respondent also refers to the wording of the 2017 terms and conditions and pleads that those terms and conditions state on their face that grades must be obtained in a single sitting of the Leaving Certificate. It is contended that the only portion of the website that may be said to have contained representations to the contrary related to the navy.

62. Mr. Morrissey is a 19 year old student who resides in Kilkenny. He has just completed his Leaving Certificate, having first taken the examination in 2017. He has applied to become a cadet in the army. He completed an online application on the date the competition opened on 1st April, 2018. The respondent has informed him that he does not meet the required educational standards because while he has achieved all the necessary grades in all the necessary subjects, they have not all been obtained at one sitting of the examination. The applicant states that he clearly understood when he was preparing for his Leaving Certificate that he did not have to sit all examinations at one sitting, and that while it is necessary to attain the required grades in six subjects at one sitting, the same did not hold true for the subject requirements. It is clear that he believed that they could be transferred from one year to the next.

63. The applicant says that he was encouraged in his understanding of how the terms and conditions applicable to minimum entry requirements operated, and were operated by the respondent, by the contents of the respondent's website and from representations made to him at an open day in the year he first completed his Leaving Certificate. It seems to me that the applicant's understanding of how the terms and conditions operated was shared by at least one section of the Defence Forces, and an important one, being the recruitment and competitions section, and also by those who were in charge of the respondent's website publications (although there is a dispute as to whether such misunderstanding was confined to the naval section).

64. On the case of the first respondent, it follows that not alone was the applicant incorrect in his understanding of how the terms and conditions operated, but so too were individual sections within his department. What has been described as a change in the presentation of the wording of the terms and conditions occurred in the 2018 version which was prepared towards the end of March, 2018. The 2018 terms and conditions were first published on the website on the day the competition opened, on 1st April, 2018. The applicant maintains that this was not just a change in the manner in which the terms and conditions were presented but it was a fundamental alteration of the manner in which they applied in his case, with the result that he has not been accepted onto the cadet course for this year.

65. The applicant does not challenge the right and entitlement of the Minister to change the terms and conditions, but maintains that any such change in the fundamental operation of the terms and conditions which may have a significant impact on a candidate such as him, must be notified reasonably sufficiently in advance to allow him and others like him to adjust their approaches accordingly. It is argued on behalf of the first respondent that he must retain the right to determine the required conditions of entry in any given year and must also retain the right to change them, if and when he deems it appropriate. It is, for example, argued that the respondent cannot be prevented from taking a view in any particular year not to hold any competition or to allocate places only in certain sections of the Defence Forces. Therefore, it is stated that it cannot be the position that he is precluded, if he wished, from changing the terms and conditions in any material respect. As stated, it is also the respondent's case that not only were the terms and conditions applicable referable to a given year only, but that when they are published in April of the year in question, they may differ from the previous or preceding years.

66. Although part of the first respondent's case is that no such change in fact took place, it is submitted that even if there was a change, the Minister was entitled to do so at that time and it was not unlawful for him to take such course of action. While the terms and conditions apply to a number of categories of applicants, including for example, persons who may have taken the Leaving Certificate in previous years and those with third level academic qualifications, it seems to me that an inevitable consequence of the respondent's interpretation of the terms and conditions and the making of alterations thereto, at its starkest and in so far as they are addressed to students sitting their Leaving Certificate in the year of publication, is that they could be faced with a fundamental change in requirements as and from 1st April, 2018, some two months before the commencement of the Leaving Certificate examination. This would give such a candidate little prospect of engaging with the relevant curriculum or addressing the examinations in a subject that he may not previously have been required to study, and had not studied, in any realistic way.

67. While I understand it to be suggested that the case does not or should not necessarily turn on an interpretation of the terms and conditions, I would have thought that the meaning and effect of the terms and conditions and how they were understood to apply in practice is relevant. In particular, the understanding by those agents of the first respondent who are responsible for the dissemination of information to prospective candidates, it seems to me, is of high significance and relevance. In my view, the only reasonable conclusion to draw is that there was a change in the terms and conditions as they were understood and applied by important sections of the first respondent's staff, and this change fundamentally impacted upon the applicant.

68. The Minister is empowered by virtue of the Defence Act 1954 to make Regulations in relation to, *inter alia*, persons to be admitted to an established military college. It has been submitted to the Court that the terms and conditions are the fruits of the exercise of the power by the Minister to make Regulations and publish terms and conditions relating to the minimum educational requirements for entry. No issue arises in these proceedings as to the power of the Minister to make provision for and publish such terms and conditions nor the process by which he has done so. What is challenged here, is the legality of the manner in which the terms and conditions have been altered, without warning or clear prior notice and as to how they have been applied to the applicant in this case.

69. I have considered the grounds of challenge and the extensive and well argued submissions of counsel on both sides.

70. It appears to me that *Abrahamson v. Law Society of Ireland* [1996] 1 I.R. 403 is relevant. After summarising the principles relating to legitimate expectation, McCracken J. stated as follows at p. 423:-

*"To return to the facts of the present case, it is undeniable that representations were made to the applicants that certain exemptions would be given by the Society to graduates who fulfilled certain conditions. In so far as it may be*



*necessary for the applicants to show that they relied on these representations, and I think it is questionable whether reliance is necessary, I am also satisfied that these representations would be a matter which persons wishing to become solicitors would have taken into account when deciding what courses to study, and indeed, in which universities they would be studied. As these representations were made to students at the start of their third level studies, I think it would be reasonable to imply that the regulations would remain in being for long enough for them to be taken advantage of by first year students. I would, therefore, hold that the applicants had a legitimate expectation that the regulations would remain in force, and that they would be able to benefit from them."*

Because the Regulations at issue had been declared invalid in a previous case, a certain course of action to attempt to remedy the situation was recommended by the court.

71. Taking this into account, and also taking into account the legal arguments of the parties, in my view, as a matter of law, while the Minister is and was entitled to change the terms and conditions relating to the minimum educational entry requirements to any section of the army, I conclude that it was both unfair and legally unreasonable for him to make such a change in such a manner and at such a time.

72. The applicant in his affidavit has given evidence of his reliance upon what he describes as a representation by the Minister and his agents. I accept that the applicant relied on the representations and understandings of the respondent's agents of how the rules operated and in particular how they had operated over previous years.

73. I must conclude that there has, at the very minimum, been a change in the manner in which the terms and conditions are applied by the first respondent, if not an express change to those terms, as and from 1st April, 2018. It seems to me that it matters little whether it is the former or the latter as on either analysis the alteration has had an impact on the applicant. This change occurred on the date on which the competition opened, the very date on which the applicant enthusiastically applied for a position. I do not believe that even if he had read what might be described as the altered terms and conditions on that day, he would have had appropriate or sufficient opportunity to alter course. Further, taken in its entirety and read in the context of a publication on the same website which, on any analysis, conflicted with what was contained in the terms and conditions, and which reflected what had up to then been understood to be the position, it would, in my view, be unreasonable to regard the applicant as being disentitled to the relief which he claims, on the basis of estoppel.

74. As this application is not a challenge to the terms and conditions themselves, rather to the application of those terms and conditions to the applicant, I do not believe that the time limitation considerations raised by the respondent apply. Even if they did, I believe that there are ample grounds to extend the time for challenge.

75. It is clear from the conduct of the applicant (in particular being the expense to which he and his parents went during the year, his actions in resitting the Leaving Certificate, the dropping of mathematics from his syllabus in order to afford more time for other studies), that as a matter of probability he placed reliance on the terms and conditions as published in previous years and during the course of 2018 but particularly on the representations, online and at an open day, as to how the Minister's representatives understood that those terms and conditions applied. I also find that the applicant had an expectation that the rules would not change as they might apply to him, at least, not without some reasonable forewarning. I suspect that the correspondence from the Minister referring to the absence of notification to schools, and also certain notices contained from time to time in the terms and conditions forewarning of certain future changes such as age requirements, are indicative of an appreciation on the part of the first respondent, that reasonable notice of significant alterations should be given.

76. Therefore to apply the change of rules to the applicant in the manner in which it was done was not only unreasonable, but in my view, was contrary to the legitimate expectation of the applicant that at the very minimum, the entry requirements would not be altered in such a fundamental way without reasonable and clear notice.

77. I do not believe it is necessary to address what, if any, are the limitations and boundaries of the suggested constitutional right to third level education. While this case involves considerations of constitutional rights and potential impacts thereon, either directly or indirectly, such as the right to earn a livelihood, or perhaps a potential right to further education or indeed a standalone right to fair procedures, I do not believe that I am necessarily required to delve too deeply into a consideration of those rights to determine the issues in this case.

78. In summary, on the particular facts and circumstances of this case, in sporting parlance, the Minister perhaps unwittingly, and maybe even unknowingly to certain divisions of his Department who may not have been aware of the informed interpretation by other sections in the Department of how the terms and conditions operated or the impact it would have on the applicant, acted in a manner in which, in my view, had the effect of changing the goalposts after the game had begun. In so doing I find that he breached the applicant's rights.

79. In my view, the applicant is entitled to succeed on his application. I will discuss with the parties the wording of the order that should be made.