Roe v University of Auckland

2021 - ...

Contents

1 Judgment of Justice Fitzgerald (3 March, 2021) 2

2 Judgment of Justice Fitzgerald as to Costs (8 June, 2021) 30

3 Minute of Justice Miller (31 August, 2021) 37

4 Minute of Justice Goddard (26 Oct, 2021) 40

Chapter 1

Judgment of Justice Fitzgerald (3 March, 2021)

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-795
[2021] NZHC 368

UNDER	Judicial Review Procedure Act 2016
IN THE MATTER	of an application for judicial review of decisions made pursuant to the Education Act 1989 Part 16 s 224(1)-(6) and the Education Amendment Act 2011 s 224(1)-(6)
BETWEEN	KELLY ALEXANDRA ROE Applicant
AND	THE UNIVERSITY OF AUCKLAND Respondent

Hearing: 7 December 2020

Counsel: I Rosic and ZA Brentnall for respondent

Appearance: KA Roe, applicant in person

Judgment: 3 March 2021

JUDGMENT OF FITZGERALD J
[As to application for judicial review]

This judgment was delivered by me on 3 March 2021 at 4.00pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Gilbert/Walker, Auckland

To: K Roe, Auckland

Introduction

[1] The applicant, Kelly Roe, applied to be enrolled in the Bachelor of Medicine and Bachelor of Surgery (MBChB) at the University of Auckland in 2018 (for the 2019 programme) and 2019 (for the 2020 programme). The University[1] declined her application each year, on the basis she did not meet the minimum requirements for enrolment. Ms Roe applies to judicially review each of those decisions on the basis the University did not have the power under the Education Act 1989 (the Act) to decline her applications. The essence of Ms Roe's application is that under the Act, and being a domestic student aged 20 years or above, she was eligible to be enrolled.

[2] Counsel for the University set out in their written submissions the following key issues for determination on Ms Roe's application:

(a) Whether, in the relevant years, the University had the power to impose eligibility criteria on domestic students aged 20 years or over applying for the MBChB programme (Issue 1).

(b) Whether the University's decisions to decline Ms Roe's applications to the 2019 and 2020 MBChB programmes "had legal basis, were valid and correct" (Issue 2).

(c) Whether the University's advice to Ms Roe that she was required to undertake further University-level study in order to be eligible for the MBChB programme was correct (Issue 3).

(d) Whether the University was obliged to re-calculate Ms Roe's grade point average (GPA) and her rank order score, in light of what the University accepts was an initial miscalculation of her GPA in relation to her application for the 2019 MBChB programme (Issue 4).[2]

---

1 For ease of reference, I will refer to the University of Auckland as "the University" (save where it is necessary to distinguish it from other New Zealand universities). Also for ease of reference, I will use the term "the University" to include the University's Council.

2 Calculated at 8, but accepted as correctly calculated at 8.6.

(e) Whether, if Ms Roe's application is successful, she is entitled to the relief she seeks (Issue 5).

[3] Ms Roe accepted at the hearing that these issues cover the key matters arising from her pleaded claim.[3]

[4] This judgment is structured as follows:

(a) I first set out the factual background to Ms Roe's application;

(b) I then address the relevant statutory framework under the Act and other related legislation;

(c) I then summarise each party's submissions; and

(d) I set out my discussion and conclusions on each of the issues.

Background

Introduction

[5] The University has prescribed two "pathways" to general admission to the MBChB programme.[4] The University requires that an applicant must either:

(a) complete the first year of a Bachelor of Health Science or the first year of a Bachelor of Science in Biomedical Science; or

(b) have successfully completed a full time degree from a New Zealand university with a minimum GPA of 6, with the last year of full time study in a completed qualification from a New Zealand university within the last five years. This last requirement is referred to as "the recency requirement".

---

3 I discuss later in this judgment, however, whether Issue 3 is appropriately the subject of and determined on this application for judicial review.

4 There also exist separate pathways for targeted demographic groups and international students. They are not at issue here. Ms Roe has only ever sought general admission.

[6] Ms Roe completed an MA at the University of Waikato in 2005, and the degree was conferred in 2006. When she started corresponding with the University of Auckland in 2014 about the possibility of applying for the MBChB, she was informed that she would not meet the recency requirement (given the time since completion of her MA), and thus would need to complete the first year of one of the degrees referred to at [5(a)] instead.

[7] In 2015, Ms Roe enrolled in a Bachelor of Health Science. She failed a paper in that course and subsequently withdrew. She alleges in her submissions that this was unfair and the internal complaints process did not function properly.[5]

Ms Roe's application for admission to the 2019 programme

[8] In 2018, Ms Roe corresponded with University staff about applying for the 2019 MBChB programme. She confirmed that she intended to complete a Master of Philosophy degree (MPhil) at the University of Waikato in order to apply for the 2019 MBChB programme via the graduate pathway. Ms Roe was advised that the University would need to receive official evidence of completion of the MPhil by 7 December 2018. It was also a requirement that an applicant provide an unofficial transcript by 1 November 2018, though it does not appear Ms Roe was informed of this at the time.

[9] Ms Roe did not provide an unofficial transcript by 1 November 2018, and her application was accordingly declined on 16 November 2018. Following further communications with the University, she was nevertheless allotted an interview with University staff on a provisional basis, in case she was able to provide confirmation of having completed her MPhil by 7 December 2018. She attended the interview on 30 November 2018. She was not, however, in a position to provide evidence of completion of her MPhil by 7 December 2018. Ms Roe takes significant issue with the University of Waikato's processes in this regard, and I was informed that she has separate judicial review proceedings against that university in the High Court at Hamilton. Those matters do not arise for determination on the present application.

---

[5] That is not at issue in this case requiring determination and I accordingly say nothing further about it.

[10] Returning to the chronology, on 10 December 2018, the University informed Ms Roe that it was unable to progress her application without evidence of completion of her MPhil. On 19 December 2018, the University informed Ms Roe that she had not met the recency requirement pathway to general admission to the MBChB programme, and that even if she had, her rank score would not have been high enough to secure an offer of a place. The correspondence stated:

> Your application continued to be in the applicant pool right up until the point you were *no longer eligible* for consideration. …
>
> (emphasis added)

[11] On 19 December 2018, Ms Roe appealed to the Director of Admissions at the Faculty of Medical and Health Sciences. On 16 January 2019, the Director responded. He explained that the University calculated her applicable GPA from her previous study as 8.0 and declined the appeal. On the same day, Ms Roe appealed again to the Dean of the Faculty of Medical and Health Sciences. Ms Roe suggested that her GPA had been miscalculated and should have been 8.375 and then 8.6. On 28 January 2019, the Dean responded. He agreed that Ms Roe's GPA had been miscalculated, but suggested that this error was because Ms Roe's academic transcript was complex. He noted that in any case, Ms Roe "did not meet the *eligibility* criteria" (emphasis added) because she had not satisfied the recency requirement. The Dean also noted that:

> …your GPA, whether rightly or wrongly calculated by the admissions team, does not outweigh the fact that your application *was ineligible*.
>
> (emphasis added)

[12] The Dean therefore dismissed the appeal. On 26 January 2019, Ms Roe emailed the Vice-Chancellor disputing the decision to decline her application. On 30 January 2019, the Vice-Chancellor responded, advising her that the Dean's decision was final.

[13] Ms Roe then complained to the Chief Ombudsman. On 3 December 2019, the Ombudsman concluded that the University did not act unreasonably, and the

miscalculation of her GPA was ultimately not the reason she was not offered a place. The Ombudsman stated:

> You were unable to show completion of your MPhil because it was not completed by that date. In my opinion the University was therefore entitled to decline your entry to the MBChB programme in accordance with *its eligibility criteria*. I find nothing unreasonable or unfair about this decision.
>
> (emphasis added)

Ms Roe's application for admission to the 2020 programme

[14] In 2019, Ms Roe again applied for admission to the MBChB, for the 2020 programme. On 31 October 2019, she provided her academic transcript to the relevant staff at the University. This showed that she had failed the MPhil. Ms Roe advised that the University of Waikato ought to have passed her, and that she was in the process of referring the failing grade to the Chief Ombudsman. The University of Auckland again granted her an interview provisionally, in case the failing grade was overturned. The Chief Ombudsman found that the University of Waikato had not acted unreasonably, and the grade was not overturned.

[15] Accordingly, on 17 December 2019, the University of Auckland declined Ms Roe's application for admission to the 2020 programme. On 26 December 2019, 24 January 2020, and 12 February 2020, Ms Roe appealed successively to the Director of Admissions, the Dean and the Deputy Vice-Chancellor. She contended that she had provided evidence by the due dates of "completion" of her MPhil. Each appeal was declined, on the basis that the relevant selection criteria required "successful completion" of such a degree.

[16] The final matter to address by way of factual background is that at the conclusion of the hearing of Ms Roe's application before me, I directed that the University file a further affidavit confirming the total number of applications received for admission to each of the 2019 and 2020 MBChB programmes. I also made timetable directions for the parties to make any further submissions they wished on that information. The further information confirmed the following:

(a) There were 257 total places available in the MBChB programme for each of the 2019 and 2020 years;

(b) in the 2019 year, there were 864 total applications, with 461 of those being from domestic students aged 20 years or above; and

(c) in the 2020 year, there were 903 total applications, with 484 of those being from domestic students aged 20 years or above.

[17] As can be seen, the programme in each year was very significantly "oversubscribed". The General Counsel of the University, in her affidavit sworn in these proceedings, also confirms that "entry into the MBChB is highly competitive".

Ms Roe's application for judicial review

[18] Ms Roe now seeks judicial review of the University's decisions not to admit her to the 2019 and 2020 MBChB programmes.[6] She contends that the University's decisions that she was not eligible for admission were unlawful.

[19] Ms Roe filed her statement of claim on 11 May 2020. It did not properly state the legal basis for the relief sought, and on 15 July 2020, Palmer J stayed the proceeding until Ms Roe clarified her pleading. Her application for judicial review is now encapsulated in her amended statement of claim filed on 4 August 2020. While unclear in parts, the essence of Ms Roe's application is as follows:

(a) She was mis-advised (and there was no lawful basis to advise her) that she was required to undertake additional university level study in order to be eligible to be accepted into the 2019 and 2020 MBChB programmes.

---

[6] In her written submissions, Ms Roe notes she has also complained about these matters to the Human Rights Tribunal, Amnesty International, the Auckland Central Library, the Queen (to attempt to have Queen's Counsel appointed to prosecute the Universities of Auckland and Waikato), the Police, the Ministers of Education and Health, local Members of Parliament, the Leader of the Opposition and the Prime Minister, but in each case was "sent away".

(b) The University had no legal grounds to decline her applications on the basis she was "ineligible", given she was a domestic student who had attained the age of 20 years old. Ms Roe says that pursuant to the Act, such students are deemed eligible to enrol in the programme they have applied for.

(c) The Act does not provide a legal basis for the University to set minimum academic standards for admission or entry requirements for eligibility for domestic students who have attained the age of 20 years. The University only has authority under the Act to set *selection* criteria for such students.

[20] In terms of relief, Ms Roe seeks the following:

(a) a direction that the University reconsider its decision that she was not eligible for admission to the 2019 and 2020 MBChB programmes;

(b) a declaration that the decisions that she was ineligible for admission were unlawful or invalid;

(c) an order that the University pay or waive the student loan incurred as a result of the alleged incorrect advice referred to at [19(a)] above;

(d) an order that the University reimburse costs incurred by her as a result of the University's unlawful decisions (such as costs associated with UMAT/UCATexaminations[7]);

(e) an order that the University correctly apply the selection algorithm to her application and declare her resulting GPA for final selection, and her rank as against other applicants in each of the 2019 and 2020 years;

---

[7] The UMAT and UCAT are examinations that aim to measure clinical aptitude. Prospective MBChB students are required to submit a score on them as part of their application. The UCAT replaced the UMAT from 2019.

(f) if as a result of (e) above, an applicant with a lower ranking than her was offered enrolment, then an order that she be offered enrolment in the next MBChB programme; and

(g) if offered enrolment for the next intake, compensation for loss of earnings she says she would have earned over the last seven years, had she properly been admitted to the programme.[8]

[21] For completeness, I note that shortly after filing her amended statement of claim, Ms Roe filed a further statement of claim which raised various tort claims. After Palmer J sought clarification as to whether these new claims were intended to form part of her amended statement of claim filed on 4 August 2020, Ms Roe confirmed that the additional claim should be disregarded. This was recorded by Palmer J in his minute issued on 19 October 2020. I accordingly say nothing further about the additional claims.

[22] The University then applied to strike out Ms Roe's application for judicial review. Palmer J declined to direct that the strike out application be scheduled for a separate hearing, on the basis that the most efficient pathway to disposition of Ms Roe's application was a prompt hearing on the substantive application.

[23] Before turning to the parties' submissions, I first set out the relevant statutory background to Ms Roe's claims, which puts those submissions in their proper context.

Education Act and related legislation

Introduction

[24] The entrance criteria Ms Roe challenges are promulgated by the University Council pursuant to the Limitation of Entry Statute 1991 (the Limitation Statute). The Limitation Statute is delegated legislation pursuant to the Act, which provides that the council of a relevant institution (such as the University) may make statutes governing,

[8] Based on Ministry of Business, Innovation & Employment Occupation Outlook 2017 data for doctors' salaries, Ms Roe calculates this to be a total of $1,134,000 (said by her to be a conservative estimate).

"…subject to Part 16 [of the Act], the enrolment of persons in courses of study or training of the institution or the admission of persons to examinations of the institution".[9]

The Education Act 1989

[25] Section 160 of the Act provided that the object of the provisions of the Act relating to institutions is to:

> …give [relevant institutions] as much independence and freedom to make academic, operational, and management decisions as it consistent with the nature of the services they provide, the efficient use of national resources, the national interest, and the demands of accountability.

[26] Section 194 of the Act relevantly provided as follows:

> **194 Statutes**
>
> (1) The council of an institution and the board of an NZIST subsidiary may make statutes, not inconsistent with this Act or the State Sector Act 1988, with respect to any of the following matters:
>
> (a) the good government and discipline of the institution:
>
> (b) the imposition, by or on behalf of the council, of penalties upon staff or students of the institution for contravention of or failure to comply with a statute with respect to a matter referred to in paragraph (a):
>
> …
>
> (e) subject to Part 16, the enrolment of persons in courses of study or training of the institution or the admission of persons to examinations of the institution:
>
> (f) subject to Part 16, the courses of study and training of the institution:
>
> …
>
> (j) any other matter required or permitted by this Act to be provided for by statutes.

[9] Education Act 1989, s 194(1)(e). The full text of s 194 is set out at [26] below.

[27] Section 224 of the Act (which falls within Part 16 of the Act) relevantly provided as follows:

> **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.

Limitation Statute

[28] The Limitation Statute relevantly provides that:

…

2. Where the Council is satisfied that it is necessary to do so because:

(a) students cannot be allocated places in appropriate lecture rooms or laboratories at times when they can be reasonably expected to attend

or

(b) the number of teaching staff does not ensure all students expected to seek a place in a particular programme or course can be adequately taught;

there shall be deemed to be an insufficiency of accommodation or of staff.

3. The maximum number of students that may be enrolled for any such programme or course shall be determined by the Council from time to time after considering any recommendations from Senate and be published in a schedule to this Statute.

4. In determining such maximum number of students the Council may, after securing a recommendation from Senate:

(a) prescribe academic standards to be achieved as a prerequisite for enrolment for any such programme or course

and

(b) prescribe other criteria for selection of students to be permitted enrolment for any such programme or course.

[29] As can be seen, regs 2 and 3 of the Limitation Statute effectively mirror s 224(5) of the Act, in addressing those factors which permit the University to impose a limit or "cap" on how many students may be accepted into any given programme.

Limitations Schedules

[30] Sitting beneath the Limitation Statute, and made pursuant to reg 3 of that statute, is a "Limitations Schedule" which is determined and published for each calendar year. This sets out the limited entry programmes on a course-by-course basis, and the maximum number of students permitted for each programme. For present purposes, the following material is taken from the Limitations Schedule 2019; there is no suggestion the Limitations Schedule for the 2020 year was different in any material way.

[31] The Limitations Schedule 2019 provides as follows:

> **Approved Limitations**
>
> 1 Students must apply for a place in any limited entry programme. Unless otherwise specified in Closing Dates for Admission, the closing date for Application for Admission is 8 December 2018 and for Enrolment is 14 February 2019. The closing date for Admission to Summer School is 1 December 2018 and for Enrolment is 22 December 2018.
>
> 2 Application for places in any limited-entry programmes and/or courses will be made online, or in person.
>
> 3 Applications received after the specified closing dates will be given reduced priority in consideration for a place in a limited-entry programme and/or course.
>
> 4 Where the number of applicants for a place in a limited-entry programme or course exceeds the approved number of available places, the Faculty or department concerned will select students in accordance with criteria that have been approved by the University Council.
>
> 5 Where a course is taught in both semesters, the Selection Committee will allocate students to the First or Second Semester where numbers of applications for one semester exceed places available.
>
> 6 Selection criteria will be available from the Faculty or department concerned for the information of students. In general, selection will be based upon academic merit. In those cases where the scholastic record is insufficient, eg, Discretionary Entrance and Special Admission, other criteria such as the recommendation of the School

> Principal or Advisor, or employment history, will be taken into account. Account will also be taken of the University's Equal Educational Opportunity objectives. Limitations on programmes and courses are listed below.

[32] The Limitations Schedule 2019 then sets out admission criteria for, relevantly in the present case, general admission to the MBChB programme. This provides as follows (under the heading "Admission"):

> 1 In order to be admitted to this programme, a student needs to have:
>
> a *either*
>
> (i) completed the requirements for the courses listed in Part I of the MBChB Schedule on a full-time basis, with a Grade Point Average of 6.0 or higher
>
> *or*
>
> (ii) successfully completed, normally in the minimum academic time and no more than five years prior to the date of application, a degree, postgraduate degree or postgraduate diploma from a New Zealand university with a Grade Point Average of 6.0 or higher or equivalent
>
> *or*
>
> (iii) met the requirements of a special entry scheme
>
> *and*
>
> b demonstrated in accordance with approved selection criteria the qualities determined by the Faculty of Medical and Health Sciences as appropriate for a person seeking a qualification as a doctor. This requirement will normally include an interview.
>
> 2 a Students selected for admission under Regulation 1a(i) will be admitted to MBChB Part II.
>
> b Students selected for admission under Regulation 1a(ii) or Regulation 1a(ii) may be required to successfully complete some or all of the courses listed in Part I of the schedule to these regulations before proceeding to Part II.

[33] The schedule then sets out the various limited entry programmes (which refers to them as being "admission by selection") and the approved limit of students for each. For MBChB (domestic students), this is capped at 257.

[34] Selection criteria for limited entry programmes are also reproduced in yearly "Programme Limitations". The Programme Limitations for the 2020 year, for example, sets out the two "pathways" for general admission to MBChB and then states:

> Interview places will be offered on the basis of a ranking calculated on the grades achieved in the four common courses that are offered in both the BHSc and the BSc Biomedical Science programmes (MEDSCI 142, BIOSCI 107, CHEM 110, POPLHLTH 111). Unless there are exceptional circumstances applicants unable to attend their interview on the relevant date will not be considered further.
>
> Following interview, a rank order of applicants based on their academic performance (based on the grades achieved in the four common courses), performance in the UCAT-ANZ test and interview performance is established at a meeting of the Medical Admissions Subcommittee. The weighting is GPA 60%, UCAT-ANZ score 15%, Interview 25%.
>
> Places will be offered to the highest-ranking applicants until the limit is reached.

[35] An explanation of the selection criteria and ranking process was also published each year on the Faculty and Health and Medical Science (FHMS) website. For example, the introduction to the 2020 programme overview stated:

> Entry into the MBChB is limited and competitive. You will be selected on the basis of academic merit, University Clinical Aptitude Test for Australia and New Zealand (UCAT ANZ), performance and personal qualities exhibited during the admission interview (MMI). There are 257 domestic places available each year.

[36] Ms Roe also produced at the hearing a "FAQ – Medicine (MBChB)" document, which appears from the footer to have been "last updated June 2018" (though it is unclear when it was last published). It reflects the various selection criteria set out above. In response to the question "Can I get into Medicine directly from school?", the document states:

> No. Applicants completing a secondary qualification in New Zealand or overseas are **not** eligible to apply directly for the MBChB programme at the University of Auckland.
>
> There are only two application categories into the MBChB programme, both of which also require an applicant to sit the UMAT (see p. 3)
>
> …

> Domestic graduates must have completed a full-time degree/degrees from a New Zealand university with a minimum of GPA 6.0 (B+ average) to be eligible for consideration for an admission interview. Last year of full-time study in a completed qualification must not have been more than 5 years prior to the year. Where an applicant has completed more than 3 years full-time study (including Honours and Masters), the best 3 years will be considered in GPA calculations.
>
> (emphasis in original)

The parties' submissions

Ms Roe's submissions

[37] Ms Roe's submissions largely traversed the factual background as set out above. She also makes various submissions about the University of Waikato's conduct, which as noted earlier, is not the subject of these proceedings. She also makes generalised submissions about universities refusing "to allow students the academic freedom to work to international standards of scholarship", which again it is not necessary to discuss on the present application.

[38] More closely tied to her pleaded claim, Ms Roe submits that the Act distinguishes between "eligibility" and "selection", and that pursuant to the Act, she was at all times *eligible* to be enrolled in the MBChB 2019 and 2020 programmes. She says that "the public Universities of New Zealand refuse to accept that domestic adults are eligible to be enrolled in the programmes of study they apply to". Ms Roe further submits that the University does not have authority to construct by-laws that violate the Act, which does not empower the University to set "eligibility criterion" for domestic adults. She says that the University refused to process her application at all, "on grounds they (unlawfully) deemed her 'ineligible'". In a similar vein, Ms Roe says there were no grounds for the University to have advised that she needed to complete further study in order to be "eligible" for the programme, or to deem domestic students "ineligible" if their most recent tertiary level qualification was more than five years old.

The University's submissions

[39] The University submits that eligibility under the Act is limited by s 224(5), which provides that the council of an institution can, if required by resourcing

limitations, determine the maximum number of students who can be enrolled in a programme. Counsel for the University, Ms Rosic, accordingly submits that for programmes where the number of students has to be limited due to resource constraints, the "entitlement" of any domestic student who is 20 years or older to enrol in that programme is fettered by that limitation. The University accordingly submits that the Limitation Statute, as delegated legislation, is consistent with the Act and constitutes a lawful restriction on eligibility criteria.

[40] Ms Rosic notes that reg 4 of the Limitations Schedule (set out at [31] above) reflects that the academic criteria are used to select successful applicants when the total number of applicants exceeds the number of available places in a limited entry programme. Looking at Ms Roe's case in the 2019 and 2020 years, Ms Rosic submits that there were plainly significantly more applicants (including domestic adults) than available places. Accordingly, she submits it was lawful, and in accordance with the Act, to apply the relevant criteria to Ms Roe's application. Ms Rosic submits that the simple point is that Ms Roe did not meet the recency requirement in either year, hence her applications were declined. Counsel submits that any suggestion that Ms Roe "completed" her MPhil despite the fact she was awarded a failing grade is untenable.

[41] Ms Rosic further submits that it was correct for the University to advise Ms Roe that she needed to undertake the further study she did. Counsel accepts that it could not be known with certainty in any given year how many applicants there would be for the MBChB programme, but given the highly competitive nature of that programme, it was proper, reasonable and lawful for the University to advise students generally of the need to comply with the criteria, so that when it came to assessing students for admission, those students were well placed to meet the criteria. And in the 2019 and 2020 years in particular, the evidence is clear that the programme was very heavily oversubscribed. It was therefore correct for the University to have advised Ms Roe of what she needed to do in order to progress down one of the two pathways for general admission.

[42] As to Ms Roe's concerns about the calculation of her GPA, counsel submits that the University was not obliged to recalculate Ms Roe's GPA, given Ms Roe clearly did not meet the preceding step of the recency requirement. This was the "causative"

reason for her applications to the 2019 and 2020 programmes being declined, as the Ombudsman found.

[43] Finally counsel queries many of the aspects of relief sought by Ms Roe. For example, the University notes that damages are not generally available in a judicial review proceeding: only where a breach of the New Zealand Bill of Rights Act 1990 is alleged can *Baigent* damages be sought, and proceedings where *Baigent* damages are not sought should not be expanded to include them.[10] Counsel notes that Ms Roe filed, but then did not proceed with, separate tort claims in this regard.

[44] Ms Rosic accordingly submits that even if Ms Roe's application were to be successful, the only relief that should be granted would be a declaration. She submits that the decision to not grant Ms Roe entry into the 2019 and 2020 MBChB programmes is now past, and hence remitting it back to the University would be futile, as would recalculating her GPA and rank score. Ordering the University to grant her entry into the next MBChB intake would cut across the selection criteria and process for enrolment in limited entry programmes, as well as being prejudicial to other applicants who do meet the selection criteria.

Analysis

The approach to enrolment under the Act

[45] I start with the relevant provisions of the Act.

[46] Section 194, set out at [26] above, permits the University to make statutes, and thus the Limitation Statute. But any such statute must not be inconsistent with the Act, and in relation to enrolments, is expressly subject to Part 16. Section 224 forms a part of Part 16 of the Act.

[47] Subsection 224(1) defines an "eligible student", which is determined by reference to subsection (2). That subsection lays out three requirements that must be

[10] *Flett v Dental Council* [2016] NZHC 358, [2016] NZAR 459 at [58]; Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 1208.

met for a person to be *eligible* for enrolment in any programme or training scheme. One of those requirements (s 224(2)(b)) is that the person "holds the minimum entry requirements for the programme or scheme as determined by the council".

[48] But s 224(2) is expressly stated to be "subject to this section". Subsection (3)(a) provides that a person over the age of 20 does not need to satisfy two of the three requirements to be an eligible student – including s 2(b)'s requirement of holding the minimum entry requirements. As such, in order to be an "eligible student", a person over 20 years of age need only meet s (2)(a)'s requirement that they are a domestic student (or have the approval of the institution's council).

[49] Having determined who are "eligible" students, s (4) goes on to provide that those students are *entitled* to enrol in a programme if they apply. Subsection (4) accordingly recognises a distinction between a student being eligible and being entitled to be enrolled. Again, this subsection is also subject to the rest of the section.

[50] Subsection (5) in turn empowers the relevant institution, if considered necessary due to resourcing constraints, to set a maximum number of students who may be enrolled in a particular programme in any given year (i.e. to determine limited entry programmes). This accordingly places a lawful restriction on an eligible student's *entitlement* to be enrolled.

[51] Finally, s (6) notes that where a maximum number of students for a programme or scheme has been set, and in circumstances where there are more applications for enrolment than places, the council *may* give preference to certain classes of eligible students. But other than permitting the council to prefer certain classes of students when a programme is oversubscribed, s 224 (and the Act generally) is silent as to how the council should or may choose between the pool of eligible students.

[52] In this context, and unless inconsistent with the Act (including Part 16), the council must be permitted to adopt mechanisms or criteria to choose between eligible students in the expressly foreseen scenario of an oversubscribed limited entry programme. *Conceivably* Parliament could have intended that the councils pick randomly from the pool of eligible students. Or perhaps Parliament could have

intended that institutions pick on the basis of who posted their application first. Such mechanisms would, however, be somewhat arbitrary. But there is nothing in s 224 of the Act which prohibits the council of an institution from determining minimum academic criteria as a means of determining which students will be enrolled in a limited entry programme, when that programme is oversubscribed. This is consistent with Act's object of giving institutions as much independence and freedom in their decision making as possible, and is consistent with the efficient use of national resources.

[53] I accordingly summarise s 224's (relevant) 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.

[54] It is relevant to note at this juncture that Ms Roe did not dispute that the University may set "selection" criteria (for the purposes of (c) above), and that adopting academic criteria for that selection process was permissible.

Issue 1: Did the University of Auckland, in relation to the 2019 and 2020 programmes, have the power to impose a recency requirement on domestic students over the age of 20 applying for the MBChB?

[55] As noted, the MBChB is a limited entry programme.

[56] The evidence confirms that both the 2019 and 2020 programmes were significantly oversubscribed. A little more than half of the applicants in each year were domestic students who would have been 20 or older at the time of enrolment. They, including Ms Roe, were accordingly "eligible students" in relation to the programme.

[57] As the programme was heavily oversubscribed in both years, there was nothing unlawful in the University imposing the recency requirement as part of a mechanism for selecting those eligible students who would be offered enrolment. This includes those students who were "eligible students" by virtue of being a domestic student aged 20 years and older (and thus including Ms Roe). 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, as set out at [25] above.

[58] For completeness, and while Ms Roe does not allege the recency requirement is unreasonable or capricious, it has a clear academic purpose, in ensuring a appropriate level of academic consistency and competence among prospective MBChB students. For example, an excessive lapse of time between the relevant degree and the programme to which an eligible student applies could call into question whether the academic ability required to achieve the relevant degree remains current.

[59] I am therefore satisfied the University lawfully applied the recency requirement to Ms Roe's 2019 and 2020 applications. Given the matters raised by Ms Roe on her application, however, it is appropriate to say something about the academic criteria for admission to the MBChB programme more generally.

[60] The manner in which reg 4 of the Limitation Statute is framed suggests that the University may prescribe minimum academic standards to be achieved as a pre-requisite to enrolment in a limited entry programme, that is, even where that programme is not oversubscribed in any given year. But the power to set a maximum number of students is driven by resourcing factors only, and is not related to or driven by academic standards.

[61] Nevertheless, s 224 of the Act plainly envisages that there may, or even will, be minimum entry requirements for an institution's programmes and schemes, given meeting those requirements is one of the three express requirements to be an "eligible student" pursuant to s 224(2)(b). Through the operation of ss 224(2) and (3), it is only domestic students who are 20 years and over (or who the council is satisfied has the requisite capability to undertake the programme) to which the minimum entry requirements do *not* apply. Minimum entry requirements accordingly remain relevant to all other categories of persons who might fall within the scope of an "eligible student." Thus, reg 4 of the Limitations Statute, in empowering the University Council to prescribe academic standards to be achieved as a prerequisite for enrolment in a limited entry programme, is not itself ultra vires the empowering legislation.

[62] In my view, however, it would be inconsistent with the Act – and thus ultra vires the Act – to *apply* minimum entry requirements to domestic students who have obtained the age of 20 years when they have applied to a limited entry programme which is *not* oversubscribed. They are, subject to the fetter set out in s 224(5), *entitled* to be enrolled in such a programme.

[63] So, for example, in the event only around 50 persons applied for the MBChB programme (and thus well under the cap of 257), it would be unlawful for the University to decline enrolment to any applicant who was a domestic student aged 20 years and over. The fetter on their entitlement to enrolment contained in s 224(5) would not come into play. I appreciate, however, that such a scenario is unlikely to come to pass in relation to the MBChB programme, given the evidence that it is highly competitive, as illustrated by the very significant number of applications in the 2019 and 2020 years.

Issue 2: Was the University's decisions to decline Ms Roe's applications to the 2019 and 2020 MBChB programme legal, valid and correct?

[64] It follows from the above discussion that the answer to this issue is "yes", insofar as the decisions were legal and valid. It is not for the Court in an application for judicial review to comment on whether the decision was "correct", from a substantive or merits-based approach.

[65] For the reasons set out above:

(a) At the time of her applications, Ms Roe was a domestic student aged 20 years or over. She was thus an eligible student.

(b) The 2019 and 2020 MBChB programmes were each heavily oversubscribed.

(c) It was therefore lawful for the University to apply criteria to the applicants, including Ms Roe, in order to determine who was to be offered a place in the limited entry programme. There was nothing unlawful in that criteria including the recency requirement.

(d) Ms Roe did not meet the recency requirement. There was no evidence before the University at the time it made its decisions that Ms Roe had "successfully completed, normally in the minimum academic time and no more than five years prior to the date of application, a degree, postgraduate degree or postgraduate diploma from a New Zealand university with a GPA of 6.0 or higher or equivalent."[11] Ms Roe may have had a dispute with the University of Waikato as to the completion of her MPhil, but the point remains that she was not in a position to supply the University of Auckland with evidence of satisfaction of the recency requirement.

[11] Limitations Schedule 2019, reg 1(a)(ii); Limitations Schedule 2020, reg 1(a)(ii).

Issue 3: Was the University's advice to Ms Roe that she was required to undertake further University level study in order to be eligible for the MBChB correct?

[66] Judicial review is concerned with the review of the exercise of public powers, and more particularly, with the review of statutory or public decisions. This aspect of Ms Roe's claim does not relate to any particular decision made by the University, nor falls within the bounds of what might otherwise be considered in the context of a judicial review application. Rather, whether non-contractual advice given by a party to another is or is not correct (and if incorrect, what damages might flow from that) would ordinarily be considered in the context of a tort analysis, or under the rubric of the Fair Trading Act 1986 (to the extent the party giving the advice was "in trade" when doing so). As noted, Ms Roe did not pursue her separate tort claims.

[67] The courts are also hesitant to permit applications for judicial review to expand to incorporate such other claims, including claims for damages. Fundamentally, applications for judicial review, focusing on the lawfulness of decisions taken by statutory or other public bodies, are intended to be heard and determined in an efficient and speedy manner, reflected in a simplified procedure shorn of many of the steps attending to other forms of civil proceedings.[12] In commenting on this approach, in *Attorney General v Dotcom*, the Court of Appeal observed:[13]

> …[w]e consider the objective of dealing with judicial review proceedings in the way that is most convenient and expeditious will provide reason for a High Court Judge to be cautious about allowing the expansion of a judicial review claim by the addition of a claim for damages. We endorse what this Court said in *Orlov v New Zealand Law Society* in that regard, and stress that it is the expedition of the application for *judicial review* that must be the focus.
>
> We do not think there is any point in our setting out particular guidelines or specifications in which non-judicial review claims can be added to judicial review claims. Ours is not a legislative role. However, we accept the general thrust of Mr Boldt's submission that the objective of maintaining the simplicity of the judicial review procedure should not lose sight of when applications to extend a claim beyond the initial judicial review claim are made.
>
> (emphasis in original)

---

12 For example, discovery and viva voce evidence.

13 *Attorney General v Dotcom* [2013] NZCA 43 at [47].

[68] As Ms Roe submitted at the hearing, the Court of Appeal in *Attorney-General v Dotcom* noted there are no decisions creating absolute rules in this regard. But the Court's observations set out above plainly guide what might ordinarily be expected in the context of judicial review proceedings and hearings.

[69] Allegations of "mis-advice", and damages claims as a result, are accordingly not suitable for determination on an application for judicial review. For completeness, however, I make the following observations on Ms Roe's claims of mis-advice.

[70] Ms Roe's amended statement of claim says the advice was given to her "from 2013". The University could not locate any such advice in 2013, and Ms Roe did not produce any. The University accepts it gave such advice to Ms Roe in 2014, 2015, 2016 and 2018, but says that the advice was correct.

[71] It appears the advice, at least in some instances, used the term "eligible"; in other words, Ms Roe needed to meet the various academic criteria in order to be "eligible" for the MBChB programme. It is the use of the word "eligible" in such advice, and in the communications with Ms Roe discussed earlier in this judgment, with which Ms Roe takes issue. She says the University did not have the power to impose *eligibility* criteria on domestic students aged 20 years or over.

[72] In that context, Ms Roe is strictly right. Who will be deemed an "eligible student" for the purposes of the Act is defined by s 224(2). For the reasons set out above, holding certain minimum academic requirements does not apply to domestic students aged 20 years and over.

[73] But in my view, it is plain from the various communications and materials that the University was using the term "eligible" in its common parlance, in the context of a limited entry programme, rather than in the statutory context of who can form part of the broader pool of "eligible students" for the purposes of s 224. Further, and pragmatically, in the context of a highly competitive programme such as the MBChB, it is no doubt appropriate for the University to communicate to students in advance the minimum academic requirements for entry into the programme, so that in the event of oversubscription, those who have applied are in a position to be considered for

enrolment. There would likely be significant complaint if the University did not communicate these requirements. And as noted, those minimum academic requirements will still be relevant to others falling within the pool of "eligible students" pursuant to s 224(2), who are not domestic students over 20 years in any event.

[74] These matters do not, however, alter the outcome of Ms Roe's application for judicial review, which concerns the lawfulness of the University's decisions to decline her application to enrol in the 2019 and 2020 MBChB programmes. As concluded above, those decisions were lawful.

Issue 4: Is the University obliged to recalculate Ms Roe's GPA and rank score?

[75] Given the outcome on the earlier issues, this issue does not arise for determination. Again, I make some brief observations only.

[76] The University concedes that it miscalculated Ms Roe's GPA. This meant that her rank score (given provisionally on the basis that she would have provided evidence by the relevant deadlines of having successfully completed her MPhil) was lower than it should have been. Given that I find the University was permitted to decline Ms Roe's enrolment applications because she did not meet the recency requirement, there is no legal obligation on the University to recalculate her GPA. Even if her GPA had been correctly calculated at the time, Ms Roe would still not have met the recency requirement. Accordingly, there would be no practical utility in ordering the University to recalculate Mr Roe's GPA.[14]

Issue 5: Is Ms Roe entitled to relief?

[77] As will be apparent from the above, I do not consider that Ms Roe is entitled to any relief.

---

[14] In *Just One Life Ltd v Queenstown Lakes District Council* [2004] 3 NZLR 226 (CA), the Court of Appeal observed at [39] that "if some form of relief could have a practical value then it ought to be granted."

Result and costs

[78] Ms Roe's application is dismissed.

[79] The parties are encouraged to agree costs between themselves. If they cannot, the University may file a costs memorandum within **15 working days** of the date of this judgment, with any memorandum in response by Ms Roe to be filed within a further **five working days**. No memorandum is to be longer than three pages in length. I will thereafter determine costs on the papers.

_____

Fitzgerald J

Chapter 2

Judgment of Justice Fitzgerald as to Costs (8 June, 2021)

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-795
[2021] NZHC 1331

UNDER	Judicial Review Procedure Act 2016
IN THE MATTER	of an application for judicial review of decisions made pursuant to the Education Act 1989 Part 16 s 224(1)-(6) and the Education Amendment Act 2011 s 224(1)-(6)
BETWEEN	KELLY ALEXANDRA ROE Applicant
AND	THE UNIVERSITY OF AUCKLAND Respondent

Hearing: 30 March 2021

Counsel: I Rosic and ZA Brentnall for Respondent

Appearance: KA Roe, Applicant in Person

Judgment: 8 June 2021

JUDGMENT OF FITZGERALD J
[As to costs]

This judgment was delivered by me on 8 June 2021 at 2.30pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……..

Solicitors: Gilbert Walker, Auckland

To: K Roe, Auckland

Introduction

[1] In a judgment delivered on 3 March 2021, I dismissed Ms Roe's applications for judicial review of the University of Auckland's (the University's) decisions to decline her applications for admission to the Bachelor of Medicine and Bachelor of Surgery (MBChB) in 2019 and 2020.[1]

[2] At the conclusion of my judgment, I encouraged the parties to agree costs. They have been unable to do so and this judgment accordingly determines the costs of Ms Roe's judicial review proceedings.

Applicable legal principles and their application in this case

[3] The starting proposition is that costs follow the event and, therefore, in the ordinary course, will be awarded to the successful party overall.

[4] In this context, I am satisfied that the University was the successful party overall. As noted, I dismissed Ms Roe's applications for judicial review.

[5] I also note that Ms Roe did not file substantive submissions on the question of costs, though she did file a schedule of costs to be awarded to her as the plaintiff or applicant in her judicial review claims.[2] But on the basis that the University was the successful party overall, it would be unprincipled to make a costs award *against* it.[3] Rather, any suggested disqualifying conduct on the part of a successful party can be recognised by a reduction in the amount of costs that would be otherwise awarded, or in appropriate cases, letting cost lie where they fall.[4]

[6] For these reasons, I decline to make a costs award in Ms Roe's favour. The appropriate outcome is a costs award in the University's favour. The issue then becomes the quantum of that award.

---

1 *Roe v University of Auckland* [2021] NZHC 368.
2 For example, Ms Roe's schedule claims costs for commencing a claim.
3 See, for example, *Weaver v Auckland Council* [2017] NZCA 330, (2017) 24 PRNZ 379 at [28].
4 *Water Guard NZ Ltd v Midgen Enterprises Ltd* [2017] NZCA 36 at [13].

[7] The University seeks scale costs on a 2B basis, plus disbursements, totalling $21,859 (as set out in the schedule to this judgment). The University refers to authority to the effect that as a matter of principle, self-represented litigants should be subject to the same costs awards as any other party.[5] The University also refers to recent examples of the Court awarding 2B costs (as well as increased costs) against unsuccessful self-represented applicants for judicial review.[6]

[8] Counsel for the University acknowledges that the courts will sometimes depart from the general costs rule in judicial review proceedings, including where the applicant established a ground of review but failed to obtain a remedy in the exercise of the court's residual discretion. The normal costs principles may also not apply in cases in which the events at issue were so unusual that it was inevitable there would be an application for judicial review, or on matters of distinct public importance.

[9] The University submits that no such special circumstances arise in this case. It notes that Ms Roe failed to establish any ground of review she pursued and says that her application was dismissed following a straightforward determination and application of the law.

[10] I am not satisfied there are any special circumstances which warrant departure from the ordinary costs rules in this case. Ms Roe's applications for judicial review were focussed on her own applications for admittance to the MBChB degree for the 2019 and 2020 years. Determination of the applications was not therefore of broader or special importance.

[11] Nevertheless, I am satisfied that it is appropriate to reduce somewhat the costs award to be made in the University's favour. First, I do not consider it appropriate to certify for second counsel's appearance at the hearing. The amount of $1,195 for step 35 will therefore be excluded from the award.

[12] I also consider it appropriate to reduce the amount awarded for step 32, preparation for an affidavit hearing. In the ordinary course, this would be awarded on

---

5 *Oceanic Palms Ltd v Danforth Nominees Ltd* CA179/05, 15 December 2005 at [18].
6 Such as *Prescott v Thompson (No. 3)* [2020] NZHC 1858 at [9].

the basis of two days at the relevant scale rate. In this case, however, the University's written submissions were predicated on the basis that the University had the power to determine eligibility criteria for the various programmes and courses offered by it. As the University's oral submissions developed at the hearing, however, it was accepted that "eligibility" for admission to any programme was prescribed by the (then) Education Act 1989 (the Act) (the relevant statute in force at the time), and in particular s 224 of that Act. It was accepted in counsel's oral submissions that in the case of domestic students aged 20 years and over, and where a limited entry programme is under subscribed, the University would not have the power to deem certain students "ineligible", such students in those circumstances being entitled to enrol in the programme. As was clear in this case, however, the MBChB was a limited entry programme and the evidence confirmed that both the 2019 and 2020 programmes were significantly over subscribed.

[13] I therefore concluded that the University lawfully applied the "recency requirement" (as described in my substantive judgment at [5](b)) to Ms Roe's 2019 and 2020 applications. I observed, however, that Ms Roe was strictly correct that in certain correspondence, the University had used the term or concept of "eligibility", when it did not in fact have a power to impose *eligibility* criteria on domestic students aged 20 years or over.[7]

[14] Given the (slight) shift between the University's written submissions and the matters accepted on its behalf at the hearing itself, I consider the appropriate course is that the daily allowance for step 32 be reduced from two days to one day, and therefore for an amount of $2,390 to be awarded for that step.

[15] There is accordingly an award in favour of the University against Ms Roe in the sum of $18,274 which includes a disbursement of $110 for filing a statement of defence. The costs are comprised as follows:

---

[7] *Roe v University of Auckland* [2021] NZHC 368 at [71]-[72].

Step	Step Number	Days	Total
Commencement of defence by respondent	2	2	$4,780
Preparation for first case management conference	10	0.4	$956
Filing memorandum dated 9 October for first case management conference	11	0.4	$956
Appearance at first case management conference	13	0.3	$717
Preparing affidavits dated 7 October 2020, 18 November 20, and 21 December 2020 for one day hearing	30	2	$4,780
Additional allowance for the party who prepared the common bundle	31	0.5	$1,195
Preparation for affidavit hearing	32	1	$2,390
Appearance at affidavit hearing for principal counsel	34	1	$2,390
Overall Total:		**7.6**	**$18,164**

_____

Fitzgerald J

SCHEDULE

Step (Schedule 3, High Court Rules)		Time allocation (days)	Sum
2	Commencement of defence by respondent	2	$4,780
10	Preparation for first case management conference	0.4	$956
11	Filing memorandum dated 9 October 2020 for first case management conference	0.4	$956
13	Appearance at first case management conference on 15 October 2020	0.3	$717
30	Preparing of affidavits dated 7 October 2020, 18 November 2020 and 21 December 2020 for one day hearing	2	$4,780
31	Additional allowance for the party who prepared the common bundle (University)	0.5	$1,195
32	Preparation for affidavit hearing	2	$4,780
34	Appearance at affidavit hearing on 7 December 2020 for principal counsel	1	$2,390
35	Appearance at affidavit hearing on 7 December 2020 for second counsel	0.5	$1,195
Subtotal costs			$21,749
Disbursements (filing fee for statement of defence)			$110
TOTAL			$21,859

Chapter 3

Minute of Justice Miller (31 August, 2021)

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA132/2021
[2021] NZCA 423

BETWEEN	KELLY ALEXANDRA ROE Appellant
AND	UNIVERSITY OF AUCKLAND Respondent

Counsel: Appellant in person
I Rosic and Z A Brentnall for Respondent

Judgment: (On the papers) 31 August 2021 at 12.30 pm

JUDGMENT OF MILLER J
(Review of Registrar's Decision)

The application for review is declined.

REASONS

[1] Ms Roe seeks review of a Registrar's decision declining her application for a waiver of security for costs.

[2] I approach the application on the basis that Ms Roe is unable to pay the security. She is in receipt of a Supported Living Payment, and the filing fee was waived. I appreciate that insistence on security will likely bring the appeal to an end.

[3] There is no reason to think Ms Roe would escape liability for costs in the event her appeal fails. She is pursuing her appeal for her own advantage, not to advance a real issue of public importance.

[4] The question accordingly is whether the appeal is one which a solvent appellant would reasonably wish to prosecute.[1] I accept that were Ms Roe to succeed she would obtain something of value, the right to study medicine at the University. The argument that, although impecunious, she should be required to post security rests on the proposition that she has minimal if any prospects of success. It is necessary to be circumspect when making such an assessment as a single judge at this pre-hearing stage.

[5] The Registrar concluded that there is no real merit in the appeal. Ms Roe argues that she was entitled to be enrolled in 2019 and 2020; further, that the University was not entitled to enrol teenage applicants in the heavily oversubscribed course except to the extent there were too few adult applicants. The Registrar could see no prospect of the University being required to enrol Ms Roe.

[6] I agree. I do not think the appeal is sufficiently arguable that a solvent appellant would reasonably seek to bring it. Fitzgerald J's reasoning — to the effect that the legislation allows the University to impose entry requirements that all applicants must meet — seems unanswerable, and the consequences of Ms Roe's analysis would be startling to say the least; all adult applicants who meet the recency requirement could enrol as of right regardless of capacity constraints. Further, on the facts Ms Roe did not meet the recency requirement because she had not shown that she had completed her MPhil Degree at the University of Waikato within the past five years. She claims she had met Waikato's requirements but the point is that she failed to prove it. It is no mere slip: it appears that she has separate proceedings against Waikato in connection with its decision to deny her the degree.

[7] The application for review is declined.

Solicitors:
Gilbert Walker Lawyers, Auckland for Respondent

---

1 *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737 at [35].

Chapter 4

Minute of Justice Goddard (26 Oct, 2021)

IN THE COURT OF APPEAL OF NEW ZEALAND
I TE KŌTI PĪRA O AOTEAROA

CA132/2021
CA357/2021

	BETWEEN	KELLY ALEXANDRA ROE Appellant
	AND	UNIVERSITY OF AUCKLAND Respondent

Counsel:	Applicant in person I Rosic and Z Brentnall for Respondent
Date of Minute:	26 October 2021

MINUTE OF GODDARD J

---

[1] In CA132/2021 Ms Roe appeals against a High Court judgment dismissing her application for judicial review of decisions made by the University of Auckland.[1] In CA357/2021 Ms Roe appeals against the High Court costs decision in relation to her judicial review proceedings.[2]

[2] In CA132/2021, Ms Roe applied to dispense for security for costs. That application was declined by the Deputy Registrar, whose decision was upheld by Miller J on review.[3] Ms Roe has applied for leave to appeal to the Supreme Court against that decision. In CA132/2021, the date for compliance with r 43 of the Court of Appeal (Civil) Rules 2005 has been extended to 18 November 2021.

---

1 *Roe v University of Auckland* [2021] NZHC 368.
2 *Roe v University of Auckland* [2021] NZHC 1331.
3 *Roe v University of Auckland* [2021] NZCA 423.

[3] In CA357/2021, Ms Roe applied for security for costs to be dispensed with. On 8 October 2021 the Deputy Registrar held that security for costs should not be dispensed with in this appeal as a reasonable and solvent litigant would not proceed with it and no issue of public interest arises. However if the appeal is consolidated or heard together with the substantive appeal CA 132/2021, security for costs should not be required in this appeal.[4]

[4] Ms Roe has applied for the two appeals to be heard together. The respondent agrees to the appeals being heard together, subject to security for costs remaining payable in respect of each appeal.

[5] It is plainly sensible for the appeal from the substantive High Court decision and the appeal from the High Court costs decision to be heard together. I will make a direction to that effect.

[6] In these circumstances, the Deputy Registrar considered that security for costs should not be required in respect of the costs appeal (CA357/2021). I agree: a single set of security for costs will be sufficient in respect of the two appeals, if heard together. I will therefore make a direction dispensing with security for costs in CA357/2021.

[7] It is also necessary to align the timeframes for complying with r 43 in the two appeals, if they are to be heard together. As noted above, in CA132/2021 r 43 has been suspended to 18 November 2021. The time for complying with r 43 in CA357/2021 was 21 October 2021. I will extend that date to 18 November 2021, to align it with CA132/2021.

[8] I make the following directions:

(a) CA132/2021 and CA357/2021 are to be heard together;

(b) Security for costs is dispensed with in CA357/2021;

---

[4] At [16].

(c) The date for compliance with r 43 in CA357/2021 is extended to 18 November 2021.

Goddard J