UNAPPROVED

THE COURT OF APPEAL

Record No.: 2020/197

Donnelly J
Faherty J.
Ní Raifeartaigh J.

BETWEEN/

ELIJAH BURKE

RESPONDENT

- AND -

THE MINISTER FOR EDUCATION AND SKILLS

APPELLANT

- AND -

Record No.: 2020/207

BETWEEN/

N.P. (A MINOR) SUING BY HER MOTHER AND NEXT FRIEND B.P.

RESPONDENT

-AND-

THE MINISTER FOR EDUCATION AND SKILLS

APPELLANT

JUDGMENT of the Court delivered on the 9th day of March, 2021

Contents

Introduction

1. The Covid-19 pandemic arrived in Ireland in the Spring of 2020. From mid-March onwards, the country went into a cycle of lockdown and restriction-easing which continued throughout 2020 and into 2021. Of the many severe challenges posed by the public health crisis, one of them was in the sphere of secondary education. It soon became apparent that the holding of the usual Leaving Certificate examination in the Summer of 2020 would be impossible because of the risks posed to public health from large numbers of students congregating in confined spaces. Some method had to be devised to assess the work of the Leaving Certificate class of 2020 in order to enable them to move on with their lives, be it on to further third-level education or into the world of work.

2. In May 2020, the Government announced a non-statutory scheme known as the Calculated Grade Scheme ("CGS" or "the Scheme"). It operated from a very different model to the usual independent examination format, but it enabled approximately 60,000 students to receive grades at the conclusion of their secondary schooling. Central to the Scheme were features such as assessment by professional and registered in-school teachers; alignment of grades within the school; and oversight by principal teachers.

3. The two respondents, both of whom had been "home-schooled", were excluded from the Scheme. In the case of the first respondent, this was because he had been home-schooled by his mother (a registered teacher), the consequence of which was that she had a conflict of interest in awarding him a calculated grade. The second respondent had been home-schooled with the assistance of teachers who were not registered. These proceedings concern their exclusion from the Scheme. Both respondents were successful in persuading the High Court that their exclusion from the Scheme was unreasonable and irrational in the sense in which those terms are used in judicial review proceedings. The Minister appeals and contends that

the High Court judge fell into error on a number of fronts.

4. The appeals raise many questions, including whether the factual matrix presented in this case engages any constitutional rights on the part of the respondents, whether or not there has been an exercise of executive power pursuant to Article 28.2 of the Constitution, and the appropriate judicial review test to be applied in the event that both constitutional rights and the executive power are both engaged. The judgment also explores the nature and extent of the rights and powers of parents, children and the State as regards education under Article 42 of the Constitution and, in particular, the position of home-schooled children

PART 1: PROCEDURAL HISTORY AND RELEVANT FACTS

Procedural History

5. The respondents' cases were heard separately in the High Court; the case of the first respondent was heard first in time. These appeals come before the Court following Orders made by the High Court (Meenan J.) on the 28 August 2020 ("the *Burke* case") and the 30 September 2020 ("the *N.P.* case"). In both cases, the High Court granted relief to the applicants/respondents, quashing the decision of the respondent/appellant (hereinafter "the Minister") to refuse to provide a "calculated grade" for the applicants/respondents. The High Court made a declaration that the refusal to provide a calculated grade to Mr. Burke (hereinafter referred to as "the first respondent") in circumstances where he was home schooled and his teacher was his parent was "*arbitrary, unfair, unreasonable and contrary to law*". In the case of N.P. (hereinafter referred to as "the second respondent") the High Court made a declaration that the refusal to provide a calculated grade in circumstances where the second respondent was home schooled by a teacher who was not a registered teacher was "*irrational, arbitrary, unfair and unlawful*".

6. The second respondent's case was commenced in the High Court after judgment had been delivered in the first respondent's case. As will become apparent, the decision in the

second respondent's case drew heavily on the decision in the first respondent's case. The appeals were heard together and while there is a difference between the manner in which each respondent was home-schooled, there was much similarity in the evidence, the legal underpinnings of the claims and the response to those claims. For that reason, we will deliver a single judgment. The Minister has highlighted the difference between each respondent's response to the notice of appeal. This will be dealt with under the heading of "Are the claims moot?" below. As far as possible, the claims, evidence and legal submissions will be dealt with together and only identified separately as required in the circumstances.

The Chronology of Events

The Government Decision

7. On the 8 May 2020, the Government announced that in light of public health concerns, it decided that the Leaving Certificate examinations (which by then were scheduled to commence on the 29 July 2020) would be postponed, with students to be offered the option of accepting calculated grades and/or of sitting the Leaving Certificate examinations at a later date. The agreement made at the "Cruinniú Rialtais" was published at the time. Of most relevance to these proceedings, it recorded that it was agreed:

> (i) "to postpone the Leaving Certificate Examinations previously proposed to take place in late July and August 2020 until such time as it is safe for State examinations to be held",
>
> (ii) "to put in place a system to be operated by the [Minister] on an administrative basis pursuant to executive power of Government under Article 28.2 of the Constitution, whereby Leaving Certificate candidates could opt to have calculated grades issued to them by the Minister in order to facilitate their progress to third-level education or the world of work in Autumn 2020, and such system shall include the following elements:

(a) the professional judgement of each of the candidate's teachers which shall not be subject to appeal;

(b) in-school alignment to ensure fairness amongst candidates at school level;

(c) approval by the school principal of the estimated scores and rankings of students in the school;

(d) a process of standardisation at national level to ensure fairness amongst all candidates; and

(e) [...]

(iii) to deliver the system through a non-statutory executive office in the Department of Education and Skills and a non-statutory steering committee made up of relevant experts, who will oversee the quality and independence of the process under the authority of the Minister; and

(iv) to run the written Leaving Certificate examinations for those who wish to sit the examinations as soon as it is practicable and safe to do so;"

8. The Government memorandum noted various matters including the serious concerns regarding "the feasibility of running the examination in July/August 2020 in a manner that would be fair to students or safe for students, their families and the personnel required to run the examination". The memorandum also noted that "the calculated grades model would use estimated examination scores from students' teachers and schools and would also involve standardisation at national level to ensure equity of treatment for candidates."

9. Of importance is that the Government decision does not mention out-of-school students, and in particular, home-schooled students. Instead the decision focuses on the situation of in-school students. See in particular the items at (ii)(a) (b) and (c) above, which are items that the CGS <u>shall</u> include.

The Minister's Implementation

10. As soon as the Government announced its decision on the 8 May 2020, the Department of Education and Skills ("the Department") published "A Guide to Calculated Grades for Leaving Certificate Students 2020" ("the Guide") later updated on the 21 May 2020. That Guide stated that a calculated grade results from the combination of two data sets; a **school-based** (bolded in the Guide) estimation and data available from the Department including data on past performances of students in each school and nationally. On the same date, it published detailed guidance for schools, contained in a document entitled "Calculated Grades for Leaving Certificate 2020 Guide for Schools on Providing Estimated Percentage Marks and Class Rank Orderings" (hereinafter the "In-School Guidelines").

11. In affidavits sworn in each proceeding, Mr. Dalton Tattan, Assistant Secretary of the Department averred that the Guide detailed the six principles underpinning the CGS: teacher professionalism; support for students; objectivity; fairness and equity; collaboration; and timeliness. Mr. Tattan confirmed that the Guide explained that a calculated grade was based upon a combination of data including school information. Mr. Tattan averred in his affidavits in both proceedings that it was a newly established office, the Calculated Grades Executive Office ("the CGEO"), that put in place a separate process in respect of out-of-school students. He stated that the CGS has been developed primarily as a school-based model. He averred that in announcing the CGS it had been clear that there would be a separate process for students studying independently to apply to receive calculated grades and that applications would be dealt with on a case by case basis. We note there was a delay in making a public announcement to that effect.

12. On the 25 June 2020, the Minister announced the Leaving Certificate Calculated Grades application process for out-of-school students, set out in a document entitled "Guide

to Calculated Grades for Out-Of-School Learners" (hereinafter the "Out-of-school Guidelines"). As deposed to by Mr. Tattan, the announcement which accompanied the publication of the Out-of-school Guidelines stated that all 923 out-of-school students (taking 1,835 subjects) were being contacted directly to notify them of the application process for calculated grades. The announcement stated that the process provided for in the Out-of-school Guidelines sought to mirror the fundamental principles which applied to the In-school Guidelines.

13. According to Mr. Tattan, both schemes were "grounded in principles of objectivity, fairness and equity [...] The arrangements would seek to include as many out-of-school students as possible in the CGS provided that there was credible, satisfactory evidence from an appropriate source, on which an estimated percentage mark can be based."

14. According to Mr. Tattan, as the State Examinations Commission ("the SEC") did not have the statutory power to operate a CGS, the processes provided for in both the In-school Guidelines and the Out-of-school Guidelines were to be overseen by the CGEO. Mr. Tattan also averred that "the role of the CGEO is to determine whether there is an appropriate source from which to accept an estimated percentage mark".

15. It is important to remember that "out-of-school" students encompass a far wider cohort than home-schooled children. The out-of-school students could include those who are repeating their Leaving Certificate, those attending a centre of learning recognised by the Department or, if not recognised by the Department, where one person involved in the process is or was a registered teacher.

PART 2: THE CALCULATED GRADES SYSTEM

The CGS for in-school students

16. For in-school students, the CGS includes the following main elements:

- the professional judgment of each of the candidate's teachers which shall not be subject to appeal;
- in-school alignment to ensure fairness amongst candidates at school level;
- approval by the school principal of the estimated scores and rankings of students in the school;
- a process of standardisation at national level to ensure fairness amongst all candidates; and
- a right of appeal by candidates, confined to the verification of the relevant data.

17. The Guidelines provide that the role of the school was to provide marks and rankings which reflected:

(i) an estimate of the percentage mark in each subject that each student was most likely to have achieved if he/she had sat the Leaving Certificate examinations in 2020 under normal conditions; and

(ii) a class ranking for each student in each subject *i.e.* a list of all the students in each individual class group for a particular subject in order of their estimated level of achievement.

18. Providing estimated marks in the school-based phase of the CGS required four main steps:

(i) the teacher's estimation of student's marking and rankings;

(ii) school alignment of marks for a subject through a subject alignment group comprising teachers who were teaching the subject to Leaving Certificate students in 2020;

(iii) oversight of the alignment by the school principal; and,

(iv) transmission of the marks and rankings for national standardisation.

19. Teachers were requested to use their professional judgment, drawing on existing records and available evidence, to arrive at an estimated mark for each student and a student rank order for each class. They were required to engage with their subject alignment group to make sure that all teachers of the subject with final-year Leaving Certificate classes applied a similar standard in respect of the same subject. In the case of a subject for which there was only one teacher with a class for examination, in relation to the in-school alignment process, they were required to engage either with the deputy principal or, subject to agreement by the principal, with another teacher of the same subject. When the school's estimated marks and class rank orders were finalised, the principal was to arrange for the inputting of the data and its transmission to the CGEO for the national standardisation process. The data was transmitted to the CGEO by way of a Form A and a Form B.

20. As explained by Mr. Tattan in his affidavits, the process that would then ensue was as follows:

> "As regards standardisation of data by the Department, research makes clear that because teacher judgments are made in the context of each school, they need to be examined and adjusted at a national level to ensure comparability across different schools and that a common national standard is applied [...] This standardisation process brings the two data sets into alignment with each other and is used to ensure the Calculated Grades reflect standards that are properly aligned across schools and with a common national standard..."

21. Once in receipt of a calculated grade a student could appeal. As the process of appeal is not relevant to these proceedings, it is unnecessary to recite the details of that process. Of note however is that if a student remained unhappy with the calculated grade awarded, that student would have the opportunity to sit the Leaving Certification examination if such a

sitting could be organised. (As matters transpired, this option became available in November 2020).

22. Paragraph 16 of the In-school Guidelines addressed the position of students studying one or more subjects outside of the school. The Department's approach is explained by Mr. Tattan in the following terms:

> "Where an In-school Student is studying a subject outside of the school, the In-school Guidelines provide that every effort should be made to provide an estimated mark where the principal is confident that there is sufficient evidence of the student's achievement to make an objective judgment. If the student is receiving tuition outside the school setting that is provided by a registered teacher, the principal should request an estimate of performance from that teacher and discuss with him/her the basis for the estimate that they provide. The teacher is to complete Form A while the principal is required to complete and sign a Form C [...] to confirm that there is evidence to support the judgment reached. If the student is not being taught by a registered teacher, the principal will need to consider whether there is sufficient evidence, including through a tutor, on which to base an estimate. However, if, having made every effort to identify evidence on which to base a judgment, the principal is of the view that the school has insufficient evidence on which to base an estimate, the Form D [...] should be completed."

23. The In-school Guidelines also provide for resolution of a conflict of interest arising when a teacher in the school is also the parent of a child due to sit the Leaving Certificate and how it should be handled by the school. Para. 22 states:

> "The principles of equity, fairness and objectivity are paramount in the CGS. If there is a student in a class about whom there is an actual or perceived conflict of interest involved in giving an estimated mark to, such as a son, daughter, sister, or

brother, this should be drawn to the attention of the principal. The teacher may still need to assist in the process, by handing over data or factual information, but should not be involved in any judgment process that relates to that student as an individual. There will be additional oversight by the principal/deputy principal in such cases. This will include the principal/deputy principal countersigning Form A to confirm that appropriate arrangements were put in place and that he/she provided additional oversight and approval of the estimated mark. In instances where the principal is the teacher concerned, the deputy principal will make the necessary arrangements and oversee all tasks in relation to this student and this student's class."

The CGS for out-of-school students

24. The CGS for out-of-school students, as found in the Out-of-school Guidelines, was predicated on the following:

- Recognition that a separate process was required for students studying independently to apply to receive calculated grades;
- Out-of-school students could apply to receive calculated grades and the applications would be dealt with on a case-by-case basis;
- Every effort would be made to obtain sufficient evidence to provide out-of-school students with a calculated grade although this might not be possible in all cases.

25. Having averred that the CGS system was developed primarily as a school-based model, Mr. Tattan referred to the model for students studying independently. The over-arching requirement was that "the process be fair and equitable for all students". It was considered that Calculated Grades could not be provided to one cohort of students, however small that cohort, on the basis of evidence "which is not as robust or as transparent as that required from other students". Equally, grades could not be provided to one cohort of

students "on the basis of an individualised assessment of presented work when that option was not made available to all students."

26. Mr. Tattan explained the Department's thinking:

"In the interest of equity and fairness to all, it was essential that the principles underpinning the system of Calculated Grades, and in the process of arriving at a Calculated Grade for out-of-school students, mirrored as far as possible the process that applies to all other students entered for the 2020 Leaving Certificate examinations. To this end, a set of principles to guide the CGS for this particular category of students was put in place".

27. Mr. Tattan goes on to outline those principles, referring, *inter alia,* to:

- Teacher professionalism, which requires that "members of this regulated profession can be relied upon to uphold the relevant professional standards";
- Support for students, so as to ensure that "learners out of school are supported and their needs provided for to the greatest degree possible";
- Objectivity to ensure that in the case of out-of-school students there exists "a range of evidence as similar as possible to the evidence required for the in-school process in order to underpin and support the judgments that are made. All involved must ensure that no bias, unconscious or otherwise, influences the decisions made in relation to a student's expected performance";
- Fairness and equity, so as to ensure that the CGS for out-of-school students "be such that it neither advantages nor disadvantages, through any grades ultimately awarded, any student in the 2020 Leaving Certificate cohort in its approach and delivery of calculated grades";
- Collaboration; and,

- Timeliness, to ensure that the CGS is completed in time to ensure that out-of-school students are issued results at the same time as for all other students.

28. As deposed to by Mr. Tattan, "it is essential that the estimation process [for out-of-school students] is equally robust in order that it is fair to all students. The estimation must be based on credible, satisfactory evidence from an appropriate source which must include the professional judgment of a teacher/tutor."

29. The Out-of-school Guidelines acknowledged that out-of-school students had been preparing for and intending to sit the Leaving Certificate public examinations in a variety of contexts, and to that end may have:

- received tuition from a teacher or tutor;
- attended lessons or courses at a centre of education outside of the normal post-primary school system which may have included online tuition;
- attended lessons on a part-time basis at a private college *etc.*;
- sat a Leaving Certificate in a previous year; or
- studied for the Leaving Certificate completely independently of any support or assistance from any formal education setting or personnel.

30. For the purpose of arriving at an estimated percentage mark, Section 4.1 of the Out-of-school Guidelines required "the professional judgement of a teacher/tutor and principal or manager of a centre of education (as appropriate)". This professional judgement was to be ensured by either "the requirement that the teacher providing [the] tuition is currently or previously a registered teacher" or that "[the] tuition has been provided by a centre of education that is recognised by the SEC for the purpose of examinations".

The Four Routes

31. Section 4.2 of the Guidelines sets out four different routes available to out-of-school students for sourcing an admissible estimated percentage mark. In summary these are:

a) Where a student may have engaged with a centre of learning (grind school, private college *etc.*) not recognised by the SEC for examination purposes, the teacher/tutor may provide an estimated mark. Oversight on the estimated mark was required to be provided by the principal/manager of the centre in question. One of the people involved in the process must be or have previously been a registered teacher. "In the absence of the involvement of a registered teacher, either in your direct tuition or in the centre of education in which you have been receiving tuition, it will not be possible to accept an estimate" ("Route one").

b) Where a student may have engaged with a centre of learning (grind school, private college *etc.*) recognised by the SEC for examination purposes, the teacher/tutor may provide an estimated mark. Oversight on the estimated mark had to be provided by the principal/manager of the centre. Given that the centre was recognised for examination purposes and will have engaged in the calculated grades for full time students, "the involvement of a registered teacher is not an absolute requirement in this setting" ("Route two").

c) Where a student may have engaged in tuition with a registered teacher (currently or previously registered) outside of any centre of learning, the teacher could submit an estimated percentage mark provided that they were satisfied that there was satisfactory, credible evidence on which to base the estimate ("Route three").

d) In the case of a student repeating the Leaving Certificate, having previously sat the examinations in 2018 or 2019, or where the student may have engaged in tuition on a one-to-one basis with a tutor "who [was] not or ha[d] never been a registered teacher", or engaged with a centre of learning that was not recognised by the SEC for examination purposes, and where neither the tutor nor the

principal/manager was a registered teacher, it might be possible for the CGEO to make a connection with the school in which the student sat the examinations previously for the purposes of collaboration by the principal of the school with the tutor such that the principal might be satisfied to sign off on an estimate even though the student had not been attending the school as part of his/her study for the Leaving Certificate examinations, 2020. The tutor was required to provide additional evidence, to the satisfaction of the principal, of the student's further engagement with learning since his/her previous sitting of the Leaving Certificate ("Route four").

32. The Out-of-school Guidelines made clear that in each of the above four routes, it might be possible for a student to receive a calculated grade. The Out-of-school Guidelines go on to state that in the absence of evidence being available in respect of any of the four routes set out in s. 4.2, it would not be possible for a student to receive a calculated grade.

33. According to Mr. Tattan, there were two further categories where it was considered that it would not be possible to provide a calculated grade, explained as follows:

"[54]...The first category relates to cases where a student has engaged in tuition with a tutor who is not, and never has been registered as a teacher and there is no involvement of a learning centre of any kind. In this case it would not be possible to provide a Calculated grade based on an estimated mark. While it is acknowledged that the student has engaged in tuition, the fact that the tutor is not a registered teacher and the student has no connection with a school would undermine the principles underpinning the CGS. Such an approach would not be consistent with the approach for other students and the reliability of the estimated mark could not be guaranteed. In the absence of the involvement in any part of the process of a registered teacher, who is appropriately qualified and who has signed up to the code of professional

conduct applicable to the profession, it would be difficult to stand over the estimated mark.

[55] The second additional category concerned students who are fully independent learners, who have not engaged with tuition of any kind, and who have had no engagement with a school for a previous sitting of the Leaving Certificate in 2018 or 2019 which is within the duration of the programme of study for the current Leaving Certificate. In this case, in the absence of a registered teacher to provide an estimate it will not be possible to provide a Calculated Grade. It would not be fair or equitable to allow the student to provide the estimated mark. Any other third party could not provide the estimate given that they have not engaged with the student's learning in any capacity and therefore there would not be any credible or satisfactory evidence from an appropriate source on which to base the estimate. To facilitate the provision of an estimated mark in this scenario would be highly inequitable given that the students who are attending the school have not been afforded this option."

34. From the above, it is clear that Route three is the only possible route for a student who is entirely home-schooled *i.e.* is studying outside a centre of learning. Accordingly, home-schooled students required the input of a registered teacher in their tuition. Even then, if the registered teacher had a conflict of interest, the Scheme did not permit a student to be assessed for a calculated grade, as illustrated later.

The application process for an out-of-school student

35. The first step in the process for an out-of-school student to obtain a calculated grade required the student to register on the "Calculated Grades Student Portal" operated by the CGEO. Thereafter, the student had to complete the requisite application form identifying the subjects and level in which a calculated grade was sought and identifying his/her teacher for each subject and the "centre" at which the tuition took place. Section 6.1 of the Out-of-

school Guidelines required the teacher/tutor "to consider all evidence available to them in order to arrive at the estimated percentage mark [...] in the subject in which they provided tuition" and "confirm that they have satisfactory, credible evidence on which to base the estimate".

36. The teacher was required to complete a "Form A1", identifying the relevant information considered by the teacher in respect of the student's achievement levels in the subjects in question. The teacher was to then give an estimated percentage mark that he/she believed the student would have achieved had the Leaving Certificate examination taken place. Additionally, the teacher was required to confirm that he/she had no conflict of interest. On receipt of the requisite Form A1, the CGEO would review all the information and decide whether it was possible to accept an estimated percentage mark to allow for the generation of a calculated grade.

Alternatives Considered

37. Mr. Tattan set outs that a number of alternatives for arriving at a calculated grade were considered and dismissed:

> "One alternative was to provide a supplementary assessment on which to base the estimated mark where it is not possible to arrive at a Calculated Grade due to insufficient/unsatisfactory evidence for a subject(s). In order to be objective, fair and equitable the work to be so assessed would have to have been carried out under uniform conditions which could be verified by the Respondent - *i.e.* under the conditions which would normally pertain in a public examination. While this proposal would assist in the provision of evidence in relation to a student's attainment, if the transaction of an examination were possible, then the examinations would have gone ahead. Therefore, all the issues that lead to the postponement of the examinations came into play. Furthermore, the Out-of-school Guidelines clearly state (in paragraph

4.1) that no additional assessments or assignments are to be put in place for the purpose of the CGS. To do so in these cases would create inequity between these students and the remainder of the cohort. If this approach were to be adopted, consideration would have to be given as to whether this option for the arrival at the Calculated Grade would have to be offered to all students in the interest of equity and fairness. Obviously, this would not be feasible or desirable as it would set up an unsuitable parallel route to a Grade.

Another alternative which was considered was in a situation where it is not possible to arrive at a Calculated Grade due to insufficient/unsatisfactory evidence for a subject(s), to use statistical modelling based on performance in other subjects. In instances where there is evidence in relation to other subjects that the student is studying and information on previous performance in other subjects, some consideration was given to, in such situations, exploring the possibility of calculating a Grade in the subject based on the student's performance in other subjects and/or their prior attainment at Junior Cycle. The data provided by schools for each student could be used as part of a statistical modelling process. While such a proposal would address the inability to provide a Calculated Grade in a subject(s) due to lack of satisfactory evidence, there are theoretical and equity issues associated with it that are highly problematic. While attainment in cognate subject areas may provide some measure in the areas if innate ability or aptitude towards particular subject type, it cannot serve as a definitive indicator of attainment in another unrelated subject area. Whereas a statistically most likely grade could theoretically be produced it would not in reality be based on any data that is specific to both the student and the subject. For example, if two students entered for French had similar profiles of achievement in their other subjects, and one was a native speaker of French and the other not, then this method

would be nonetheless produce identical outcomes for them in French. This would clearly not be credible. Any grade in a subject achieved through this means could not be considered comparable to a grade received through the estimated percentage mark and rank order processes. Another question that would arise is that any other student, even where it was possible to arrive at a Calculated Grade, could seek to argue that they had the right to a similar option in relation to their Calculated Grades and be allowed to choose the better of the two. This would lead to an entirely unsustainable parallel route to Grades".

38. Mr. Tattan then went on the consider alternatives which had been put forward by the first respondent in his pleadings. He considered the proposal that an independent teacher or principal assess "the evidence" to determine whether a calculated grade could be provided. Although the material constituting the evidence had not been identified by the first respondent, Mr. Tattan inferred it was the respondent's course work, his mother's record of his work and the result of his mock examination. In relation to that, he said, in a passage quoted by Meenan J., that "the process of an independent person who has no prior knowledge of the [first respondent] or his work making an assessment of his level of achievement in a particular subject in a restricted period of time would to all intents and purposes be an individualised assessment which is not what the CGS [...] is or is intended to be. The only circumstances in which an independent person can be asked to individually assess a candidate's work in a manner that is objective, fair and equitable is when that work has been produced under examination conditions. Further, it would be practically impossible for a teacher to make a proper informed professional and accurate judgment in this way. If such a process were introduced for people in the [the first respondent's] position, it would be difficult to refuse to introduce it for others who wanted their Grade to be assessed by an independent person".

39. With respect to the second respondent's position as a person who did not receive tuition from a registered teacher, Mr. Tattan pointed out that it was accepted that there were a small number of unregistered teachers teaching in schools. He said that in any case where they have been involved in estimating percentage marks and ranking students within a class, their input had been overseen by registered teachers through the in-school alignment process and the role of the principal. He went on to say:

> "[49] It is important that this is fully understood and appreciated in the context of this case. It appears from the [second respondent's] papers that it is being suggested that an individualised assessment should be carried out of work completed historically by the [second respondent] while studying under the sole direction of persons who are not and never have been registered teachers. This would require her work to be presented to and individually assessed by an independent third party (presumably a different third party for each subject or subject group). Whilst the Department is, as a result of the decision in the *Burke* case, undertaking an individualised assessment of the work of four students who were taught by a parent or a close relative who is or was a registered teacher in an out of school setting, such an assessment process cannot be undertaken in the same way in respect of the [the second respondent]. It appears from the [second respondent's] papers that she has not engaged in tuition with a person who is or has been a registered teacher. In fact, the extent to which she has engaged in regular tuition with a tutor is open to question in light of Mr O'Neill's affidavit. Whilst she has listed Mr Simon O'Neill as her tutor in 5 subjects and Ms Tatenda O'Neill as her tutor in one, it appears from Mr O'Neill's affidavit that he has not in fact provided regular tuition in 4 of those 5 subjects but rather "assisted" her when she "got stuck" and corrected past exam papers completed by her.

[50] This means that the [second respondent's] body of work has been prepared under the supervision and direction of a person who is not qualified teacher. Whilst it would never be appropriate for a registered teacher who is a close relative of a student to provide an estimated mark for that student within the CGS, the [Minister] can still rely on the professionalism and experience of that teacher in the setting, supervising and correcting of course work, project work, essays and school examinations undertaken by the student. However, where no professional teacher has been involved in a student's tuition, the [Minister] cannot rely on such professionalism and experience. This means that if the [Minister] were required to carry out an assessment of the [the second respondent's] body of work for the purposes of providing a calculated grade, it would have no professional insight into the circumstances under which this body of work had been produced. The personnel carrying out such an assessment would not have any idea of a number of material matters such as the purpose for which a particular item of work had been produced (for example whether it had been required to demonstrate or test a particular skill or method, to reinforce learning already acquired or for another purpose), the tuition tools and methods used, what level of assistance (if any) had been given in respect of an item of work and what methods and systems had been used to test and evaluate the [second respondent's] work in the past. In this regard, we note from the affidavit of [B.P.] that the [second respondent's] past exam papers were corrected by her tutors but the evidence indicates that these tutors do not have any qualifications or training to correct exams and so the marks awarded would have limited value to the [Minister] in carrying out assessment of the work. In the circumstances, the [Minister] would have to devise a particular system of assessment designed for a student who has not had any qualified or registered teacher involved in his or her tuition and which would require robust

verification of presented work which has not been prepared under the guidance of a registered teacher. This would be a very significant task for the [Minister] and would involve the use of considerable resources in terms of personnel and time. Further, we believe that to put such a system of assessment in place which was, and was seen to lead to an accurate, professional and reliable assessment of the [second respondent's] level of attainment, it would take at least a number of weeks. We would have considerable doubts that such a process of assessment could be properly concluded in time to allow the [second respondent] to move on to third level education this year. In these circumstances, the purpose of the CGS would, insofar as the [second respondent] was concerned, not be achieved as its purpose was to enable second level students to move on from school at the same time of year as second level students have done in every previous year, notwithstanding the huge challenges caused by Covid-19 pandemic.

[51] Save for the aforesaid four students [in the same position as the first respondent], the CGEO is not undertaking an individualised assessment of any student's work. In order to undertake this task, specific processes would have to be developed which would have to be robust and objective. There would be a fundamental difficulty as regards the verification of work as that of the student and of the circumstances in which that work was undertaken especially where the persons involved in providing tuition were not qualified teachers. From the [Minister's] perspective, there is little difference between a student who is tutored by persons who are neither qualified nor registered teachers and a student who is studying entirely alone. If the [second respondent] is entitled to have a body of work prepared without any professional guidance or supervision reviewed and assessed for the purposes of providing a grade, then presumably the [Minister] would also be obliged to assess the

"work" of any other student who has studied without professional input. There are clearly serious issues arising in relation to the verification of work presented by a student which has been prepared without any professional supervision or involvement. The [Minister] simply cannot award a Leaving Certificate to students on the basis of the student's say-so as to their own work. Further, if this option were to be provided to the [second respondent] it would have to be made available to all students on a similar basis - which cannot be done in the current circumstances."

40. In her affidavit in both proceedings, Ms. Andrea Feeney, Director of the CGEO, averred as follows:

"It should be noted that the CGEO has been set up for the purposes of providing calculated grades on the basis of estimates where there is satisfactory, credible evidence from an appropriate source to provide the estimate. It has not been set up for the purpose of providing individualised assessments of a student's level of achievement in a subject and there would, in my view, be serious difficulties in the CGEO undertaking any such role. In this regard, we refer to the paragraphs addressing this issue in Mr Tattan's affidavit under the heading "Alternatives suggested on behalf of the Applicant". The CGEO is applying the same scheme to every student who applies for Calculated Grades subject to modifications as are necessary to adapt the basic criteria for out-of-school students. The CGEO cannot offer an alternative method of obtaining grades to any individual student without making the same facility available to all students."

Conflicts of interest in the out-of-school setting

41. Section 3 of the Guidelines, under the heading "Conflict of Interest", provides as follows:

"Throughout this guide, we have set out specific circumstances which will allow a teacher or tutor with whom you have received tuition, to provide an estimated percentage mark on your behalf, subject to certain other criteria. To uphold the integrity of the process, it will not be possible, under any circumstances, to accept an estimated mark from a teacher or tutor who is closely related to you (including a brother, sister, parent, spouse, etc.). This would be a direct conflict of interest and accepting estimated marks from a family member would undermine the credibility of the process. The Conflict of Interest declaration must be completed by all those submitting an estimated percentage mark."

42. The rationale underpinning Section 3 is described by Mr. Tattan, at para. 46 of his affidavit:-

"This mirrors the provisions in relation to conflict of interest in the In-School Guidelines and accordingly, in so far as a parent being involved in the judgment process leading to the provision for an estimated percentage for the purposes of determining a Calculated Grade is concerned, a student who is in school is in the exact same position as a student who is out-of-school in that, in neither case, is a parent permitted to be involved in the exercise of judgment in the estimation of a student's mark. The difference arises from the fact that for a student who is studying in a school there will be other teachers with knowledge of that student who can assist in the formulation of a Calculated Grade and a principal or deputy principal who will have oversight of the process. These objective elements are absent for the home-schooled child. It is also relevant that potential conflicts of interest in a school situation usually only affect at most one of two of the subjects the child is studying the calculation of grades for that child in all other subjects can take place in accordance with the standard process."

Evidence concerning the numbers and categories of student

43. In her statement of opposition in the first respondent's case (para. 16), the Minister pleaded that she was aware that some home-schooled children are tutored exclusively by parents and other family members but was not aware of the proportion of such children nor of the extent to which such children might be receiving tuition from non-family members in some or all subjects in other non-school based settings. In her statement of opposition in the second respondent's case (para. 37), the Minister clarified the position further by noting that the obligation, pursuant to s. 14 of the Education (Welfare) Act, 2000, on parents who home-school a child under the age of 16 to register with the National Education Welfare Board does not persist once the child reaches the age of 16. This, the Minister explained, accounted for her lack of awareness of the exact number of students who were self-taught, taught by family members, were availing of tuition *via* private tutors, grind schools, study centres or any combination of the above or whether a family member teaching a child was a qualified or registered teacher or not.

44. In her affidavit sworn in the *Burke* case, Ms. Andrea Feeney set out certain figures concerning the Leaving Certificate students of 2020. In her affidavit in the *N.P.* case, which was sworn on a later date, the information was updated. She indicated that the total number of Leaving Certificate 2020 candidates was 60,419 (which includes school candidates, external candidates and Leaving Certificate Applied Year 2). The total number of grades issued was 428,324.

45. Of the total number of candidates, the category "independent/not attached to a school or authorised centre" was 929. Of those 929, 383 were repeat candidates and 280 were due to sit their Leaving Certificate in schools they had attended in 2019.

46. Regarding the group of 929 candidates within the "independent/not attached to a school or authorised centre" category (1,834 grades), the following was the position regarding calculated grades:

(1) Of these, 549 candidates could be provided with a grade (787 grades);

(2) 173 candidates were described as "no tutor/unregistered: decision to refuse" (544 grades);

(3) 21 candidates were part approved/part refused;

(4) 51 candidates did not want a grade; and

(5) 135 candidates were described as "no application received/no engagement".

47. Ms. Feeney averred that the total number of grades that the CGEO was unable to award was 2,172. This broke down into 1,628 "subjects outside school" and "at the outside, 544 of the out-of-school learners".

48. In the statement of opposition in the second respondent's case, it was pleaded that mechanisms had been developed through which 99.4% of candidates who were not currently attending any second level school would be able to be offered calculated grades.

PART 3: THE RESPONDENTS' UNSUCCESSFUL APPLICATIONS FOR A CALCULATED GRADE AND THEIR JUDICIAL REVIEW PROCEEDINGS

The first respondent's application

49. The first respondent is the youngest of ten children, all of whom have been educated at home by their mother, Ms. Burke. Ms. Burke is a registered teacher. In her affidavit evidence, Ms. Burke recounts her long history in education, including working as an examiner for the SEC since 2016, correcting higher level Junior Certificate and Leaving Certificate English. She details the tuition centre she runs in her own home where she also

teaches other students from schools in the local area. She predominantly follows a mainstream, traditional approach to education and adheres to the national curriculum for the various subjects. The first respondent's education regime followed a pattern similar to schools including observing school holiday periods. He is, according to his unchallenged affidavit, an exceptionally gifted pianist and composer who at the time he swore his affidavit was studying for his Associate Diploma in Piano Teaching.

50. The first respondent was registered as an external candidate for the 2020 Leaving Certificate examination and was entered for nine Leaving Certificate subjects. He takes these proceedings in his own name as he has reached the age of 18 years. The fact that he was no longer a minor was not raised as an issue in these proceedings. His entire education as a child had been imparted to him at home.

51. It appears to be the case that from as early as April 2020, there was an exchange of correspondence between Ms. Burke and the Department relating to the first respondent's participation in whatever scheme might be put in place in lieu of the 2020 Leaving Certificate public examinations. The first respondent's completed application for a calculated grade for each of his nine higher level subjects as an out-of-school student was received by the CGEO on the 30 June 2020. Communication with the Department continued subsequent to the first respondent's application for calculated grades, and by letter dated the 22 July 2020 from the first respondent's solicitor, the Minister was called upon to provide:

> "1 Confirmation that my client will be considered for a calculated grade, notwithstanding that he has been schooled at home by his mother;
>
> 2. Confirmation that my client's mother can assist in the estimating of her son's grades, and how this is to be done;
>
> 3. Confirmation whether it will be necessary to have oversight by a nominated Principal or Deputy Principal, and how this is to be done;

4. Confirmation that the CGS will be extended to enable my client to obtain a calculated grade in sufficient time to take up his chosen course this academic year;

5. Detailed reasons for the above."

52. By e-mail of the 24 July 2020, Ms. Burke confirmed to the Department that she was her son's tutor and acknowledged that pursuant to the CGS, she was precluded from completing the requisite Form A1.

53. The formal responses to the first respondent's solicitor's letter and his application for a calculated grade were furnished by the CGEO on the 29 July 2020. The letter from the Department to his solicitor advised, *inter alia*, that the first respondent was entitled to sit the proposed Leaving Certification examinations which were expected to take place in November 2020 and that the right to sit those examinations was entirely independent of whether or not he received results through the calculated grades model.

54. The decision from the CGEO in respect of the first respondent's application stated as follows:

> "The purpose of this letter is to provide you with the CGEO decision that it will not be possible to provide you with a calculated grade in any of the subjects in which you were entered for the 2020 Leaving Certificate examinations. This is due to the absence of *satisfactory, credible evidence from an appropriate source* on which to base the estimate. The reason for the decision is as follows:
>
> To uphold the integrity of the process, it is not possible, under any circumstances to accept an estimated mark from a teacher or tutor who is closely related to you (including a brother, sister, parent, spouse etc). This is a direct conflict of interest and accepting estimated marks from a family member would undermine the credibility and integrity of the process. Given the clear conflict of interest arising in your case, it is not possible to provide an estimated mark in respect of each relevant subject."

55. The first respondent was invited to appeal the decision. He did not do so. Nothing turns on this as it is accepted that the first respondent did not come within the criteria to be assessed for a calculated grade.

The first respondent's judicial review

56. On the 29 July 2020, counsel for the first respondent applied to the High Court for leave to seek certain reliefs by way of judicial review, which was duly granted.

57. The refusal to accept Ms. Burke as a credible source for the purpose of awarding the first respondent calculated grades is addressed by Mr. Tattan in his affidavit of the 5 August 2020:

> "[50] As regards sources of evidence, the Guidelines state that a student's engagement in tuition regularly over a sustained period during the course of study for the Leaving Certificate programme is required to provide credible evidence on which to base an estimate of the student's expected performance. The Guidelines state that under no circumstances will the CGEO engage in any process of generating an estimated mark. The role of the CGEO is to determine whether there is an appropriate source from which to accept an estimated percentage mark.
>
> [51] It is important that this is fully understood and appreciated in the context of this case. It appears from the [the first respondent's] papers that it is being suggested that an individualised assessment of work completed historically by [the first respondent] while studying under the sole direction of his mother should take place. This would require his work to be presented to and individually assessed by an independent third party (presumably a different third party for each subject or subject group). The CGEO is not undertaking an individualised assessment of any student's work. In order to undertake this task, specific processes would have to be developed which would have to be robust and objective. There would be a fundamental difficulty

as regards the verification of work as that of the student and of the circumstances in which that work was undertaken. Further, if this option were to be provided to [the first respondent] it would have to be made available to all students on a similar basis – which cannot be done in the current circumstances."

The High Court judgment in the first respondent's case

58. The trial judge did not consider it necessary to examine in detail the nature, extent and application of rights provided for in Article 42 of the Constitution (in conjunction with Article 40) in order to reach his decision. Nor did he believe it necessary to consider the principles applicable in actions for legitimate expectation or the *audi alteram partem* rule, each of which had also been relied upon by the first respondent. He considered that the matter fell to be determined by the principles enunciated by Henchy J. in *State (Keegan) v. Stardust Compensation Tribunal* [1987] I.R. 642.

59. Meenan J. noted that the first respondent's purpose in challenging the decision was "not to invalidate the process whereby calculated grades are awarded" but only so much of the procedures followed by the Minister that resulted in his being refused consideration for the award of a calculated grade. Comparing how conflicts of interest were to be dealt with in both the In-School Guidelines and Out-of-school Guidelines, the trial judge opined:

"The difference between how a "conflict of interest" is dealt with for a school student and an "out-of-school learner" is very stark."

He went on to state:

"[50] ...In the case of a school student, the conflicted teacher "may still need to assist in the process, by handing over data or factual information..." and "appropriate arrangements" may be put in place to provide the student with an estimated percentage mark. This means the school student can remain in the system and may be awarded a calculated grade.

[51] However, for the "out-of-school learner", which includes the applicant, no such arrangements apply. Once a conflict of interest arises, the applicant will not be awarded an estimated percentage and, so, is excluded from the system under which he/she may be awarded a calculated grade.

[52] In both cases, the school student and the "out-of-school learner" are facing a similar problem, not of their own making, that arises from the teacher having a conflict of interest. Both should have the benefit of a similar solution, but they do not. To my mind, this is a patent unfairness."

Meenan J. referred to the potential solution of having an independent teacher assess the first respondent's work. He did not accept the Minister's argument that this would be a major departure from the Scheme, saying:

"[55] I do not believe that a non-conflicted teacher in giving an estimated percentage mark to an "out-of-school learner", such as the applicant, is required to do anything or take any step that would be materially different from that done by a non-conflicted teacher in a school setting taking the place of a conflicted teacher. Therefore, I do not believe that there is a rational basis for maintaining that the involvement of another teacher, as described, in the applicant's situation is conferring on the applicant an advantage that is not available to a school going student."

60. The trial judge found the decision of the 29 July 2020 to be *"legally in error where it refers to an absence of "satisfactory, credible evidence"*. His reasoning was expressed as follows:

"[56] [...] A conclusion can only be reached that evidence is not satisfactory or credible when such evidence has been looked at. This never happened here. The [Minister] appears to have reached the conclusion that as the evidence was being furnished by the applicant's mother, a conflicted teacher, that such evidence must be

neither satisfactory nor credible. This may or may not be the case but it can only be decided when such evidence is looked at by a non-conflicted or independent teacher. The applicant has a right at law to the benefit of such a process."

61. He also rejected the Minister's argument that the respondent could sit the Leaving Certificate in November 2020 and this was an acceptable alternative, saying:

"[57] An opportunity to do the Leaving Certificate in November, 2020, which may or may not take place depending upon public health advice at the time, is not a remedy. It would, at the very least, mean that the applicant would be delayed by one year in commencing his third level course of choice, should he be so admitted to it. This would clearly be detrimental to the applicant.

[58] I am satisfied that a non-conflicted or independent teacher(s) ought to be involved in the place of the applicant's mother in the system for the award of an estimated percentage mark in each of the applicant's Leaving Certificate subjects. Should it be possible to award such percentage mark(s), then the process set out in the "out-of-school learners" document for the awarding of a calculated grade can operate for the applicant."

62. The trial judge concluded that the exclusion of the first respondent from the Scheme failed the *Keegan* test, saying:

"[59] I, therefore, conclude that so much of the system that provides for the giving of estimated percentage marks that excludes the applicant on the grounds that his teacher has a conflict of interest is irrational and unreasonable and, thus, unlawful.

[60] It also follows that the decision of the respondent of 29 July 2020 is irrational, unreasonable and, thus, unlawful."

The Second Respondent's Application For A Calculated Grade

63. The second respondent is the third of nine children. She was educated at home for the nine years preceding the Leaving Certificate 2020 by her mother with the help of the children's father and tutors. To assist in giving grinds to the second respondent for her Leaving Certificate, her mother engaged two tutors, Mr. Simon O'Neill and his spouse, Ms. Tatenda O'Neill. These tutors had previously assisted in the education of other members of the family (who were also home-schooled). Although these tutors have degrees and one of whom who is the holder of a Ph.D in Biomedical Chemistry, neither are "registered teachers" under the provisions of the Teaching Council Act, 2001.

64. On the 1 July 2020, the CGEO received a completed Form A1 signed by either Mr. O'Neill or Ms. O'Neill setting out estimated percentage marks for the second respondent in Irish, English, Mathematics, Geography, Biology and Home Economics.

65. In a decision dated the 11 August 2020, the second respondent was advised that it would not be possible to provide her with a calculated grade in any of her subjects. The decision stated:

> "This is due to the absence of satisfactory, credible evidence from an appropriate source on which to base an estimate. The reason for the decision is as follows:
>
> '(1) While you have engaged in private tuition with a tutor, the tutor does not meet the criteria of being a previous or currently registered teacher.'"

The second respondent's judicial review

66. On the 31 August 2020, leave was granted by the High Court (Keane J.) to the second respondent to apply for judicial review.

67. The application was grounded on affidavits sworn by B.P., the second respondent's mother, and Mr. O'Neill, both of which outlined her preparation for the Leaving Certificate

2020 and the nature and extent of Mr. O'Neill's input. The most relevant parts of the evidence on behalf of the Minister have been referred to, or quoted, above.

The High Court judgment in the second respondent's case

68. The trial judge again decided the case on the basis of the *Keegan* test. As he had previously observed in the *Burke* case, the trial judge considered that the second respondent was not making the case that she was entitled to a calculated grade but rather that she should be allowed to be considered for same. He found that the reason for her exclusion from the CGS was the absence of the involvement of a registered teacher in her education in the home.

69. At para. 29 of his judgment, Meenan J. acknowledged the necessity for the involvement of a registered teacher, stating:

> *"[29] In order to maintain integrity in the system for the awarding of calculated grades, it was reasonable and proper for [the Minister] to have a requirement that registered teachers would play a central role in the awarding of estimated percentage marks."*

70. Having noted that the second respondent was precluded from access to the Scheme as she did not fall within any of the four routes set out in the Out-of-school Guidelines, and having compared her situation with that of an in-school student, Meenan J. went on to state:

> *"[34] It is, therefore, clear that the requirement by the [Minister] that the [second respondent], a home schooled student, is taught by a registered teacher(s) puts the applicant at a considerable disadvantage compared to a student taught in-school who is subject to no such requirement. Unlike the home schooled student, a student in-school has access to other teachers, vice principal(s) and a principal. In my view, this is clearly an unfairness. The "out-of-school document" does not live up to its own stated principles of "fairness and equity..."*

He considered that this was unfair and alluded, albeit without further elaboration, to Article 40.1 of the Constitution:

> *"[35] ...When the Leaving Certificate examination of 2020 was cancelled, the cohort of home educated students were entitled to be put in the same position, as far as practicable, as those students who attended school. I put in the qualification as there may well be some out-of-school students, not including the applicant, for whom it is not possible to give an estimated percentage mark and, thus, who cannot be awarded a calculated grade. Insofar as Article 40.1 of the Constitution can be relied upon by the applicant, this should mean that the system for the giving of estimated percentage marks ought to be as inclusive as possible.*

Again, Meenan J. took the view that a practical solution would be to provide for an independent assessment of the second respondent's work and did not accept the Minister's argument that this would be entirely contrary to the system or that it would be "materially different" to what an in-school teacher would be doing. He drew a distinction from the source of evidence (being the unregistered teacher) and the contents of the evidence (being the student's work), and said:

> *"[37][...] Such a process ought to have been made available to a student in the position of the [second respondent] by way of the involvement of an outside registered teacher(s). The absence of such a process resulted in the [Minister] deciding that there was no satisfactory and credible evidence, when that evidence had never been looked at. In my* view, *the decision of 11 August 2020 was legally in error."*

71. By the time the second respondent's application for judicial review was heard, provision had been made by the Minister for the Leaving Certificate examination to commence on the 16 November 2020. As with the first respondent, however, the trial judge did not consider that a solution, finding that the second respondent was not in the position

of someone who was dissatisfied with her calculated grade, rather that she had been unlawfully excluded from the CGS from the outset. He also noted that the holding of the Leaving Certificate examination in November 2020 would depend on the public health circumstances at the time.

72. Meenan J. duly quashed the decision of the 11 August 2020 and granted the second respondent declaratory relief, applying the same principles as in the first respondent's case. He found no basis on which her circumstances could be distinguished from his earlier decision.

PART 4: THE APPEALS

73. The grounds of appeal in each of the appeals were largely similar. The first respondent opposed the appeal on all grounds. The second respondent did likewise but also placed reliance on Articles 40-42 of the Constitution, matters considered elsewhere in the judgment. We believe it is sufficient to identify the issues as they arose from the notices of appeal, the responses to the appeals and the parties' submissions.

Issues Arising

74. We consider that the following issues arise for determination:

i) Whether the appeals are moot in circumstances where, subsequent to the decisions of the High Court, the respondents achieved the very thing they sought, namely the opportunity to be considered for a calculated grade;

ii) Whether the establishment and operation of the CGS falls within the spectrum of "the executive powers of the State" which Article 28.2 provides shall be exercised by and on behalf of the Government; and if so, how that impacts upon the judicial review test to be applied by the Court;

iii) In circumstances where the respondents assert that their exclusion from the Scheme breached their constitutional rights, whether the respondents have any constitutional rights which were adversely affected by their exclusion from the CGS; and

iv) What standard of judicial review is to be applied if the Court reaches the conclusion:

(a) that the establishment and operation of the CGS was the implementation of a policy decision of the Government; and

(b) that the constitutional rights of the respondents were engaged by the decisions of the Minister.

PART 5: ARE THE CLAIMS MOOT?

75. In compliance with the order of the High Court, the Minister put in place a process whereby it was arranged that the respondents' work would be reviewed by registered teachers who had no connection with them. In due course each of them received calculated grades and moved on to third level education. We will refer in this judgment to this arrangement as the "independent teacher assessment mechanism". The Minister used the terminology of "individualised assessment" to describe what the respondents were seeking (and to oppose it) but we do not think this this terminology is helpful because it implies that in-school students do not have "individualised assessment" under the CGS. In fact, they do: it is their teachers who engage in the individualised assessment which is fed into a process which ultimately generates a calculated grade at its conclusion. The distinctive feature of the arrangement which was put in place for the two respondents was that the individualised assessment was to be carried out by a registered teacher unknown to and independent from the respondents. Therefore, we prefer to use the terminology of "independent teacher assessment mechanism".

76. The Minister, in appealing, does not want to interfere in any way with the award of the calculated grades awarded to the respondents. The Minister accepts that the appeals are moot *in so far as these respondents are concerned.* Nonetheless, she submits that the issue remains important in circumstances where there are outstanding cases before the High Court for home-schooled students in the same position as the second respondent. Furthermore, the Minister submits that in the event that it is necessary to proceed with a CGS in any future year and this appeal is unsuccessful, material revisions to that system will be required for out-of-school students.

77. The Minister and the respondents have reached an agreement with respect to costs. Despite having pleaded that the appeals were moot, the respondents' legal representatives have instructions to participate in the appeal and, subject to the Court, to deal with the substantive issues addressed in the Notice of Appeal as akin to a *legitimus contradictor.*

78. The Minister submits that where important legal issues are at stake, the appeal should proceed. She relies upon *Sinnott v. Minister for Education* [2001] 2 IR 545, a case heard by the Supreme Court despite the Minister having offered to pay damages. Denham J. noted:

> *"[3] The State has accepted that they were in breach of the first plaintiff's rights when a child. There were discussions as to whether this appeal was in fact a moot in view of the stance of the State. However, in view of the important legal issues at stake, the appeal proceeded"*

79. In *O'Brien v. Personal Injuries Board* [2006] IESC 62, Murray C.J. seemingly approved a test encompassing the following: whether it can truly be said that a decision on the appeal would not have the effect of resolving further *"some controversy affecting or potentially affecting the rights of the parties".*

80. There are undoubtedly important legal issues at stake. Apart from the other cases awaiting the finalisation of these appeals, the resolution of the controversy affects the

position of the Minister in so far as she must resolve any issue relating to the Leaving Certificate that may arise in the light of the continuing pandemic. We have considered the decision of the Supreme Court in *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] IESC 49, [2013] 4 I.R. 274 in which McKechnie J. set out with great clarity the principles upon which a determination on mootness should be made. The first two principles are as follows:

> *"a) a case, or an issue within a case can be described as moot when a decision therefore can have no practical impact or effect on the resolution of some live controversy between the parties and such controversy arises out of or is part of some tangible and concrete dispute then existing.*
>
> *b) Therefore, where a legal dispute has ceased to exist, or where the issue has materially lost its character as a lis, or where the essential foundation of the action has disappeared, there will no longer be in existence any discord or conflict capable of being justiciably determined."*

81. McKechnie J. then explained the rationale for the doctrine of mootness as stemming from the adversarial nature of the system together with other reasons such as resources and the position of the court in the constitutional model. He said it follows as a direct consequence that the court will not, save pursuant to some special jurisdiction, offer purely advisory opinions or opinions based on hypothetical or abstract questions. McKechnie J. held that the rule was not absolute and the court retains a discretion to hear and determine a point, even if otherwise moot. If the court is do so it should hear the case only reluctantly having been guided by the rationale and by the overriding requirements of justice.

82. McKechnie J. appeared to question whether one could classify *O'Brien v. PIAB* as a case that was (a) not moot or (b) moot but important and therefore to be taken under the exceptional jurisdiction. PIAB had a continued interest in having a point on the exercise of

its core statutory functions determined. Not entirely unlike the situation which presented in *O'Brien v. PIAB,* here the Minister wishes to explore the extent of the permitted exercise of executive power, which the Minister maintains is at issue here, in light of the ongoing pandemic and issues with the Leaving Certificate examinations. We accept that the Leaving Certificate process is a matter of wide public importance. Whether one characterises this as a case which is a) not truly moot because of the Minister's interest in the outcome or b) moot but presenting issues of public importance to be determined, we are of the view that these appeals should be determined on their merits.

83. That is not the end of the matter however. Notwithstanding having advocated for the appeals to continue with each of the respondents playing the role of *legitimus contradictor*, the Minister went on to raise very specific objections to the arguments being canvassed by the first respondent in the appeal on the basis that they had not been pleaded in his notice opposing the appeal. In particular, the Minister objected to any question of proportionality arising from the decision in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701 or the issue of Article 40.1 and Article 42 of the Constitution being considered by the Court in the context of the first respondent's case. These grounds, however, were raised by the second respondent and there is no objection by the Minister to dealing with them.

84. Counsel for the respondents contends that the approach of the Minister is inconsistent with her approach to the issue of mootness. He submits that to take a "pleading point" to what are, on the Minister's own case, important general points of law, is entirely inappropriate.

85. The respondents had a pleading point of their own to raise. They object to the Minister seeking now to rely upon a "resources argument" in circumstances where this had not been explicitly pleaded by the Minister in the High Court.

86. There are fleeting references to the resources argument in the Statements of Opposition, if one looks carefully, but the argument was not squarely and explicitly pleaded. Nor was it raised explicitly in the submissions to the High Court in the first respondent's case. Indeed, given the significance the "resources issue" attained in this appeal, its absence from the statements of opposition is striking.

87. By the time the Minister's submissions were being drafted in the second respondent's case, the High Court had already issued its decision in the *Burke* case, which had led to the Minister putting in place the independent teacher mechanism (discussed further below at Part 8) to assess the work of the first respondent. Having accommodated the first respondent, pursuant to the decision of the High Court, with the provision of calculated grades to him, in the context of the second respondent's case, the "separation of powers" attained more prominence in the Minister's submissions to the High Court. The issue was not however, addressed by the trial judge in the *N.P.* judgment.

88. Overall, with regard to the pleading points now raised by both sides, we consider that they are not well made. First, in the first respondent's case, proportionality and constitutional rights were in fact pleaded and relied upon by him in his submissions before the High Court. Secondly, as far as the resources issue is concerned, this was canvassed by the Minister in the second respondent's proceedings: submissions were made to the High Court relating to the considerable resources the independent teacher mechanism would require. To that extent these were all issues before the High Court. We consider that there would be no merit or reason to persist in the appeal of first respondent's case if it must be decided without reference to proportionality or constitutional rights. Similarly, in the second respondent's case there is no merit or reason in deciding it without reference to the "resources issue". Taking both cases, and the circumstances of this appeal in the round, we are of the view that if the Court is to take on board the appeal notwithstanding any issue as

to potential mootness between the parties, it should deal with all issues raised before the High Court and not limit the appeal unduly on the basis of pleading points, whether raised by the Minister or the respondents. We therefore conclude that it is in the interest of justice to address the same issues in both cases, without being constrained by the "pleading points" raised by both sides.

PART 6: THE CGS – AN EXERCISE OF EXECUTIVE POWER?

89. In these proceedings what is under challenge is the exclusion of the respondents from the Scheme, communicated to them on the 29 July 2020 (in the case of the first respondent) and the 11 August 2020 (in the case of the second respondent). While there is no challenge to the decision of the 8 May 2020 itself, the nature and source of the powers under which the Minister made the decision to exclude the respondents is at the core of these appeals, and whether those decisions affected constitutional rights together with the nature of the applicable standard of judicial review to be applied to the decisions. Central also to the questions to be addressed in the appeals is the fact that the CGS was established without legislative input and thus does not involve the exercise of an administrative discretion as provided for by *statute*, which is what a court is usually asked to consider in judicial review.

The arguments as to the nature of the decisions and the appropriate judicial review test

90. The fault line in these appeals arises from the significant dispute between the respondents and the Minister as to the nature of the CGS. The respondents contend that the CGS "is not an act of State" but rather an administrative scheme to which the approach set out in *Keegan/O'Keeffe* (overlaid by the proportionality assessment set out in *Meadows* when constitutional rights are in the balance) applies. The Minister's argument is that the CGS was put in place as a result of a policy decision of the Executive pursuant to its powers under Article 28.2 of the Constitution and that, consequently, certain established legal principles apply in reviewing the Minister's decisions. In particular, she submits that the

courts must show considerable deference to the decisions and that the respondents must establish "clear disregard" of the Constitution in order to succeed. A more detailed summary of these arguments follows.

The Minister's position on the nature of the decisions and appropriate judicial review test

91. Essentially, the Minister asserts that as the decision of the 8 May 2020 was an executive act (attracting a high presumption of constitutionality), the administrative decision-making in relation to the respondents that followed upon the implementation of the executive decision of the 8 May 2020 was a valid exercise of the executive power of the State and thus cannot be challenged unless the State has acted in "clear disregard" of the respondents' constitutional rights. The Minister relies on *Boland v. An Taoiseach* [1974] I.R. 338, *Crotty v. An Taoiseach* [1987] I.R. 713, *Kavanagh v. Government of Ireland* [1996] 1 I.R. 321, [1997] 1 I.L.R.M. 321 as to the presumption of constitutionality and says that the presumption applies with particular force in matters of economic and social policy (*Ryan v. Attorney General* [1965] I.R. 294 (pp. 337-358) and that the onus of proof to displace the presumption is considerable (Laffoy J. in *Kavanagh v. Government of Ireland*);

92. The Minister relies on *T.D. v. Minister for Education* [2001] 4 I.R. 259, *Prendergast v. The Higher Education Authority* [2008] IEHC 257, *Collins v. Minister for Finance* [2017] 3 I.R. 99) for the proposition that the courts are not entitled to intrude upon the policy-making functions of the Executive. It is thus argued by the Minister that the CGS and its operation falls to be considered having regard to the principles enunciated in the aforesaid line of jurisprudence.

93. The Minister also points to the circumstances which gave rise to the executive decision of the 8 May 2020 and asserts that there is judicial recognition that exceptional crises may call for exceptional measures. It is submitted that the crisis which the Covid-19 pandemic engendered was, in the words of Charleton J. in *Collins v. Minister for Finance,*

"in every sense exceptional" and that the CGS *"was designed and tailored"* to meet the exceptional crisis that was presenting as of May 2020.

94. Accordingly, the Minister submits that the exceptional backdrop to the establishment of the CGS warrants the Court according considerable deference to the executive power of the State, even beyond that which applies to "regular" executive decisions.

95. It should be acknowledged at this point that, by way of alternative argument, the Minister submits that if the *Keegan/Meadows* test is the appropriate test, the Minister should in any event succeed because the decisions in question were not unreasonable or irrational.

The respondents' position on the nature of the decisions and the appropriate judicial review test

96. The proposition advanced by the respondents is that the CGS is not an exercise of the executive power of the State but is purely administrative in nature. It is contended that merely because the CGS was described on the 8 May 2020 as an exercise of executive power under Article 28.2 does not necessarily render it such. The nature of a power must be ascertained by examining its substance, not the terms in which it may be described. They assert that the invocation by the Minister of the Article 28.2 argument is a "veil" to avoid judicial scrutiny.

97. Counsel for the respondents thus takes issue with the Minister's contention that the CGS attracts a high degree of presumptive constitutionality. He refutes the Minister's contention that unless the State is found to have acted in "clear disregard" of its obligations under the Constitution the administrative acts in question are valid and cannot be impugned. To adopt this argument could render the decisions, even when affecting constitutional rights, immune from judicial review and counsel describes this as a "chilling prospect".

98. In support of their submissions that what is in issue here is a purely administrative scheme which does not warrant the type of judicial restraint advocated by the Minister, the

respondents cite *State (C) v. Minister for Justice* [1967] I.R. 106, (1968) 102 I.L.T.R. 177 and *Murphy v. Dublin Corporation* [1972] I.R. 215, (1973) 107 I.L.T.R. 65. This jurisprudence is considered below.

99. Counsel contends that what is being claimed by the Minister as an exercise of the executive power of the State under Article 28 is a power which clearly could have been conferred by statute on any person or body chosen by the legislature. Moreover, he maintains that the powers as exercised by the Minister under the CGS could just as easily have been exercised by the SEC, or indeed any other *ad hoc* body entrusted to deal with the matter.

100. Therefore, counsel asserts, the threshold for intervention by the courts as enunciated in *Boland* and *Crotty* cannot be relied on by the Minister given that what was at issue in these cases was the conduct of the State's external relations and declarations of policy – clearly entrusted to the Government by Article 29.4.1 as part of the executive power of the State. Nor can the Minister look to *Kavanagh*, where the power at issue was one entirely governmental in nature, that of deciding on a parliamentary basis whether circumstances existed which required the making of a proclamation pursuant to s. 35(2) of the Offences Against the State Act, 1939. It is further asserted that insofar as the Minister relies on the decision of Keane J. in *Re Article 26 and the Planning and Development Bill*,1999 [2000] 2 I.R. 321, [2001] 1 I.L.R.M. 81, that case dealt with the uncontroversial proposition that a proposed post-1937 statute was presumed to be constitutional and that a balancing of the rights of private property as against the common good was *prima facie* for the legislature. What was in issue involved matters only capable of being carried out by the legislature as the relevant organ of State. It is suggested by the respondents that if there was any validity in the claim that the decisions in issue here arose pursuant to the executive powers of the

State, the Minister would not, as support for that argument, have to resort to jurisprudence which concern matters which are so clearly interwoven with the prerogative of Government.

Discussion of the texts and authorities concerning executive power

101. Unlike many judicial review cases, we are not dealing with an administrative authority conferred on the Minister by *statute and* accordingly, we are not addressing whether the Minister's operation of the CGS is outside the limits of any statutory power or function thus conferred. We are concerned with the conferral of authority on the Minister by the Government, said by the Minister to be in accordance with the Government's powers under Article 28.2 of the Constitution. Thus, we must endeavour to determine what is meant by "the executive power of the State...to be exercised by or on the authority of the Government", as set out in Article 28.2.

102. As pointed out by Hogan, Morgan and Daly in *Administrative Law in Ireland* (5th edn., Round Hall, 2019) "The articles [in the Constitution] devoted to the purposes, scope and status of the executive are 'patchy'". *Kelly: The Irish Constitution (* Hogan G, Whyte G, and Kenny D, 5th edn., Bloomsbury Professional, 2018) notes that "beyond noting that the conduct of foreign affairs [Article 29.4.1] and the exercise of all powers, functions, rights, and prerogatives formerly exercisable in respect of Saorstát Éireann [Article 49.2] are matters within the remit of the executive, the Constitution is silent as to the extent of executive power".

103. It is apt to commence our analysis of Article 28.2 by looking at the term "by or on the authority of the Government" (emphasis added). Hogan, Morgan and Daly, describe the Government as standing at "the apex of the executive-administrative organ of government", being "the main engine of the Administrative State" and taking as it does "the major policy decisions" and overseeing their discharge. In *Comyn v. Attorney General* [1950] I.R. 142, (1949) 83 I.L.T.R. 146, Kingsmill Moore J. (citing Article 28) put it thus:

"[The Government]" is not a mere executive organ, it is the executive organ exercising the supreme executive power of the State (Article 28.2)."

The concept of the Government as being at the apex of the "executive-administrative organ of government" is therefore a relatively straightforward concept.

104. On the other hand, the term "executive power of the State" is, as we have already observed, not so readily definable. Hogan, Morgan and Daly suggest, insofar as Article 28.2 is dealing with the "inherent executive power", that the phrase refers "to powers which the executive possesses, with no need for the support of (primary or delegated) legislation".

105. In his learned commentary, "Under-Explored Corners: Inherent Executive Power in the Irish Constitutional Order (D.U.L.J., January 2017, 40(1), 1-36), Dr. Conor Casey notes:

"there is very little textual guidance [in Article 28.2] as to what executive power in the Irish constitutional order consists of".

106. He cites Oran Doyle: *Constitutional Law: Text, Cases and Materials* (Clarus Press 2008), where it is suggested that the question of what constitutes a function or power of government may be answered through considering the powers some organ must have "in order to be a State". He recites Doyle's premise that powers a State must have, in order to be a State, and which are neither legislative nor judicial, "are presumptively vested in the executive".

107. The precept in Article 28.2 that "the executive power of the State shall…be exercised by the Government" was addressed in *Barlow v. Minister for Agriculture* [2017] 2 I.R. 440. At issue in that case was a challenge by the plaintiffs of the practice, known as voisinage, whereby vessels registered in Northern Ireland, with the knowledge and approval of the State, fished for mussel seed in Irish territorial waters. The plaintiffs argued that mussel seed was a natural resource and belonged to the State and therefore, in accordance with

Article 10 of the Constitution, the granting of permission to fish for mussel seed had to be provided for by legislation approved by the Oireachtas.

108. The Supreme Court allowed the plaintiffs' appeal from the decision of the High Court. In the course of his judgment O'Donnell J. considered, *inter alia*, Article 28.2 and Article 29 of the Constitution (the latter Article dictating, *inter alia*, the circumstances in which international agreements must be laid before the Dáil).

109. He stated:

> *"[37] Since the conduct of international affairs is an important executive function, the distinction between executive and legislative functions is also relevant in this case. That distinction is often blurred in the Irish context because the executive sits in the legislature and more often than not effectively controls it and in particular the process of legislation. It is not therefore as important in practical terms to maintain the distinction between matters which can be controlled by executive decision and those which require to be regulated by public general legislation, as it is in other countries with a more complete separation between those powers. Second, it does not appear the precise boundary between executive and legislative functions is one fixed immutably by the Constitution. The Executive is responsible to the Dáil. The Oireachtas may it appears legislate for areas previously controlled by executive action. It is not necessary to consider what if any are the limits to such legislative power. It appears that the executive power in Irish law to date is, as Professor Casey observed, the residue which is left when the judicial and legislative powers are subtracted: Casey, Constitutional Law in Ireland, 3rd Ed., (Dublin, 2000), pp. 230-231. Perhaps the clearest example of this is in the related field of the control of entry of persons to the State. Until the enactment of the Aliens Act 1935, this was an executive function. The executive granted passports to Irish persons, and allowed entry*

into the State to those which it had either agreed in advance to permit to enter, or was prepared to permit entry. One of the features which made the case of Laurentiu v. Minister of Justice [1999] 4 IR 26 so intriguing was the fact that after the passage of the Aliens Act, it appeared that little in substance had changed: the decision on entry or exclusion was one made by the Minister. But that case turned on the fact, that while the same decision was made by the same person, it was now being made by a Minister not in the exercise of an executive power, but rather as the delegate of the legislature. Crucially that meant that the legislature was required to set out principles and policies by which that power should now be exercised by the Minister, who was in this sense merely persona designata that is the person identified to exercise the power."

110. As far as the State's foreign relations are concerned, the rationale for foreign policy as the preserve of Government is explained by O'Donnell J. in *Barlow*:

"[34] The conduct of foreign affairs is an important executive function, and for that reason rarely comes before the courts. The government conducts diplomatic relations, discussion with other states, negotiates and executes treaties and conventions, and may enter into arrangements or understandings with other countries. Generally none of this requires legislative authority or power. Article 29 dictates very precisely the circumstances in which international agreements must be laid before the Dáil or receive approval by it, and it should be noted, any such approval required is that of the Dáil and not the Oireachtas more generally and is therefore a representative rather than a legislative function."

Judicial oversight of the exercise of executive power at the level of "high policy"

111. Even in matters of high policy such as the conduct by the State of its foreign policy and relations, the actions of the Government in its exercise of the executive power of the State may, in certain circumstances be subject to judicial review. However, the scope for

judicial review is very limited and there is, in some situations, almost a zone of non-justiciability. In *Boland,* a challenge was taken (on constitutional grounds) to the conduct of the State's external relations and declarations of policy - a matter expressly reserved to the Government pursuant to Article 29.4.1 of the Constitution. The challenge was not successful. In the Supreme Court, Fitzgerald C.J. held that "*...the courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions.*" Supervision or interference by the courts, however, may be warranted in certain circumstances. Fitzgerald C.J. stated what would have to be established to warrant supervision or interference by the courts was *"a clear disregard by the Government of the powers and duties conferred on it by the Constitution*".

112. In *Crotty*, there was a successful challenge to the exercise by the Executive of its power under Article 29 of the Constitution. What was in issue was whether the provisions of Article 29. 4.3 authorised the ratification by the State of the provisions of the Single European Act. By a majority, the Supreme Court granted a declaration that the purported ratification of the Single European Act was unconstitutional, notwithstanding what was said by Walsh J.,

> "*The constitution confers upon the Government the whole executive power of the State, subject to certain qualifications*".

113. In *Crotty*, as in *Boland*, there was extensive judicial discussion as to when the courts could exercise supervision of or interfere with the exercise by the Government of the executive power of the State. Finlay C.J. said:

> "*[33] With regard to the executive, the position would appear to be as follows: This Court has on appeal from the High Court a right and duty to interfere with the activities of the Executive in order to protect or secure the constitutional rights of individual litigants where such rights have been or are being invaded by those*

activities or where activities of the executive threaten an invasion of such rights."

(Emphasis added)

And at para. 42 –

"[42] The overall provisions concerning the exercise of executive power in external relations do not contain any express provision for intervention by the Courts. There is nothing in the provisions of Articles 28 and 29 of the Constitution, in my opinion, from which it would be possible to imply any right in the Courts in general to interfere in the field or area of external relations with the exercise of an executive power.

This does not mean that the executive is or can be without control by the Courts in relation to carrying out executive powers even in the field of external relations. In any instance where the exercise of that function constituted an actual or threatened invasion of the constitutional rights of an individual, the Courts would have a right and duty to intervene."

And at para. 34:-

"[34] This right of intervention is expressly vested in the High Court and Supreme Court by the provisions of Article 34, s. 3, sub-s. 1 and Article 34, s. 4, sub-s. 3 of the Constitution and impliedly arises from the form of the judicial oath contained in Article 34, s. 3, sub-s. 1 of the Constitution."

114. In the same case, Walsh J, having described the executive power under the Constitution, went on to say:-

"[60] Nevertheless the powers must be exercised in subordination to the applicable provisions of the Constitution. It is not within the competence of the Government, or indeed of the Oireachtas, to free themselves from the restraints of the Constitution or

to transfer their powers to other bodies unless expressly empowered so to do by the Constitution. They are both creatures of the Constitution and are not empowered to act free from the restraints of the Constitution. To the judicial organ of government alone is given the power conclusively to decide if there has been a breach of constitutional restraints". (Emphasis added)

115. Further, Henchy J. said –

"[103] I am unable to accept the submission that the powers of Government in the conduct of foreign policy are not amenable to control by the Courts. It is true that Article 29, s. 4, sub-s. 1 of the Constitution provides that "the executive power of the State in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government." However, when one turns to Article 28 one finds that s. 2 of that Article clarifies the position by declaring that "the executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government."(Emphasis added). *It follows, therefore, that in the conduct of the State's external relations, as in the exercise of the executive power in other respects, the Government is not immune from judicial control if it acts in a manner or for a purpose which is inconsistent with the Constitution. Such control is necessary to give effect to the limiting words "subject to the provisions of this Constitution."* (Emphasis added)

116. Griffin J. said –

"[129] No express power is given by the Constitution to the Courts to interfere in any way with the Government in exercising the executive power of the State. However, the Government, and all of its members and the administration in respect of which the members are responsible, are subject to the intervention of the Courts to ensure that in their actions they keep within the bounds of lawful authority. Where such actions

infringe or threaten to infringe the rights of individual citizens or persons, the Courts not only have the right to interfere with the executive power but have the constitutional obligation and duty to do so. But that right to interfere arises only where the citizen or person who seeks the assistance of the Courts can show that there has been an actual or threatened invasion or infringement of such rights." (Emphasis added)

117. From *Crotty*, there emerged what *Kelly: The Irish Constitution*, describes at para. 5.1.31 as "the recognition of a new constitutional right to have government conducted in accordance with the mandates of the Constitution".

118. The limit of executive power being exercised in the domestic sphere was in issue in *McKenna v. An Taoiseach (No.2)* [1995] 2 I.R. 10. There, the plaintiff challenged the use of government funds to support the "yes" campaign for the 15th Amendment to the Constitution (No. 2) Bill, 1995. The Supreme Court by a majority upheld the challenge. In his judgment, Hamilton C.J. stated that in advocating for a particular outcome in a constitutional referendum, the Government was not engaged in the exercise of the executive power of the State. He put it thus:

> *"[The Government] was not acting in pursuance of any statutory authority and any activity of the Government is not per se an activity which assumes the character of the exercise of the executive power of the State".*

The outcome in *McKenna* was adjudged, *inter alia*, by reference to certain principles formulated by Hamilton C.J. as the basis upon which the courts would supervise or interfere with the exercise by the Government of its executive functions.

119. We will consider more fully later in the judgment (Part 8 below) whether or not the "clear disregard" test applies in the present case and/or the level of judicial deference which should be observed.

Executive power in the socio-economic sphere

120. It is a relatively uncontroversial proposition that decisions on economic and social policy fall within the exercise of executive power, concerned as they are with matters that again could be described as "high policy" decisions of the State. Hence, quite apart altogether from the doctrine of separation of powers which precludes the judicial arm of government from interfering in such matters, the functioning of the State in the realm of socio-economic matters, not being concerned with issues of law, does not readily lend itself to judicial review. The courts are ill-equipped to adjudicate on such matters in the absence of recognised legal standards by which they can be tested in the courts. Nor would courts have the specialist knowledge to take on such matters. Further, judges are not elected and should not be involved in the type of decision-making that is reserved for the elected representatives of the people.

121. Again, however, even in the realm of such policy decisions, judicial oversight may be warranted by the Constitution. *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 concerned a challenge in circumstances where the State had made virtually no provision for educational facilities for a child suffering from Reye's syndrome. A declaration was granted by the Supreme Court that the applicant was entitled to free primary education in accordance with Article 42.4 of the Constitution.

122. On the other hand, in *T.D. v. Minister for Education* where what was at issue was, *inter alia,* executive policy which had been formulated to deal with children with special needs, the Supreme Court held that insofar as the order of the High Court under appeal purported to force the executive branch of government to implement a particular policy which extended beyond the needs of the applicants, the High Court had acted in breach of the doctrine of the separation of powers. It held, however, that the doctrine of the separation of powers would not protect the executive where there was a clear disregard of its

constitutional powers and duties. Considerable reliance is placed by the Minister on *T.D* (in particular, the *dicta* of Murray J. and Hardiman J.) in support of her argument that for the Court to hold that the decisions of the Minister in issue here invalid, the respondents must reach the high bar for judicial review set down in *T.D.* We will return to this argument in Part 8.

Non-statutory schemes as an exercise of executive power

123. It is uncontroversial to observe that the inherent power of the Executive pursuant to Article 28.2 extends beyond what was referred to at one point in oral submissions as such "lofty" matters as foreign affairs, international relations and indeed the socio-economic issues referred to above. In *Kelly*: *The Irish Constitution,* the editors state::

> "[5.1.18]...in the domestic arena, successive Governments have used extra-statutory schemes to provide benefits to citizens. Governments may also enter into contracts and acquire and dispose of property without statutory authority, and on a number of occasions, companies have been established by the executive in the absence of the statutory authorisation."

124. Hogan, Morgan and Daly too cite, *inter alia*, the creation of non-statutory policy schemes as an example of the manifestation of the exercise of inherent executive power by the Government by or on behalf of the State. Examples of the establishment of extra-statutory schemes in the domestic sphere set up to confer benefits on citizens cited in *Kelly: The Irish Constitution* include the funding for primary and secondary education prior to the enactment of the Education Act, 1998 ("the 1998 Act"); the pre-1995 Civil Legal Aid Scheme; and the Criminal Injuries Compensation Scheme.

125. An example of an extra-statutory scheme set up to meet the exigencies of a particular situation was the scheme at issue in *Bode (a minor) v. Minister for Justice* [2008] 3 I.R. 663. The scheme, introduced in 2005, allowed the foreign parents of Irish children to remain in

the State. The applicants challenged the scheme on the basis that they had an entitlement to be considered individually for inclusion and should not be excluded by reason of the criteria established by the Government in the exercise of its executive power. The Supreme Court upheld the inherent executive power of the State to consider and determine applications for residency outside of a statutory framework. In the course of her judgment Denham J., opined that *"one of the fundamental powers of a State"* arose for consideration and described the scheme as executive power exercised by the Minister on behalf of the State *and "an example of the State exercising its discretion to allow specific foreign nationals to reside in Ireland"*. She stated that *"[t]he inherent power of the State includes the power to establish an ex gratia scheme of this nature..."*

126. In *T.A. v. Minister for Justice and Equality* [2014] IEHC 532, Mac Eochaidh J., in holding that the system of "direct provision" for housing asylum applicants (also an extra-statutory scheme) was not *ultra vires* the Executive for lack of statutory footing and that the Executive could use its inherent powers to establish such schemes, regarded *Bode* as a primary example of *"an executive action establishing a scheme without legislative input"*.

127. On the face of it, therefore, when one considers the *dicta,* respectively, of Denham J. and MacEochaidh J. in *Bode* and *T.A.,* it is not difficult to comprehend why the Minister contends that the CGS introduced by the Government on the 8 May 2020 was an extra-statutory scheme set up pursuant to the inherent power of the State. But, as we see, the respondents contend otherwise. They rely, in particular, on *State (C) v. Minister for Justice* and *Murphy v. Dublin Corporation* in support of their argument.

128. In *State (C) v. Minister for Justice* the applicant for *habeas corpus* had been certified by the Minister for Justice (as successor to the Lord Lieutenant) pursuant to s.13 of the Lunatics Asylum (Ireland) Act, 1875 for transfer to the Central Mental Hospital. The issue was whether or not the Minister for Justice was entitled to do so on the basis that it had been

a prerogative power of the Lord Lieutenant before independence. The applicant asserted that the function was an exercise of executive power and, as such, could under Article 28.2 be exercised not by a Minister, but only by or on the authority of the Government.

129. That argument failed. The Supreme Court held that the powers conferred on the Lord Lieutenant, in so far as they were still exercisable, were exercisable by the Minister for Justice. It held that the powers were not part of the executive power of the State within the meaning of Article 28.2. As to the nature of the authority conferred by s. 13, Ó'Dálaigh C.J. had "*no doubt that the authority conferred by s. 13 of the Act of 1875 on the Lord Lieutenant was conferred upon him not as representing the Crown, but as a named individual, and that his function is to be identified as an administrative function related to prisons.*"

130. In the course of his judgment, Walsh J. stated:

> "*...it is my opinion that the fact that a statutory power is conferred upon a member of the executive or a representative of the executive, as was the Lord Lieutenant, does not make that power an executive power within the meaning of that expression in the Constitution as the statute might just as easily have conferred the power on anybody else. The executive power of the State is not the same as a specific ad hoc power conferred by statute upon a Minister or some other member of the executive. In my opinion this statutory power, conferred upon the Lord Lieutenant, is not one which falls within Article 28, section 2 of the Constitution.*"

131. In issue in *Murphy v. Dublin Corporation* was the right of the Minister for Local Government to claim executive privilege in relation to the production of a document. The plaintiff sought a declaration that a compulsory purchase made by the defendant corporation and confirmed by the Minister for Local Government was invalid. The Minister for Local Government (also a defendant) objected to the production of a report made by one of his inspectors claiming its production "would be contrary to public policy and the public interest

and service". In the Supreme Court, Walsh J., relying on Article 34 of the Constitution, said that the power to compel the production of documents was *"an inherent part of the judicial power of government of the State"*. He further held that the Minister for Local Government, in exercising power to determine appeals under the Housing Act, 1966, was merely a *persona designata* and that as such was not exercising the executive power of the State in any sense that could entitle him to assert privilege over a document. In the course of his judgment, Walsh J. opined:

> *"The function [in issue here] is not an executive power of the State assigned to his Department or a power which vested in the Government as an executive power from the State. He is persona designata in that the holder of the office of the Minister for Local Government is the person designated for that function. If the Oireachtas had so enacted, the Act could just as easily have assigned the function to [a quite different official] .... the fact that the Minister for Local Government was the person chosen ... does not per se confer upon the function the character of the exercise of the executive power of the State."*

132. What we understand Walsh J. to be saying in *Murphy v. Dublin Corporation* is that once *statutory* power is conferred on a Minister, the exercise of that power is not "the executive power of the State". The core principle is that once the ministerial power in issue is underpinned by legislation it cannot be an executive power: rather it is exercised by the relevant minister as "the delegate of the legislature" (see O'Donnell J. in *Barlow* at para. 37). Similarly, we are of the view that the respondents' reliance on the *dictum* of Walsh J. in *State (C) v. Minister for Justice* is misconceived for much the same reason.

133. In the present appeals, the fundamental difference is that, unlike the position in *State (C) v. Minister for Justice* and *Murphy v. Dublin Corporation,* the Minister was not operating

as *persona designata* under a *statutory* power. Rather, she was operating the CGS pursuant to a power conferred on her "by or on the authority of the Government".

134. As a matter of logic, the phrase "by or on the authority of the Government", as it appears in Article 28.2, must be understood to contemplate the need for administrative structures to be set up, and administrative action to take place, to give effect to the exercise of the power conferred on an individual or body by the Government. Hence, it is noteworthy that the policy decision of the 8 May 2020, which conferred the Minister with power to put in place a system whereby Leaving Certificate students could opt to have calculated grades issued to them by the Minister, *itself* contained the basic administrative structure by which the Government's objective (to facilitate Leaving Certificate students' access to third level education and the world of work) would be achieved.

The relevance, if any, of the existence of legislation establishing the State Examinations Committee

135. It is of course the case that the CGS was set up in circumstances where there was an already-established statutory scaffolding underpinning the State examination regime. Part VIII of the 1998 Act provides for procedures to be put in place for the conduct of examinations, including those at post primary level. Schedule 2 to the Act lists the Leaving Certificate as one such examination. Pursuant to s. 50, "the Minister may from time to time prescribe such other examinations as he or she considers appropriate..."

136. Section 54 of the 1998 Act provides for the establishment of a body to perform functions relating to support services and the SEC was established in 2003 by statutory order S.I. No. 373/2003 - State Examinations Commission (Establishment) Order.

137. In response to questions from the Court, counsel for the Minister addressed the question of whether, in circumstances where the 1998 Act clearly envisaged a ministerial function in legislating for the State examination process, the Government retained an

inherent power to put in place an alternative means for the calculation of grades. Counsel submitted that the mere fact that the 1998 Act envisaged a ministerial function in relation to the Leaving Certificate examination did not mean that the Government did not have power under Article 28.2 to put in train the measures decided upon on the 8 May 2020. She submitted that the provisions of the 1998 Act could not "empty the executive of its constitutional entitlement to deal with the unprecedented challenge that arose".

138. The Court accepts that to be the case. The fact that the Leaving Certificate examination has a legislative structure did not preclude the Government from taking the decision it took on the 8 May 2020. As noted in the decision of the 8 May 2020 itself, the system of voluntary grading was being offered to Leaving Certificate examination candidates solely because of the *inability* of the SEC or the Minister to operate the Leaving Certificate examination safely. The statutory Leaving Certificate system could not address the crisis that was presenting as of May 2020. It was because of the very nature of the Leaving Certificate examination system, entailing as it does the assembly in one location of large numbers of students, that the examinations could not go ahead as normal in June 2020, as would have been the case in any normal year, or indeed in July and August 2020 as had been the plan prior to the 8 May 2020. Thus, the Government, in the exercise of its inherent executive power, stepped in to make provision for the establishment of an alternative means of ensuring that 2020 Leaving Certificate students who aspired to accessing third level education or entering the workplace could do so armed with State recognition of their educational achievements. The existing legislative structure and the procedures set up thereunder by the SEC provided for an altogether different system: they were fashioned for the sitting of the Leaving Certificate in "normal" circumstances.

The Court's conclusion as to whether the executive power of the State was invoked in May 2020

139. We view the decision in *Bode* as being of assistance in this regard. While the scheme in *Bode* (established, as said by Denham J., *"as an exercise of executive power"*) cannot be said to be on all fours with the CGS in issue here, we note that it was operated as an *administrative* scheme in respect of which applications by foreign nationals for residency were considered having regard to established criteria. In *Bode,* it was not suggested that the operation of the scheme on an administrative basis somehow stripped the scheme of its status as an exercise of an executive power of the State.

140. Similarly, the fact that the scheme could equally have been legislated for (as opposed to being set up on an extra-statutory basis) does not preclude the scheme from being an exercise of the executive power of the State. As said by O'Donnell J. in *Barlow, "it does not appear the precise boundary between executive and legislative functions is one fixed immutably by the Constitution".* The mere fact that the CGS could have been placed on a legislative footing does not mean that it should have happened. That is not to say, however, that the establishment and operation of the CGS pursuant to the decision of the 8 May 2020 did not have the capacity to affect the fundamental rights of the respondents. Indeed, it is the respondents' case that their rights were so affected by the design of the CGS and its administration under the auspices of the Minister. We address this claim later in the judgment.

141. There was nothing to inhibit the Government, in the exercise of its executive function under Article 28.2, in making the decision that it did to postpone the Leaving Certificate examinations and to decide, as a matter of policy, to provide a non-statutory scheme to meet the exigencies of the situation in which the Leaving Certificate students of 2020 found themselves. Accordingly, in all the circumstances, and while we are mindful of the *dictum*

of Hamilton C.J. in *McKenna* that "..*any activity of the Government is not per se an activity which assumes the character of the exercise of the executive power of the State*" (emphasis added), we are satisfied that the decision of the 8 May 2020 to move away from the holding of the Leaving Certificate and to introduce calculated grades was a policy decision taken by the Government in the exercise of the executive power of the State.

142. Should a distinction be drawn between the decision of Government and the administration of the Scheme? More particularly, might it be said that the Scheme was a Government policy decision while the exclusion of the respondents from it an administrative one? The Court thinks not. The Scheme as administered, and the exclusion of the respondents from it, was inextricably bound up with the policy decision taken by the Government on the 8 May 2020. We cannot therefore accept the respondents' proposition that, for judicial review purposes, it is sufficient to consider the Scheme as established and administered by the Minister as a purely *ad hoc* scheme and without reference to its genesis. The Scheme ultimately established by the Minister was an administrative implementation of the prior government policy decision and the implementation of the Scheme including the exclusion of the respondents from it arose from the Government decision. As the policy decision taken on the 8 May 2020 was an exercise by the Government of the executive power of the State pursuant to Article 28.2, *prima facie* the starting point for judicial review purposes is that the Court will approach its task bearing in mind that appropriate deference to the decision must be accommodated, recalling the words of Griffin J. in *Crotty* that *"no express power is given by the Constitution to the Court to interfere in any way with the Government in exercising the executive power of the State"* but recalling, equally, his *dictum* that where "*such actions infringe or threaten to infringe the rights of individual citizens or persons, the Courts not only have the right to interfere with the executive power but have the constitutional obligation and duty to do so*".

Exercise of executive power and presumption of constitutionality

143. Acts of the Executive enjoy the presumption of constitutionality in the same way as legislation. As said by Murnaghan J. in *Boland*, *"this court must assume until it is clearly established to the contrary, that any declaration of policy by the Government is within the constitutional powers conferred on the Government"* (see also *Crotty*).

144. In *Kavanagh* (where what was in issue was a power entirely governmental in nature, that of deciding on a parliamentary basis whether circumstances existed which required the making of a proclamation pursuant to s. 35(2) of Offences Against the State Act, 1939), Laffoy J. opined:

> *"There is a strong presumption of constitutionality in favour of the Government and that executive actions are performed in a constitutional matter. The onus of proof necessary to displace this presumption is a considerable onus ..."*

On appeal in that case, Barrington J. opined that the presumption of constitutionality of legislation:

> *"... was justified by the Supreme Court in Buckley v. Attorney General [1950] I.R. 67 by reference to the "respect which one great organ of the State owes to another". The Executive is one of the great organs of State and it appears entirely consistent that the courts should show the same respect to it."*

In the same case, Keane J. stated:

> *"While all three organs of State derive their powers from the people, the Government and the Oireachtas were accountable, directly and indirectly, to the people in the electoral process. Where, as here, the exercise by the Government of the executive power of the State is challenged as being in breach of the Constitution, it must be presumed, until the contrary is shown, that their actions are a lawful exercise of the power vested in them."*

145. Whether the decisions of the Minister in issue here constitute a lawful exercise of the power vested in her on the 8 May 2020 is addressed later in this judgment. The case law referred to above has pointed towards constitutional rights as a factor to be considered by a court when reviewing the exercise of executive power. For that reason, we now turn to a consideration of whether the rights asserted by the respondents pursuant to Article 40- 42 of the Constitution exist, and if so, whether they are engaged by the decisions of the Minister.

PART 7: ARE FUNDAMENTAL RIGHTS AT ISSUE?

The Core Claims

146. The respondents maintain that the *Keegan* test as interpreted in *Meadows* should be applied because their constitutional rights were impacted upon by the decision to exclude them from the Scheme. The Minister maintains that no constitutional rights were in issue. The Court must therefore examine whether any of the constitutional rights of the respondents were engaged and if so, the precise nature of those constitutional rights.

147. In order to identify the fundamental rights claimed by the respondents, it is necessary to examine the pleadings.

In his statement of grounds, the first respondent pleaded:

a) That the Constitution set out the rights and duties of the State in the matter of education in Article 42;

b) That the State has "failed to properly vindicate the [first respondent's] constitutional rights to be educated in his home, his right to fair procedures, his family life or his Equality rights under the Constitution of Ireland." The State's system of calculated grades amounts to an unjust attack on his constitutional rights as aforesaid; and

c) That he had a legitimate expectation that he would be eligible for a calculated grade.

This final ground has not been pursued in this appeal.

148. In her statement of grounds, the second respondent pleaded:

a) That the Constitution set out the rights and duties of the State in the matter of education in Article 42;

b) It is the right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children. That the second respondent was the recipient and beneficiary of this correlative constitutional right and has a right to be educated in her home with her parents as teachers;

c) That the State failed to properly vindicate the second respondent's constitutional rights to be educated in the home and her concomitant right to conclude her secondary education by means of sitting the Leaving Certificate or being considered for a calculated grade under the CGS; and

d) An omnibus plea in her grounding statement that the State had failed to properly vindicate her constitutional right to fair procedures, to family life or her equality rights under the Constitution. She claimed that the State's system of calculated grades amounts to an unjust attack on her constitutional rights aforesaid.

149. The trial judge did not expressly deal with any of the constitutional issues in his judgment in respect of the first respondent, although the Minister has appealed on the basis that the trial judge made an implicit assumption that Articles 40 and 42 established a right to be considered for a calculated grade. As stated above, the first respondent did not cross-appeal or rely on other grounds but relied on constitutional rights arguments in submitting that the trial judge's decision should be upheld.

150. In his judgment concerning the second respondent, the trial judge referred more explicitly to the constitutional rights issues in respect of Article 42 and Article 40.1. The

Minister also appealed this case on the basis that there was an implicit assumption on the part of the trial judge that those Articles established a right to be considered for a calculated grade. The second respondent in her respondent's notice relies upon the following additional ground upon which the decision should be upheld:

> "[I]n light [of] Articles 40-42 and of Article 42.4 in particular, the test set out in *Meadows* and *Keegan* does not properly apply to the issue in this case, as the Minister did not enjoy a conventional administrative discretion, subject to reasonableness to decide how to treat the applicant's application of a calculated grade or in devising a scheme for giving calculated grades. Unless it was incapable of being reasonably effected, [the Minister] was obligated to provide a calculated grade."

The second respondent later clarified that the last sentence overstated the extent of the constitutional protection sought by her in that she did not claim she was entitled to obtain a grade but rather that she was entitled to be considered for a grade.

151. From their grounding statements and submissions, it appears that the core part of the respondents' proceedings relates to the provisions of Article 42. The gravamen of their argument is that while Article 42 expresses that there is a right vested in parents to home school their children, the child must enjoy some corresponding rights. These corresponding rights include the right not to be affected unnecessarily detrimentally by the choice of their parents where it can reasonably be avoided. Therefore, the second respondent submits that for the right to be educated at home to be effective, the respondent as a beneficiary of that right, should have the possibility of drawing profit from the education received, namely official recognition of the studies which she completed.

152. The second respondent submits that Article 42.4 "is clearly an important, if not the primary foundation of the ground advanced." It is contended that the requirement that "the State shall [...] endeavour to supplement and give reasonable aid to private [...] educational

initiative", read in conjunction with the equality provisions of Article 40 and the explicit entitlement of parents to provide education in their homes, necessarily results in a constitutional obligation on the State not to disadvantage the respondent as a recipient of home education as a result of parental choice where, by reasonable endeavours, effective parity with other candidates can be accomplished.

153. It is also important to consider what is not pleaded by the respondents and indeed what is expressly disavowed. The second respondent expressly states that she is not claiming a right of access to third level education as a human right (para. 101 of submissions). The second respondent pleaded a failure to vindicate her constitutional right to be educated in the home and her concomitant right to conclude her secondary education by means of sitting the Leaving Certificate or being considered for a calculated grade under the Scheme.

154. The respondents did not make any express reference to Article 40.3 in their statements of grounds but the language of Article 40.3 was utilised. The pleadings included a claim that the Minister failed to properly vindicate the constitutional rights to be educated in the home, to fair procedures, family life and equality under the Constitution and that the Scheme amounted to an unjust attack on their constitutional rights aforesaid. The respondents relied upon Article 40.1 in submitting that the manner in which the CGS was established was a violation of their right to equality. This right they say is interlinked with Article 42 rights.

155. In written and oral submissions, the Minister contends that there was *no* constitutional or statutory right at issue in this case. While the Minister, at para. 85 of her written submissions in the second respondent's case, appeared to accept that there is a right of a child to be home-schooled once that choice had been made by her parents, she refuted any suggestion that anyone had sought to deny the second respondent that right. The Minister submitted, relying on *Prendergast v. The Higher Education Authority* which

concerned access to third level education and is discussed in more detail in Part 8 below, that the proper understanding of Article 42 was that the facility for home schooling should not, to paraphrase Charleton J. in *Prendergast*, be allowed by the State to be destroyed. According to the Minister, by no stretch of the imagination could it be said that the existence of the Scheme or the respondent's exclusions from it destroyed or impaired the parent's right to home-school the child.

156. The Minister also submits that no provision of the Constitution required identicality of treatment between home-schooled and in-school students. The only commonality according to the Minister, is that a "certain minimum education" through Article 42.3.2° be provided. She also contends, relying on *Carter v. Minister for Education and Skills* [2019] IECA 162, that no argument had been made that there was an unenumerated right to enter third level education in this case and therefore that right was not contended as being at issue here.

157. The Minister contends that the constitutional rights claim was not properly pleaded and was too vague, as put forward in submissions, to constitute any such constitutional right and was, in any event, unnecessary for the Court to make a finding upon.

Education, Family and the position of the home-schooled child under the Constitution

158. Before looking at whether the right of the parent to home-school their children pursuant to Article 42 creates any correlative right of the child it is worthwhile recapping the nature and extent to which constitutional rights with respect to education have been recognised to date. This is particularly important where the Minister correctly points out, in reliance on *Friends of the Irish Environment v. The Government of Ireland* [2020] IESC 49 that the courts should act with caution when considering the identification of new constitutional rights lest they trespass impermissibly into areas which are more properly characterised as policy. In *Friends of the Irish Environment v. The Government of Ireland,*

Clarke C.J. nonetheless acknowledged that new rights which are *derived from* the Constitution may be identified where they stem from certain constitutional values taken in conjunction with other express rights or obligations, or from the democratic nature of the State whose fundamental structures are set out in the Constitution, or a combination of rights, values and structures. It is noteworthy that Clarke C.J. expressly mentioned dignity as a constitutional value.

159. The Minister and the respondents are in agreement that this is an area where there is a lack of direct authority on the precise claim made by the respondents. All parties also agree with Laffoy J. in *O'Shiel v. Minister for Education* [1999] 2 I.R. 321 that Article 42 is *"a complex provision and embodies a number of interlocking elements"*.

160. The Constitution creates strong connections between the family and the education of the child. In Article 42.1, the State acknowledges that the family is the primary and natural educator of children and that the State guarantees to respect the inalienable right and duty of parents to provide for the religious and moral, intellectual, physical and social education of their children. In *G v. An Bord Uchtála* [1979] 113 I.L.T.R 25, Walsh J., referring to the types of education set out in Article 42.1, said that *"[s]uch education is therefore regarded both as a right and a duty of the parents and, correlatively, it is the right of the children to look to their parents and family for the fulfilment of their duty to supply, arrange for, or provide that education."*

161. Denham J., in *DPP v. Best* [2000] 2 I.R. 17, a case concerned with the prosecution of a mother under the School Attendance Act, 1926 (as amended), expanded upon this: -

> *"The child's right is not expressly stated in Article 42. However, jurisprudence in Ireland has acknowledged the rights of the child to include the right to be educated. In G. v. An Bord Uchtála [1980] I.R. 32 at p. 55, O'Higgins C.J. stated, in relation to the constitutional rights of the child: -*

'The child also has natural rights. Normally, these will be safe under the care and protection of its mother. Having been born, the child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being. These rights of the child (and others which I have not enumerated) must equally be protected and vindicated by the State.'"

162. In this passage, it might appear that the right to education only flows from Article 40.3 which provides that the State must guarantee in its laws to respect, and in so far as practicable, by its laws to defend and vindicate the personal rights of its citizens. Although Denham J. stated that the child's right to education was not expressly stated in Article 42, it appears, however, that she was not ruling out that the right was implicit within the Article.

163. Indeed, support for this is found in Article 42 itself. Article 42.2 points towards a right to education by stating that parents are free to provide this in their homes or in private schools or in schools recognised or established by the State. Article 42.3 recognises that, although the State cannot oblige parents to send their children to State established or recognised schools contrary to their conscience and lawful preference, the State shall require that, as guardians of the common good, that children receive a certain minimum education; moral and intellectual and social.

164. From the case law we have reviewed, it appears to us that the State's role in ensuring the provision of education to children must be viewed through the provisions of the Constitution. Unlike Article 10 of the Constitution of the Irish Free State, which gave citizens the right *to* free elementary education, Article 42.4 is expressed in terms of the State's duty to provide *for* free primary education. In *Crowley v. Ireland* [1980] I.R. 102, a case involving the effects of an industrial dispute on the ability of certain primary children to attend school, O'Higgins C.J. stated: -

"[11] However, the imposition of the duty under Article 42, s. 4, of the Constitution creates a corresponding right in those in whose behalf it is imposed to receive what must be provided. In my view, it cannot be doubted that citizens have the right to receive what it is the State's duty to provide for under Article 42, s. 4."

165. O'Higgins C.J. gave a minority judgment in that case but, giving the majority judgment, Kenny J. also stated that the effect of Article 42 was that each child in the State has a right to receive a minimum education, moral, intellectual and social. In *Sinnott v. Minister for Education*, the Supreme Court confirmed that the right to free primary education was limited to children. In doing so the Supreme Court, in the various judgments delivered, interlinked the right to education set out in Article 42.4 with the balance of the provisions set out in the Article, which refer to family, parental rights and duties and children's rights.

166. *Crowley v. Ireland* accords with the view articulated by Walsh J. in *G v. An Bord Uchtála*, that where a duty is imposed a corresponding right exists. These *dicta* were made in the context of the constitutional right to education. We will discuss later whether the rights claimed by the respondents are so unclear as not to be derived from the Constitution. At this point we will observe however that the concept of a derived, corollary or concomitant right is one known to our Constitution.

167. Article 42.1 also refers to the right and duty of parents to provide for education of their children. Article 42.2 clarifies that this right of the parents is to provide for that education in a choice of settings: home, private schools, State established or recognised schools. The extent of the duty of parents in terms of intellectual, moral and social education appears limited by Article 42.3 which provides that the State shall require that children receive a certain minimum education of that type. The issues raised in this case go beyond the duty to provide a minimum education but involves the right of parents to educate their children to the level of the Leaving Certificate and the interlinking with the child's right, if

any, to receive education to that extent and the State's duty, if any, to provide for, lend support to, or not disadvantage that choice of education lawfully exercised by the parents.

168. What then is the extent of the child's rights in circumstances where the parent has chosen to home-school him or her? The respondents submit that the child must enjoy corresponding rights "not unnecessarily to be affected detrimentally by that choice where it can reasonably be avoided" but cannot cite authority which directly supports this proposition. The nuanced manner in which the respondents express the nature of the child's rights under Article 42 is perhaps a recognition that the litigation concerning Article 42 to date has been with respect to the extent of the duty of the State to provide (for) free primary education or to require a certain minimum education (e.g. *Crowley v. Ireland, Sinnott v. Minister for Education*) and the cases on the extent to which the State can interfere with the provision by parents of education in the home (*e.g. In Re Article 26 and Schools Attendance Bill* and *DPP v. Best*). In those cases, the duties of the State and parents, can be understood as being delineated by the terms "free primary education" and "certain minimum education". The facts in this case demand a greater attention to the right of the parent to exercise a choice in providing for the education of the child and the corresponding duty, if any, on the State to respect that right and the concomitant right if any, conferred on the child, as a result of the choice exercised by his or her parent.

169. On the other hand, the Minister, in arguing for a limited view of the duties imposed on the State in Article 42, has relied upon the *dicta* of Charleton J. in *Prendergast v. The Higher Education Authority* as follows:

> *"[64] It is argued that I should read the guarantee of equality set out in Article 40.1 of the Constitution together with Article 42.1, taken in isolation from its context. It is clear that the context of Article 42 is to allow provision to be made by law for the*

setting up of schools, but in such a way as not to infringe religious freedom, or to destroy private education or to allow home schooling."

The Minister's contention, relying on that *dicta*, appears to be that the extent of the State's duty under Article 42, beyond ensuring a certain minimum education, is that it should not "destroy" the facility for parents to home school their children. This would not amount to an onerous duty at all and the Court will examine if such a narrow scope accords with the correct constitutional interpretation.

170. There has been little judicial consideration of the right of the child to receive secondary level education, apart from the *Campaign to Separate Church and State v. Minister for Education* [1998] 3 I.R. 321, a case involving the constitutional propriety of the State paying the salaries of Chaplains in Community Schools. That case primarily addressed Article 44.2, the prohibition of endowment of religion clause, but also involved Article 42. Barrington J., speaking for the majority of the Supreme Court in the *Campaign to Separate Church and State v. Minister for Education*, with reference to post-primary schools, stated:-

"[84] [...] It therefore appears to me that the present system whereby the salaries of Chaplains in Community Schools are paid by the State is merely a manifestation, under modern conditions, of principles which are recognised and approved by Articles 44 and 42 of the Constitution".

171. Moreover, Murphy J. in *DPP v. Best*, although in the minority in part, stated that *"[m]ore particularly, the parents' duty (and the corresponding right of the child) is not limited. The parental duty could encompass full secondary and third level education if this is within their means"*. The decision of the Supreme Court in the *Campaign to Separate Church and State v. Minister for Education* is binding authority and the *dicta* of Murphy J. concerning the breadth of the parents' duty, while quite far reaching, is at a minimum persuasive in recognising that parents have rights to provide for secondary and third level

education if within their means. The Court therefore concludes that Article 42 envisages that the parents have rights to provide for secondary education and the State has, at a minimum, a power (as distinct from a duty) to provide for secondary education. The impact of this conclusion will be explored.

172. The respondents cite with approval from the decision of Laffoy J. in *O' Shiel v. Minister for Education* in support of their contention that, where parents have exercised their right to educate their child at home, the State's duties to the child extend beyond ensuring the provision of a certain minimum education to include supporting the parents' exercise of the right to home-schooling (a right interlinked with family and child rights). This was a case where the parents of primary school children had set up and funded a school run on a system of education based upon Steiner principles. The school applied for State funding, but that funding was only granted to schools which followed the rules providing for recognition by the State. These rules included a requirement as to teacher qualifications. Only one teacher in the school had the required qualifications.

173. In her judgment, Laffoy J. described some of the interlocking elements of Article 42 as follows:

> *"[95] Thirdly, in addition to its obligations to intervene already referred to, duties are imposed on the State –*
>
> *(1) to provide for free primary education*
>
> *(2) to endeavour to supplement and give reasonable aid to private and corporate educational initiatives, and*
>
> *[....]*
>
> *Fourthly, Article 42 inferentially recognises certain rights of children, for instance: the right identified by Kenny J. in Crowley v. Ireland to intervene so that they receive a certain minimum education; the right identified by O'Higgins C.J. in Crowley*

v. Ireland to receive what it is the State's duty to provide for under Article 42.4; and, by analogy, the right to have the State intervene and endeavour to supply the place of the parents in the exceptional cases mentioned in Section 5. Section 5 expressly characterises the rights of the child as being natural and imprescriptible."

[Note Article 42.5 has since been repealed]

174. The respondents rely upon the reference at point (2) as indicating that the second part of the sentence at Article 42.4, together with Article 40.1 and the right of parents to educate in the home, requires the State to endeavour to supplement and give reasonable aid to private and corporate education initiatives and obliges the State not to disadvantage the respondent as a recipient of home education as a result of parental choice.

175. It must be acknowledged that *O'Shiel v. Minister for Education* concerned recognition of a Steiner primary school. The arguments in that case focused on the legal and constitutional rights and duties with respect to the provision of primary education, especially with regard to the first limb of Article 42.4. That is made abundantly clear by the *dicta* of Laffoy J. as she opened that section of her judgment which itself is headed "*Core issue: The extent of the State's duty under Article 42.4*". Laffoy J. stated:

"[82] Essentially, the plaintiffs' claim is a claim for funding of Cooleenbridge School by the State on the same basis as other primary schools recognised by the State are funded. The core issue in determining whether that claim is sustainable is the extent of the State's liability under Article 42.4. The plaintiffs' claim based upon Article 42 rests solely on the first limb of Article 42.4, which provides that the State shall provide for free primary education."

176. It was with reference to the duty of the State to provide for primary education that Laffoy J. said that in fulfilment of its duties *"the State must have regard to and must accommodate the expression of parental conscientious choice and lawful preference."* It

was in that context that she held that the provision of fifteen *denominational* schools within a twelve-mile radius of Cooleenbridge as fulfilment of the State's constitutional obligations to the plaintiffs would render meaningless the guarantee of parental freedom of choice in the case of the parent plaintiffs. While Laffoy J. held that the fulfilment of the State's duty did not mean the State had to accede to the wishes of every group of parents, she said it was implicit in Article 42.4 that any scheme put in place, involving as it does the disbursement of public money, must be rational. Laffoy J. went on to say that the proper constitutional scope of Article 42 could not be diminished by administrative measures and in so far as the Rules for National Schools purported to do so, they were invalid. She went on to hold that it was proper for the Minister to prescribe standards in relation to academic competence and like matters for deeming a person eligible to teach in a recognised primary school.

177. In answer to the question of whether the failure of the Minister to seek a solution to accommodate the choice of Steiner education within the system of recognised primary schools by relaxing the normal teacher qualification criteria was an infringement of the constitutional rights of the plaintiffs, Laffoy J. stated:-

> *"[128] If there is a reasonable solution available, it seems to me that the failure of the Minister to adopt it would constitute a breach of the plaintiffs' constitutional rights. To suggest that there should be no prescribed standard is not a reasonable solution. While the plaintiffs did not overtly suggest that there should be no prescribed standard at all, by seeking the relief they claim in these proceedings on the basis of the evidence adduced, in essence that is what they are doing. To suggest that full time permanent teachers should be regarded in the same light as substitute teachers is not a reasonable solution. There may be the possibility of a reasonable solution in the precedent of restricted recognition of Montessori trained teachers in special schools."*

178. It is this passage that appears to ground the respondents' argument that the State was obliged to facilitate the respondents moving to third level, if this could be accomplished by reasonable endeavours on the part of the State. They have phrased this in a slightly different manner elsewhere in the submissions *e.g.* that "the Respondent need only establish that the [Minister] was obliged to provide a fair mechanism for considering whether the Respondent could get an estimated mark and thus a calculated grade if this was the only effective means of progression in the relevant year."

179. One of the complexities at the heart of Article 42 is that the duties, rights and empowerments contained therein extend in some areas beyond primary education. While the express duty on the State is to provide for free primary education, there is also a power, referred to in various sections of Article 42, given to the State to recognise or establish schools. That power is not limited to primary schools.

180. The parental right to provide education in the home also extends to a right to provide education beyond primary level. Does the exercise of this right have an impact on any State obligation to the parents and also to the children? As we shall demonstrate, it would appear that it does have an impact.

181. The second respondent refers to her right to be educated in the home and a concomitant right to sit the Leaving Cert or be assessed for a calculated grade. Education was defined by the Supreme Court in *Ryan v. Attorney General* (Ó'Dálaigh C.J.) when he said: *"Education essentially is the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral"*. In more academic terms, Baker *et al* in *Equality: From Theory to Action*, (2nd edn., Palgrave Macmillan, 2009), pronounce: -

> *"[t]he right to education is articulated in several international legal instruments including Article 24 of the Universal Declaration of Human Rights (1948). Education*

is valued because of its intrinsic worth for all human beings and because it is indispensable in achieving other human rights, including the right to economic well-being and good health. Where the right to education is guaranteed, other rights are greatly enhanced (UNESCO 2002)."

The phrase *"intrinsic worth for all human beings"* chimes with the *dictum* of O'Higgins C.J. in *G v. An Bord Uchtála*, cited at para. 160 above, that a child has the right to realise his or her full potential and dignity as a human being. The right to education and to have the opportunity to work are part of the vindication of the right to dignity. The Supreme Court in *N.V.H. v. Minister for Justice and Equality* held that the right to work, at least in the sense of a freedom to work or seek employment, is a part of the human personality and therefore withholding absolutely those aspects of the right which are part of human personality from non-citizens would violate the equality principle of Article 40.1.

182. Parents have a right to teach and train their children at home so that the children make the best use of their inherent and potential capacities, which is intrinsic to the children's self-worth and is an indispensable means to achieve other rights. Under Article 42.3, the State cannot oblige parents in violation of their conscience and lawful preference to send their children to established or designated schools. If the State were to provide a system of education that included an exclusive provision for in-school children only to be examined for third level, the lack of any similar provision for home-schooled children to make the best possible use of their inherent and potential capacities would, at a minimum, give rise to an inference such that it placed a *de facto* obligation on parents, in violation of their *lawful preference* of home schooling, to send their children to school if they wished their children to avail of the possibility of moving straight into third level education.

183. The judgment of the trial judge records that Article 42.3 was relied upon by the second respondent, especially when taken with the equality provisions of the Constitution

set out in Article 40.1. While the respondents did not advance this argument in written submissions before this Court, we note that the respondents did rely generally on the right of parents to home school and the general obligation on the State to respect the exercise of that right. We are also of the view, that in circumstances where this appeal was heard although it was moot in so far as any benefit to the respondents was concerned, it would be unhelpful for this Court to deliberately close off considerations of relevant arguments made in the court below although perhaps not pursued with the same vigour in this Court. We consider that the *dictum* of Keane C.J. in *Sinnott v. Minister for Education*, though he was in the overall minority, is relevant to the consideration of Article 42. He said that the provisions of Article 42: -

> *"[82] [...] reflect a philosophy in which the State is seen as playing, in theory at least, a secondary role only in the provision of education, the primary role being that of the parents. The qualification is important, since practice in this area had travelled far from theory even at the time of the enactment of the Constitution. This is most graphically illustrated by the prominence given in the Article to the right of parents to educate their children at home. In modern conditions, the number of parents who elect to educate their children in this manner is a tiny minority, ..."*

Keane C.J. went on to say:-

> *"[85] [...] [i]t is probably unnecessary to add that, however theoretical, in some respects at least, the philosophy underlying these provisions appears to be in modern conditions, they must be fully upheld by the courts in any case where they become relevant."*

184. It is difficult to think of a case, other than *In re Article 26 and School Attendance Bill, 1942* [1943] I.R. 334, where the rights and duties of the home-schooling sector as a cohort have been as directly at issue as a result of legislative or executive action as they are

in these appeals. In that case, the 1942 Bill purported to amend the 1926 School Attendance Act by stating that a child shall not be deemed to be receiving suitable education in a manner other than attending an [acceptable] school unless such education and the manner of receiving it "have been certified...by the Minister to be suitable." The Supreme Court held that on any reasonable construction, the section permitted the Minister to require a higher standard of education than prescribed under Article 42.3.2°. It was thus repugnant to the Constitution (an outcome some commentators and Keane J. in *DPP v Best* have said might be different now, in the light of the principle of the presumption of constitutionality which has since been developed in constitutional jurisprudence). A point of particular note from the judgment is worth mentioning. The Supreme Court said that *"it appears that [Articles, 41, 42, and 44] contemplate that normally the right and duty of educating children is vested in parents..."*.

185. The case of *DPP v. Best*, referred to above, involved a prosecution for a breach of the School Attendance Act, 1926 as amended, which provided that a parent must cause a child to attend a national or other suitable school unless there was a reasonable excuse for not doing so. The Act provides that it shall be a reasonable excuse for failure to comply where the child is receiving suitable elementary education in some other manner. The accused's mother put forward the reasonable excuse that she was home-schooling her child. The Act put the burden of proof on the parent to show that the education was suitable. The District Court Judge found as a fact that the child was not receiving suitable elementary education of general application *vis-à-vis* the primary school curriculum of the State. The District Court Judge stated a case for the opinion of the High Court as to whether she could convict in the absence of a statutory definition of "suitable elementary education."

186. There were a number of judgments given by the Supreme Court, with different emphasis on the extent of the education that the Constitution required. Ultimately, the

Supreme Court held that the judge was not precluded from convicting by reason of the absence of a definition. The phrase "suitable elementary education" was not to be interpreted so as to require the giving of an education which exceeded the "certain minimum education, moral, intellectual and social" referred to in Article 42.3.2°. It is interesting that counsel on behalf of the Attorney General, who was the notice party in the Supreme Court, submitted that in construing Article 42 it must be borne in mind that while the family was the primary and natural educator of children, it was also intended to safeguard the constitutional right of the child to receive a certain minimum education (and that this flowed from *G v. Bord Uchtála*, *Crowley v. Ireland* and *O'Donoghue v. Minister for Health*).

187. The Constitution stresses the family's role in education. In Article 42.1, the State acknowledges that the primary and natural educator of the child is the family. Under Article 41.1, the State recognises that the family is the primary and fundamental unit group of Society. Article 41.1.1° describes the family as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law. Under Article 41.1.2° the State guarantees to protect the family, in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State. As we have seen, the relevance of the family provisions was recognised by the Supreme Court in the case of *In re Article 26 and School Attendance Bill, 1942.* In *DPP v. Best,* Denham J. in her judgment, one of five delivered, stated that *"[t]he distinct place of the family in Irish society is a factor to be weighed in all relevant decisions."* Two other judges of the Supreme Court either expressly agreed with her judgment or held that the relevant provisions of Article 42 must be read in the context of the special recognition granted to the family in Article 41.1.1°.

188. The second respondent relied upon this close association of Articles 41 and 42, which recognises the family as the primary educator of the child and constitutionally protect the

choice of parents to home-school, in submitting that the State cannot contemplate a situation where children are disadvantaged by the parents' choice where it is reasonably possible to avoid that outcome. The Minister's answer to this submission is not so much to deny that Article 42 is somehow linked to Article 41 but to submit that the right being relied upon by the respondents is unclear and cannot and should not be viewed as being an unenumerated one deriving from the Constitution. The Minister submits that a concomitant right must be related to a duty and there was no such duty identifiable in any of the Articles relied upon by the respondent.

Decision on whether the constitutional rights of the Home-Schooled Child are engaged

189. The Supreme Court has recognised that the Constitution is a living document (*e.g.* Denham J. in *DPP v. Best)*, and not an historical one. This does not take away from the fact that the structure, wording and values in the education provisions of the Constitution indicate a particular philosophy. We view this as a case where the philosophy underlying the education provisions in the Constitution must be fully respected in the consideration of the issues arising here.

190. We consider that the structure of the Constitution, including the fact that Article 41 relating to the family is immediately followed by Article 42 relating to education, together with the express wording of those Articles, place the family at the heart of the provision of education. Parental duty to provide for education is paramount and parental choice in how that is provided is guaranteed. Furthermore, the right to education and the right of a child to realise his or her full potential, has been recognised as part of the natural rights guaranteed by Article 40.3. The State, pursuant to Article 41.1.2°, also guarantees to protect the family in its constitution and authority.

191. This Court considers that the case law demonstrates that the relationship between parents, the State and the child as envisaged by Articles 40, 41 and 42, is a trifecta not just

of the participants but of the rules under which constitutional engagement on education must take place; namely rights, duties and powers. It is only through understanding the interwoven nature of those relationships, that clarity can be brought to the complex constitutional provisions on education. It appears to us that the right of the child to education does not stop at the point where "a certain minimum education" has been imparted but is interwoven with the parents' right to choose how to provide for secondary education and also the State's power to make provision for such education.

192. Taking the interwoven pattern of rights, duties and powers, we understand the true constitutional position to be that there is a duty on the State to protect the family's authority and the parent's right to home school. We agree with Laffoy J. in *O'Shiel v. Minister for Education* where she held that in fulfilment of the State's duty to provide for primary education, the State must have regard to and accommodate the expression of parental conscientious choice and lawful preference. We consider that the duty of the State to protect the family's authority and the parents' right to home school must include accommodation of that expression of parental conscientious choice and lawful preference even with regard to the choice of the parents in providing for secondary schooling. The child's natural rights, together with his or her centrality within Article 42, require the child not to be treated as merely incidental to the exercise of the rights of parents and the duties of parents and the State. Instead, the rights of the child to education must receive appropriate recognition by the organs of the State.

193. As the State has a duty to respect the right of parents to provide for education through home-schooling, we consider that there is a concomitant duty on the State when formulating education policies for children, to take reasonable account of those who are being home-schooled. By virtue of the interwoven rights set out in the Constitution as regards the rights of the child, this in turn creates a concomitant right of the home-schooled child to have

reasonable account taken of his or her situation when education policies are being implemented by the State. That right can be expressed also as a duty on the State not to disadvantage a child who is home-schooled where it is reasonably possible to avoid that outcome. The expression of this right that we identify is not, as the Minister submits, so ill-defined or so unclear, that it could not be said to derive from a combination of rights, values and fundamental structures set out in the Constitution. This right is derived from the interwoven provisions of the Constitution which make a clear value judgment about the primacy of parental choice in education and the duty on the State to respect that choice, while also guaranteeing a right to the child to education.

194. An important educational policy of the State is the facilitation of state examinations, which are structured so that despite the financial advantages that some students may have over others in procuring education, the examination process seeks to level the field in terms of assessment of post primary educational attainment. The Leaving Certificate examination in the words of the trial judge *"provides a pathway for the vast majority of young people who have completed second level education to go onto further education and careers beyond."* Its role in the life of a child being educated is therefore one of extraordinary significance. While the Minister has submitted that there is no right to sit the Leaving Certificate, she does not take issue with the proposition that once a Leaving Certificate examination is provided for, it must be on a fair and equitable basis. Indeed, she relies in her submissions on *Cahill v. Minister for Education and Science* [2010] 6 JIC 1102, where it was recognised that the Minister acted as a guarantor of fairness and equality to all Leaving Certificate candidates, to support the contention that fairness must apply in the CGS. We consider that the provisions of Article 42 would not permit home-schooled children to be excluded from sitting a State facilitated Leaving Certificate in ordinary circumstances. That would be because Article 42 would not permit the State to disadvantage a child where it was

reasonably possible to avoid that outcome. This is the context in which the provision of an alternative to the Leaving Certificate examination, such as the CGS, must be viewed, taking account, of course, of the ongoing pandemic.

195. For the sake of completeness, we would add that Article 42A was not pleaded and was not addressed in the submissions. Article 42A.1 provides that "[t]he State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights." We do not have to decide if that Article strengthens the conclusions we have reached in relation to the rights of a home-schooled child but we are certain it does not weaken them.

PART 8: THE APPLICABLE JUDICIAL REVIEW TEST AND ITS APPLICATION TO THE FACTS

The issue for the Court

196. It will be recalled that there was a fundamental dispute between the parties as to the appropriate test or standard of review the Court should apply in this case. This was intertwined with their respective positions on whether the respondents had any constitutional rights; and the nature of the decision under review. The respondents submit that the appropriate lens through which the court's review should be conducted is the common law "reasonableness or irrationality" test (*Keegan-O'Keeffe*) as interpreted in *Meadows* to take account of constitutional rights. Although the decision in *Meadows* is complex because of the differences of opinion expressed in the different judgments, we might say by way of shorthand that a majority favoured a reasonableness test infused with proportionality considerations when constitutional rights are in the balance.

197. In contrast, the Minister contends that the usual judicial review test is too low a threshold for intervention and that the court should exercise a high level of judicial restraint when reviewing what she describes as an exercise of executive power pursuant to Article

28.2 of the Constitution. In this regard, heavy reliance was placed upon such cases as *Boland, Crotty, McKenna,* and *T.D.*, as we have seen. It was submitted that in such cases, the court has no role at all to intervene save for the most exceptional of circumstances, described by a number of judgments as a situation where the Executive has acted in "clear disregard" of the Constitution. Indeed, the Minister went further and submitted that the test was the one articulated by Murray and Hardiman J.J. in *T.D.*, namely that there must be a "deliberate and conscious" disregard, in effect a requirement of bad faith or recklessness before the courts may intervene. As noted already, this was linked with the Minister's argument that no constitutional rights of the respondents were engaged.

198. The Minister's alternative argument was that, even if the "lower" *Keegan-Meadows* test were applied, she should be successful because there were good reasons for the respondents' exclusion from the scheme and why the independent teacher assessment mechanism should not be used; and therefore, there was, she submitted, no *Keegan* unreasonableness.

199. We have earlier concluded (in Part 7) that the respondents possess relevant constitutional rights. Our view was that the combined effect of Articles 41 and 42 was to create an interwoven set of duties and rights, in which, among other things, primacy was given to parental choice concerning the education of children and a duty placed on the State to respect that choice. We considered that there is a concomitant right of the home-schooled child to have reasonable account taken of her situation when education policies are being implemented by the State. This can also be expressed as a duty on the part of the State when formulating education policies not to disadvantage a child who is home-schooled where it is reasonably possible to avoid that outcome. This conclusion has consequences, in our view, for the appropriate judicial review test to be applied, as discussed below.

200. We have also concluded (in Part 6) that the Government's decision to shift from the usual format of the Leaving Certificate to the CGS was a policy decision by the Government acting pursuant to Article 28.2. Although the implementation of the Scheme was delegated to an administrative body, the CGEO, overseen by the Minister, there was a close interconnection between the Government policy decision and the implementation of the Scheme, including the exclusion of the respondents from it. The alternative model had at its core a number of key features which were based on an in-school model: these included the centrality to the Scheme of input from professional and registered teachers, the fact that those teachers would have familiarity with the student to be graded, in-school "alignment" of grades, and the supervisory role of principals. Therefore, the exclusion of the respondents from the Scheme (by reason of having a parent-teacher in the case of the first respondent, and non-registered teachers in the case of the second respondent) could not be said to be some sort of "add-on" created by the Minister or the CGEO which deviated from the Government-announced scheme; on the contrary, it was closely connected with it; indeed the exclusion of the respondents might be described as merely carrying out of the Government's instructions to their logical conclusion.

201. The present appeals are therefore unlike other cases which have, in the main, presented a situation involving *either* constitutional rights *or* an Executive policy decision; here the Court is presented with *both.* We turn now to the question of the proper approach the courts should adopt in such circumstances.

202. We have earlier referred to the line of authority which emphasises the need for judicial restraint when dealing with reviewing policy decisions of the Executive. This is what we might call the *Boland* line of authority, which regards certain types of executive decision-making as a zone of virtual non-justiciability. On the other hand, there is a steady theme throughout the authorities that the courts must step in to protect constitutional rights

when necessary and appropriate; here one thinks not only of *Meadows* but of earlier cases such as *East Donegal Co-operative Livestock Marts v. Attorney General* [1970] I.R.317, *State (Lynch) v. Cooney* [1982] I.R. 337, and *Clinton v. An Bord Pleanála (No. 2)* [2007] 4 I.R. 701. The latter authorities would not regard executive action trenching on constitutional rights as a zone of non-justiciability and are instead associated with an emphasis on the role of the court as protector of individual constitutional rights and, at least in *Meadows*, the relevance of a proportionality assessment.

203. Is the Court faced with an "either-or" choice between tests, or is it possible to achieve a harmonious synthesis of the principles emerging from all the authorities? This is the question to which we now turn. There is indeed a line of authority which urges a high level of judicial restraint with regard to decisions made by the Government at a high policy level and/or in the field of international relations, but we wish to interrogate further the proposition that a test of "clear disregard" is necessarily applicable in all cases of review of executive action and, more particularly, where individual constitutional rights have been adversely affected by that action.

Judicial restraint v. vindicating constitutional rights

204. The starting point for the Minister's submission is the famous comment of Fitzgerald C.J. in *Boland v. An Taoiseach*:—

> "*Consequently, in my opinion, the Courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred on it by the Constitution.*" (p.362) (emphasis added)

It is interesting to note, however, that Griffin J., in the course of his judgment in the same case, at p. 370, did not state the judicial obligation or power to intervene in quite such stark terms. He stated as follows: -

"*In the event of the Government acting in a manner which is in contravention of some provisions of the Constitution, in my view it would be the duty and the right of the Courts, as guardians of the Constitution, to intervene when called upon to do so if a complaint of a breach of any of the provisions of the Constitution is substantiated in proceedings brought before the Courts.*" (emphasis added)

205. The decision in *Crotty* is of particular interest because the court *upheld* a constitutional challenge in respect of the Single European Act. It is instructive to recall from the *dicta* referred to in Part 6 above, the language used in the judgments to describe when the courts are permitted, indeed required, to step in, even with regard to executive decisions. As we have seen earlier, the language of "clear disregard" did not feature.

206. It is clear from *Crotty,* therefore, that even where Government policy is concerned, the courts have a role to play in ensuring that decisions are kept within the bounds of the Constitution and, more particularly, to step in to protect individual constitutional rights if necessary. As noted, no test of "clear disregard" was posited.

207. The phrase "clear disregard" was employed again in *McKenna v. An Taoiseach (No.2)* Hamilton C.J., having considered the *dicta* in *Boland* and *Crotty,* set forth a summary in the following terms:

"*1. The courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions provided that it acts within the restraints imposed by the Constitution on the exercise of such powers.*

2. If, however, the Government acts otherwise than in accordance with the provisions of the Constitution and in clear disregard thereof, the courts are not only entitled but obliged to intervene.

3. The courts are only entitled to intervene if the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred on it by the Constitution.

Having regard to the respect which each of the organs of government must pay to each other, I am satisfied that where it is alleged that either the Oireachtas or the Government has acted other than in accordance with the provisions of the Constitution, such fact must be clearly established."

208. The phrase "clear disregard" featured prominently in the judgments of Murray and Hardiman J.J. in *T.D.*. Considerable reliance was placed by counsel on behalf of the Minister upon those judgments. However, we consider it important to place those *dicta* in the factual context of that case. Not only was *T.D.* concerned with a large-scale executive policy concerning the building of high-security units for children with special needs, but the High Court order under appeal was a most unusual one. It was described as being not only of a mandatory nature but one which would, if it came to be enforced by the court, would require the court involving itself in matters of detail such as "*the design of premises, engagement of contractors, applications for planning permission, identification of the number and kind of specialised staff and their recruitment*" (per Murray J. at [320]). The language of "deliberate and conscious disregard" should be read within that context rather than necessarily treating it as a general expression of when the courts are entitled to grant relief (such as declarations) in respect of executive action involving a policy component. With that caveat in mind, we note what was said as follows.

209. Murray J. said -

"I have already made the distinction between "interfering" in the actions of other organs of State in order to ensure compliance with the Constitution and taking over their core functions so that they are exercised by the Courts. For example, a mandatory

Order directing the executive to fulfil a legal obligation (without specifying the means or policy to be used in fulfilling the obligation) in lieu of a declaratory Order as to the nature of its obligations could only be granted, if at all, in exceptional circumstances where an organ or agency of the State had disregarded its constitutional obligations in an exemplary fashion. In my view the phrase "clear disregard" can only be understood to mean a conscious and deliberate decision by the organ of state to act in breach of its constitutional obligation to other parties, accompanied by bad faith or recklessness. A court would also have to be satisfied that the absence of good faith or the reckless disregard of rights would impinge on the observance by the State party concerned of any declaratory order made by the court" (emphasis added)

210. Hardiman J. expressed it in the following terms

"*I have read the judgment of Murray J. in this case and I wish to express my agreement with what he says in relation to the circumstances in which the court may make a mandatory order compelling the executive to fulfil a legal obligation. First, such a thing may occur only in absolutely exceptional circumstances "where an organ or agency of the State has disregarded its constitutional obligations in an exemplary fashion. In my view the phrase 'clear' disregard can only be understood to mean a conscious and deliberate decision by the organ of state to act in breach of its constitutional obligation to other parties accompanied by bad faith or recklessness.*

Secondly, even in such extreme circumstances, the mandatory order might direct the fulfilment of a manifest constitutional obligation but "without specifying the means or policy to be used in fulfilling the obligation".

Such an order, in my view, could only be made as an absolutely final resort in circumstances of great crisis and for the protection of the constitutional order itself. I

do not believe that any circumstances which would justify the granting of such an order have occurred since the enactment of the Constitution 64 years ago. I am quite certain that none are disclosed by the evidence in the present case".

211. The qualifier "conscious and deliberate" added to the "clear disregard" test is curiously (and presumably intentionally) reminiscent of the phrase used within the doctrine of exclusion of evidence ("evidence obtained as a result of deliberate of conscious breach of constitutional rights"), the precise meaning of which had been the subject of much judicial and extra-judicial comment since *The People (AG) v. O'Brien* [1965] I.R. 142, and was the subject of close examination and re-interpretation subsequently in *DPP v. J.C.* [2017] 3 I.R. 417. It is not clear to what extent, if any, the *dicta* of Murray J. and Hardiman J. above might now have to be read in the light of *J.C.* and its interpretation of the phrase "deliberate and conscious".

212. Another case relied upon by the Minister in her argument was *MacMathúna v AG and Ireland* [1995] 1 I.R. 484. This involved a claim by a married couple with children about the tax regime insofar as it applied them *vis à vis* unmarried parents, the Supreme Court in rejecting their claim drew a distinction between a situation where the Executive *withdrew all support* for married couples and the situation in that case, where the claim was that provision for their situation was *inadequate*. The Court held that while the total withdrawal of financial support for the family could constitute a breach of the State's duty under Article 41, thus what was alleged fell short of such an allegation because the case was that such support was insufficient rather than non-existent. In the assessment of that issue, the decision-maker would have to take into account not only the other means of support provided, such as education and medical assistance, but also the other constitutional duties of the State and the other demands properly made on the resources of the State. These were the matters peculiarly within the field of national policy to be determined by the Executive

and the Legislature and were not capable of adjudication by the courts. Although the phrase "clear disregard" was not used, in substance the approach was broadly similar. The judgment in *MacMathúna* drew upon the distinction drawn by Costello J. in *O'Reilly v. Limerick Corporation* [1989] I.L.R.M. 181 between distributive and commutative justice; the judicial arm having no business to deal with the former. This distinction was returned to in some detail in *Sinnott* by Hardiman J. It also featured in the discussion of the High Court (Noonan J.) in *West Cork Bar Association v. Courts Service* [2017] 2 I.L.R.M. 281, although it may be noted that the relief sought in that case was actually granted.

213. Many other authorities since the above have emphasised the limited role of the court in assessing executive policy decisions. In *Horgan v. Ireland* [2003] IEHC 64, the plaintiff sought declarations that the decision of the Government to permit United States military aircraft and civilian aircraft carrying American troops to either overfly Shannon airport or to land and re-fuel at Shannon airport was in breach of the neutrality of the Irish State and in breach of the Constitution. It was contended that this facilitation by the State constituted participation in the war been waged by the United States and Britain against Iraq which infringed the principle of neutrality. The High Court (Kearns P.) refused the relief, holding that Articles 15, 28 and 29 of the Constitution demonstrated that the Government alone exercised executive power and that its freedom and discretion were subject only to the exceptions set out in the Constitution. Some quite egregious disregard of constitutional duties and obligations would have to be placed before the Court before it would intervene under Article 28 and the Court was not persuaded that any such untoward conduct had occurred. It was specifically noted by Kearns P. that no individual rights arose under Article 29, which only referred to relations between States.

214. In *Moore v Minister for Arts, Heritage and Gaeltacht* [2018] IECA 28, this Court again explained, when holding that the High Court had no *first instance* jurisdiction to

declare a monument to be a national monument, the reason for the courts' reluctance to trespass inappropriately in areas of policy: -

> *"[55] All of this demonstrates that the choice of these particular political and cultural traditions is ultimately a political and policy choice which lies outside the realm of judicial determination and competence. On this point the system of separation of powers provided by the Constitution is quite clear, namely, that matters involving policy and political choices of this nature are matters for elected representatives and must therefore by definition be either executive or legislative powers which cannot appropriately be discharged by an unelected judiciary. There are, in particular, no legal standards which can guide the judicial branch in any determination of this question of what monuments should as a matter of national importance be preserved."*

215. Two cases arising out the 2008 financial crisis deserve mention when considering the authorities concerning the review of executive policy decision-making in a time of crisis. We have already referred to *Collins v. Minister for Finance*. In the last paragraph of its judgment, the Supreme Court said:

> *"This Court has no function, however, in considering the wisdom of decisions taken by the other branches of government, only the limited capacity to review that judicial review constitutes. It is this Court's function to ensure that the constitutional organ which has responsibility to make such decisions, whether they be wise or foolish, trivial or far reaching, is allowed to do so within the limits imposed by the Constitution. The momentous nature of the decisions which have been made in relation to the crisis which the Irish economy experienced in recent years, including those made in this case, highlights the importance of each organ of government*

respecting the field of operation of the other branches, and performing its own functions conscientiously and carefully."

216. Of course, the context in which that was said was entirely different to that arising in the present case. The plaintiff had challenged the lawfulness of procedures by which the Minister for Finance agreed to issue promissory notes in excess of €30 billion to the Irish Bank Resolution Corporation (IBRC) and the Educational Business Society (EBS). Nonetheless, the Minister relies upon it for the proposition that great deference should be paid by the courts to far-reaching policy decisions made by the government in a time of crisis.

217. The second of the cases was *Garda Representative Association v. Minister for Finance* [2010] IEHC 78, which concerned the pension levy introduced in the context of the 2008 financial crisis by the Financial Emergency Measures in the Public Interest Act, 2009. The applicant claimed that the respondent should have excluded members of An Garda Síochána from this austerity measure and that the Minister had not properly considered the application of the Gardaí for exclusion or the reasons they had put forward in support of exclusion. The High Court (Charleton J.) held that the discretion in the FEMPI Act 2009 was both policy-based and fiscal, and ultimately decided that the court had no role to intervene. Again, the Minister emphasises the level of deference to emergency policy-making shown by the court.

218. Turning again to *Prendergast*, it will be recalled that this was a case in which Charleton J. refused to grant relief which would have enabled the applicant to pursue a course of third-level studies in medicine. Medical courses within the various third-level institutions were the subject of different quotas for EU students and non-EU students. The latter paid a much higher level of fees than the former. The applicant had failed to obtain sufficient points in his Leaving Certificate to enable him to secure a place within the quota for EU students

and challenged the system of funding and quotas as a whole. Arguments were made that the quota for places for EU students in undergraduate degree courses was unconstitutional, without statutory foundation and/or was *ultra vires* the relevant legislation. At para. 56 of his judgment, Charleton J. had the following to say regarding the executive power of the State in matters of policy:

> *"[56]...Central to the exercise of government power is the establishment of policies for the proper governance of Ireland. Taxation of the people, which can only be carried out by legislation in specific terms, provides the funds that are necessary to implement policy. No doubt, in deciding upon a policy the Government will have regard to the directive principles of social policy as set out under Article 45 of the Constitution, which are "not ... cognisable by any Court under any of the provisions of" the Constitution. The fundamental function of Government is to keep order, to decide the direction in which the country is to go and to disburse the funds collected through taxation from the people in aid of their objective. In a democracy, the people are entitled, in the event of disagreement with the Government on issues, large and small, to vote accordingly. I do not believe that this Court is entitled to set policy, or to exchange one policy for another...I cannot find anything to suggest that the Government does not have the power to decide what funds should go to higher education or to suggest to the Higher Education Authority the policies that it sees as best be pursued, once An t Údarás retains discretion in accordance with its legal role. This Court has no role in policy..."*

219. Ultimately, Charleton J. was satisfied to dismiss the action, stating:

> *"[58]...I am satisfied...on the authorities cited, that the Government is entitled: to set a policy for the training of a specific number of medical graduates to meet the needs of the State; to decide what funds are appropriate to be disbursed in that regard;*

to decide that particular forms of education should be free, or should be contributed to by fees; and to decide that foreign students can take up spare places at an economic cost to the benefit of the economy."

220. The Minister relied heavily upon *Prendergast* for the proposition that the High Court in the present case had impermissibly strayed into the area of executive policy-making in the field of education. However, what was under challenge may be contrasted. In *Prendergast* it was a far-reaching challenge to the general system of funding and determining quotas with respect to medical education in third-level institutions in circumstances where the applicant had no underlying constitutional right. Here, the Scheme itself is not under attack but merely such part of it as trenched upon the constitutional rights of the respondents in the field of secondary education by excluding them from the Scheme.

221. If one looks at the cases discussed above in the round, what emerges is that judicial restraint is heightened - sometimes indeed to the point of virtual non-justiciability - where the exercise of power by the Government or individual Ministers involves matters of 'high' policy, including matters touching upon international relations, and/or where the subject matter does not lend itself to judicial evaluation by reason of the absence of clear legal standards or the presence of issues which the courts characterise as "distributive" justice; this heightened judicial deference is particularly so when no individual rights are directly in issue. The cases in which the phrase "clear disregard" was used were very different to the present one in terms of their context; this is even more so in the case of (*T.D.*) where the phrase "deliberate and conscious disregard" was employed.

222. Some caution has to be exercised, we believe, before assuming that the balance is precisely the same in cases where constitutional rights have to be put into the reckoning. One cannot ignore the fact that there is a consistent theme in the authorities that

constitutional rights must be appropriately protected if necessary. In *Meadows,* Fennelly J. drew on *East Donegal Co-Operative* and *State (Lynch) v. Cooney* in this regard, saying:

> *"[39] While respecting the limits of judicial power, the courts are under a fundamental obligation incumbent upon them by virtue of the Constitution to ensure the protection of the fundamental rights which it guarantees. It is equally a constant theme of our case-law that persons or bodies exercising executive power must, in their decisions, take due account of the constitutional rights of those affected. Most notably, Walsh J. in his judgment in East Donegal Co-operative v Attorney General [1970]1 I.R., writing at page 344 about the powers conferred on a Minister, emphasised that:*
>
> *'...they [were] powers which cast upon the Minister the duty of acting fairly and judicially in accordance with the principles of constitutional justice, and they do not give him an absolute or an unqualified or an arbitrary power to grant or refuse [a licence] at his will.'*
>
> *[40] Similarly, in the decision of this Court in State (Lynch) v Cooney [1982] I.R. 337, O'Higgins C.J., upholding the exercise of the power to prohibit the broadcasting of material (in the form of election broadcasts for Sinn Féin) said at page 361:*
>
> *'These, however, are objective determinations and obviously the fundamental rights of citizens to express freely their convictions and opinions cannot be curtailed or prevented on any irrational or capricious ground. It must be presumed that when the Oireachtas conferred these powers on the Minister it intended that they be exercised only in conformity with the Constitution.'"*

223. This point was also well made by Geoghegan J. in the important pre-*Meadows* case, *Clinton v. An Bord Pleanála (No 2)* [2007] IESC 19, [2007] 4 I.R. 701. Dealing with a challenge to the validity of a compulsory purchase order, Geoghegan J. said

"[723] It is axiomatic that the making and confirming of a compulsory purchase order (CPO) to acquire a person's land entails an invasion of his constitutionally protected property rights. The power conferred on an administrative body such as a local authority or An Bord Pleanála to compulsorily acquire land must be exercised in accordance with the requirements of the Constitution, including respecting the property rights of the affected landowner (East Donegal Co-Operative v. The Attorney General [1970] I.R. 317). Any decisions of such bodies are subject to judicial review. It would insufficiently protect constitutional rights if the court, hearing the judicial review application, merely had to be satisfied that the decision was not irrational or was not contrary to fundamental reason and common sense."

224. In *Meadows* itself, of course, the question of reconciling the duty to protect individual rights with the deference to executive decision-making (traditionally expressed in the *Associated Provincial Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223 test as applied in this jurisdiction in *Keegan* and *O'Keeffe)* loomed large and gave rise to some sharp differences of opinion within the judgments. Although it is notoriously difficult to extract a majority view from the various judgments in *Meadows*, we think it can safely be said that the approach which emerges overall is one which eschews the more extreme interpretations of the term "irrationality" which had sometimes been adopted (*e.g. Aer Rianta v. Commissioner for Aviation Regulation*, Unreported decision of the High Court, January 1993 where O'Sullivan J. said at p. 48 *"...it is not sufficient that a decision-maker goes wrong or even hopelessly and fundamentally wrong; he must have gone completely and inexplicably made; taken leave of his senses and come to an absurd conclusion"*). Instead, the approach is one which, while retaining the concept of reasonableness, infuses it with proportionality considerations, even if does not explicitly or formally replace "reasonableness" with "proportionality" as such.

225. It may be noted that proportionality under *Meadows,* albeit that it is not the whole of the test but rather a component of the "reasonableness" test which itself is the test, is similar in substance to that applied to legislation under the *Heaney v. Ireland* [1994] 3 I.R. 593 analysis. It will be recalled that the *Heaney* test for assessing the proportionality of legislation is that (i) the means chosen must be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; (ii) they must impair the right as little as possible; and (iii) must be such that their effects on rights are proportional to the objective. Similarly, in *Meadows*, Murray C.J. at para. 58 described the principle of proportionality within the context of the "reasonableness" assessment of a decision as one where what is examined is whether "*the effects on, or prejudice to, an individual's rights by an administrative decision be proportional to the legitimate objective or purpose of that decision.*". He also said at para. 62: -

> *"[62][...] where there is grave or serious limitations on the rights and in particular the fundamental rights of individuals as a consequence of an administrative decision, the more substantial must be the countervailing considerations that justify it".*

Denham J., having referred to the *Heaney* test in a manner which made it clear that she considered the same approach to apply in the context under consideration, said: *"The nature of the proportionality test is that [...] it must be rationally connected to the objective; not arbitrary, unfair or irrational."*

226. It is not surprising to find proportionality analysis playing a role in both review of legislation and review of executive acts which trench upon individual constitutional rights; on the contrary, it would be more surprising to find entirely different standards operating to protect constitutional rights from infringement depending on whether the source of the infringement be executive or legislative. It would be a chilling prospect if the government could, by avoiding the use of legislation, simply circumvent the court's role in protecting

individual constitutional rights except in circumstances of the most egregious disregard of those rights.

Conclusion on the applicable judicial review test

227. The Court considers therefore that it must seek to accommodate *both* appropriate deference to executive policy decisions *and* appropriate consideration of individual constitutional rights as far as possible. Even in situations where non-statutory executive policy is under review, it may be necessary for the courts to step in to vindicate individual constitutional rights.

228. Holding the balance between appropriate judicial deference and appropriate vindication of constitutional rights is not an easy thing to do in practical terms, as the principles pull in different directions. It seems to us that the Court is required, on a case-by-case basis, to give appropriate weight to both areas of concern and that the following emerge from the authorities as relevant factors to be taken into account:

(a) the degree to which the executive decision has a policy content; some executive decisions have a very high policy content and others less so. In this regard, it may be helpful to bear in mind the broad scope of executive action, whether one describes it as the residue when the judicial and legislative functions are removed (as per O'Donnell J in *Barlow*) or the binary classification suggested by *Kelly, The Irish Constitution,* namely the executive power *of* the State together with executive power *in* the State. Not all executive decisions require precisely the same level of judicial deference; those at the 'administrative' end of the spectrum are not entitled to quite the same level of deference as those at the far or 'high-end' of governmental policy;

(b) whether or not there are international relations involved which might attract Article 29.4 considerations;

(c) whether any resource implications are of a distributive or commutative nature;

(d) whether or not there are constitutional rights in issue, and if so:

i. the degree to which the executive decision has impacted upon those rights;

ii. the degree to which judicial action would interfere with any executive policy;

iii. whether, if there is a range of reliefs possible ranging from more intrusive to less intrusive, the less intrusive relief would be sufficient to vindicate the constitutional rights.

229. This is not intended to be an exhaustive list but rather a list of items which suggest themselves to the Court, arising from its examination of the caselaw and a consideration of the facts in the present case. Ultimately, where constitutional rights have been affected by an executive decision/action, the question a court must ask itself is whether the executive decision/power as exercised was "unreasonable" in the *Meadows* sense *i.e.* informed as appropriate by considerations of whether the infringement of constitutional rights was proportionate. Judicial deference should be adhered to as far as is consistent with the protection of individual constitutional rights, and in some cases, applying a test of "clear disregard" or "deliberate and conscious clear disregard" may not be appropriate as it would not be constitutionally adequate to protect those rights. In short, the Court does not consider that the authorities establish the simple proposition that a test of "clear disregard" should be applied to every case where the executive action under review contains a policy component; matters are considerably more complex and nuanced than that.

230. We will now apply this analysis to the facts of the present case.

Application to The Facts

An Alternative Option?

231. We addressed at the outset a point repeatedly emphasised by the Minister; the plan was to hold the Leaving Certificate in November 2020 and the respondents could then sit the examination. This was presented by the Minister as 'an alternative option' for the respondents. The Minister submitted the significance of this alternative option was that the exclusion of the respondents from the CGS did not mean that they were blocked access to the Leaving Certificate or access to third-level, but merely denied access to a voluntary scheme for rational and significant reasons which arose directly from their factual circumstances.

232. The Court is not satisfied that the availability of the Leaving Certificate examination in November 2020 meant that the respondents would not suffer a real burden or disadvantage compared with other candidates. We would not disturb the trial judge's finding of fact as follows that: -

> *"[57] […][a]n opportunity to do the Leaving Certificate in November, 2020, which may or may not take place depending upon public health advice at the time, is not a remedy. It would, at the very least, mean that the [first respondent] would be delayed by one year in commencing his third level course of choice, should he be so admitted to it. This would clearly be detrimental to the [first respondent]".*

The trial judge applied the general principles of that judgment to the judgment in the second respondent's case. We note that p. 13 of the Out-of-school Guidelines said that a student who was unhappy with the outcome of the calculated grade awarded would have the opportunity to sit the Leaving Certificate examination at a later stage when it was safe to do so and that "if the improvement in the candidate's grade means that he /she would have been entitled to a higher officer of a CAO course, he/she will be facilitated in taking up that place

as soon as practicable". We note however the finding of the trial judge as aforesaid and the Minister did not seek to undermine that as a finding of fact before us.

233. We consider the exclusion of the respondents from the Scheme to be a real and significant disadvantage and burden placed upon them. The question of whether it was "unreasonable" is a separate matter, to which we return below. However, we wish to make clear that we commence our analysis of the reasons put forward by the Minister for their exclusion from the starting point that their exclusion did constitute a real and significant disadvantage or burden to them.

Distinction between being considered for a grade and receiving a grade; two stages in the "independent teacher assessment mechanism"

234. Much of the Minister's case consisted of the putting forward of reasons as to why the independent teacher assessment mechanism could not be applied to the situation of the respondents. To examine this further, it is necessary to distinguish clearly between two stages of the process of the mechanism which the respondents, to the contrary, contend is suitable for their situation and which was in fact applied to them after the High Court decision.

235. The first stage of the mechanism is that an independent teacher assesses the body of work of the student *in order to determine if it is capable of being subjected to the process whereby a calculated grade may be awarded i.e.* whether there is a satisfactory and credible source of the data. This might lead to a negative answer, the respondents accept, in which case the process would not move on to the second stage and the student would simply not receive any calculated grade. They do not contend for a right to receive a grade if this conclusion is reached by the independent teacher. However, if the independent assessor concludes that there *is* a body of work susceptible to the award of a calculated grade is possible, then the *assessment itself* is carried out by way of second stage and a calculated

grade is awarded. As was indicated earlier, this was in fact done in the case of each of the respondents.

236. The respondents say their case is, in essence, about the right to be *considered* for a calculated grade, not to receive one. They say that the Scheme did not permit even the first stage of the analysis to be carried out in respect of their work by reason of the conditions under which it was produced *i.e.* under the supervision of a parent-teacher or a non-registered teacher, outside a school setting.

237. The respondents place emphasis on the fact that this mechanism was in fact applied to them after the High Court decision and resulted in an award of calculated grades. They say this shows that the Minister's opposition to the mechanism is misplaced, at least insofar as the Minister's objection is based upon the premise that such a mechanism is "impossible" to implement or that there is, in the case of students such as the respondents, "no appropriate source material" to be examined because of the conditions under which the work was created. The Minister submits that we should not have regard to what occurred post the High Court decision as to do so would be to reverse engineer and to engage in a false logic.

238. We are not convinced by that submission of the Minister. We consider that we are permitted to note that the application of the mechanism to the work of the respondents did not result in a decision that their work *was not capable* of being evaluated for the purpose of a calculated grade. To hold otherwise would be to blinker ourselves to a relevant fact, namely that there was credible, satisfactory evidence from an appropriate source on which to estimate a grade. Moreover, we note that by the time the trial judge gave his judgment in the N.P case, he was able to say with regard to the first respondent that "the involvement of other teacher(s) in his case led to the award of calculated grades giving him 577 points." Therefore, it was a fact before the High Court in at least one of these appeals. Furthermore, the fact of the awards of calculated grades was also introduced into both appeals, by means

of the respondents' notices when they claimed these proceedings were moot. That was a factor which had to be addressed by the Minister in both a practical (the covering of the respondents' costs) and a legal way (through submissions to this Court on the issue of mootness). This is a case of particular public importance and we consider that this is a relevant fact because as will be seen, it lends support to the view that the exclusion of the respondents from the Scheme was over-inclusive. Therefore, insofar as the Minister's contention is that work produced by students in those particular circumstances is not capable of being properly evaluated, the outcomes of the process suggests that it is *not always and necessarily so.* Thus, if home-schooled students taught by parents and/or non-registered teachers in the home are a sub-set of home-schooled students generally, this in turn sub-divides into cases of students whose work *is* capable of receiving a calculated grade from an independent teacher and those whose work *is not.*

239. Despite the fact that the Minister did in fact successfully apply the independent teacher assessment mechanism to the respondents and did not contend that there was no appropriate source material in their cases, she continued in the appeal to maintain the argument that in cases such as the respondents' there was no appropriate source material in respect of which an independent teacher assessment could be applied.

The reasons put forward by the Minister

240. As we have seen, the Minister, in seeking to rely on the "clear disregard" test was in effect arguing for a form of virtual non-justiciability. However, in addition to this primary argument, the Minister also sought to explain and justify the decisions taken (including in particular, the exclusion of the respondents from the Scheme), presumably on the basis that the Court might agree with the trial judge that the *Keegan* test was the appropriate test to apply. In this regard, she put forward a number of arguments which are discussed below.

241. By way of context, the Minister pointed out that despite the health crisis and the emergency conditions in which the Scheme was adopted, that the Scheme successfully managed to award calculated grades to 99.4%, (.1% more than was originally forecast) of the candidate students, a significant achievement in light of the fact that the number of candidate students in totality were approximately 60,000. The number of people in the position of the respondents, it was pointed out, was a tiny proportion of the overall group of candidates, and a small sub-set of even the "out-of-school" group, many of whom did in fact receive calculated grades under the normal application of the Scheme.

242. The Minister advances a number of arguments against the suggestion that the first and second respondents are entitled to an independent assessment of their work. Although the arguments interlink and overlap to a considerable degree, it may be helpful to disentangle a number of themes within the larger argument:

1) It would be unfair to the in-school students (the "fairness argument");
2) It cannot be done because there is no appropriate source material on which to base a calculated grade (the "no appropriate source material" argument);
3) The Minister does not have the discretion to operate a different system to that approved by the Government (the "no discretion argument");
4) The respondents are not entitled to force the Minister to distribute resources in the manner suggested because this would constitute a breach of the separation of powers under the Constitution (the "resources argument"); and
5) Allied with this last argument is the point that the CGEOS was not set up with a view to itself engaging in (or hiring others to conduct) assessments of students' work; it was established and designed merely to receive assessments and then conduct the national 'alignment' processes. Thus, forcing it do so would involve

a logistical challenge which is not appropriate for a court to direct ("the logistical argument").

243. So, for example, the statements of opposition contained numerous iterations of what we have called "*the fairness argument*", of which the following are examples:

- "The [Minister] cannot offer the [first respondent] the benefit of a process which is not made available to all other candidates without breaching the principles of *fairness and equality* which the [Minister] must apply to all candidates". (*Emphasis* added).
- "To provide the [second respondent] with a process whereby her body of work would be assessed notwithstanding that she had not engaged in tuition with a person who is or had been a registered teacher would be *to confer an advantage* on her relative to other leaving certificate students" (*Emphasis* added).

244. Examples of the "*no appropriate source material*" argument as pleaded include:

- "[…] [I]n the absence of involvement of a currently or previously registered teacher in the [second respondent's] tuition in any subject, it is *not possible* to properly and objectively assess her educational attainment in any subject without holding a public examination and such examinations cannot currently be held for public health reasons". (*Emphasis* added).
- "The CGS is based on the professional judgment of teachers and [p]rincipals who have been actively involved in the education of the students concerned and does not provide for individualised assessment by persons to whom the student and/or the student's participation in education and education achievement to date is unknown".

245. We have dealt earlier in the judgment with the complaint by the respondents that the question of resources was not explicitly pleaded in the statements of opposition and we have rejected their submissions that the court should simply refuse to deal with this *in limine.*

246. The suggestion that the Minister *had no discretion* to do what the respondents sought is pleaded in precisely the same wording for both Statements of Opposition in *Burke* and *N.P.*:

- "The [Minister] does not retain a discretion to operate a different system to that approved by Government".

This argument seems to have been subsumed into the Minister's submission that the decision under consideration was the exercise of executive power pursuant to Article 28.2 of the Constitution.

247. We wish here to describe in further detail the Minister's "fairness argument" because it lies at the core of her opposition to the independent teacher mechanism as a solution to the respondents' situation. Her argument can be summarised as follows. The Scheme had been designed in such a way as to ensure fairness across the body of student candidates as far as possible. The paradigm upon which it was built was one in which most of the key features were contingent upon the student's work having been produced and assessed within a school staffed primarily by registered teachers. First, the student's work would have been produced in the first place in the school environment under the supervision of a registered teacher. Secondly, a registered teacher who knew the student and his or her work would assess the work and assign a grade. Thirdly, there would be in-school alignment, carried out by registered teachers. Fourthly, there would be school-principal supervision and involvement in the process. Finally, there would be national alignment, a task for the CGEO. While there could some accommodation and "work-around" for some cases which did not fit the paradigmatic model, such as in-school students being taught one or two subjects by a parent-

teacher, or (theoretically at least, although unlikely to be a reality in practice, according to the Minister) an in-school student being taught a subject by an unregistered teacher.

248. The "workarounds" for in-school students whose teacher could not provide a calculated grade (whether by reason of being conflicted or being unregistered), the Minister submitted, were not comparable in any meaningful way to the situation of the respondents if assessed by an independent teacher, for the following reasons. First, the independent teacher is not familiar with the home-schooled student's work or ability and has no way of knowing the circumstances under which the work was produced. This was sometimes referred to in argument as the credibility of source issue. Secondly, there is no in-school alignment with other student grades nor any involvement of a principal who is familiar with the student's work or ability. The Minister submits that the absence of these factors renders the mechanism qualitatively different to that being applied to "in-school" students and to such a degree that it is not merely a "work-around" of the essential features of the Scheme, but in effect, a radical departure from it.

249. This being such a radical departure from the Scheme, the Minister argues, it would be unfair to the in-school students; they had been deprived of independent assessment which was the essence of the "normal" Leaving Certificate examination and it would not be fair to them that others would receive the benefit of it. It is not entirely clear whether the Minister means, when she refers to "unfairness" and "undermining the integrity of the scheme for everybody" that the other students would have a *legitimate ground of complaint on the grounds of fairness,* such as one which could lead to successful court challenges to the Scheme by in-school students, or merely that they would have *complaints* and that this was a matter of concern to the Minister because a widespread perception of "special treatment" for the home-schooled students might lead to some kind of rejection of the CGS as a whole. In any event, the Minister took the view that she had a duty of fairness to all students and

that this duty would be breached if she were to provide for independent assessments to be carried out in respect of the respondents (and others in similar factual circumstances) and not to the vast majority of other students. Having thus described the "fairness" test, we will indicate our views on it below.

The Court's conclusion on the application of the reasonableness test

250. We have reached the conclusion that, despite appropriate deference being paid to the Government's policy decision, the establishment and operation of the Scheme insofar as it excluded the respondents from being *considered* for a calculated grade was an infringement of their constitutional rights which was neither reasonable nor proportionate and that the trial judge was correct in this regard. In reaching this conclusion, we have taken into account the following factors.

251. We start by recalling that the actions of the Minister are presumed to be constitutional and that the onus of proof is on the respondents.

252. We also recall our earlier analysis of Articles 41 and 42 and our conclusion that the State has a duty, when formulating education policies for children, to take reasonable account of those who are being home-schooled. Our view was that the combined effect of Articles 41 and 42 was to create an interwoven set of duties and rights, in which, among other things, primacy was given to parental choice concerning the education of children and a duty placed on the State to respect that choice. We took the view that there a concomitant right of the home-schooled child to have reasonable account taken of his or her situation when education policies are being implemented by the State. This can also be expressed as a duty on the part of the State not to disadvantage a child who is home-schooled where it is reasonably possible to avoid that outcome.

253. We also reiterate our earlier conclusion that the exclusion of the respondents from the Scheme had a real and significant negative impact upon them insofar as, it would have

prevented them from progressing to third-level education in the Autumn of 2020. As we have explained, the only alternative on offer was to sit the Leaving Certificate examination in November 2020 which was both uncertain and, in any event, would have been too late for them to obtain third-level places in the academic year 2020-21. Therefore, their exclusion was a significant and real disadvantage to them as home-schooled students. The constitutional duty of the State is not to disadvantage them where it is reasonably possible to avoid that outcome.

254. The Court is not persuaded by the submissions on behalf of the Minister that the exclusion of the respondents from being considered for calculated grades was reasonable or proportionate under the *Keegan-Meadows* test, for the reasons set out in the following paragraphs.

255. First, the Scheme from its inception appears to have been conceived by the government without adequate consideration for the position of students whose parents had decided to exercise their constitutional right to educate their children in the home, and the constitutional rights of the children themselves. The working paradigm for the CGS was a factual matrix reflecting the situation of in-school students only. The original announcement of the Scheme made no reference to the position of home-schooled students. The Guide as published on the 21 May 2020 did not reference home-schooled students. The Minister sought to emphasise that the subsequent Out-of-school Guidelines, published in June 2020, provided four routes by which out-of-school students could access the Scheme. But even there, the group of out-of-school student group is not co-extensive with home-schooled students and only one of the four routes applied to home schooled students (route three). The respondents therefore did not fall within the single available route. The system, having been designed with in-school students in mind, then excluded the respondents on the basis that they did not fit within it. This was a predictable consequence of the fact that the system

itself had been designed without much, or perhaps any, account having been taken of their factual situation.

256. Of course, the vast majority of students attend secondary education in schools and it is not surprising that this was the paradigm working model for the Government in devising an alternative; but there is a small minority of students who are home-schooled and their parent's entitlement to educate them in the home is given explicit constitutional recognition. This warranted appropriate consideration when policy decisions were being made. We consider that there is no evidence that this was taken into any real account until quite a late stage in the process. There was no mention of home-schooled students in the Government decision, and the Out-of-school Guidelines were published at a later stage than the In-school Guidelines. By the time the Out-of-school Guidelines were produced the exclusions arose because they could not be accommodated, in the Minister's view, within the model which had been created with in-school students in mind, and insofar as it belatedly accommodated out-of-school students, the model paid little heed to the cohort of students who were being home-schooled.

257. Secondly, we note that the respondents did not challenge the CGS as a whole. Their challenge was directed solely to their exclusion from it. These appeals are in that regard, different to other cases involving challenges to policy decisions where applicants have mounted far-reaching challenges to the entirety of major policy decisions (*e.g. Prendergast*).

258. Thirdly, looking at matters through the proportionality lens, we take into account the purpose for which the respondents were excluded and the means by which this purpose was sought to be achieved. A distinction may be drawn here between the purpose of the Scheme and the purpose of the respondents' exclusion from it. The purpose of the CGS was, by reason of the Covid-19 pandemic, to create a method by which secondary level students could have their work assessed for the purpose of producing a Leaving Certificate grade in

a manner which was safe and avoided risk to public health and was as fair and equitable as could reasonably be devised in the circumstances. The purpose of the exclusions from the CGS was to ensure that where a student's pre-existing marks, results or body of work were not capable of meaningful assessment by reason of the circumstances under which they were produced (or not from a "satisfactory or credible source", to use the language of the Guide), no calculated grade would be given. The Minister repeatedly emphasised the problems which would arise in determining the credibility of the source material for students in the situation of the respondents and comparing this with the fact that such credibility would not be in issue in respect of an in-school student. We accept that this purpose is and was a legitimate purpose. It is the means by which it was to be achieved however, that we consider problematic and disproportionate. The exclusion did not allow the respondents' work even to be considered; they were automatically excluded *in limine* without anyone having looked at whether there was in fact credible and satisfactory source material in their cases. This was disproportionate to the objective sought to be achieved. It excluded not only students whose work was not from a credible, satisfactory source but also students whose work *was* from such a source.

259. This point is emphasised by what in fact transpired. We note that calculated grades were in fact arrived at for the two respondents as a result of the assessment in fact carried out by the Minister (or agents on her behalf) of the respondents' work after the High Court decision. In this regard it is important to recall the two-stage process of the independent teacher assessment described at para. 235 above. The High Court decision did not oblige the Minister (or her agents) to *give* a calculated grade; the terms of the judgment make it clear that the Minister was obliged merely to give *consideration to* whether it would be possible to give calculated grades to the respondents. However, both respondents did in fact receive calculated grades. It follows logically that their body of work must have been

capable of meaningfully generating calculated grades; if this were not the case, they would not have received them. Had such circumstances arisen, the Court would no doubt have been told that that the first stage of the mechanism had been applied to the respondents' work but that it was not possible to proceed to the second stage because, for example, there were too many questions marks about the credibility of the results or the circumstances in which the work/previous results had been generated. Nothing of the kind was suggested to us.

260. It is important to pause and consider the implications of this. We now know (with hindsight) that the respondents had produced work which *was* capable of independent assessment to produce a calculated grade. Yet they fell within the exclusion. The Minister had been prepared to rely upon a factual assumption which was, in their cases, quite simply wrong. This was the mistaken assumption that their work was inevitably and necessarily incapable of generating a calculated grade simply by reason of the circumstances of their home-schooling.

261. To put it another way, the Minister was collapsing the distinction between stage 1 and stage 2 of the independent teacher mechanism. The exclusion was therefore over-inclusive insofar as its purpose was excluding from the Scheme those students whose work was not capable of generating a meaningful calculated grade and to that extent we consider the exclusion disproportionate. This is not a decisive factor in our decision on the issue, but it lends evidential support to the view that the exclusion of the respondents from the Scheme was unreasonably excessive.

262. Nothing we say is intended to suggest that someone who has been home-schooled and whose work is *not* capable of generating a meaningful calculated grade, or whose work is not from a satisfactory, credible source, is in the same position as the respondents or that their exclusion from getting such a grade is unreasonable or disproportionate. Where the

unreasonableness comes into the picture is where the exclusion is over-inclusive having regard to the purpose for which it was introduced.

263. Fourthly, we have carefully considered the Minister's key argument that allowing the respondents to access an independent teacher assessment mechanism might be unfair to the other students (many of whom might well prefer an independent assessment to the CGS) or that it might destabilise CGS as a whole. This was in effect a countering of the respondents' equality argument with something of a counter-equality argument; one might consider that the argument was more relevant to a claim under Article 40.1 of the Constitution. However, the question of equal treatment may also be relevant to the *Keegan-Meadows* test in some cases, of which the present case is one.

264. The Minister accepts that she has a duty of fairness to all students. We think that a useful description of this duty was expressed by the High Court (De Valera J.) in *Cahill* as follows (albeit in the context of the Leaving Certificate examination as distinct from the CGS in issue in the present case):

> *"[54] The Leaving Certificate is relied upon by academic institutions, potential employers, training authorities and many others with a legitimate interest in the nature and level of a person's academic achievement at post-primary level. All candidates for the examination, including the appellant, have a legitimate interest in the uniform application of the rules and procedures of the examination to all candidates. In its supervision of the Leaving Certificate examination system, the Department of Education and Science does not merely act as a supervisor for legitimately interested parties but also as a guarantor of fairness and equality to all Leaving Certificate candidates*".

De Valera J. also referred to students having a *"legitimate interest in the fair and equitable administration of the Leaving Certificate examination"*, and as the document itself

constituting *"a record of achievement...which occupies an important place in the educational system of this country and abroad"*. While the framework of analysis in that case was entirely different to the present proceedings because it involved a discrimination claim pursuant to the Equal Status Act, 2000, the comments are, we think, useful in general terms as a description of the Leaving Certificate and the duty of fairness to all students. We acknowledge that this decision was appealed and although it was dismissed not every aspect of the High Court's analysis was accepted.

265. On the face of it, the Government might appear to have been faced with something of a Hobson's choice: to exclude the respondents and maintain confidence in the system on the part of the majority or apply the independent teacher assessment mechanism to the respondents and risk dissatisfaction and claims of unequal treatment from the majority. Which solution would have produced less inequality? A key difference between the two groups, we think, is that if the respondents were excluded from the CGS, they would then have *no* method by which to receive a grade in time for the commencement of the third-level academic year 2020/21. In contrast, the in-school students always had a method whereby they could receive a grade; the complaint that was anticipated from that group if the independent teacher assessment mechanism was used for the respondents was that the in-school students would not have a *different* or *second* route into third-level education in Autumn 2020.

266. Accordingly, we are of the view that the Minister took into account an irrelevant consideration when she considered that making provision for the respondents would lead to dissatisfaction among the in-school students and that far from being a valid justification for what was done, it was contrary to reason and common sense in the *Keegan* sense. Further, the system that was arrived at was inequitable insofar as it excluded the respondents whose work *was* assessable into the scheme but at the same time allowed for 'workarounds' for in-

school students whose teachers could not provide a calculated grade for them (whether because their teacher was a relative or their teacher was unregistered).

267. We are conscious that, in assessing the question of fairness as between groups of students, the Government is much better placed to assess a wide range of factors, including some which are of a non-legal nature such as issues relating to maintenance of public confidence in the system. However, the Court cannot abdicate its role to protect and vindicate the respondents' constitutional rights nor allow constitutional rights of a minority to be dealt a significant and real blow simply because others in society would be aggrieved by a mechanism which is designed to take account of the minority's (constitutionally protected) special circumstances. It is central to our condemnation of the exclusion of the respondents from the Scheme in the present case that they had *no method* available to them by which they could access third-level places for the academic year 2020-21 and in this regard the Court's conclusion is firmly anchored to the Leaving Certificate options as they presented in 2020.

268. Fifthly, we take into account that the system, having been designed in circumstances of a public health emergency, was itself entirely a temporary workaround designed to achieve a "second-best" to the Leaving Certificate examination itself. Within the Scheme, there were further minor workarounds, for example for in-school students being taught by parents or by unregistered teachers for whom a solution was devised. The overall aim was not one of perfection but one of reasonable workability and equity in the face of a major health crisis. It was unreasonable, in our view, to exclude the respondents entirely from a scheme in which there were already many compromises and imperfections. One comparison which comes to mind is that between the position of the first respondent and that of an in-school student whose teacher was conflicted; in the case of the latter, provision was made for the conflicted teacher (e.g. a parent) to hand over the student's data to another teacher

for the purpose of generating a calculated grade. Similarly, the position of the second respondent can be contrasted with a situation which was, envisaged at least in theory under the Scheme, namely that of an in-school student taught by an unregistered teacher. Again, the data would be passed by that teacher to another teacher for assessment. The Minister says that the in-school alignment and principal supervision in the case of the in-school students in those cases provided the necessary professionalism and independence warranting recognition of the student's data. That particular problem can be addressed by providing for independent teacher assessment, to which the objection is the separate one of resources.

269. Finally, we are not persuaded that the resource implications of the CGS are of a kind that involve the Court in an exercise of distributive justice as discussed in cases such as *O'Reilly, T.D.*, and *Prendergast.* The challenge was not to the entirety of the Scheme nor was it concerned with general funding issues in the area of secondary education or the Leaving Certificate examination. In reaching this conclusion, we appreciate, as the Minister pointed out, the process sought by the respondents might require assessment of up to eight or nine subjects per student, unlike, for example, an in-school student whose parent was conflicted in one subject. The Minister informed the Court that there were some 173 students in a similar position to the second respondent. We consider that the declaratory relief granted by the High Court in order to vindicate the respondents' constitutional rights went no further than many past decisions of the courts which have had costs implications when orders have been given in order to protect constitutional rights.

270. In all of the circumstances, therefore, we find that the exclusion of the two respondents from any route by which their work might be subjected to consideration for a calculated grade (being the only route at the material time for securing entry into third-level in the autumn of 2020) was unreasonable and constituted a disproportionate interference with their constitutional rights.

PART 9: THE CLAIM ON EQUALITY GROUNDS

271. As we have already concluded that it was unreasonable and disproportionate to exclude the respondents from the CGS, we do not consider it necessary to address whether this also amounted to a breach of the respondents' right to equality under Article 40.1 of the Constitution.

PART 10: CONCLUSIONS

272. We conclude as follows:

1) The Government was exercising the executive power of the State under Article 28.2 of the Constitution when it devised an alternative to the Leaving Certificate examinations by way of the Scheme. While the Minister's implementation of the Scheme could be considered an administrative exercise, the close interconnection between the essentials of the Scheme as announced by the Government and the administrative implementation (including the exclusion of the respondents) was such that the same level of deference should be adopted by the Court to both.

2) While we accept that the presumption of constitutionality applies to exercises of such executive power and that there is a high judicial deference to such action, we have decided, having reviewed the authorities, that the Court must accommodate both that deference and appropriate consideration of individual constitutional rights as far as possible.

3) The "clear disregard" test is not appropriate in every case even in a case involving a policy decision of the Executive, where constitutional rights have been affected by executive decision/action.

4) The respondents possessed constitutional rights to have reasonable account taken of their situation when education policies were being implemented by the State.

5) The respondents suffered a real and significant impact by their exclusion from the Scheme.

6) It was unreasonable and disproportionate (in the *Keegan-Meadows* sense) to exclude the respondents entirely from the Scheme.

273. We therefore dismiss these appeals. However, we propose to vary slightly the declarations granted by the trial judge to reflect the substance of our judgment (and that of the trial judge's judgments) more precisely. Instead of a declaration that the refusal *to provide a calculated grade* was unreasonable and unlawful, we therefore grant declarations in each case in the following terms: a declaration that it was unreasonable and disproportionate and therefore an unlawful breach of the respondent's constitutional rights for the Minister to refuse to *consider* the respondent for calculated grades in respect of [his] [her] work without having in place any system by which it could be determined whether [his][her] work was from a satisfactory, credible source; and for the Minister to fail to provide a means by which the respondent could receive a calculated grade in the event that it was determined that [his] [her] work was from a source meeting this standard.