An Chúirt Uachtarach

The Supreme Court

O'Donnell CJ
MacMenamin J
Dunne J
Charleton J
O'Malley J

Supreme Court appeal numbers: S:AP:IE:2021:000035 and S:AP:IE:2021:000036
[2021] IESC NN
Court of Appeal record number: 2020/197
[2019] IECA 67
High Court record numbers 2020/533 JR and 2020/595 JR
[2020] IEHC 418 and 479

Between

Elijah Burke
Applicant/Appellant

- and -

The Minister for Education and Skills
Respondent

Between

Naomi Power (a minor suing by her mother and next friend Breda Power)
Applicant/Appellant

-and-

The Minister for Education and Skills
Respondent

Judgment of Mr Justice Peter Charleton delivered on Monday 24 January 2022

1. For consideration in this judgment, concurring with the majority in the result, is whether the 8 May 2020 decision of the Government, in the face of the Covid 19 pandemic, to postpone the Leaving Certificate Examination "until such time as it is safe for State examinations to be held" and to substitute teacher assessed calculated grades, constitutes merely an administrative step or is, instead, the exercise of the executive power of the State under Article 28.2 of the Constitution and the consequences thereof.

2. The difference in the tests lies in the standard of review by the courts and in the consequences. The first, judicial review of administrative action, triggers the everyday test of reasonableness, perhaps assessed as to the proportionality of the decision, or the reasons behind it, or excess of jurisdiction or unfairness of procedures. The second, the very rare exercise of judicial control over the execution of executive power, properly construed, requires an applicant seeking to overturn an executive decision to demonstrate a clear disregard of the Constitution. An alternative, and on the existing decisions, a more stringent test is to require an applicant to demonstrate that constitutional rights have been or are being invaded by those activities of the executive or that activities of the executive threaten an invasion of such rights.

Home-schooling

3. Both Elijah Burke and Naomi Power were among a tiny minority of students at second level hoping to try for success in the Leaving Certificate in 2020 who were caused a detriment by reason of its cancellation. They were home-schooled. By reason of having their parents teaching them, objectivity and fairness ruled out the possibility of those teachers assessing their own children. It can happen in a school that a parent has a child in his or her class but the Government scheme made provision for a different teacher to step in. With home-schooling, that was impossible. When predicted grades came in as the State examinations approached in 2020, it was uncertain if the Leaving Certificate could be held given the restrictions put on public interaction due to the Covid-19 pandemic. Would it happen at all was uncertain. The exams are run in June, in normal years, with applications for university and third level courses put in before that to the Central Applications Office and offers being made to students in mid-August. That could not happen in 2020. As the pressure from numbers infected eased towards the summer, candidates were given the option of a later run of the examination. They could, hence, have chosen to sit the Leaving Certificate in November 2020 but with the inescapable result that progress into a third level course would be delayed by a year to 2021 and in circumstances where delay, coupled with the competition for places, might have undermined the standing of their results due to the danger of possible ongoing grade inflation. These decisions were made by the Government as a matter of high policy. It is unimaginable that the Department of Education could have gone beyond administering governmental decisions and made this policy themselves. The civil service runs the State in consequence of governmental decisions but is not answerable to Dáil Éireann, save where there is an Oireachtas committee of inquiry. Such a manoeuvre would have left the Department running policy but leaving the Government of the day to suffer the consequences.

4. It is clear that a right inures to the family under Article 42.1 of the Constitution to be the "primary and natural educator of the child" and the State is required "to respect the inalienable right and duty of parents to provide … for the religious and moral, intellectual, physical and social education of their children." Hence, under Article 42.2, the mother and father of Elijah Burke and Naomi Power were "free to provide this education in their homes or in private schools or in schools recognised or established by the State." But, while under Article 42.3 the State may require, "as guardian of the common good", that "children receive a certain minimum education, moral, intellectual and social" (physical is not mentioned, and the minimum standard required is currently set at school leaver-standard for a 16 year old), the State cannot "oblige parents in violation of their conscience and lawful preference to send their children to schools

established by the State, or to any particular type of school designated by the State." Article 42.4, in requiring the State to provide for "free primary education", also places an endeavour, but only that, before the State "to supplement and give reasonable aid to private and corporate educational initiative" and "when the public good requires it" towards "other educational facilities or institutions". An overall saver in the constitutional text is that the State, in providing for free primary education and in endeavouring to assist post-primary education in various forms, have "due regard … for the rights of parents, especially in the matter of religious and moral formation." This provision reflects a concern for upholding parental authority; a foundational pillar of the Constitution that accords with Article 41 recognising the family as "the natural primary and fundamental unit group of" Irish society. Hence, society is built around the family.

5. The thrust of those provisions obliges the State to fund primary education. The Constitution also puts forward an objective of support after that stage for schooling at second level. And as a matter of practicality, there is free secondary education but with several subsidised private schools. All compete to produce good results in the Leaving Certificate and to instil in pupils a foundation of education. The text of the Constitution appears to recognise that the general tendency in the 1930s was, and remains, that parents send their children to school while also elevating freedom of conscience so that where the views of a family diverge from whatever may become the prevailing orthodoxy of approach as reflected in State or private schools, education may take place in the home. Dissent from what may be taught, or perhaps the general attitude in local schools, may be what motivates parents towards home-schooling but, even apart from considerations of right and wrong, some small minority of parents have always considered that they would do more for the development of their children through acting as their teachers at home than schools might. Recently, health considerations due to the Covid-19 pandemic may have increased those numbers. In declaring home-schooling to be a right, this is nothing to do with the larger group of students who, in addition to studying the core subjects that are on the curriculum in most schools, choose to take music or a language as an additional subject taught by a parent or by engaging private tuition.

Simple language

6. What is clear is that there is a right derived from the Constitution, and stated in explicit terms, for parents to opt for education at home for their children. That is a simple right, put in simple language, as are all other rights declared in the fundamental law or in consequence thereof; such as, the right to life, to good name, to property, to free expression, to assembly, to be held equal as human persons before the law, to prepare for and follow a chosen career (*Landers v Attorney General* [1975] 109 ILTR 1), to legal and medical assistance upon arrest (*In the Matter of Article 26 of the Constitution and in the Matter of The Emergency Powers Bill, 1976* [1977] IR 159), to bodily integrity (*Ryan v Attorney General* [1965] IR 294) – to name a few. The nature of a fundamental law is to state basic principles which legislation must not infringe; to declare the objectives or ideals which are paramount in guiding decisions that impact on national life; and to define the nature of a stated polity by reference to component parts of government and their interaction. As such, the Constitution of 1937 is simple in its terms but requires thought in its application. Hence, rights in the text may require elaboration and, in their application, are rarely, if ever, so absolute as to be permitted to override the public good or to undermine the true social order which is a core objective set out in the Preamble to our fundamental law.

7. Similar to the text of a fundamental law, Government decisions, as the exercise of the high authority of the State as the driver of policy, tend to be short: that a strategy is to be followed to some end, that a scheme for redress is to be established, that a treaty should be ratified, that legislation be prepared to address an issue, that a local community should have improved roads or transport services. Naturally, such decisions are reached on the basis of debate and research but the actual conclusion to go one way or another on a range of possible options is typically recorded tersely. That differs from legislation, which may implement or fully realise a policy. Thus legislation requires considerable detail. With a decision, the Government is politically answerable and with legislation the assent of a majority of elected representatives is required. Legislation must pass through the Oireachtas and, in contrast to a decision of Government, is, by its nature, detailed, perhaps supplemented by subsidiary elaboration through delegated authority where boundaries and objectives can properly be derived from the primary text; *Bederev v Ireland* [2016] IESC 34, [2016] 3 IR 1. Taxation, having no equity, meaning a background of already accepted law, is required to address all essentials. Logistics and specifics characterise legislation which sets up new bodies, for instance to enforce rights or promote obligations derived from international treaty commitments. Administrative schemes are similar as to the level of detail. These are established either in consequence of legislation or through a decision of the Government, and address entitlements; who is within a scheme and on what conditions and subject to particularised qualifications. Both legislation and administrative schemes must, by nature, contain sufficient detail in the way of technicality and logistics as to define application and entitlement. In stark contrast, since under Article 28 the Government acts as a collective of 15 Ministers in exercising the executive power of the State and is answerable to Dáil Éireann, governmental decisions would typically be ones of principle as opposed to detail.

8. That general tendency towards terseness in formulating policy is less in evidence in the three pages of the Government decision of 8 May 2020 since, therein, the reasoning behind the decision is set out. While the Government is a political and executive body, answerable not to the courts through judicial review of administrative action but to the Dáil through a political process, reasons are not legally required. Reasons, in contrast, are required in administration to demonstrate why a decision has been made. Nonetheless, this decision of the Government sets out the nature of the emergency faced and gives detail as to the erection of structures to replace the 100-year tradition of final school examinations, called the Leaving Certificate, with the radically different measure of calculated grades as assessed and checked within schools by teachers. Why are there reasons in this decision? There may be many motives for setting out why the Government decided on this approach but having reasons within a document does not necessarily mean that the character of what is done moves from the sphere of governmental policy and executive action into that of administration. Reasoning through a decision is always helpful and reasons are a foundation as well for the political defence of a policy.

9. Article 28.4.1° tersely states: "The Government shall be responsible to Dáil Éireann." It is alien to the scheme of the Constitution that the Government should be answerable to the Courts as if the Government were a court of local and limited jurisdiction or a local authority whose jurisdiction is built on, and bounded by, statute or some administrative body concerned with environmental licencing or planning. Rather the Government is answerable politically to Dáil Éireann; but integral to the fundamental legal text is that all branches of the powers defined in the Constitution should abide by

their limitations as defined by the people in adopting the fundamental law. Hence, Article 6 states: "All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good." Policy is devolved to government from the people. In reality, therefore, as well as being answerable politically in the Oireachtas, since politics moves with the national mood, why a decision of Government is made and what precisely is proposed may sensibly be recited to both advocate for the policy pursued and to confront dissent with the motives behind a decision. Since the issue addressed here is whether that decision of the Government was merely administrative, it will be noted that no legal obligation requires such detail. Even still, the decision recites a list of detailed reasons; including considerations of a health emergency, generating millions of deaths worldwide, a need to have regard to the less advantaged and those with health issues, a principle of reliability in grading and the unfairness of requiring necessary isolation due to contact with carriers of Covid-19.

Administration and executive decision

10. There is no doubt, however, that a government can administer through Cabinet decisions and that not all decisions of Government are an exercise of the executive power of the State through Article 28.2. Hogan, Morgan and Daly, *Administrative Law in Ireland* (5th edition, Dublin, 2019) 2, in describing administrative action, usefully sets out criteria whereby resolutions of policy may be contrasted with the kind of administrative decisions which are amenable in the ordinary way to judicial review. These distinctions focus on the nature of a governmental decision, of its essence a matter of policy and hence the pursuit of an ideal, in contrast to the precision which should be presented to an administrator who is left to apply the scheme to individual circumstances, thus:

> administration assumes that there is already in existence a principle and that all the administrator has to do is to establish the facts and circumstances and then to apply the principle. It is of the essence of good administration that the principle must be fairly clear and precise so that, in any given situation, the result should be the same, whether it is administrator A or administrator B who has taken the decision. For, in its purest form, administration requires only a knowledge of the pre-existing principle and an appreciation of the facts to which it is being applied; it is an intellectual process involving little discretion. By contrast, policy-making is largely discretionary; the policy-maker must decide, as between two alternatives, the one which he or she considers best in the interest of the community … [taking into] account all of the relevant factors and which factors are relevant is, to a considerable extent, left to him or her.

11. The authors rightly call in aid the etymology of politics, politician and policy, based on the word πόλις, which imports a meaning of the decisions of affairs which the leaders of a city would make as a matter of principle for their citizens in ancient Greece. Hogan, Morgan and Daly continue:

> Applying the policy-administration dichotomy to the list of governmental functions given earlier, we can say that matters such as the building of a concert hall, the making of procedural regulations, and the making of a development plan, are policy matters; whereas the grant of planning permission, assessment of

capital gains, award of a welfare benefit, and allocation of a corporation house are acts of administration.

12. In approaching this issue of whether the governmental decision is mere administration, of key import is how the powers of government are separated in our system. In the constitutional law of the United States of America, the interaction between the various parts may often be described as a system of checks and balances. Our constitutional law is characterised by boundaries: the government and Oireachtas may not trespass on judicial power while the judiciary may not formulate policy for the executive, may not assume administrative responsibilities and, in reviewing administrative action, is subject to defined rules whereby on identification of error an impugned decision is reverted to the appropriate authority for reconsideration. In no instance where an administrative decision is struck down does a High Court judge substitute a judicial view dictating or even suggesting what is to happen. To do that would be to engage in administration; which is no part of the judicial function. Instead, the High Court decides a point of law and the application of that ruling is for the tribunal; *Barry & Others v Minister for Agriculture & Food* [2015] IESC 63.

13. The tests for the review of administrative action are well known. These originate from the limited nature of the jurisdiction which county councils and other administrative bodies exercise. Since bodies such as An Bord Pleanála or the International Protection Office derive their authority exclusively from statute, exceeding the powers granted as a matter of law is legally impossible and is thus subject to judicial examination and condemnation. It is the same with courts of local and limited jurisdiction: the District Court cannot sit with a jury or try a murder case, and in a civil case the Circuit Court cannot award damages in excess of the limit set by statutory instrument. Judges must give reasons why a decision is reached, as must administrators; *EMI Records (Ireland) Ltd v Data Protection Commissioner* [2013] IESC 34. In that way, judicial review is enabled as to whether a decision was reasonable or within jurisdiction or whether irrelevant considerations or errors of fundamental law have undermined the result. Schemes for administration set up by executive decision of the Government subject those who administer it to the same restraints: to only do what they are supposed to do and to remain within the boundaries of the text which delimits what they are to administer and on what criteria; *M v The Parole Board* [2020] IESC 36, [76]. Of course, these schemes must respect constitutional rights, including the right to home-school children.

14. Where bodies such as tribunals and commissions of inquiry are required to assess differing accounts of an event of public moment, whether on documents or through oral testimony, a fair approach of considering each side's papers, of hearing each side's evidence and equally accepting oral and written material, is required. The basic rule is to consider what each side has to put forward, not blocking one side from presenting orally or by the presentation of documents where the opposition has been granted that facility; *Kiely v Minister for Social Welfare* [1977] IR 267, [1977] IESC 2. Aside from the dubiety of any requirement that criminal trial rights of cross-examination and rhetorical advocacy ought to be applied to every inquiry, which is not the case, there is a fundamental standard which guarantees a fair approach and that is that decided by Barrington J in *Mooney v An Post* [1998] 4 IR 288, 11 and followed by Clarke J in *Atlantean v Minister for Communications and Natural Resources* [2007] IEHC 233, [4.4]. This minimum standard is that a person affected as to a decision where there is a protected right "is entitled to" some notice of what, very loosely and not importing criminal procedures, may be stated

as "the charge against him" or her. While cross-examination or a public hearing of such an allegation do not come into play, fairness necessitates that such person "be given an opportunity to answer it and to make submissions." Thus the basic right is fair notice and a chance to comment. Hence, *Shatter v Guerin* [2019] IESC 9 declares only that minimum standard. Where an investigation involves a public declaration of wrongdoing, it is a simple requirement to get the account of the person who may be unfavourably publicly commented on by the recitation of what, again loosely, may be described as an accusation. Potentially, a procedure of consideration of individuals singly, without the presence of the opposing contender, with the circulation of a draft conclusion and supporting documentation for comment is open to inquiries. Only very rarely, if ever, are full rights of information, or charge or notice of what is wrong, full relevant papers, representation, rights to cross examine and make submissions necessary. Those circumstances remain to be defined in law. Within the administration of the State, inquiries take place all the time, perhaps resulting in sanctions against employees or changes of approach to problems. Since there is no public statement of a tribunal or commission's opinion and powers of compulsion to require documents or an account are not used, resort is had to such legislation as the Tribunals of Inquiry (Evidence) Acts 1921-2004 or the Commissions of Investigation Act 2004. All inquiries should be simple, with transparent procedures, and clear as to focus.

15. For a decision to be reviewable as to its lawfulness by a court, a tribunal or administrative body must give sufficient reasons to show the trajectory of the result from logic. A decision must be supported by reasons. Then, it can be analysed if a decision is within jurisdiction. As to whether a decision of a tribunal or of an administrative body is reasonable has become an independent ground in addition to jurisdiction and a fair approach to adjudication. Essentially, a decision must not be so devoid of sense as to fly in the face of calculable reason; *State (Keegan) v Stardust Tribunal* [1986] 1 IR 642, *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39, and this includes that the proportionality of the decision may make it reasonable; *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701 at [171]. Another way of expressing the concept is that no reasonable tribunal or administrative authority could come to the impugned decision. That separate ground, however, is historically derived from a fundamental administrative law principle that tribunals and instruments of administration are not set up to act unreasonably. This principle is of wide-ranging embrace and includes, for instance, a requirement that arrest powers be based on rational, though not necessarily extensive, suspicion. Thus, an irrational decision, carrying a definite flavour of repellence to reason and to balance, exceeds jurisdiction and may consequently be impugned by judicial review.

16. The Courts are not now, and are not capable under the Constitution of being, a forum whereby citizens may obtain a ruling disagreeing with governmental policy or a major governmental decision on the basis of any contention that such decision was unreasonable or disproportionate. For such politicised litigation to be allowed to happen would be to strike at the very heart of the separation of powers doctrine within the Constitution and to delay what is political responsibility in policy making through litigious manipulation. Proportionality and reasonableness have nothing to do with the exercise of executive power. That is a political matter. Hence, and contrary to what is argued on behalf of Elijah Burke and Naomi Power, to put decisions of the Government dealing with matters of high policy on a par with an administrative tribunal and subject to judicial review is contrary to the scheme upon which the Constitution is constructed.

Delay

17. Experience indicates that with major administrative decisions which impact on communities, such as motorway projects, wind electricity generators and other infrastructure proposals, such as pipelines or electricity interconnectors, judicial review is a constant factor. Resort to judicial review is an entitlement under the Constitution. The analysis in the High Court under Order 84 applications is complex, often involving multiple pieces of legislation, and it takes time; as do appeals and the often repeated resort to litigation where, if a decision is impugned, the matter is reverted to the administrative body, a decision is made and an issue is again found. While experience shows that most judicial reviews perhaps fail, the process delays what may need to be done administratively. Could judicial review of administrative action be the process by which governmental adherence to the Constitution is to be judged; involving such a complex series of tests; such involved legal analysis; and whereby policy may not be implemented?

18. Furthermore, this is a common process, grist to the mill of court proceedings, with often a dozen cases in a Monday list and more complex issues of judicial review being heard on a weekly basis in the High Court. These impact on criminal and civil administration, with delay in instituting criminal proceedings or loss of evidence cases, planning disputes, commercial firms cross contending as to public procurement contracts – these are but examples. This chorus of litigation constitutes a persistent and necessary review on jurisdiction, on procedural grounds and on reasonableness and proportionality of administration and of judicial action in the District Court and Circuit Court and of quasi-judicial bodies such as commissions of inquiry and tribunals of inquiry. While before Order 84 of the Rules of the Superior Courts was promulgated, a conditional order of certiorari, or other State-side remedy, was required from a judge to enable a judicial review to move forward, since 1984 the test has been considerably easier. It is unthinkable to hold up serious government decisions of policy through the judicial application of such a low threshold for initiating judicial review. The principles which a court applies when considering whether or not a judicial review should be allowed are set out in the judgment of Finlay CJ in *G v Director of Public Prosecutions* [1994] 1 IR 374, 377 where he states:

> It is, I am satisfied, desirable before considering the specific issues in this case to set out in short form what appears to be the necessary ingredients which an applicant must satisfy in order to obtain liberty of the court to issue judicial review proceedings. An applicant must satisfy the court in a prima facie manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:–
> (a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20 (4).
> (b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.
> (c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks…"

19. In *Esme v Minister for Justice and Law Reform* [2015] IESC 26, Charleton J elaborated so as to exclude the barely arguable:

> 15. … Any issue in law can be argued: but that is not the test. A point of law is only arguable within the meaning of the relevant decisions if it could, by the standards of a rational preliminary analysis, ultimately have a prospect of success. It is required for an applicant for leave to commence judicial review proceedings to demonstrate that an argument can be made which indicates that the argument is not empty. There would be no filtering process were mere arguability to be the test without, at the same time, taking into account that trivial or unstatable cases are to be excluded: the standard of the legal point must be such that, in the absence of argument to the contrary, the thrust of the argument indicates that reasonable prospects of success have been demonstrated. It is still required to be shown that a prima facie legal argument has been established. … In terms of law, the test is no different: it is a point of law which if not balanced or outweighed by other principles will suffice to establish the contention. This is the filter, which the leave application is designed to be, in order to ensure that there is sufficient reason to disrupt administrative decisions and to litigate them.

20. This standard, of having an arguable case with a reasonable prospect of success in order to be granted leave to bring a judicial review, has been superseded by legislation in the area of planning and the environment and for refugee applications, among others. Section 50 of the Planning and Development Act 2000, for instance, instead requires that there be "substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed." The contrast between "substantial grounds" and the test outlined in *G v DPP* indicates that the standard by which leave to bring a judicial review will be granted in the ordinary case is not a very high one; it is not particularly difficult to meet, though judges should beware of the facility with which anything may be described as arguable. Therefore, if judicial reviews could be brought against Government decisions on the basis of an applicant having an arguable case, executive decision making could be severely impeded with decisions being reviewed on a routine basis by the courts.

Separation of powers

21. Enabling each branch of government to do its duty and in a timely manner requires that each part not impede the work of the others. Where judicial intervention is required, it should be on a strictly limited basis and where actual governmental decisions are sought to be impugned, in stark contrast to the judicial review of administrative action, a stringent test is necessary. Otherwise, an unwelcome clash of wills may be introduced into a system where separation lays the foundation of the harmonious operation of the moving parts of government. Hence, any test to be applied can have nothing to do with a court thinking politically; which would be the case were there a ground for judicial interference with policy on the basis of what an individual judge in the High Court thought was reasonable or proportionate in a given instance.

22. In respect of the separation of powers, cases and texts from the neighbouring kingdom are of limited usefulness; the executive and government and judiciary being traditionally separate but with an interaction that, historically at least, elided any clear dividing lines. An obvious example being the Lord Chancellor, formerly fulfilling roles at cabinet, in parliament and as a judge; *Halsbury's Laws of England*, 3rd edition, volume 1 at 1,

102, 122 (the edition appropriate to this point). Article 6 of the Constitution in declaring that the powers of government "are exercisable only by or on the authority of the organs of State" and in deriving "under God" those powers "from the people" while designating them as "legislative, executive and judicial" sets the scene whereby in subsequent Articles specific roles are assigned to the national parliament, to government and to the judiciary. None of these powers are immunised from the Constitution: and the final arbiter as to legislative and executive compliance is the judicial power. In the most explicit fashion, to take but one example, the old application for *habeas corpus* places, in Article 40.4, a court remedy of a deliberately informal kind over both legislative acts which infringe liberty, through the text of an Act being contrary to the Constitution resulting in a person being arrested or otherwise imprisoned, or by an executive or administrative detention that does not accord with law. This exemplifies the subordination of the legislature and the executive to the Constitution and the ultimate guardianship of compliance as reposing with the judicial branch.

Judicial power

23. Since, however, the function of the Constitution is to define or describe the competencies of the branches of government, that is where the boundaries of judicial power are to be found. *Boland v An Taoiseach* [1974] IR 338 is a case which emphasises the separateness of governmental power from judicial scrutiny. At issue was the entry, pursuant to the executive power under Article 28.1, by the Government into what was judicially found to be a limited agreement of consultation and cooperation with a view to easing the burdens of division and violence in Northern Ireland; a decision claimed by the applicant to violate the territorial integrity of Ireland under Articles 2 and 3, as then in force, but since amended by the Nineteenth Amendment. Even in the exercise of high policy, the Government had to act in accordance with the Constitution; which in this instance was done, due to the limited nature of the agreement as not being an abdication of sovereignty. Griffin J affirmed, p 370, that "in the event of the Government acting … in contravention of … the Constitution" then "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 … is substantiated in proceedings" but only in the context of court proceedings. This, for the reasons outlined above, is a notably stringent test and, furthermore, it is a test distanced from own-motion intervention in governmental policy by the Courts: could one imagine the High Court, of its own motion, becoming in effect a litigant through some attempted judicial ostensible reigning in of governmental power? There is no instance of the judiciary being enabled to intervene other than in response to the complaint of a concerned citizen as to a claimed trespass beyond the boundaries of governmental power. As Budd J stated, at p 366, of *Boland*:

> The judiciary has its own particular ambit of functions under the Constitution. Mainly, it deals with justiciable controversies between citizen and citizen and citizen and the State … Such matters have nothing to do with matters of State policy. Viewing the matter from another angle, as to the nature of any relief that could properly be claimed in proceedings of this nature, I ask whether it could be said that the Courts could be called upon to pronounce adversely or otherwise on what the Government proposed to do on any matter of policy which it was in the course of formulating. It would seem that that would be an attempted interference with matters which are part of the functions of the Executive and no part of the functions of the judiciary. …

> The Constitution goes further in indicating how far the policies involved in government decisions as to policy such as this are removed from the purview of the Courts in that it makes the Government responsible to the Dáil which can support or oppose those policies and review them. Ultimately, there is the responsibility of the government to the people who must be consulted by way of referendum where any change of the constitution is contemplated.

24. Thus cast, judicial power is defined and delimited under the Constitution in a way that would not accord with such matters as overturning an economic policy pursued by government. Is a policy proportionate; or is it unreasonable? These issues are no business of the Courts under the Constitution. As an example of judicial power that does not accord with our fundamental law, and whereby policy was overturned even though cast in legislation, *Schechter Poultry Corporation v United States*, 295 US 495 (1935), a Supreme Court response to the New Deal, contrasts strongly with the Irish principle of mutual respect of separateness. Further, as so bounded in this jurisdiction, it would only be in the clearest cases of infringing the powers delegated by the people under the Constitution that an action by a citizen could result in the restraint of governmental power. In the *Boland* case, that was definitively stated to involve a test of "clear disregard by the Government of the powers and duties conferred upon it by the Constitution"; per FitzGerald CJ at p 362. There is no warrant for not following that case in the circumstances of this appeal. In *Crotty v An Taoiseach* [1989] IR 713, Finlay CJ and Griffin J, concerned about the clarity of the limits and the requirement of strict separation, dissented to the majority's restatement of that traditional test which they saw as insufficiently restrained. While Henchy J supported the non-immunity of the Government from "judicial control if it acts in a manner or for a purpose which is inconsistent with the Constitution", at p 786, and Walsh J declared the Government and the Oireachtas incompetent "to free themselves from the restraints of the Constitution", at p 778, those strictures also apply to the judiciary. No more than the Government, the Courts cannot exceed their powers. As to the test for the review of governmental executive action, Finlay CJ preferred a test requiring an applicant for judicial intervention to demonstrate that constitutional rights "have been or are being invaded by those activities or where activities of the executive threaten an invasion of such rights", at p 773. Griffin J, while accepting that test, added that any judicial entitlement of interference "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", at p 792. What had by then become the traditional test was affirmed by the majority to be the clear disregard one derived from the *Boland* case.

25. This test of clear disregard of the Constitution was again the touchstone in *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10 at 32 where Hamilton CJ, by way of summary, usefully proposed these principles:

> 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.

26. At issue in *TD v Minister for Education* [2001] 4 IR 259 was a High Court order addressed to the Government to construct and manage and to make available to at-risk children dedicated care-units. The strong statements of this Court on that decision as to separation of powers might be viewed in the context of the issue of the Courts apparently ordering the Government around, or superintending governmental obligations, indeed, but the approach clearly also demonstrates that boundaries must not be crossed. Murray J, at p 337, would only permit judicial interference in an executive decision where it had been proven that there had been "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." Concurring in that observation, Hardiman J, at p 372, again remembering the mandatory nature of what the High Court had ordered, stated that such a judicial intervention required "absolutely exceptional circumstances". Of their nature, mandatory orders, difficult to police and subjecting the court venturing such an order to a possible role of oversight, have always required a more stringent test than orders of restraint. That at least is part of the overall context; see *Hoey v Waterways Ireland* [2021] IESC 34. In *Horgan v An Taoiseach* [2003] 2 IR 468, 515, a challenge to the Government permitting the aircraft of the United States of America to overfly the State and to refuel at Shannon, in the context of international conflict, this test was stated in the High Court by Kearns J as requiring "some quite egregious disregard of constitutional duties and obligations" before a court could interfere with an executive decision under Article 28. Article 28.3 states that: "War shall not be declared and the State shall not participate in any war save with the assent of Dáil Éireann." This special context renders the analysis of what was claimed to be participation in military conflict as standing apart from the exercise of non-military executive power. Even still, the test for the review of executive authority is as stated by this Court. As with many serious issues in civil cases, while the burden of proof remains probability, the seriousness of the intervention, requiring particular judicial care, is emphasised.

Mutual respect

27. Clear lines must be drawn for the purpose of truly acknowledging the boundaries set by the Constitution and to delineate the exclusive responsibility of each branch of government. There must be no blurring of those lines. The formulation by the Court of Appeal at [228] of their judgment in this case, while a serious and admirable grappling with the disparate decisions on the test for judicial restraint of executive action, lacks sufficient legal concreteness. There is, consequently, a risk that, in application of that over-complex test, the various parts may be treated elastically or may be portrayed by judicial analysis to encompass such varying elements so as to endanger a moving away from settled authority. A peril in consequence is the foundation of what would become, in effect, discretion. That is singularly inappropriate in an area where the boundaries delineated by the Constitution are clearly set: and should be clearly declared. Any such flexibility of judicial intervention would be incompatible with the demarcation of power. The same point needs to be made about introducing any test of review of governmental

action based on reasonableness or proportionality. As straightforward as the constitutional rights are as declared by the people in 1937, or as derived from those rights since then by judicial analysis, and simple in application, the test remains that of requiring a litigant to show clear disregard of the Constitution by the Government in an executive action.

28. Historically, the progress of the text of the Constitution over time demonstrates adherence to the separation of powers both by judicial decision and through the ultimate authority of the people under Article 6. This involves mutual distancing through mutual respect. In *Maguire v Ardagh* [2002] 1 IR 385, the Oireachtas proposed to set up a political inquiry into the death of an armed man with personal difficulties at Abbeylara in 2000 who had tragically been shot by gardaí after emerging from a house after a siege. This inquiry followed on a report to an Oireachtas sub-committee and it was proposed to follow through with the hearing of oral testimony from the participants in the siege and finding facts; witnesses being summoned, including those directing the containment operation and involved directly in the death. The powers purported to be exercised arising, it was claimed, under s 3 of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, 1997. That could have led to, and seems to have been intended to result in, a political declaration of fact as to responsibility; was the use of force correct, was oversight properly exercised, who might have been to blame, etc. That exercise was restrained by this Court as trespassing on the domain of the judicial arm of government. Keane CJ at p 537-8 emphasised the restraint within which judicial intervention into the affairs of the Oireachtas were conducted but found that no provision of the Constitution enabled the condemnation of a citizen by the political or legislative process, effectively taking away that citizen's constitutional right to his or her good name:

> That is not to say that the courts will accept every invitation to interfere with the conduct by the Oireachtas of its own affairs: such an approach would not be consistent with the separation of powers enjoined by the Constitution. Specifically, the courts have made it clear that they will not intervene in the manner in which the House exercises its jurisdiction under Article 15.10 to make its own rules and standing orders and to ensure freedom of debate, where the actions sought to be impugned do not affect the rights of citizens who are not members of the House: see the decision of this court in *Slattery v. An Taoiseach* [1993] 1 IR 286. It was also held by the former Supreme Court in *Wireless Dealers Association v. Minister for Industry and Commerce* (Unreported, Supreme Court, 14th March, 1956), that the courts could not intervene in the legislative function itself: their powers to find legislation invalid having regard to the provisions of the Constitution arise only after the enactment of legislation by the Oireachtas, save in the case of a reference of a Bill by the President to this court under Article 26. Nor, in general, will the courts assume the role exclusively assigned to the Oireachtas in the raising of taxation and the distribution of public resources, as more recently made clear by this court in *T. D. v. Minister for Education*[2001] 4 IR 259.
>
> That resolutions authorising the establishment by the executive of a tribunal of inquiry invested with the powers specified under the Act of 1921, may be scrutinised by the courts and their legal effect conclusively resolved by the courts is clear from the decisions in *Goodman International v. Mr Justice Hamilton* [1992] 2 IR 542 and *Haughey v. Moriarty* [1999] 3 IR 1. However, it is equally clear, as

> Geoghegan J found at first instance in the latter case, that the actual process by which parliament is convened for the purpose of passing such resolution is not justiciable.
>
> Different considerations apply, however, where, as here, the Oireachtas purports to establish a Committee empowered to inquire and make findings on matters which may unarguably affect the good name and reputations of citizens who are not members of either House. An examination by the courts of the manner in which such an inquiry is established in no way trespasses on the exclusive role of the Oireachtas in legislation. Nor does it in any way qualify or dilute the exclusive role of the Oireachtas in regulating its own affairs.
>
> Even if there were no authority to guide this court on this issue, I would, accordingly, be satisfied that, as a matter of principle, the Divisional Court was correct in holding that these issues were justiciable. The matter, is however, put beyond doubt, in my view, by the decision of this court in *In re Haughey* [1971] IR 217.
>
> As I have already pointed out, in his judgment, Ó Dálaigh CJ expressly found at p. 257 that:-
>
> > "the examination of the expenditure of monies belonging to the Irish Red Cross Society, not being monies granted by the Dáil to meet public expenditure, is not a matter which, as such, falls within the jurisdiction of the Committee of Public Accounts."
>
> Such a finding was plainly irreconcilable with any view on the part of the former Chief Justice that this was not a justiciable issue. Similarly, as the Divisional Court pointed out, Ó Dálaigh CJ, in another part of his judgment, expressed the view that the committee in that case was not legally entitled to an answer to any question which was not relevant to the proceedings and which was not within its terms of reference. Similarly, his judgment considered the powers granted to the Committee of Public Accounts under a specific standing order and the validity of what purported to be a certificate of the committee having regard to its terms of reference.

29. Denham J, at p 566, strongly proposed that limits to judicial activism were set by the text of the Constitution itself, whereby the Courts could not disregard the separation of powers by either interfering in policy or by empowering the legislative sphere with a competence to conduct judicial hearings. A corollary of that principle was that where no adjudicative power, outside that of making official inquiries through the compellability of witnesses with a view to formulating policy, was constitutionally given to the legislative branch of government, there was no judicial warrant to imply into the Constitution a power that was not there and which was exclusively part of the function of the Courts, or of properly constituted and independent judicial tribunals:

> Judges have a duty to uphold the Constitution: Article 34.[6].1°. In addition, the superior courts may judicially review legislation to determine its constitutionality. These are grave duties and responsibilities of judges.

> In exercising these duties and responsibilities, it is often necessary to balance and harmonise conflicting constitutional rights. This requires careful judicial judgment. It may require the exercise of judicial discretion to achieve a just and proportionate determination. When a court is protecting constitutional rights, it has specific duties and responsibilities under the Constitution. These duties and responsibilities are exercised by a court using power which has come from the people and which has been designated by the Constitution to be exercised by the courts. This duty and responsibility are to be carefully guarded by a court for the protection of the Constitution and constitutional rights.
>
> In construing the Constitution and protecting rights the courts do not have a role in legislating or writing a constitution. In this case the Attorney General, … [is] asking this court to make a decision which would involve considerable judicial activism. They request that the court construe the Constitution so as to find an inherent power for the Houses of the Oireachtas to establish a committee system of legislative government to empower an inquiry of the type in issue. The court is requested to describe and proscribe the boundaries of this alleged inherent power. This is a request to make law. Without shirking the duty and responsibility of upholding the Constitution and the laws it is necessary to ensure that such a decision does not exceed the jurisdiction of the court. It is my view that it would not be constitutional to make such a judgment. Such a decision should be made elsewhere, either by the legislature or by the people. In my opinion, to decide that a power as submitted for the Committee is inherent in the Constitution would be either to draft a constitutional amendment or to legislate. To establish such a legislative committee of inquiry is a matter for the people in a referendum or the legislature in legislation, and is not a matter for the court. It is a matter neither explicitly nor implicitly in the Constitution. It is a power contrary to the roots laid down in 1922 and grown in 1937. It is not an inherent power in the Constitution of Ireland, 1937.
>
> Whether such a power in the Houses of the Oireachtas is a good thing or a bad thing is a policy issue to be determined by the legislature or by the people. Whether the people's representatives in the national legislature should undertake inquiries, such as in issue, is a policy matter to be determined in another forum. It is a policy matter to be decided by the representatives of the people in a legal frame. It is a policy matter which has to be decided in light of the Constitution of Ireland.

30. The Oireachtas, it follows, is enabled, with a view to formulating the correct policy behind legislation, to hear evidence as to deficits in existing or past policy or legislation and for sub-committees to report in that regard; but without finding fact in such a way as to undermine the constitutionally protected reputation of citizens or the judicial power. An amendment enabling fact finding generally and the ascribing of blame through political hearings was rejected by the people in the proposed 30th Amendment to the Constitution in October 2011.

Decisions as to policy

31. Defining and keeping separate executive power is key to the issue as to whether the decision to cancel the Leaving Certificate and to substitute predicted grades in such a way as to disenable home-schooling as guaranteed by the Constitution is the exercise of

executive power. It is no part of the judicial function to decide policy or "as to what may be the best method by which the State can carry out its constitutional duties"; *Landers v Attorney General* at p 6 per Finlay J. In *TD*, Hardiman J reasoned that decisions of policy were not capable of restraint because of the difference in function as between setting policy and the microcosm of a court hearing. One looks at a huge picture, attempts a prediction of future needs and is answerable politically, whereas the other is the finding of such facts as litigants put before a court with a view to obtaining a decision as to where, on finding facts as a probability, their respective rights and duties lie or whether a criminal offence has been proven beyond reasonable doubt. His judgment, at 360-361, emphasised how any unwarranted expansion of the judicial power would eat into policy and executive action; a situation whereby an inflation of judicial power would strip political debate from Dáil Éireann and pull the democratic process away from the electorate and towards an increasing use of court intervention:

> The exercise of the executive power is vested in the Government which is responsible to Dáil Éireann. On the ordinary principles of construction I believe that this responsibility is an exclusive one; the Government is not in this respect responsible to any other person or body. As appears from the citation earlier in this judgment from *Buckley and Others (Sinn Féin) v. Attorney General and Another* [1950] IR 67, these articles, combined with Article 6, not merely set forth the distribution of powers, but they 'require that these powers should not be exercised otherwise'. I agree with the observations of Murray J. in this case to the effect that the order under appeal would tend to 'undermine the answerability of the executive to Dáil Éireann and thus impinge on core constitutional functions of both those organs of State'. In my view those observations are clearly borne out by the passage which follows them in the judgment of Murray J.
>
> In my judgment in *Sinnott v. Minister for Education* [2001] 2 IR 545, I gave a number of reasons why the courts could not assume the policy making role in relation to the multitude of social and economic issues which form the staple of public debate. I said at p. 710:-
>
> > 'Firstly, to do so would offend the constitutional separation of powers. Secondly, it would lead the courts into the taking of decisions in areas in which they have no special qualifications or experience. Thirdly, it would permit the courts to take such decisions even though they are not, and cannot be, democratically responsible for them as the legislature and the executive are. Fourthly, the evidence based adversarial procedures of the court, which are excellently adapted for the administrative of commutative justice, are too technical, too expensive, too focused on the individual issue to be an appropriate method for deciding on issues of policy.'
>
> This list is by no means exhaustive. One might add that if the courts (or either of the other organs of government) expand their powers beyond their constitutional remit, this expansion will necessarily be at the expense of the other organs of government. It will also be progressive. If citizens are taught to look to the courts for remedies for matters within the legislative or executive remit, they will progressively seek further remedies there, and progressively cease to look to the political arms of government. Such a development would certainly downgrade the political arms of government and, just as significantly, it would tend to

> involve the courts, progressively, in political matters. This cannot be permitted to occur."

32. The judgment of Hogan J in *The Garda Representative Association v The Minister for Public Expenditure* at [36] reasons that the judicial branch does not enact legislation, make Regulations, or formulate policy due to its "institutional weakness" which makes it singularly suited to administering justice. He highlights the "fallacy" of assuming that the other branches of government should act in a similar way to the judicial branch; [37]. He explains at [40]:

> the other branches of government are engaged in the business of policy formulation as distinct from the administration of justice. In contrast to judicial decision-making, the policy makers of the legislative and executive branches are not required to be consistent or to have regard to established precedent or to proceed from legal principle or to give detailed reasons in writing for their decisions. Nor are they required to be detached and impartial in the same manner as would be expected and required of the judiciary. Critically, however, the other branches of government are democratically accountable in a way that the judiciary are not.

33. Drawing on prior cases, such as *Bode (a minor) v Minister for Justice* [2008] 3 IR 633 and *Prendergast v Higher Education Authority* [2010] 1 IR 490, there is no doubt that there is a power vested in the Government to make decisions within the express constitutional mandate of Article 28.2 and that this is a power which is not subject to review by the Courts where there is no demonstrated clear disregard of the limits of the Constitution. Such powers as setting up a civil legal aid scheme, or custody issues scheme to pay lawyers, disbursing funds to developing countries with which Ireland has particular ties, directing the civil service, directing the Defence Forces and An Garda Síochána, engaging in peace keeping missions or police or administrative support measures for nations emerging from conflict, and deciding who is to qualify to remain in the State who has a child who is Irish but where the parents are foreign nationals are all examples of that power. In the decided cases, treaty accession, the management of elections and foreign relations issues have been the subject of challenge as to the exercise of high governmental power; see Hogan, White, Kenny and Walsh, *Kelly: The Irish Constitution* (5th edition, Dublin, 2018) chapter 5.1. Clearly, in terms of executive power, the Government can decide that legislation, as with legal aid, provides better clarity than a scheme pursuant to their penumbral power outside of statutory regulation; in which case the legislation passed by the Oireachtas details what may and may not be done. That executive power may be translated into legislation, as where formerly a decision of the executive granted a passport but this, in the main, is now regulated by the Irish Nationality and Citizenship Acts 1956-2004. A Minister granting a passport would be a good example of an action under the power of the executive but would not qualify under Article 28.2 as all that essentially involved would be the administration of an existing scheme; this is now provided for in the Passports Act 2007. Another would be the grant of a silk gown to a barrister as a mark of professional eminence; this is now provided for in the Legal Services Regulation Act 2015. Such decisions touch one person but is not a policy decision but is mere administration. With the Leaving Certificate Examination, there is some legislation but this is not decisive as to whether the decision should be characterised as merely administrative. The decision to shut down part of national life that has persisted as the gateway to cherished careers over many generations was far reaching and exclusively political.

Application

34. The stringency of the test for judicial restraint of an executive decision is all very well, but if in the application of the test what is truly an executive action is inaccurately characterised as mere administration, as the argument presented on appeal would have it, the test is undermined. If this happens, the test is replaced with the judicial review of administrative action principles of reasonableness, proportionality, reasons for decision, adherence to jurisdiction and fairness of procedures. No doubt all policies have reasons behind them, since governmental decisions are proceeded often by a green paper proposal or the adoption of a white paper as to future actions, or even a Citizens' Assembly report. Even still, the statement of reasons is not a requirement of executive action; to reiterate: the Government is constitutionally answerable to Dáil Éireann in the political sphere. Since the parameters of executive power are a matter of law, the judicial review of administrative action is an entirely different species of judicial intervention which cannot be forced upon a Governmental action within Article 28.2. But how can such an action be properly characterised since governments can also administer, as with granting a passport prior to legislation, as well as make and pursue policies by executive action?

35. Executive decisions at this level, characterised as such, have included *Crotty* as to entry into the Single European Act, *McKenna* on aid to referendum campaigns, *Boland* on international relations, comments in *TD* as to mandatory orders against perceived inaction, *Prendergast* on the use of State resources to train medics and to pursue a policy of the education of foreigners for funding of colleges purposes, and *Horgan* as to the use of State resources in cooperation with a foreign power pursuing, in effect, a war. These are all decisions within Article 28.2 which do not merely involve administering an existing scheme but which act in such a way that Government power shifts the national polity in a fundamental sense. Certainly, some of what the government does is administration, but there is also a category of decision which case law has recognised as outside the mere administration of a scheme. These have involved decisions of policy, as opposed to mere decisions as to entitlement, and where a new course is set as opposed to, calling in aid here the above quoted analysis from Hogan, Morgan and Daly, taking an existing scheme where the parameters have already been set, and deciding that some particular individual or group fits within an existing definition.

36. All of these cases have been about policy at governmental level and, in setting policy, the Courts have no power to interfere. In that regard, judicial restraint is not to be portrayed as anything more than respecting the existing constitutional boundaries; limits which keep the disparate powers working within the harmony of the constitutional scheme decided upon by the Irish people. If the difference between administration and the exercise of executive power were to be essayed as essential to this decision, usefully it could be said that administration is the following through on schemes which policy has previously decided ought to be in place and where the parameters have been set whereby all that needs to be done is to decide on eligibility. Executive power, in contrast, truly engages the exercise of policy decisions whereby administrative schemes may be put in place or whereby the fundamental machinery of Government is moved to offer the nation's support in international relations or in introducing changes to domestic life which have far-reaching consequences for the life of the State.

37. The Leaving Certificate has run for a hundred years. It is widely discussed publicly as to what questions are set, how candidates perform, what grades may be hoped for and how this will pan out in offers for university and other places. In cancelling that examination, the Government was not substituting for the Department of Education. No, it was making a decision of high policy and was altering a fundamental aspect of national life which touches not only those some 60,000 participating whose expectations had suddenly changed, but also their families and the students coming in the following years, all of whom were preparing for this test. This was an executive decision. There was nothing administrative about a decision of such wide ramification.

38. When looking at the decision, it is to be noted that it makes no attempt to exclude those who have been home-schooled. There is thus in the Government decision no disregard of any right of parents to teach their children at home to the exclusion of the school system. There could thus be no clear disregard of the Constitution save where a contention is proven that the scheme had been set up in such a way as to exclude the home-schooled or to substantially undermine their rights. In reality, as O'Donnell CJ points out in his judgment, any such disregard of rights came not from the Government but from the Department of Education and its, it must be acknowledged, quite heroic efforts to find a means whereby the overwhelming preponderance of those at second level might progress to third level or, if going into the jobs market, get a grade commensurate with their work. When it comes to assessing the Department's implementation of the scheme developed by the government, there the lesser test of judicial review applies. On that basis, there has been an unlawful excluding of this minority from their rights, such that the over-arching jurisdiction limit of constitutional compliance has been breached.

Entitlement to access

39. A matter that came across strongly in argument on behalf of the State was an apprehension that upholding the text of the Constitution to home-education, which is inescapable, would inhibit the development of school assessments and examinations. That it does not.

40. In so far as it can be understood from the limited exposure to policy through argument on this appeal, the Leaving Certificate Examination may possibly be moving away from the challenge of memorising a course and participating in a series of written tests and towards an, at least partial, in-school assessment. If that is government policy, then that is within the constitutional scheme whereby authority rests there and reposes nowhere else. It is not for the Courts to interfere with any such change of policy. There is nothing now before the Court to suggest that the Government in any way intends to clearly disregard the entitlement of parents to home-school their offspring. Nor may it now be contended that what has been a shifting oasis as educational policy must forever remain fixed and as it now is in the moving sands of what is modern life and the demands which an evolving economy places on workers. What was not required a generation ago, coding, computer literacy, competence in word processing, either is or may become a commonplace assessment. As O'Donnell CJ states in his judgment, it is for the Government to predict those trends and to set policy.

41. Talk that education for its own sake is a good thing travels over many generations, as does debate as to whether third level colleges should offer more in the way of places of practical application, such as engineering or computer science or hotel management,

rather than the deep study of such subjects as theology or art history or Koine Greek or archaeology or even subjects of everyday practical application in human affairs such as history or ones requiring tremendous feats of memory such as playing a musical instrument by heart. Where policy moves is a concern of citizens and public representatives in the political sphere, to be addressed by Government and for that policy to be called to account in Dáil Éireann; but nothing advanced in argument demonstrates such choices as having anything to do with the Courts.

42. As to school education, that is pursued so that students will have exposure to the great poets, such as Ó Ríordáin and Yeats, to our unsurpassed heritage of folk music, to the legends which speak to us as a nation, and aspects of culture which otherwise would not occur in general discourse, and to other aspects of historic endeavour as well as practical subjects related to science or computer coding. But, it would be wrong to confine home-schooled students to the pursuit of learning for its own sake as that is not part of the experience which State education policy seeks to bring to young people. As well as becoming aware of the vast treasure of human experience, people need also to earn a living. Both can be pursued. In that respect, the Leaving Certificate is most often publicly discussed as a vehicle for entry into such desired third-level courses as engineering or pharmacy. But everyone has a part to play. The constitutional right of parents to home-school children would be lost if they could not compete at some level for university courses. But what is required is that some avenue of access, be it a State examination of some kind or any reasonably accessible international test, be left open. Where changes are made gradually, and noticed through ordinary public discussion, those schooled in State or private schools and those home-schooled all have to adapt. Prior generations had to take account of changing grades and altered curricula and the same applies here.

Result

43. There is a constitutional right invested in parents to home-school their offspring under Article 42 of the Constitution. That right harmonises with the authority of the family as declared in Article 41 and whereby the fundamental unit of society is the family. Up to this case, no one has suggested that there has been any policy to exclude or to discriminate against those home-schooled. On the contrary, everything indicates that their rights have been respected. From Saint Patrick's Day 2020, the State and the Irish people have struggled to find ways of pursuing everyday life in the face of a mutating and, prior to mass vaccination, potentially killer disease which has put untold strain on health services. With the transmissible nature of Covid-19, large gatherings had to be avoided until a vaccination program struck back against the disease. Any mass examination in 2020 was then an infection-spreader event. The Government were obliged to react and did so in a way which has not been demonstrated to display any clear disregard of the Constitution. The Leaving Certificate examination was postponed and predicted grades enabled those at school to access third level during 2020. Clear disregard of the Constitution is the test to be applied to any asserted review of the Government exercising their authority to make decisions of fundamental policy. The Government decision to put off the Leaving Certificate in 2020 and replace written and orally examined grading in subjects with predicted grades was a legitimate exercise of the power conferred by the Constitution. That decision did not seek to deprive home-schooling parents or their offspring of any right. There was therefore no clear disregard of the Constitution by the Government.

44. In light of the argument presented on this appeal, it should be reiterated that the proper test for a challenge to an executive decision of the Government under Article 28.2 is that an applicant seeking to challenge such a decision must show a clear disregard of the Constitution. That has not been met. The Government legitimately made a policy decision. That decision did not exclude the home-schooled or disadvantage them. Using a test derived from judicial review of administrative action, such as reasonableness or proportionality, one redolent of delay and routine interference in governmental action at the highest level, is not appropriate. Principles of jurisdiction, reasons, procedure and decisions requiring not to fly in the face of fundamental reason and common sense might facilitate a constant trammelling of the executive power by the judiciary. As such, any proposition which makes this decision of the Government into a merely administrative action does not accord with the decided cases. Hence, there is no warrant for changing the test.

45. Policy, however, as declared by Government, must be turned into an administrative scheme. There is a vast gulf between formulating a policy and implementing it. Here, that was traversed swiftly. Any such a scheme must abide by the Constitution. That is the over-arching jurisdiction under which every organ of the State must act. Reverting to a consideration of judicial review of administrative action, as analysed above, that edifice of law rests on a foundation of jurisdiction. Can there be any more fundamental delimiting of jurisdiction than that which is set down by the Constitution? The Government made no decision to exceed constitutional limits. That decision does not even mention the home-schooled. The implementation of that scheme by the Department of Education pursued that legitimate government policy through a detailed scheme in such a way, however, as interfered with home-schooling by not providing an avenue of assessment for those home-schooled which approximated with what was open to those at second level schools. With the considerable stress of keeping interested parties, including parents, administrators and teachers, within the ark of consideration, and pursuing the possible while faced by a close-to impossible situation, the Department of Education devised a scheme which inadvertently exceeded constitutional limits. By implementing a scheme which, while understandably, addressed the majority of considerations in a way which respected the integrity of substituting the Leaving Certificate, left those who were home-schooled with no possibility of advancing to third level education in 2020, the Department acted outside what the Constitution required. Thus, applying an analysis derived from administrative law, this was not a decision as to an existing scheme but the administration seeking to do what seemed possible to implement a governmental decision. Hence, the Department of Education derived an entirely new scheme based on a valid governmental policy and which required a new tier of administrative arrangement to implement. That scheme, however, left the home-schooled outside of the range of assessment for achieving a grade to progress to third level education in 2020. That was not constitutionally permissible. Hence the departmental scheme exceeded jurisdiction.

46. To that analysis, however, should prudently be added a comment that a right to home-school is not undermined by changes in policy once a path to university or third-level remains open on a reasonably equitable basis and once the changes occur over time, enabling adaptation. Common sense demonstrates that such changes happen not infrequently and through political or administrative action that is commonly reported in the media.

47. In this case, however, due to an error born of urgency, no path was reasonably left open to Elijah Burke or Naomi Power to advance to third level education as home-

schooled people in 2020. They could have taken the Leaving Certificate in person in November 2020, but thereby any third level place was gone for the academic year 2020-2021. Postponement for a year may be posited as a small burden; but delay in garnering a third level place puts the dilatory on shifting sands as grades inflate and requirements for entry change. It must be clearly stated that the government policy did not trammel on the position of the home-educated as exercising a constitutional right. Understandably, however, faced with a need to change in a flash, because of the Covid-19 pandemic, a scheme for examination which had evolved gradually over generations, the Department of Education inadvertently exceeded the jurisdictional limits of the Constitution by leaving the home-schooled with no available entry to third level approximating to that open to school students. Of course, there was no ill-intention involved. The meeting of the demands of 60,000 students at second-level schools was an astonishing feat of administration which, regrettably, erred as regards this very small cohort. In that respect only, there was an excess of jurisdiction in the departmental scheme as required by the Constitution.

48. With this analysis as a foundation for the decision, it follows that the appeal by the State against the decision of the Court of Appeal condemning the decision of the Government is correct. There was no decision of Government which has been demonstrated to show any clear disregard of the Constitution. What has been established is an excess of jurisdiction in the departmental scheme through an inadvertent disregard of the rights of the home-schooled under the Constitution. In consequence of this analysis, the result and the order proposed by O'Donnell CJ are concurred in.