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

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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.

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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).
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> (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).
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> (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

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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**
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> 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)

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Kelly Roe - Applicant