Roe v University of Otago

2021 - ...

Contents

Chapter 1

Judgment of Justice Gendall (3 November, 2021)

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE

CIV-2020-412-115
[2021] NZHC 2952

UNDER	Judicial Review Procedure Act 2016
IN THE MATTER OF	an application for judicial review
BETWEEN	KELLY ALEXANDRA ROE Applicant
AND	THE UNIVERSITY OF OTAGO Respondent

Hearing: 20 October 2021

Appearances: Applicant in Person
R J M Sim for Respondent

Judgment: 3 November 2021

JUDGMENT OF GENDALL J

This judgment was delivered by me on 3 November 2021 at 4 pm
pursuant to Rule 11.5 of the High Court Rules 2016

Registrar/Deputy Registrar

Date: .

Introduction

[1] The applicant, Ms Kelly Roe, applied to be enrolled in the Bachelor of Medicine and Bachelor of Surgery (MBChB) programme (the programme) at the University of Otago (the University) in 2010, 2017, 2018 and 2021 under the "Alternative category". Each year, the University declined her application. Ms Roe applies to judicially review the latter three decisions on the basis the University did not have the power under the Education Act 1989 (the Act) to decline her applications.

Ms Roe's application for admission

[2] Admission to the MBChB programme is governed by the University's MBChB Regulations (the Regulations), which were established by the University Council under the Act and now operate subject to the Education and Training Act 2020. Of the three pathways to entry established by the Regulations, the only one applicable to Ms Roe, and the only one under which she has sought admission, is that now known as the Alternative category.[1] The purpose of this category is attract a range of academically suitable applicants with broad life experiences, skills and perspectives to the medical programme who do not fit in the other categories for entry. Regulation 1(h) of the Regulations stipulates an applicant can only apply once under the Alternative category.

[3] In 2010, Ms Roe sought admission to the programme through this Alternative pathway. Her application for entry was considered, including through holding an interview with her, but was ultimately not successful.

[4] Despite reg 1(h) preventing multiple applications under the Alternative category, in April 2017 Ms Roe submitted a second Alternative category application. In doing so, she referred to reg 1(k) of the Regulations which allows for admission for "exceptional reasons" for applicants who have not satisfied the Regulations "in a particular aspect". There being no meeting of the Medical Admissions Committee timetabled for some months, the matter of whether exceptional circumstances existed

[1] At no stage has Ms Roe suggested she can seek enrolment under either of the other pathways ("Health Sciences First Year" and "Graduate"). Ms Roe has not completed the Health Sciences First Year course and, at the time of her first application in 2010, she had not completed a degree within the previous three years so as to avail herself of the Graduate category.

to receive a second Alternative category application was considered at the time under a specific delegation by its Convenor and the Admissions Dean. Ms Roe was advised her request that the University accept a second Alternative category application was not approved and her application had accordingly been declined.

[5] Pursuant to the University's Appeals Statute 2011, Ms Roe sought leave to appeal that decision to the Appeals Board of the University Council. The Board declined leave for an extension of time to file the out-of-time application. However, the Board recorded it had considered both the adequacy of the delegation under which the exceptional circumstances issue had been considered, and the overall merits of the proposed appeal, and was satisfied there was no realistic prospect of an appeal succeeding.

[6] In April 2018, Ms Roe again communicated her wish to be considered for admission to the programme in reliance on exceptional circumstances. Ms Roe was advised the University did not accept there were exceptional reasons to allow a further Alternative category application and that it would not progress an application for admission. Ms Roe then sought leave to appeal that decision, on this occasion within time, and her situation was considered by the Appeals Board. After considering a full report prepared on behalf of the University Senate by one of its professorial members, the Board declined leave to appeal. As a result, an application for admission which Ms Roe had lodged on 30 April 2018 was not progressed by the University.

[7] In early 2021, Ms Roe engaged with the University's online enrolment system in an endeavour to again apply for enrolment to the programme under the Alternative category. The system identified Ms Roe and prevented her progressing the application. It directed her to the electronic address "AskOtago" as the appropriate source of assistance. Ms Roe communicated with AskOtago until, as a result of the issues raised, the Registrar and Secretary to the Council, Mr Stoddart, took over the correspondence. The Registrar explained to Ms Roe that it remained open to her to advance a case for exceptional reasons to the Convenor of the Medical Admissions Committee. No such further application was received and these proceedings followed.

[8] The present proceedings, however, are not the first Ms Roe has pursued in this Court. She has also unsuccessfully sought judicial review of her non-admission to the medical programme at the University of Auckland,[2] as well other judicial review proceedings she has issued against the University of Waikato,[3] and the New Zealand Vice-Chancellor's Committee.[4] This Court's decision, first noted above in *Roe v University of Auckland* (the "*Auckland University Decision*"), is an important authority in considering the present matter, whereas the latter two decisions, which arise from the non-award to Ms Roe of a MPhil degree at the University of Waikato, are of less relevance to this proceeding. Ms Roe also sought to appeal the *Auckland University Decision* to the Court of Appeal. However, the Registrar of that Court declined her application for a waiver of security for costs. Ms Roe then applied for review of the Registrar's decision, but this was declined by Miller J in the Court of Appeal.[5]

Ms Roe's present application for judicial review

[9] Ms Roe filed an initial statement of claim on 21 December 2020. She sought three remedies:

(a) a declaration that the University's decision to refuse to process her applications in 2017 and 2018 was invalid "by reason of conflicting with the Education Act";

(b) unspecified damages; and

(c) removal from office of the (unnamed) "remaining senior level officials" involved in decisions to refuse to provide her an application form and to process an application to enrol her.

[10] Following a case management conference, Dunningham J in this Court issued a minute on 1 March 2021. It recorded that the first of the claims related solely to the

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2 *Roe v University of Auckland* [2021] NZHC 368.
3 *Roe v University of Waikato* [2021] NZHC 1808.
4 *Roe v New Zealand Vice-Chancellor's Committee* [2021] NZHC 719.
5 *Roe v University of Auckland* [2021] NZCA 423.

interpretation of s 224 of the Act,[6] and Ms Roe's claim that under a proper interpretation of the section she was automatically "eligible" to enter the programme. In relation to the other claims, her Honour directed that Ms Roe file an amended statement of claim specifying the quantum of damages sought and the individuals Ms Roe sought to have removed from office.

[11] Ms Roe then filed an amended statement of claim but, rather than responding with additional detail as directed, significantly repleaded the claim. Minutes then issued since by Mander J clarify that Ms Roe has abandoned her claims for damages and for the removal of University personnel from office, and Ms Roe confirmed this at the hearing before me. Mander J also confirmed the core issue in Ms Roe's application was whether the University has correctly interpreted s 224 of the Act.

[12] For completeness, I note that, following the first case management conference, Ms Roe filed an application for an interlocutory injunction, seeking that the University supply her with, or allow her to submit, an application to enrol in a programme of her choosing. At the second case management conference in the Court, Mander J directed that application be heard together with the substantive judicial review application as the relief sought in both applications was the same. In any event, Ms Roe made no submissions in the hearing before me in this Court on the issue and she can be taken as having abandoned the claim for injunctive relief.

Ms Roe's submissions

[13] Ms Roe's submissions do not identify the matters at issue here with clarity. However, case management conferences have confined the matters at issue. The issues can be identified through consideration of the remedies sought by Ms Roe's amended statement of claim, which can be deduced from that statement of claim and Ms Roe's advice to the Court in the course of the case management conferences as follows:

(a) An order that the University be required to supply application to enrol forms so that students who may be eligible to be enrolled in various programmes may apply to be enrolled in various programmes.

[6] Section 255 of the Education and Training Act 2020 is in materially equivalent form.

(b) The endorsement of an interpretation of the Education and Training Act whereby Parliament only intended the University to consider domestic teenagers in cases where the programme is under-subscribed by domestic adults.

(c) An order that the University supply an application to enrol to Ms Roe and any other candidate who wants one.

[14] At the hearing, Ms Roe emphasised she was not seeking entry to the programme but simply to obtain a declaration from the Court as to the legal parameters of the enrolment process "for other students in the future".

[15] In her submissions, Ms Roe appeared to pursue an additional point, namely, a challenge to the validity of the decision to decline her 2010 application for enrolment on the basis that the University's response involved discrimination against her on the grounds of disability and was consequently unlawful. Although Ms Roe's amended statement of claim refers to her 2010 application being wrongly decided, no remedy was sought in relation to that. Seeking to advance the issue now is inconsistent with confirmation given by Ms Roe during the case management conferences that the 2010 decision was not under challenge. Regardless, Ms Roe did not disclose at the hearing before me what, if any, disability she may have, much less did she establish that the University took into account any disability in an unlawful way in 2010. There is no evidential basis on which any adverse finding on that issue could be made against the University, and I reject Ms Roe's belated attempt to challenge the 2010 decision.

[16] So far as the University's submissions in response are concerned, I confirm they are outlined and addressed in my analysis that follows.

Analysis

[17] The remedies sought by Ms Roe arise from her interpretation of the meaning and effect of s 224 of the Act, which relevantly provides:

224 Enrolment of students

(1) In this section,—

eligible student, in relation to a programme or training scheme at an institution, means a person who is eligible to be enrolled as a student in that programme or scheme by virtue of subsection (2)

year means a period of 12 months commencing on 1 January.

(2) Subject to this section, a person is eligible to be enrolled as a student at any institution in a programme or training scheme provided by the institution if, and only if,—

(a) either—

(i) the person is a domestic student; or

(ii) the council of the institution consents; and

(b) the person holds the minimum entry requirements for the programme or scheme as determined by the council; and

(c) the person has attained,—

(i) if the institution has fixed a minimum age for enrolment at the institution, the age so fixed; and

(ii) if the institution has fixed a minimum age for enrolment in the programme or scheme, the age so fixed.

(3) Subsection (2)(b) and (c) do not apply to a person if—

(a) the person has attained the age of 20 years; or

(b) the council of the institution is satisfied that the person is capable of undertaking the programme or scheme concerned.

(4) An eligible student who applies for enrolment in a programme or training scheme at an institution is, subject to this section, entitled to be enrolled in that programme or scheme.

(5) If the council of an institution is satisfied that it is necessary to do so because of insufficiency of staff, accommodation, or equipment, the council may determine the maximum number of students who may be enrolled in a particular programme or training scheme at the institution in a particular year.

(6) Where—

(a) the maximum number of students who may be enrolled at an institution in a particular programme or training scheme in a particular year is determined by the council of the institution under subsection (5); and

(b) the number of eligible students who apply for enrolment in that programme or training scheme in that year exceeds the maximum number so determined,—

> the council may, in the selection of the students to be enrolled, give preference to eligible persons who are included in a class of persons that is under-represented among the students undertaking the programme or training scheme.
>
> …

[18] In the *Auckland University Decision, Roe v University of Auckland*, Fitzgerald J considered s 224 in detail and summarised its effect as follows:[7]

> (a) First, there is a pool of *eligible* students, one category of which is domestic students aged 20 years and older, irrespective of whether they hold any minimum entry requirements for the programme in question.
>
> (b) Second, all eligible students who apply to programmes are *entitled* to be enrolled in those programmes, except if a maximum number of students to be enrolled has been duly set by the council of an institution for resourcing reasons (meaning the programme is a limited entry programme).
>
> (c) Third, if a limited entry programme is oversubscribed, the council of an institution can select from the pool of eligible student applicants those that will be permitted to enrol in the programme, using whatever mechanism or criteria it prefers (so long as not inconsistent with Act).
>
> (d) Fourth, the council of an institution is expressly permitted (though not required) to prefer under-represented groups when carrying out that selection process.

[19] It appears the use of the term "eligibility" in s 224 may have caused Ms Roe some confusion. She seems to believe that her status as a "domestic adult" guarantees that simply submitting an application will entitle her to enter the programme as of right. Under s 224, a person is an eligible student *inter alia* if they are a domestic student, which s 2 of the Act defines as including all New Zealand citizens, and have attained the age of 20 years. There is no doubt that Ms Roe is an eligible student in accordance with s 224.

[20] However, meeting the definition of an eligible student under s 224(1) does not translate into a guaranteed right to enter a specific course. Ms Roe's entitlement to be enrolled in the programme is subject to her being selected for one of the limited places available under the processes adopted by the University. Where a course has a lawfully established limitation on numbers, an institution is able to select entrants from the

[7] *Roe v University of Auckland*, above n 2, at [53].

eligible student pool "using whatever mechanism or criteria it prefers (so long as not inconsistent with the Act)".[8] The mechanism or criteria adopted by the University here are those established through the Regulations. The process of assessing an eligible student's ability to be selected under those Regulations may (perhaps to a limited degree a little confusingly) be referred to as a process of considering eligibility, but this is a matter of eligibility under the Regulations, not the Act.

[21] Fitzgerald J confirmed in *Roe v University of Auckland* that a university's ability to design its own selection process scheme is virtually unfettered:[9]

> As noted, other than the permitted preference of certain classes of eligible students, the Act does not direct or even suggest how the relevant institution might go about selecting from a pool of eligible students those who will be admitted to an oversubscribed limited entry programme. The very fact the Act is silent on this point is consistent with the object of the Act …

[22] The object of the provisions of the Act relating to institutions was set out in s 160 of the Act. It is preserved in identical form in s 266 of the Education and Training Act 2020. It confirms the very wide-open freedoms the University has to make its decisions:

> **160 Object**
>
> The object of the provisions of this Act relating to institutions is to give them as much independence and freedom to make academic, operational, and management decisions as is consistent with the nature of the services they provide, the efficient use of natural resources, the national interest, and the demands of accountability.

[23] In the *Auckland University Decision*, Ms Roe's application for entry was rejected due to her failure to meet a "recency" requirement under the Auckland admission scheme. This required the completion of a qualifying degree not more than five years prior to the date of application.[10] I note that in Ms Roe's application for review by the Court of Appeal of its Registrar's decision to decline her application for a waiver of security for costs in relation to an appeal of the *Auckland* decision, Miller J made comments as to the merits of the substantive appeal, which bear on this case.[11]

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8 *Roe v University of Auckland*, above n 2, at [53].
9 *Roe v University of Auckland*, above n 2, at [57].
10 The University's scheme here contains a similar requirement for those applying for entry under the Graduate pathway.
11 *Roe v University of Auckland*, above n 5.

In declining Ms Roe's application for review, his Honour agreed with the Registrar that there was no prospect of the University being required to enrol Ms Roe, and that Fitzgerald J's reasoning, to the effect that the legislation allows the University to impose entry requirements that all applicants must meet, appeared "unanswerable".[12] The consequences of a finding that all adult applicants who met the recency requirement could enrol as of right regardless of capacity constraints would, in Miller J's opinion, be "startling to say the least".[13]

[24] In the present situation, the obstacle facing Ms Roe has been the "once-only requirement" in the Regulations, that is, the stipulation that a candidate can apply only once under the Alternative pathway. Ms Roe did not challenge the lawfulness of this requirement (as opposed to the requirement that she face a selection process at all) and there can be no suggestion it is inconsistent with the objects of the Act or otherwise unlawful. I accept Mr Sim's submission on behalf of the University that, in any event, it is clearly legitimate for the University to impose such a restriction as part of its wide powers to determine how students will be selected for admission to an over-subscribed limited entry programme from a pool of eligible students. If the University could not reject applications for non-compliance with the "once-only requirement", it would be required to consider what might become a flood of potentially unmeritorious and repetitive applications, undermining the efficiency of University procedures.

[25] Further, I acknowledge the potentially severe effects of an unbending "once-only requirement" are ameliorated by the discretion afforded by reg 1(k) of the Regulations to the Medical Admissions Committee to "consider any applicant who, not having satisfied these regulations in a particular aspect, warrants admission to the programme for exceptional reasons". Ms Roe has twice advanced a case for the exercise of that discretion in her favour, and on both occasions, via applications to the University Council's Appeals Board, pursued review of the decisions declining to do so. The University has expressly highlighted to Ms Roe her ongoing right to advance a case for "exceptional reasons", but she has not pursued that avenue. Were there any basis for review in this matter, I consider the fact Ms Roe has not pursued this avenue,

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12 At [6].
13 *Roe v University of Auckland*, above n 5, at [6].

given the opportunity made available to her to do so, would strongly point against the Court exercising its discretion in favour of Ms Roe.

[26] Having addressed these contextual matters, I now turn to the arguments Ms Roe sought to advance. Ms Roe's principal contention appeared to be an assertion that Parliament only intended universities to consider "domestic teenagers" in cases where a programme was under-subscribed by applications from domestic adults. In other words, Ms Roe suggested the Act requires that priority be given to applicants who are in the pool of "eligible students" because they are domestic students over the age of 20.

[27] In my view, this submission has no support whatever in the wording of the Act. It is plainly inconsistent with the extensive discretion the Court in *Auckland University Decision*, *Roe v University of Auckland*, identified is afforded to universities in the establishment and exercise of their decision-making processes. Prioritising domestic adults at all times would significantly impede the object of the Act in relation to ensuring the efficient use of national resources. This is the case because it would impair the University's ability to select candidates it assessed as best qualified for undertaking the MBChB programme and, in due course, who would be best suited for meeting the needs of New Zealand's health workforce. As Mr Sim submitted, an extreme implication of Ms Roe's interpretation of s 224 is that the medical school intake could be comprised largely of retirees with no demonstrated aptitude for the study of medicine.

[28] The second line of argument put forward by Ms Roe was that the University is in breach of the Act by not allowing her to complete an application and have it considered under the Alternative category. She argued this is the case even in circumstances where it is patently clear such an application would be rejected once the Regulations assessment criteria were applied to it. In her amended statement of claim (but not in her submissions before me), Ms Roe argued that, because the total number of domestic adult applications that will be received is not precisely known at the time Alternative category admissions are considered, it is not certain the programme will be over-subscribed by domestic adults, and consequently it cannot be

known with certainty that a selection process will be necessary. On this basis, Ms Roe contended the Regulations should not be applied to decline any applications.

[29] Before me, Mr Sim noted this submission appears secondary to Ms Roe's argument about the priority right of admission for domestic adults, which I have already rejected. However, if the submission is approached by reference to the entire pool of eligible students, it cannot be reconciled with the inevitability that (as has occurred throughout) the programme will be substantially oversubscribed. The University Registrar's affidavit before the Court details a longstanding pattern of oversubscription where applications exceed available places by a factor of at least three. For instance, in 2021, 1,126 applications were made for the programme for which, in 2022, only 282 domestic places are available.[14] The Registrar deposed that the number of First Year Health Science enrolments in 2021 demonstrates beyond any doubt that this pattern will continue.

[30] I am left in no doubt that it is both lawful and reasonable here for the University to approach its decision-making in relation to enrolment in the programme on the basis that the programme will be significantly over-subscribed. The Act does not require the University to receive or process enrolment applications from eligible students at any particular time. Similarly, a process in which the University declines to receive an application at a time it has a clear basis for concluding that it will not be successful, cannot be regarded as either unlawful or unreasonable. As I see it, the University might be lawfully required to admit eligible students without some form of selection process only in the hypothetical event of under-subscription that might emerge at a time when all categories of application recognised by the Regulations had closed.

[31] Moreover, I accept Mr Sim's submission that it would be futile to grant any aspect of the remedies sought here by Ms Roe as, in the absence of exceptional reasons (which she has declined to advance despite being invited to do so), supplying her an application form for her to submit would not alter the inevitable rejection of such an

[14] In 2017, there were 1,081 applications; in 2018, 998 applications; in 2019, 1,070 applications; and in 2020, there were 1,056 applications.

application under the Regulations. It is appropriate for the Court to decline relief where it is inevitable the substantive outcome the applicant seeks will not be achieved.[15]

[32] The University responsibly considered it was not appropriate to seek to resolve these proceedings through providing Ms Roe with the ability to complete an application for admission to medicine, only for it to be inevitably rejected for the reasons given. To have done so would have been disingenuous. This is so because it would have constituted holding out an imaginary hope to Ms Roe that her application would be accepted, when it would inexorably be declined under the "once-only requirement" and in circumstances where Ms Roe had not sought admission under the exceptional reasons power in the Regulations. This is especially the case given that Ms Roe believes her status as a "domestic adult" means that submitting an application will automatically entitle her to enter the programme as of right.

Conclusion

[33] For all the reasons I have outlined above, Ms Roe's application is dismissed.

Costs

[34] Costs are reserved. The parties are encouraged to agree costs between themselves. They may be sought by the University given that costs would ordinarily follow the event. If the parties are unable to agree, the University may file a costs memorandum within 20 working days of the date of this judgment, with any memorandum in response by Ms Roe to be filed within a further 10 working days. No memorandum is to be longer than three pages in length. I will then make a determination on the papers.

Solicitors:
Gallaway Cook Allan, Lawyers Dunedin

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[15] See *Wislang v Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29 (SC) at 42; and *Stininato v Auckland Boxing Association (Inc)* [1978] 1 NZLR 1 (CA)

Copy to:
Kelly Roe - Applicant

Chapter 2

Filing for court of appeal (28 November, 2021)

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI MATUA O AOTEAROA

CA

Between	**Kelly Alexandra Roe** (Applicant)
And	**The University of Otago** (Respondent)

Notice of Appeal

Filed by: Kelly Alexandra Roe (applicant), November 28, 2021
Flat 5, Shed 20, Princes Wharf, Auckland 1010, email@kellyroe.org

1. The appellant in the proceeding identified above, Kelly Alexandra Roe, gives notice that the appellant is appealing to the court against:

   ROE v THE UNIVERSITY OF OTAGO [2021] NZHC 2952 [3 November 2021] Judgment of Gendall, J.

   Particulars

2. This filing is lengthy because I have included the entirety of the judgment in block quotes. I have tried to put problems that I have in the relevant places or sections.

   > *[1] The applicant, Ms Kelly Roe, applied to be enrolled in the Bachelor of Medicine and Bachelor of Surgery (MBChB) programme (the programme) at the University of Otago (the University) in 2010, 2017, 2018 and 2021 under the "Alternative category". Each year, the University declined her application. Ms Roe applies to judicially review the latter three decisions on the basis the University did not have the power under the Education Act 1989 (the Act) to decline her applications.*

3. I did not maintain that the Univerity did not have the *power* to decline my applications. I maintained that the *way* or *manner* in which the University went about declining my applications was ultra vires.

4. I also maintain that the University is unlawfully discriminating against applicants on the basis of disability since they are collecting up information about disability prior to candidate selection and then using that information for the purpose of exclusion only[1]

[1]Ms Roe supplied the blank Health Declarations to the courts. Prior to interview candidates were required to supply the Declaration and Police Vetting Form for the purposes of Health and Conduct Review Committee making decisions to exclude people from the Profesional Practice of Medicine. The University was clear prior to interview that first-person knowledge or experience of the health system in New Zealand was something that would attest to the unsuitability of the applicant, only. Ms Roe stated she had nothing to declare because she did not believe that her previous experience would undermine her ability to practice. But Ms Roe also felt that that set up a context where she felt unable to talk about her lived experience or first-hand knowledge of the health system or her personal motivation to become a doctor as the information would be

[2] Admission to the MBChB programme is governed by the University's MBChB Regulations (the Regulations), which were established by the University Council under the Act and now operate subject to the Education and Training Act 2020. Of the three pathways to entry established by the Regulations, the only one applicable to Ms Roe, and the only one under which she has sought admission, is that now known as the Alternative category. The purpose of this category is attract a range of academically suitable applicants with broad life experiences, skills and perspectives to the medical programme who do not fit in the other categories for entry. Regulation 1(h) of the Regulations stipulates an applicant can only apply once under the Alternative category.

[3] In 2010, Ms Roe sought admission to the programme through this Alternative pathway. Her application for entry was considered, including through holding an interview with her, but was ultimately not successful.

[4] Despite reg 1(h) preventing multiple applications under the Alternative category, in April 2017 Ms Roe submitted a second Alternative category application. In doing so, she referred to reg 1(k) of the Regulations which allows for admission for "exceptional reasons" for applicants who have not satisfied the Regulations "in a particular aspect". There being no meeting of the Medical Admissions Committee timetabled for some months, the matter of whether exceptional circumstances existed to receive a second Alternative category application was considered at the time under a specific delegation by its Convenor and the Admissions Dean. Ms Roe was advised her request that the University accept a second Alternative category application was not approved and her application had accordingly been declined.

5. Ms Roe applied in 2010 under 'Other' category. In 2017 there was no 'Other' Category but there was an 'Alternative' Category. That is to say it was not obvious to Ms Roe an application in 2017 would be regarded as a second

used to attest to her unsuitability. That is to say Ms Roe feared discrimination against her. Ms Roe subsequently applied for 'disability consideration' from Auckland (full disclosure) and was then failed for Population Health 101 so she was deemed ineligible to apply. Then she applied for general category application and they refused to calculate her GPA according to published selection criterion and then refused to get her thesis to external examiners in order to prevent and prohibit her completing her masters thesis without her being required to enrol with part-time status so Auckland could say she failed to complete a qualification from a NZ University in the 'minimum' time. The Universities of NZ have gone to elaborate lengths to justify their decision to exclude Ms Roe from Medicine.

application under 'Alternative' category. Ms Roe did not start out seeking that the University make an exemption or exception for her. Ms Roe had applied to MBChB on one occasion, only, in 2010. That application was unsuccessful. Ms Roe felt that something had gone wrong with how the merits of her application had been assessed and she wanted them to consider her application again, this time being accountable for the way they are going about making their decision.

6. Ms Roe was informed that the only way she could apply again was under 'exceptional reasons' of regulation 1(k).

7. Ms Roe therefore applied under regulation 1(k). She asked the University to consider an application from her on its merits and she asked them, specifically this time, to consider 'disability' or 'health condition' as reasons to include a candidate, since if they aren't willing to consider 'disability' or 'health condition' for reasons of inclusion then them collecting information about it prior to selection can only be for the purposes of discrimination, which is unlawful.

8. The Convenor and Admissions Dean (Professors Peter Crampton and Bryan Hyland) decided between themselves that Ms Roe's application would not be considered on its merits and they removed Ms Roe's application from the applicant pool prior to the meeting of the Medical Admissions Committee so as to effectively prevent or prohibit any possibility of Ms Roe being selected to study MBChB.

> *[5] Pursuant to the University's Appeals Statute 2011, Ms Roe sought leave to appeal that decision to the Appeals Board of the University Council. The Board declined leave for an extension of time to file the out-of-time application. However, the Board recorded it had considered both the adequacy of the delegation under which the exceptional circumstances issue had been considered, and the overall merits of the proposed appeal, and was satisfied there was no realistic prospect of an appeal succeeding.*
>
> *[6] In April 2018, Ms Roe again communicated her wish to be considered for admission to the programme in reliance on exceptional circum-*

stances. Ms Roe was advised the University did not accept there were exceptional reasons to allow a further Alternative category application and that it would not progress an application for admission. Ms Roe then sought leave to appeal that decision, on this occasion within time, and her situation was considered by the Appeals Board. After considering a full report prepared on behalf of the University Senate by one of its professorial members, the Board declined leave to appeal. As a result, an application for admission which Ms Roe had lodged on 30 April 2018 was not progressed by the University.

[7] In early 2021, Ms Roe engaged with the University's online enrolment system in an endeavour to again apply for enrolment to the programme under the Alternative category. The system identified Ms Roe and prevented her progressing the application. It directed her to the electronic address "AskOtago" as the appropriate source of assistance. Ms Roe communicated with AskOtago until, as a result of the issues raised, the Registrar and Secretary to the Council, Mr Stoddart, took over the correspondence. The Registrar explained to Ms Roe that it remained open to her to advance a case for exceptional reasons to the Convenor of the Medical Admissions Committee. No such further application was received and these proceedings followed.

[8] The present proceedings, however, are not the first Ms Roe has pursued in this Court. She has also unsuccessfully sought judicial review of her non-admission to the medical programme at the University of Auckland, as well other judicial review proceedings she has issued against the University of Waikato, and the New Zealand Vice-Chancellor's Committee. This Court's decision, first noted above in Roe v University of Auckland (the "Auckland University Decision"), is an important authority in considering the present matter, whereas the latter two decisions, which arise from the non-award to Ms Roe of a MPhil degree at the University of Waikato, are of less relevance to this proceeding. Ms Roe also sought to appeal the Auckland University Decision to the Court of Appeal. However, the Registrar of that Court declined her application for a waiver of security for costs. Ms Roe then applied for review of the Registrar's decision, but this was declined by Miller J in the Court of Appeal.

9. Ms Roe gave the University ample opportunity to hear the substance of her complaint and they would not. After writing about it in the last chapter of her thesis (that the Universities of New Zealand refuse to acknowledge) she

brings the issue before the courts. The courts have declined to dispense with the usual security for costs and that decision was upheld through to the court of appeal. Ms Roe has applied for Work and Income to assist with recoverable costs so that security for costs can be paid for the cases to progress through the court of appeal so that there is not a miscarriage of justice. Ms Roe maintains that these are public interest cases pertaining to New Zealand Universities being held to account for how they are selecting students for enrolment and completion for New Zealand University qualifications.

> *[9] Ms Roe filed an initial statement of claim on 21 December 2020. She sought three remedies:*
>
> *(a) a declaration that the University's decision to refuse to process her applications in 2017 and 2018 was invalid "by reason of conflicting with the Education Act";*
>
> *(b) unspecified damages; and*
>
> *(c) removal from office of the (unnamed) "remaining senior level officials" involved in decisions to refuse to provide her an application form and to process an application to enrol her.*

> *[10] Following a case management conference, Dunningham J in this Court issued a minute on 1 March 2021. It recorded that the first of the claims related solely to the interpretation of s 224 of the Act,6 and Ms Roe's claim that under a proper interpretation of the section she was automatically "eligible" to enter the programme. In relation to the other claims, her Honour directed that Ms Roe file an amended statement of claim specifying the quantum of damages sought and the individuals Ms Roe sought to have removed from office.*

> *[11] Ms Roe then filed an amended statement of claim but, rather than responding with additional detail as directed, significantly repleaded the claim. Minutes then issued since by Mander J clarify that Ms Roe has abandoned her claims for damages and for the removal of University personnel from office, and Ms Roe confirmed this at the hearing before me. Mander J also confirmed the core issue in Ms Roe's application was whether the University has correctly interpreted s 224 of the Act.*

10. Ms Roe is concerned that there be consequences of some variety to the University such that is more costly for things to need to be resolved by the courts

than for things to be resolved within the University. Ms Roe should not have to pay the cost of their refusal to be accountable for how they are making decisions about student enrolments and completions.

> *[12] For completeness, I note that, following the first case management conference, Ms Roe filed an application for an interlocutory injunction, seeking that the University supply her with, or allow her to submit, an application to enrol in a programme of her choosing. At the second case management conference in the Court, Mander J directed that application be heard together with the substantive judicial review application as the relief sought in both applications was the same. In any event, Ms Roe made no submissions in the hearing before me in this Court on the issue and she can be taken as having abandoned the claim for injunctive relief.*

11. The Education Act states that domestic adults are eligible to be enrolled in programmes they have applied to. The University was withholding an application to enrol from Ms Roe so that she would not be counted amonst those eligible to study MBChB in 2022. The University does not have to supply a reason why they declined Ms Roe's application to study MBChB in 2022 because they prevented her from applying. They are now accountable for their refusal to supply an application to her. They say there is no reason to give Ms Roe an application because they have already made up their minds they do not select Ms Roe. They don't need to consider her application with an open mind their mind is made up and they are immune or recaltruent or not willing or able to process any additional evidence that might have them change their minds. They have irrecokably made the decision that Ms Roe will never study MBChB with the Univerisy of Otago on the basis of what limited information they had about her in 2010.

> *[13] Ms Roe's submissions do not identify the matters at issue here with clarity. However, case management conferences have confined the matters at issue. The issues can be identified through consideration of the remedies sought by Ms Roe's amended statement of claim, which can be deduced from that statement of claim and Ms Roe's advice to the Court in the course of the case management conferences as follows:*
>
> *(a) An order that the University be required to supply application to enrol forms so that students who may be eligible to be enrolled in various programmes may apply to be enrolled in various programmes.*

> (b) *The endorsement of an interpretation of the Education and Training Act whereby Parliament only intended the University to consider domestic teenagers in cases where the programme is undersubscribed by domestic adults.*
> (c) *An order that the University supply an application to enrol to Ms Roe and any other candidate who wants one.*
>
> *[14] At the hearing, Ms Roe emphasised she was not seeking entry to the programme but simply to obtain a declaration from the Court as to the legal parameters of the enrolment process "for other students in the future".*

12. By this Ms Roe meant to capture something she said in one of the case management conferences whereby she intended to accuse the University of Otago not of wrongly denying her a place, but of wrongly denying her a *chance* of a place by refusing to consider her application on it's merits, by refusing to allow her application to progress to the Medical Admissions Committee for them to consider her application on it's merits, and then, ultimately, by refusing to allow her to submit an application at all. Ms Roe understands that even if the way in which the Univerity had declined her application in one or all of 2010, 2017, and 2018 and their refusal to supply an application in 2021 were found to be unlawful, overturning a decision to decline is a different thing from substituting a decision to offer enrolment. Ms Roe is not maintaining Otago was required to enrol her. That is something she is claiming about Auckland and not something she is claiming about Otago. As Ms Roe stated in the case management conference she is maintaining Auckland wrongly denied her a place whereas Otago wrongly denied her a chance of a place.

> *[15] In her submissions, Ms Roe appeared to pursue an additional point, namely, a challenge to the validity of the decision to decline her 2010 application for enrolment on the basis that the University's response involved discrimination against her on the grounds of disability and was consequently unlawful. Although Ms Roe's amended statement of claim refers to her 2010 application being wrongly decided, no remedy was sought in relation to that. Seeking to advance the issue now is inconsistent with confirmation given by Ms Roe during the case management*

conferences that the 2010 decision was not under challenge. Regardless, Ms Roe did not disclose at the hearing before me what, if any, disability she may have, much less did she establish that the University took into account any disability in an unlawful way in 2010. There is no evidential basis on which any adverse finding on that issue could be made against the University, and I reject Ms Roe's belated attempt to challenge the 2010 decision.

13. I confirm I am not trying to get the courts to reverse the University's decision to decline my application to MBChB in 2010. In my written submissions I expressed concern (as I had expressed concern to the University) that the University was open to the charge of unlawfully discriminating against applicants on the basis of disability by requesting disability information prior to selection while making it clear to the applicant that the information was to be used for the purposes of their exclusion only. Ms Roe supplied to the courts the Health Declaration forms that were required to be filled out by applicants prior to interview that mad it clear to applicants prior to interview how the Institution of the University regarded disability and how the University regarded first-person knowledge of or experience of the health system of New Zealand and how they regarded that kind of experience with respect to motivation or reason for committment to Medical Professional Career.

14. This issue of the Univeristy making it clear they would only consider the above kinds of information for the purposes of exclusion (and not for the purposes of inclusion) was the grounds that Ms Roe attempted to apply to under 1(k). She requested the University allow her to submit an application from her on the basis of considering disability as a reason to include rather than exclude a candidate. That they allow candidates with disability to make a case to the University as to how they experience and knowledge could help the profession and the people of New Zealand. The University's response was to refuse to allow Ms Roe to submit an application in which she was going to make a case for disability as reason to include rather than exclude a candidate with the capacity to study and practice Medicine.

[16] So far as the University's submissions in response are concerned, I confirm they are outlined and addressed in my analysis that follows.

[17] The remedies sought by Ms Roe arise from her interpretation of the meaning and effect of s 224 of the Act, which relevantly provides:

> *224 Enrolment of students*
>
> *(1) In this section,—*
>
> *eligible student, in relation to a programme or training scheme at an institution, means a person who is eligible to be enrolled as a student in that programme or scheme by virtue of subsection (2)*
>
> *year means a period of 12 months commencing on 1 January.*
>
> *(2) Subject to this section, a person is eligible to be enrolled as a student at any institution in a programme or training scheme provided by the institution if, and only if,—*
>
> *(a) either—*
>
> *(i) the person is a domestic student; or*
>
> *(ii) the council of the institution consents; and*
>
> *(b) the person holds the minimum entry requirements for the programme or scheme as determined by the council; and*
>
> *(c) the person has attained,—*
>
> *(i) if the institution has fixed a minimum age for enrolment at the institution, the age so fixed; and*
>
> *(ii) if the institution has fixed a minimum age for enrolment in the programme or scheme, the age so fixed.*
>
> *(3) Subsection (2)(b) and (c) do not apply to a person if—*
>
> *(a) the person has attained the age of 20 years; or*
>
> *(b) the council of the institution is satisfied that the person is capable of undertaking the programme or scheme concerned.*
>
> *(4) An eligible student who applies for enrolment in a pro-*

gramme or training scheme at an institution is, subject to this section, entitled to be enrolled in that programme or scheme.

(5) If the council of an institution is satisfied that it is necessary to do so because of insufficiency of staff, accommodation, or equipment, the council may determine the maximum number of students who may be enrolled in a particular programme or training scheme at the institution in a particular year.

(6) Where—

(a) the maximum number of students who may be enrolled at an institution in a particular programme or training scheme in a particular year is determined by the council of the institution under subsection (5); and

(b) the number of eligible students who apply for enrolment in that programme or training scheme in that year exceeds the maximum number so determined

the council may, in the selection of the students to be enrolled, give preference to eligible persons who are included in a class of persons that is under-represented among the students undertaking the programme or training scheme.

[18] In the Auckland University Decision, Roe v University of Auckland, Fitzgerald J considered s 224 in detail and summarised its effect as follows:

(a) First, there is a pool of eligible students, one category of which is domestic students aged 20 years and older, irrespective of whether they hold any minimum entry requirements for the programme in question.

(b) Second, all eligible students who apply to programmes are entitled to be enrolled in those programmes, except if a maximum number of students to be enrolled has been duly set by the council of an institution for resourcing reasons (meaning the programme is a limited entry programme).

(c) Third, if a limited entry programme is oversubscribed, the council of an institution can select from the pool of eligible student applicants those that will be permitted to enrol in the

programme, using whatever mechanism or criteria it prefers (so long as not inconsistent with Act).

(d) Fourth, the council of an institution is expressly permitted (though not required) to prefer under-represented groups when carrying out that selection process.

[19] It appears the use of the term "eligibility" in s 224 may have caused Ms Roe some confusion. She seems to believe that her status as a "domestic adult" guarantees that simply submitting an application will entitle her to enter the programme as of right. Under s 224, a person is an eligible student inter alia if they are a domestic student, which s 2 of the Act defines as including all New Zealand citizens, and have attained the age of 20 years. There is no doubt that Ms Roe is an eligible student in accordance with s 224.

15. I have never said that my status as a "domestic adult" means that simply by my submitting an application to enrol in MBChB means the University is required to enrol me in that programme. I stated in the proceedings very explicitly that either eligibility for enrolment does not confer entitlement to be enrolled, else entitlement to be enrolled does not entail enrolment. I do understand that if there are more eligible candidates than places available then some eligible candidates will miss out.

[20] However, meeting the definition of an eligible student under s 224(1) does not translate into a guaranteed right to enter a specific course. Ms Roe's entitlement to be enrolled in the programme is subject to her being selected for one of the limited places available under the processes adopted by the University. Where a course has a lawfully established limitation on numbers, an institution is able to select entrants from the eligible student pool "using whatever mechanism or criteria it prefers (so long as not inconsistent with the Act)". The mechanism or criteria adopted by the University here are those established through the Regulations. The process of assessing an eligible student's ability to be selected under those Regulations may (perhaps to a limited degree a little confusingly) be referred to as a process of considering eligibility, but this is a matter of eligibility under the Regulations, not the Act.

16. So one issue is the lawfulness or the legality of the mechanism or criterion by which the University is selecting applicants as the mechanism or criteria

is required to be consistent with the Act.

> *[21] Fitzgerald J confirmed in Roe v University of Auckland that a university's ability to design its own selection process scheme is virtually unfettered. As noted, other than the permitted preference of certain classes of eligible students, the Act does not direct or even suggest how the relevant institution might go about selecting from a pool of eligible students those who will be admitted to an oversubscribed limited entry programme. The very fact the Act is silent on this point is consistent with the object of the Act.*
>
> *[22] The object of the provisions of the Act relating to institutions was set out in s 160 of the Act. It is preserved in identical form in s 266 of the Education and Training Act 2020. It confirms the very wide-open freedoms the University has to make its decisions:*
>
> > *160 Object*
> >
> > *The object of the provisions of this Act relating to institutions is to give them as much independence and freedom to make academic, operational, and management decisions as is consistent with the nature of the services they provide, the efficient use of natural resources, the national interest, and the demands of accountability.*

17. I accept this, but also think the following section (not considered explicitly by Justice Fitzgerald) is relevant:

> *161 Academic freedom and institutional autonomy of institutions (other than NZIST)*
>
> *(1) It is declared to be the intention of Parliament in enacting the provisions of this Act relating to universities, wananga, colleges of education, and specialist colleges that academic freedom and the autonomy of those institutions are to be perserved and enhanced.*
>
> *(2) For the purposes of this section,* ***academic freedom****, in relation to an institution, means –*
>
> *(a) the freedom of academic staff and students, within the law, to question and test received wisdom, to put forward new ideas and to state*

controversial or unpopular opinions:

(b) the freedom of academic staff and students to engage in research:

(c) the freedom of the institution and its staff to regulate the subject matter of courses taught at the institution:

(d) the freedom of the institution and its staff to teach and assess students in the manner they consider best promotes learning:

(e) the freedom of the institution through its chief executive to appoint its own staff.

(3) In exercising their academic freedom and autonomy, institutions shall act in a manner that is consistent with –

(a) the need for the maintenence by institutions of the highest ethical standards and the need to permit public scruitiny to ensure the maintenence of those standards; and

(b) the need for accountability by institutions and the proper use by institutions of resources allocated to them.

(4) In the performance of their functions the Councils and chief executives of institutions, Ministers, and authorities and agencies of the Crown shall act in all respectes to as to given effect to the intention of Parliament as expressed in this section.

18. That is to say, training places in Medicine are a resource that has been allocated to the University. The University is needs to be accountable for the 'proper use' of that resource and accountable for how they are deciding who are to be offered training places in limited entry programmes.

19. The establishment conditions are also relevant insofar as they define the establishment (or persistence) conditions for University:

(a) Universities have all of the following characteristics and other tertiary institutions have 1 or more of those characteristics:

(i) they are primarily concerned with advanced learning, the principle aim being to develop intellectual independence:

(ii) their research and teaching are closely interdependent and most of their teaching is done by people who are active in advancing knowledge:

(iii) they meet international standards of research and teaching:

(iv) they are a repository of knowledge and experise:

(v) they accept a role as critic and conscience of society; and

(b) ... a university is characterised by a wide diversity of teaching and research, especially at a higher level, that maintains, advances, disseminates, and assists the application of, knowledge, develops intellectual independence, and promotes community learning.

20. The section 13 General provisions relating to tertiariy education are also relevant

159 AAA Object of provisions relating to tertiary education

The object of this Part, Parts 13A to 18, and Part 19 (which relate to tertiary education), and of the provisions of Parts 18A and 20 to 24 that relate to tertiary education, is to foster and develop a tertiary education system that—

(a) fosters, in ways that are consistent with the efficient use of national resources, high quality learning and research outcomes, equity of access, and innovation; and

(b) contributes to the development of cultural and intellectual life in New Zealand; and

(c) responds to the needs of learners, stakeholders, and the nation, in order to foster a skilled and knowledgeable population over time; and

(d) contributes to the sustainable economic and social development of the nation; and

(e) strengthens New Zealand's knowledge base and enhances the contribution of New Zealand's research capabilities to national economic development, innovation, international competitiveness, and the attainment of social and environmental goals; and

(f) provides for a diversity of teaching and research that fosters, throughout the system, the achievement of international standards of learning and, as relevant, scholarship.

(2)

In making decisions under this Part, Parts 13A to 18, and Part 19, and under the provisions of Parts 18A and 20 to 24 that relate to tertiary education, the Minister, the Commission, and the Qualifications Authority must take into account the objects specified in subsection (1), so far as is practicable in the circumstances.

21. I introduce these other sections of the Education Act that talk about the goals or aims or purposes of Tertiary Education so that we can then consider (demands of accountability) how consistent it is with the purpose or goals or aims of the University for the University to have the aspirational goal of giving the vast majority of the training places in MBChB to students who have only met the most minimum of academic standards (that is to say no more than 1 year of University level study for the University of Otago). Both the University of Auckland and Otago have been informed about various ways of cheating that first year studnets are complaining are going on with other studnets in the first year cohort. The Universities have responded that it didn't matter. That can only be because the University has already decided which of the first years are going to to Medicine independently of their grades, else how the grades are assigned is something that is happening independently of what they are putting down on their examinations. That is to say the Universities are not being accountable for how it is that they are offering training places in MBChB to first year students who are enrolled in their Universities.

22. The University of Otago is prioritising students who have studied in expensive private rural boarding schools for 'rural equity' priority entrance. I don't

think that anybody would think this fair or a good use of allocation of public training places. We are talking about kids, here, who have every educational advantage already, who are not able to obtain places, one can only suppose, by any kind of fair selection process or mechanism that they are required to expediate their selection in the name of 'rural equity'.

23. The University of Queensland, Australia had an investigation into the VC's daughter being offered a place in the UQ programme in the name of 'leadership equity'. He resigned over it as it was obvious to everyone that giving the VC's daughter priority entrance in the name of 'equity' was a misuse or abuse of what equity criterion are supposed to be about the practice of prioritising selection for his daughter was regarded to be corrupt. The Universities of Auckland and Otago need to be accountable for the reason or rationale as to why they are expediating entrance for some teenagers at the expense of the development of Medicine in New Zealand. That is to say they are not engaging in attainment of international standards of scholarship when it comes to Medicine they are engaging in selecting those with least educational background.

    [23] In the Auckland University Decision, Ms Roe's application for entry was rejected due to her failure to meet a "recency" requirement under the Auckland admission scheme. This required the completion of a qualifying degree not more than five years prior to the date of application. I note that in Ms Roe's application for review by the Court of Appeal of its Registrar's decision to decline her application for a waiver of security for costs in relation to an appeal of the Auckland decision, Miller J made comments as to the merits of the substantive appeal, which bear on this case...

24. I do not aagree that the University of Auckland rejected me due to my failure to meet a "recency requirement". It is more that the University of Aucklands decision that they were not going to select me to Medicine that resulted in the University of Waikato refusing to allow me to complete the MPhil Degree to internationally accepted standards of scholarship within the 'minimum, normal, or standard time' by refusing to get my work out to externals in order to prevent and prohibit them signing off on timely completion of the

research masters degree.

25. Evidence for this is that the University of Auckland was full of an endless succession of excuses as to why they were not processing or progressing my application. Firstly they failed me for Population Health 101 saying that they had the authority to adopt a standard of scholarship that was different from a traditional academic essay and therefore Ms Roe fails the paper. Ms Roe was not granted academic freedom to write what she thought about issues of equity in a public health paper. The University belived they were entitled to teach her a little lesson in what it is that they value: compliance. Students were required to copy-paste together an essay comprised of lecturers powerpoint slides inserting references they found on Google. Ms Roe understands that different studnets are coming in from different educational backgrounds and you don't want to fail students when they are learning and aquiring skills. That was not what was going on in Population Health 101, however. What was going on was that students with capacity were being failed and bullied into fleeing the University to make way for students who the University had already decided were going to be selected to study Medicine.

26. Ms Roe was failed for her essays so that the University could say she was not eligible to apply to Medicine. Ms Roe was then informed she could complete the MPhil for eligibility. Then she was denied an MPhil because they refused to accept her enrolment start date for a programme of study she applied to by the deadline. Then they refused to accept her thesis submission. Then they refused to get her work to external examiners in order to prohibit them signing off on her qualifiation completion. Then they sent it out for examination for the wrong qualification so the examiners would be forced to say insfoar as her thesis was acceptable it would require substantive revisions. Then they, effectively gave Ms Roe's thesis away by allowing the externals to keep it without themselves signing off on (or allowing externals to sign off on) hard copy substitution of a substantively updated thesis. Then they refused to base the outcome of examination on the reports of externals withhholding the qualification so as to force re-enrolment. They demanded more money

to be paid else they would withhold the qualification indefinately. When she protested they updated her transcript to say she was failed for the Degree.

27. Where is the accountability in all this? What happened to the Universities of New Zealand? The Universities are not making decisions about enrolments and completions that are consistent with the Education Act. They are expediating the selection of students who have been selected on political grounds, or something like that, insfoar as I can see. I really don't see that New Zealand has Universities, at all. People (both faculty and studnets) do not have academic freedom to state unpopular views and there is no dialogue or discussion. People with all the power and none of the accountability make up their minds quickly on the basis of irrelevant reasons and will not approach things again later with open minds.

> *[23]...In declining Ms Roe's application for review, his Honour agreed with the Registrar that there was no prospect of the University being required to enrol Ms Roe, and that Fitzgerald J's reasoning, to the effect that the legislation allows the University to impose entry requirements that all applicants must meet, appeared "unanswerable". The consequences of a finding that all adult applicants who met the recency requirement could enrol as of right regardless of capacity constraints would, in Miller J's opinion, be "startling to say the least".*

28. In the University of Auckland case there are three main issues. The first is whether their 'recency' criterion is lawful. The reason for the recency criterion is allegedly that the knowledge and skills may atrophy over time. This doesn't fit with the University's preference for students with little to no educational background or experience, however. It seems more likely that the reason for and the effect of the recency requirement is to keep the knowledge level and experience of the Medical cohort relatively low by effectivley prohibiting and preventing people from doing the programme not because they are too old (which would be unlawful) but because they know too much or because they have depth of experience that the Univeristies are keen to keep out of Medicine (e.g., first hand knowledge or experience of the public health system from a consumer perspective).

29. The second is whether Ms Roe had not met the recency criterion in fact. Ms Roe supplied a theses to the University of Waikato and they intentionally refused to get her work to external examiners so as to prevent and prohibit them from siging off on her qualification completion. The University of Auckland kept asking Ms Roe to supply things to them that they did not need. For example, they asked Ms Roe to get Waikato to send them 'Unofficial transcripts' in 2019 and, at their request, Waikato generated transcripts saying they re-enrolled her with limited full time status (which is part time status) and then failed her for the qualification when she protested and objected their refusal to allow her to complete her work to internationally accepted standards of scholarship in a timely fashion in order to justify the decision that they already made on quite different grounds that Ms Roe was not selected to do study Medcine. Ms Roe supplied them with evidence of her having completed the qualification and the Unviversity of Auckland refused to accept any evidence that did not support the decision they already made that they were entitled to refuse Ms Roe entry to Medicine.

30. The third is whether, insofar as Ms Roe was in fact eligible for selection, the Univeristy was required to select her. Auckland published an algorithm whereby GPA, external exam score (UMAT / UCAT), and interview would jointly determine rank order score in a hierarchy. The University of Auckland refuses to say what Ms Roe's correct rank order score it. Firstly they said it was too low for a place so whether or not she completed the thesis was irrelevant to their decision that they didn't choose her for a place in Meidicine. But they don't get to choose, they are required to follow their algorithm (insfoar as it is lawful) else prioritise people as members of equity groups insfoar as they have the capacity to study Medicine given what that means within the context of it being a University subject. The University of Auckland would only enter false information as her GPA so as to say her score was too low. They refuse to say what her score is as the result of their applying the very same algorithm to her application as the one they publisihed for general selection. Ms Roe did not ask Auckland for special consideration on grounds of disability. Ms Roe tired that previously and as

the result she was failed for Public Health 101. Whatever they need to do to keep her out – right? Maybe they should involuntarily detain her in the health system in the name of 'lock-down policy' in order to say they are entitled to refuse to select her becuase she's mentally ill. Or maybe they will arrange for her to be murdered and get rid of her that way? Things are really starting to look ridiculous the lengths the supposed 'Universities' of New Zealand are willing to go to to keep Ms Roe out.

31. That is to say, Ms Roe is claiming of Auckland that they were in fact required to select her. Accountability means they were required to select her. They refuse to employ their algorithm and they have gone to great lengths, now, to undermine Ms Roe's credibility including failing her for Population Health 101 first year essays and refusing to allow her to complete a 1 year masters research within 1 year (by refusing to get it to externals) and then involuntariliy detaining her – which resulted in their deciding at the end of a 5 day hold that they had no grounds to detain Ms Roe in the psych ward.

32. I don't know why the courts keep characterising me as saying that I am trying to say the University is required to enrol more studnets than can fit given capacity limitations.

33. Demands of accountability to University values mean that the 'competive' qualifications should be developing in the sense that the educational backgrounds and life experiencs of the people in the programme are increasing over time. New Zealand Universities are not developing or growing because decisions are not being made on academic grounds. The Universities are refusign to allow their studnets to work to internationally accepted standards of scholarship and they are refusign to objectively and indepenndently and externally examine studnets work and merits on the basis of acdemic values and the things that they are supposed to select for rather than against (e.g., people willing to speak out when educational standards are not being upheld and when public resourses are being stolen for private advantage which is typically considered corruption).

[24] In the present situation, the obstacle facing Ms Roe has been the

"once-only requirement" in the Regulations, that is, the stipulation that a candidate can apply only once under the Alternative pathway. Ms Roe did not challenge the lawfulness of this requirement (as opposed to the requirement that she face a selection process at all) and there can be no suggestion it is inconsistent with the objects of the Act or otherwise unlawful. I accept Mr Sim's submission on behalf of the University that, in any event, it is clearly legitimate for the University to impose such a restriction as part of its wide powers to determine how students will be selected for admission to an over-subscribed limited entry programme from a pool of eligible students. If the University could not reject applications for non-compliance with the "once-only requirement", it would be required to consider what might become a flood of potentially unmeritorious and repetitive applications, undermining the efficiency of University procedures.

34. The 'once only' requirement goes directly against academic values as articulated by the act. They are not assessing applications on the basis of the merits of the applicant with respect to the qualities etc they are supposed to be selecting for.

35. The University states they are more concerned with inefficiency involved in considering what they regard to be 'unmeritorious and repetitive' applications than they are concerned to select the best or most suitable applicants for the programme. They focus on giving the majority of the places to first year students where they are deciding not only whether or not they get a place in Medicine but what their grades for the first year will be as well. They seem very concerned to have the Medical studnet cohort dominant culture set by the youngest studnets with the most limited education knowlege and life experience. Their way of doing things does not seem to be consistent with demands of accountability. It is hard to see how applications from students their first year out of High School can be deemed to be of such high merit when they acknowledg themselves that students of that age really are not very certain of their career choices insofar as they have limted experience of things that there are in the world. It seems to be more a way of ensuring that certain people (who might not want to otherwise) are selected out of concern that otherwise, they really might not make very much of their lives (I imagine that is what is going on in the minds of selectors). People

need to look into what factors are driving decisions (particularly around who the parents are and what school they went to and so on.) These are public trainig places and they are required to be accountable.

36. The 'once only' requirement is not compatible with the Education Act. They are not processing appliations with open minds and they are deciding on the basis of things that are not supposed to be relevant or they are deciding on the basis of giving further advantages to those who already have the most.

> *[25] Further, I acknowledge the potentially severe effects of an unbending "once- only requirement" are ameliorated by the discretion afforded by reg 1(k) of the Regulations to the Medical Admissions Committee to "consider any applicant who, not having satisfied these regulations in a particular aspect, warrants admission to the programme for exceptional reasons". Ms Roe has twice advanced a case for the exercise of that discretion in her favour, and on both occasions, via applications to the University Council's Appeals Board, pursued review of the decisions declining to do so. The University has expressly highlighted to Ms Roe her ongoing right to advance a case for "exceptional reasons", but she has not pursued that avenue. Were there any basis for review in this matter, I consider the fact Ms Roe has not pursued this avenue,given the opportunity made available to her to do so, would strongly point against the Court exercising its discretion in favour of Ms Roe.*

37. The University informed Ms Roe that since they had already made up their minds that she was not selected to Medicine her only option was to apply under 'exceptional reasons'. Ms Roe requested them to consider disability as grounds for inclusion rather than exclusion as they currently did and their response was that disability was not something they were looking at as a reason or an exceptional reason to include a person in MBChB. That means the Univerity is left with their current discriminatory practices of asking about disability for the expressely stated purposes of exclusion. The main purpose of the interview appears to be to check that the applicant appears acceptable to the elite white miniority. We need to remember that Medical training places are for their kids, primarily, picked out when they are very very young with minimal educational background or life experience. This is how they have chosen to go about selecting and training the future Medical

workforce of New Zealand. Ms Roe was not asking for the University to offer her anything more or different from what she would want them to offer to other candidates with disability.

> *[26] Having addressed these contextual matters, I now turn to the arguments Ms Roe sought to advance. Ms Roe's principal contention appeared to be an assertion that Parliament only intended universities to consider "domestic teenagers" in cases where a programme was undersubscribed by applications from domestic adults. In other words, Ms Roe suggested the Act requires that priority be given to applicants who are in the pool of "eligible students" because they are domestic students over the age of 20.*

38. That is not quite it. What I suggested was that the purpose of the Education Act is to give protection to a special class of persons. Firstly, domestic studnets so that the Universities are required to train domestic studnets and not offer all the training places to international studnets. Secondly, domestic students who have attained the age of 20 years. Concievably, again, so that the Universities don't offer all the trianing places to teenagers. The Education Act states that domestic adults are eligible for selection by statute. The Education Act grants discretion to the Universities to select teenagers. The University is not required to regard teenagers to be eligible or to supply teenagers with applications to enrol, at all. The Universities are required to regard domestic adults to be eligible and to supply domestic adults with applications to enrol.

39. The University was saying that they don't have the capacity to process all the applications to enrol in Medicine. If they don't have teh capcaity to process all the applicaitons to enrol in Medicine then the thing to do would be to make sure you process all the applicaitons from the people who are eligible by statute before you start to use up limited time and attention and energy and effort processing applicatons from people who are only eligible by virtue of the University choosing to exercise discretion. The teenagers will become 20 years old at some point and then they are eligible by statute (if they still want to apply to that programme). It seems to me to be more in keeping with the Education Act and the functions and aims of the University to be focused

on training domestic adults, primarily, in Universities. Most particularly in professional practice programmes like Medicine and Law. Expediating selection for teenagers is not helping the University or Programme to develop. They are not being subject to accountability with respect to limiting the educational background and life experiences of students they are willing to select to study Medicine.

> *[27] In my view, this submission has no support whatever in the wording of the Act. It is plainly inconsistent with the extensive discretion the Court in Auckland University Decision, Roe v University of Auckland, identified is afforded to universities in the establishment and exercise of their decision-making processes. Prioritising domestic adults at all times would significantly impede the object of the Act in relation to ensuring the efficient use of national resources. This is the case because it would impair the University's ability to select candidates it assessed as best qualified for undertaking the MBChB programme and, in due course, who would be best suited for meeting the needs of New Zealand's health workforce. As Mr Sim submitted, an extreme implication of Ms Roe's interpretation of s 224 is that the medical school intake could be comprised largely of retirees with no demonstrated aptitude for the study of medicine.*

40. I cannot fathom how the youngest students with the least educational background and life experience can, plausibly, be judged to be those who are 'best qualified' or 'best suited for meeting the needs of New Zealand's health workforce'. It isn't solely about the health workforce, either, as the Medical Programme is not situated within a vocational training programme – it is situated within the University. These studnets have not demonstrated aptitude for the study of medicine. They are being picked out likely because people fear that they have no aptitude to study medicine which will become aparent over time such that there is pressure to expediate their entry early. With respect to the concern that if the selection people were to priorise students over 20 then there is nothing to stop them prioritising students over retirement age I will admit I don't really understand this objection. We are talking about people being eligible by statute vs people being eigible becuase the council is choosing to exercise their discretion. The council is choosing to exercise their discretion to offer the bulk of the training places to peo-

ple they have selected. Since they were selected at their discretion they are required to be accountable for why they selected them. Grades are not being decided independently from the people doing the selecting and they are turning a blind eye to cheating and pay-to-win tutorial services etc. They are not being accountable for present selection practices.

> *[28] The second line of argument put forward by Ms Roe was that the University is in breach of the Act by not allowing her to complete an application and have it considered under the Alternative category. She argued this is the case even in circumstances where it is patently clear such an application would be rejected once the Regulations assessment criteria were applied to it. In her amended statement of claim (but not in her submissions before me), Ms Roe argued that, because the total number of domestic adult applications that will be received is not precisely known at the time Alternative category admissions are considered, it is not certain the programme will be over-subscribed by domestic adults, and consequently it cannot be known with certainty that a selection process will be necessary. On this basis, Ms Roe contended the Regulations should not be applied to decline any applications.*

41. I don't really care for their categories of application. I asked them to approach an application with an open mind and they refused because their minds were already made up. The idea, here, is that the University reports on how many applications they receive from eligible students for various purposes. People want to know how difficult it is to get a place and the University has things to say about how many eligible applicants there are for however many places. People also want to know about the characteristics and qualities of the eligible applicants who the University is selecting from. The problem is that the Universities are refusing to allow people to submit an application and / or they are throwing away submitted applicatons so tha those people are not counted. That is to say if you ask the University 'how many of your applicants asked to to be considered on the basis of disability or how many disclosed disability' the information the University of Otago is suppliying about that will be wrong. Ms Roe atttempted to apply to the University of Otago being considred as an applicant with disability. She did not supply evidence of disability to them because instead of asking her for that they refused to allow her to submit an application.

42. The concern is that some of the people who might well clearly or obviously make good doctors are having their applications culled or removed or similar such that we end up with 'there is no alternative'. I mean to say that people who have disability (and capacity), say, might find their applications removed (or not allowed to submit one) so that the only applications they will accept from people with disability are ones that are clearly or obviously not capable such that those places are returned to the general pool to be given to the children of the wealthy elite like the majority of the training places. Ms Roe thinks it far more likely that good applicants are having their applications removed so that the teenage kids of the wealthy elite don't look quite so immature and under-developed and so that the selection people can think that their present selection practices are justified because they aren't really getting any other sorts of kinds of applicants.

> *[29] Before me, Mr Sim noted this submission appears secondary to Ms Roe's argument about the priority right of admission for domestic adults, which I have already rejected. However, if the submission is approached by reference to the entire pool of eligible students, it cannot be reconciled with the inevitability that (as has occurred throughout) the programme will be substantially oversubscribed. The University Registrar's affidavit before the Court details a longstanding pattern of oversubscription where applications exceed available places by a factor of at least three. For instance, in 2021, 1,126 applications were made for the programme for which, in 2022, only 282 domestic places are available. The Registrar deposed that the number of First Year Health Science enrolments in 2021 demonstrates beyond any doubt that this pattern will continue.*

Three applicants for every place is not a great deal when you consider that quite a few of those would have applied to Auckland as well and also to Australia. Universities in the USA can have up to 80 eligible applicants per training place and it isn't uncommon for students to be instructed to apply to around 8 programmes. NZ only has 2 Medical Training Programmes. They are not being inundated with applications from domestic adults and a lot of the teenagers are encouraged to 'reach for the top and settle for what you get' when it comes to them marketing that people should be aiming (at a very young age) to be applying to Medicine. It seems to be more about

preventing capable adults from having training places.

> *[30] I am left in no doubt that it is both lawful and reasonable here for the University to approach its decision-making in relation to enrolment in the programme on the basis that the programme will be significantly over-subscribed. The Act does not require the University to receive or process enrolment applications from eligible students at any particular time. Similarly, a process in which the University declines to receive an application at a time it has a clear basis for concluding that it will not be successful, cannot be regarded as either unlawful or unreasonable. As I see it, the University might be lawfully required to admit eligible students without some form of selection process only in the hypothetical event of under-subscription that might emerge at a time when all categories of application recognised by the Regulations had closed.*

43. Again, fillin the programme with teenagers does not seem to be in keeping with the aim or function of the University.

> *[31] Moreover, I accept Mr Sim's submission that it would be futile to grant any aspect of the remedies sought here by Ms Roe as, in the absence of exceptional reasons (which she has declined to advance despite being invited to do so), supplying her an application form for her to submit would not alter the inevitable rejection of such an application under the Regulations. It is appropriate for the Court to decline relief where it is inevitable the substantive outcome the applicant seeks will not be achieved.*

44. I am not sure I follow this. I applied in 2010 under 'Other'. I applied in 2017 under 'Alternative' and my application was prevented from going before the Medical Admissions Committee on the grounds that I was ineligble to apply. I was told that I could not apply under 'Alternative' because 'Alternative' was another name for 'Other' and one could only make one application under either of those in ones lifetime. I asked if there was any other way I could get an application before the Medical Admissions Committee for them to accept it or decline it on it's merits and I was informed I would need to submit a 'special reason' for them to consider another application from me. I requested they consider it on the basis of choosing to include (rather than exclude) someone with experience of disability and they informed me that was no reason that they would accept to allow a person to apply. In two years

they refused to consider disability as a reason to allow me to submit a further application to MBChB. In 2021 they had altered the computer system sot hat I could not submit an application to MBChB. They didn't need to intervene and remove it before it went before the Medical Admissions Committee because they prevented me from submitting an application. Then the registrar says I can submit another application to apply and since I had done that two years previously and the University was simply not willing to hear reason I declined to do that and initiated Judicial Review of Administrative Action so they could be accountable for the decisions they make before the courts.

> *[32] The University responsibly considered it was not appropriate to seek to resolve these proceedings through providing Ms Roe with the ability to complete an application for admission to medicine, only for it to be inevitably rejected for the reasons given. To have done so would have been disingenuous. This is so because it would have constituted holding out an imaginary hope to Ms Roe that her application would be accepted, when it would inexorably be declined under the "once-only requirement" and in circumstances where Ms Roe had not sought admission under the exceptional reasons power in the Regulations. This is especially the case given that Ms Roe believes her status as a "domestic adult" means that submitting an application will automatically entitle her to enter the programme as of right.*

45. Saying that it was 'inevitable' that an application to MBChB would be declined on administration grounds (rather than anything to do with the actual merits of Ms Roe's applicaton with respct to the stated aims of the University) is the problem, here. I don't understand how a 'once only requirement' is lawful. The children of the wealthy elite are selected on the basis of a 'once only' application, I see that. It appears that it is those candidates (and certainly not Ms Roe) who are regarded by the University as being entitled to enter the programme as of right. Other people (people who might call that right into question) are not even allowed to submit applicaitons to enrol.

Kelly Roe Monday 29 November 2021