THE HIGH COURT

[2022] IEHC 520

[2022 No. 731 JR]

BETWEEN:

CATHERINE GALBRAITH

APPLICANT

– AND –

DUBLIN CITY UNIVERSITY

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 14th September 2022.

SUMMARY

This is an unsuccessful judicial review application brought by Ms Galbraith, a university student wishing to proceed to Year 4 of a four-year degree despite not having completed all required elements of Year 3. I conclude that the dispute arising is not a matter that is properly amenable to judicial review. Even if it were, I explain in the pages that follow why I do not see that Ms Galbraith would in any event have succeeded on any of the points that she has raised.

A. Overview

1. Ms Galbraith commenced Year 3 in DCU's Bachelor of Education (B.Ed.) programme in September 2021 with a view to concluding her studies in June 2023. In the course of Year 3 Ms Galbraith was scheduled to complete three school placements. However, on 29th August

2021 she unfortunately sustained a serious ankle injury while playing camogie. Surgery followed in September 2021. Following her release from hospital Ms Galbraith was in a non-load bearing cast for six weeks. Ms Galbraith communicated with DCU on a continuous basis, keeping it apprised of her situation and the implications for her upcoming school placement (referred to at the hearings as 'SP3'). Prior to 10th September 2021, Ms Galbraith was hopeful that she would be medically fit to attend SP3, which was intended to run from 27th September 2021 to 15th October 2021. However, she received medical advice on 10th September 2021 that she would not be able to attend SP3. She advised DCU of this.

2. On 16th September 2021 Ms Galbraith was advised by DCU that she should complete an R30 Extenuating Circumstances Form. This form is part of a process intended to allow a student to identify specific circumstances which have had a significant impact on their ability to complete an assessment to the best of their ability and to allow them to bring these to the attention of, amongst others, the 'Progression and Awards Board' (PAB). The R30 form states that the recognition of extenuating circumstances does not normally result in the awarding of additional marks but may result in module assessments being referred to as 'D' ('Deferred') or 'I' ('Illness'). The advantage of this process is that when a student comes to do the module she is treated as undertaking it for the first time (and thus can repeat it if she fails the module). Ms Galbraith submitted the form on 20th September 2021.

3. Ms Galbraith, acting of her own volition, procured the agreement of certain national schools to her completing her SP3 with them on certain dates between November 2021 and June 2022. She proposed these alternative arrangements to DCU, but her proposal was not accepted. She complains that an alternative period in June *is* allowed to persons who cannot participate in a student placement because of family bereavements, and that ad hoc provision had to be made following on the Covid pandemic. (Her point, as I understand it, is in effect 'If students can be facilitated under the rules in such cases, why can't I be facilitated in mine?').

4. Ms Galbraith received formal notification of her exam results on 25th May 2022 in which her grade for SP3 was marked as 'I'. Her overall result was deferred, *i.e.* it will be finalised after (in accordance with the applicable DCU rules) she repeats her year and completes the SP3 placement. Ms Galbraith complains that no explanation or reasons accompanied the results. Ms Galbraith appealed her results to the Examination Appeals Board (EAB) on the basis that the PAB did not give sufficient weight to any extenuating circumstances previously identified

to DCU prior to the PAB meeting. The appeal was rejected. Ms Galbraith complains that adequate reasons were not given for this rejection.

B. Some Further Detail

5. The Bachelor of Education (B.Ed.) degree is a four-year degree course pursuant to which students can register with the Teaching Council and teach at primary schools in Ireland. When Ms Galbraith registered online as an academic student for the academic year 2021/2022, she was required to (and did) confirm that she agreed to be bound and abide by DCU's rules, policies, regulations, and code of discipline in force from time to time and all amendments of same.

6. Turning first to the Examination Regulations of the University, para.6 of these deal with a scenario where a candidate is absent from an examination, para.6.1 providing as follows:

> "*If a candidate is absent from the examination due to extenuating circumstances, a detailed explanation via the relevant form must be submitted to the Registry in accordance with the dates on the form, together with relevant time specific supporting documentation. Details of all such absences shall be reported to the Chairperson of the Programme Board and subsequently in summary format to the relevant Progression and Award Board by the Registry*".

7. (Ms Galbraith has also made mention of para. 8 of the Regulations concerning extenuating circumstances. However, as is clear from para.8.1, that provision is directed at the scenario where extenuating circumstances have affected a student's performance in an examination or part of an examination or assessment. Ms Galbraith's difficulty is that she was absent for the entire of SP3. Ms Galbraith has also referred to para.9 concerning provisions for candidates with a permanent or temporary disability. That, however, had no application in the circumstances presenting, in which Ms Galbraith was unfortunately unable to attend SP3 at all).

8. Each degree within DCU has individual programme regulations governing it. The Programme Regulations 2021/2022 for the Bachelor of Education are important in the context of the issues that have been raised. Section 3 of those Regulations makes clear that a student

must have successfully completed the minimum number of credits to progress to the next study period (para.3.1). Students are not permitted to 'carry' modules under any circumstances (para.3.2). Section 4 provides that compensation may apply within the regulations, except for certain modules specified therein (the excepted modules include SP3). It follows that no compensation can apply under the Programme Regulations to SP3. Section 5 of the Programme Regulations makes clear that that no resit is available for certain school placement modules in the same academic year (including SP3), stating:

> "*No re-sit is available for the below listed school placement modules in the same academic year. A student who is required to repeat a placement may normally repeat it only once. If this results in a failing grade the student will be excluded from the programme*".

9. Among the listed placement modules is SP3.

10. There are entirely legitimate reasons why a B.Ed. student who misses an entire placement module is required to re-sit that assessment in the next succeeding academic year. These are stated as follows in the statement of opposition:

> "*18.1* *As a general rule, examination re-sits occur in DCU in August. Having regard to the School Calendar it is not possible for DCU to arrange School Placements in August.*
>
> *18.2* *To give all students the best opportunity to succeed in a school placement, it is important that schools in which they undertake the placement are ready and able to host them over a relatively stable period of time in the school academic calendar.*
>
> *18.3* *It is also important that the University needs to ensure that staff are available to support students (who may have already failed) during this period. Under the B.Ed. regulations, where a student fails a school placement they only have one opportunity to re-sit and pass that placement. This does not apply to the Applicant but she is entitled to the same support and guidance as would be offered to all students taking SP3 – whether this is a re-sit of a first sitting.*

18.4. In requiring students to re-sit the module with every other student then undertaking SP3, it ensures that the student has the fairest opportunity to succeed to the best of abilities in that module.

18.5 SP3 (and each of the School Placement components in Year 3) are important building blocks of teaching experience that impact on the individual student teacher's skillset and ensure they have the skill-set to progress to Year 4.

18.6 This scenario occurs in other faculties and other degree courses within the University in the context typically of modules such as lab-based modules or extended projects."

11. Having regard to the Programme Regulations, as Ms Galbraith missed the entirety of SP3, the best possible mark that could be awarded on appeal (by PAB/EAB) was a deferral.

12. Paragraph 1.4.1(b) of the School Placement Handbook makes clear that a school placement on the B.Ed. programme constitutes a DCU examination. Section 1.8 provides a guide for making up days where a student has missed part of a School Placement. While there is some flexibility to deal with situations where students miss certain days (up to a maximum of 10) of a placement, it is clearly provided that if a student is absent for a period of more than ten days on any school placement the student will not receive a mark for her Student Placement Examination. This is provided in para.1.10.2 which states as follows:

"*A student will not receive a mark for her SP examination if the student is absent (including certified permitted leave) for a period of more than 10 days on any school placement. As per Programme Regulations, the next opportunity to sit school placement is in the next academic year when the placement is scheduled. No exceptions can be made to this policy*".

13. This is clearly an important rule and is apparently expressly highlighted and explained to students by faculty staff at the start of each academic year.

14. Paragraph 1.10 of the Student Handbook details a pilot initiative, initiated in 2019, to provide for a procedure to accommodate students who miss more than 5 days of a placement in circumstances where they have suffered a bereavement of a close relative. That procedure

facilitates the arrangement of a missed school placement to be undertaken by the end of June in any given year subject to approval by a committee established for that purpose. To date no student has made an application under this pilot procedure.

15. Ms Galbraith was/is not eligible under the bereavement scheme and clearly could not rely on a defunct scheme. What I understand her to contend in mentioning these schemes is that DCU has shown some flexibility when it comes to bereavements affecting students (and had to show some flexibility in the remarkably unusual circumstances of the Covid pandemic) and so could have shown some/more discretionary flexibility as regards her. Is it the case that DCU is being inflexible in the approach that it has adopted in this matter? I believe it appropriate that I should emphasise that DCU is not being inflexible. I have already quoted from the statement of opposition to indicate the perfectly legitimate reasons why a B.Ed. student who misses an entire placement module is required to re-sit that assessment in the following academic year. I quote below from an affidavit sworn by Ms Looney, the Executive Dean of DCU's Institute of Education which points to the sympathetic but firm approach that has been adopted by DCU and its staff in this matter.

16. Ms Looney avers, amongst other matters, as follows:

> "*I wish to acknowledge on behalf of the Respondent the unfortunate circumstances which have arisen for the Applicant due to the injury she suffered. It is entirely understandable that the Applicant is disappointed not to be able to progress to Year 4 of her B.Ed. However, the same situation arises for any student across the University who is unable to complete the entirety of a module that cannot be either compensated or for which a second offering is not available within the same academic year. DCU has at all times acted in accordance with the Programme Regulations for the B.Ed. and its wider rules, regulations and policies.* [This is so]. *DCU is very conscious that there are other students in the DCU B.Ed. programme who, like the Applicant, unfortunately, for various reasons could not progress to the next year of study. DCU seeks to act at all times fairly and in the interests of all students. While it is understandable that the Applicant is focused on her individual situation, DCU has obligations to the wider student body to ensure the fair application of its rules, policies and regulations. Unfortunately for the Applicant, the correct application of the Programme Regulations means that she cannot*

progress to Year 4 as in circumstances where she missed an entire Teaching Placement Module (Module SP3) she must repeat SP3 in the coming academic year."

17. I also understand from the evidence before me that DCU intends to see whether there should be a future rule-change so that the rules would perhaps operate in a manner akin to that contended for by Ms Galbraith. However, that is an intention only, it may or may not yield any rule-change (let alone a restructuring of the rules in the manner that Ms Galbraith might think appropriate) and all this is in any event entirely academic when it comes to this application: Ms Galbraith, with respect, has to treat with the rules as they were at all relevant times, not as she might like them to have been, or how at some future time they may be.

C. Some Correspondence

18. There was a fairly lengthy of sequence of correspondence between Ms Galbraith and DCU concerning her missed placement. That correspondence might be summarised as follows:

- 30th August 2021. Ms Galbraith notifies DCU of her injury. At that stage she was hopeful that she would be able to complete one of the three weeks of SP3. (Had she done so she could have made up the other days in accordance with the rules prescribed in the Student Handbook).

- 31st August 2021 to 3rd September 2021. Ms Galbraith corresponded with Professor O' Connor concerning her predicament. Notably, Professor O'Connor expressly advised Ms Galbraith that if she was unable to undertake at least one week of SP3 the placement would have to be undertaken at the next sitting in the next academic year. So, the consequences of missing the entirety of SP3 was promptly and clearly brought home to Ms Galbraith by Professor Connolly.

- 16th September 2021. Professor O'Connor advises Ms Galbraith to complete an R30 Extenuating Circumstances Form. As mentioned above, this is done. The advantage of this process is that when a student comes to do the module she is treated as undertaking it for the first time

(and thus can repeat it if she fails the module). Ms Galbraith submitted the form on 20th September 2021.

- 20th – 21st September 2021. Ms Galbraith was in contact with Dr White concerning Ms Galbraith's next placements. In the course of this correspondence he noted Ms Galbraith's willingness to proceed with those placements, not the alternative arrangements that Ms Galbraith was seeking to have approved in lieu of SP3. I do not see how it can convincingly be maintained that in the context of what she had expressly been told by Professor Connolly, Ms Galbraith could have understood that Dr White had somehow acquiesced in the proposed alternative arrangements when, in point of fact, he did not so (and when one has regard to the rules as described above he just could not have done so). It is in any event quite clear from the correspondence of 4th and 5th October (described below) that Ms Galbraith understood the true position presenting.

- 4th and 5th October 2021. Ms Galbraith liaises with Professor Lodge, indicating (as just mentioned) that she was being confronted with a situation in which she would have to repeat a full year and enquired as to the prospects of appealing against such an eventuality. By reply of 5th October 2021, Professor Lodge indicates that Ms Galbraith should speak to the Programme Chair to see whether there was any flexibility presenting. She also suggested that Ms Galbraith might usefully contact the Students' Union to see if the Union could be of any assistance. (As it turned out, though it went out and 'batted' for Ms Galbraith, the Union was unable to procure the end-result that Ms Galbraith desired). In her reply to Professor Long, Ms Galbraith indicates, amongst other matters, that it is "*very possible*" that she may have to repeat Year 3.

- 6th October 2021. In correspondence between Ms Galbraith and Professor Furlong, Professor Furlong indicates that there is no time in the academic calendar to complete up to three weeks of a missed placement, and that the only form of appeal is an appeal against results.

- 7th –8th October 2021. Ms Galbraith indicates to Professor Furlong that she has referred certain queries to the Teaching Council. In reply, Professor Furlong indicates (referring to Professor O'Connor's previous express advice in this regard) that it is the DCU regulations governing the B.Ed. programme that govern the elements of the programme (and the related examination process). So there can have been no doubt on Ms Galbraith's part that it was solely DCU's rules that were in play.

- 21st February 2022. Ms Galbraith indicates that she intends to appeal the need to repeat Year 3 and seeks guidance on the appeals arrangement. Professor Furlong indicates that the appeals process is explained on the website and indicates that final results (not provisional results) should be appealed against, with the final results to appear in May/June. There is a curious complaint (at least it *seems* to be a complaint) in Ms Galbraith's affidavit evidence that Professor Furlong knew that to appeal results appearing in the early summer would mean that there would never be time for Ms Galbraith to complete an SP3-style placement in Year 3. I am unclear as to what is meant by this complaint: it had by this time been made abundantly and repeatedly clear to Ms Galbraith by DCU that, in accordance with the applicable rules, she would have to repeat Year 3. And if Ms Galbraith intended to appeal results that were only due to issue on 25th May, she must surely have seen herself that any appeals process concerning those results was likely to bring matters to a point in the summer when schools are closed. Professor Furlong had nothing to do with this outcome. It was just the natural consequence of results issuing in late-May.

- 6th May 2022. Ms Galbraith sends a somewhat erroneous account to the DCU Registry as to what she had been advised by Professor Furlong. In an ensuing email Professor Furlong set matters straight as to what she had previously said. Professor Furlong's account accords with the description of facts outlined by me above.

- 22nd May 2022. Ms Galbraith contacts the President of DCU concerning her predicament. The President asks the Dean of the Institute of Education to reply. On 26th May the Dean (Ms Looney) does so. She follows up with a telephone call on 31st May. In the course of that call, Ms Looney indicated to Ms Galbraith that appealing her results would not be able to do anything but uphold the deferral. (And, as events panned out, Ms Looney was proved entirely correct, with both the PAB and EAB doing nothing to vary the deferral as there is simply no power for them to do so under the B.Ed. Programme Regulations or otherwise).

- June-August 2022. On 29th July last, Ms Galbraith's solicitor sent a letter of complaint to DCU. On 11th August, DCU replied. These proceedings have ensued. There was suggestion at the hearing that there was some sort of delay presenting in the commencement/progress of these proceedings (though they were commenced on time). I respectfully do not see any such delay to present. This is the sole point on which I respectfully disagree with the various submissions made by DCU in this case.

D. The PAB/EAB Process

19. It is necessary and helpful to provide a little further detail on the formalities of the decision-making process that led to the decisions that have been impugned in these proceedings. To do so, I quote some relevant text from the statement of opposition:

> "*8.* *A PAB is held for each programme leading to a university award. The Academic Council of DCU approves Marks and Standards, which determines the academic regulations that govern DCU taught programmes. Marks and Standards (para.4.3.2 and para.4.3.3) provides for the establishment of a PAB for each programme 'to determine the progression or awards outcomes of the student registered for that programme' and determines that the PAB will*

recommend results for the approval of Academic Council. The functions of PAB are to: (i) approve student progression as appropriate, (ii) approve the award and classification of students, (iii) consider applications for extenuating circumstances which have been referred to the PAB.

9. *The EAB is a sub-committee of the Academic Council (the Academic Council is established under s.27 of the Universities Act 1997) and submits a report on an annual basis to Academic Council. The functions and conduct of EAB are provided for in the Terms of Reference, Composition and Standing Orders of the Examination Appeals Board. At para.2.7 it is provided [that] "Decisions of the Examination Appeals Board are informed by and consistent with University Regulations and Standards".*

...

22. *The R30 Form once submitted by the Applicant was provided by the Registry to the faculty for review. Once reviewed a record was entered on the system of the Registry being 'deferred ill ED3902 – AL 4/2/22'. That 'deferred ill' mark was inputted then on a large spreadsheet of results referred to internally as the 'broadsheet' and was considered by the Exam Review Committee in February 2022. Provisional results for each of the modules undertaken in the first semester were published in February 2022 on the exam results portal to students. The results are provision as they are not finalised until the PAB review the final results for the year in May 2022.*

23. *The PAB on 25th May 2022 awarded a 'deferral' mark to the Applicant for SP3. The PAB took into account the R30 Extenuating Circumstances Form insofar as it could having regard to its obligation to take a decision in accordance with the Programme Regulations for the B.Ed. Under those Regulations the best possible*

outcome for the Applicant from PAB was a 'deferral' mark. The Applicant was at all material times aware that this was the case.

24. *The Applicant (and every student) has a right to appeal a decision of PAB. The Terms of Reference of the Examination Appeals Board at para.1.2.3 specify the grounds on which a student may appeal against a decision of a PAB. The Applicant appealed on the following ground only: '(b) The Progression and Award Board did not give sufficient weight to any extenuating circumstances previously notified to the Registry prior to the holding of the meeting of the Progression and Award Board.'*

25. *The EAB in making its decision had the following information…[1] A completed appeal form submitted by the Applicant on 6th June 2022….[2] A copy of the extenuating circumstances form (R30) submitted by the Applicant dated 20th September 2021….[3] A copy of the Applicant's examination results as issued to her on 26th May 2022….[4] A response from the Chairperson of the Programme Board in respect of the appeal.*

Paragraph 4.6 of the Terms of Reference of the Examination Appeals Board specifies the documentation which the papers for the EAB meeting include and the foregoing are consistent with those requirements.

26. *On 21st June 2022 the Secretary to the EAB wrote to the Applicant and advised her that the appeal had been considered in detail but had not been upheld 'on the basis that the Board found that the Progression and Award Board did give sufficient weight to the extenuating circumstances'.*

27. *The EAB acted within its jurisdiction and/or was entitled to conclude that the Progression and Award Board did give sufficient weight to the extenuating circumstances having regard to the requirements of*

the B.Ed. Programme Regulations pursuant to which the best possible outcome for the Applicant from the PAB was a deferral mark."

E. The Reliefs Sought

20. By notice of motion of 26th August 2022, Ms Galbraith comes seeking the following reliefs:

> "*(I) an order of* certiorari *quashing the purported decision of the Progression and Awards Board of the Respondent, ostensibly dated the 25th May 2022, (II) an order of* certiorari *quashing the purported decision of the Examinations and Appeals Board of the Respondent, ostensibly dated 21st June 2022, (III) a declaration that the Applicant is entitled to commence the fourth year of the Bachelor of Education programme….(IV) such declaration(s) of the legal rights and/or legal position of the Applicant and/or persons similarly situated and/or the legal duties and/or the legal position of the Respondent as the Court considers appropriate, (V) such further or other relief as this Honourable Court shall deem fit. (vi) the costs of and ancillary to the within proceedings*".

E. Is This a Matter Amenable to Judicial Review?

21. The decisions complained of by Ms Galbraith are not matters amenable to judicial review. This is clear from the judgments of the High Court in *Rajah v. Royal College of Surgeons* [1994] 1 I.R. 384 and *Fassi v. DCU* [2015] IEHC 38.

22. In *Rajah,* Keane J. indicated (in the context of a case brought against a decision to refuse to allow a student to repeat a twice-failed examination) that (a) the jurisdiction of the College of Surgeons derived in that case solely from Ms Rajah's free agreement to be bound by the regulations of the College, including the procedures under consideration in that case, (b) (relying on *Murphy v. The Turf Club* [1989] I.R. 171) judicial review is not available against a body where it derives its jurisdiction from contract, and (c) the fact that an institution is established by a charter or parliamentary act does not in and of itself make a decision of that institution amenable to judicial review.

23. In *Fassi v. DCU* [2015] IEHC 38, Noonan J. took what can perhaps be described as a somewhat more nuanced approach, expressly and helpfully adverting to what may perhaps always have been implicit in any event, namely that (i) while in general a body which derives its jurisdiction from contract law (or otherwise from member consent) will not be amenable to judicial review, (ii) every general rule has its exceptions, (iii) it follows that even where a relationship is based on contract, a court may decide that there is a sufficiently public element to confer jurisdiction, but that (iv) the fact that a body is established by statute will not normally suffice in and of itself to make a decision amenable to judicial review. Noonan J. also indicated that (v) save, for example, where improper considerations (in effect some sort of malice) or bad faith present, decisions of educational institutions will not be reviewable where they relate *solely* to matters of academic judgment.

24. So how does Ms Galbraith contend that she can properly invoke a public law remedy when she appears merely to be asserting private rights? She comes to court claiming in effect that there *is* a sufficiently public element presenting in this case to render the decisions she complains of amenable to judicial review. In her written submissions to the court, Ms Galbraith's counsel ably makes this contention in the following terms:

> "*In making its decision the respondent's jurisdiction to do so is derived in part from its contract with the applicant but also in part from its public function to comply with the Teaching Council's….standards [which] specifically provide for the duration and nature of teaching practice which is required to be a feature in a degree of the nature undertaken by Ms Galbraith….Further the respondent's decision to defer Ms Galbraith's education…is entirely unrelated to matters relating to conduct or any assessment or evaluative process pertaining to Ms Galbraith's education….The reality is that the decision of the respondent, while in part is one derived from an individual contract made in private law also incorporates a public law element, derived not only from the statutory basis on which the respondent was formed but also arises in the context of the application by the respondent of the standards prescribed by the Teaching Council, in accordance with statute*".

25. I respectfully do not see that because DCU offers a degree which satisfies the criteria necessary for graduates holding that degree to become registered primary school teachers that somehow involves DCU discharging a public function to comply with teaching standards set by the Teaching Council, a body established by statute. As counsel for DCU observed in court, that very same situation would have presented in *Rajah*, with the College of Surgeons offering a medical degree that satisfied the criteria necessary for graduates holding that degree to be registered subsequently as medical practitioners by the Medical Council, a body established by statute. Yet Keane J. was satisfied that he was presented with a non-judicially reviewable matter in *Rajah*, and I am satisfied that the same situation presents here. Here, Ms Galbraith consented to her relations with DCU being governed by the rules, regulations, and policies of DCU. The fact that DCU was established by statute or that it offers a degree which is structured in such a manner that a graduate holding that degree can become an accredited national schoolteacher does not affect the fact that the matters at issue between Ms Galbraith and DCU are entirely private in nature. There is not a sufficiently public element presenting in this case to render the decisions that Ms Galbraith complains of amenable to judicial review.

26. I should perhaps add that there is no bad faith or malice at play in how DCU has conducted itself. Nor has it engaged in any improper considerations. And the impugned decisions are exclusively concerned with academic matters, being the nature of the results to issue to Ms Galbraith and, more generally, whether and when a student should be deemed sufficiently qualified to proceed from Year 3 to Year 4 (a matter governed by the rules described above, which rules have correctly been applied by DCU). So even if the matters at play were potentially judicially reviewable (because there was a sufficiently public element presenting for the prospect of judicial review to present – and I do not see a sufficiently public element to present) the impugned decisions would still fall not to be reviewed when one has regard to the observations in *Fassi* as to when decisions relating solely to matters of academic judgment will fall to be reviewed.

27. I note in passing that there is a distinction made in case-law between the reviewability of disciplinary (as opposed to non-disciplinary decisions); see, for example, *Zhang v. Athlone Institute of Technology* [2013] IEHC 390. However, the case before me is not a disciplinary case so the said distinction and cases treating with it are irrelevant.

F. What If I Am Wrong?

28. What if I am wrong and this is a matter amenable to judicial review? I do not believe that I am wrong but even if I am, Ms Galbraith's application would, unfortunately for her, still fail. I turn now to consider why this is so.

i. Failure to Take Alternative Proposals into Account or Show Flexibility

29. Ms Galbraith contends that DCU (PAB/EAB) failed adequately to consider the alternative placement proposals advanced by her, failed to consider her extenuating circumstances, failed to consider the implications for her at having to repeat Year 3, failed to acknowledge that, for example, accommodations are made available to students affected by bereavements. All of these complaints proceed on the entirely wrong basis that DCU (PAB/EAB) has some sort of discretionary power in the circumstances presenting to depart from the rules as to school placements which I have described above. But no such discretionary power exists under those rules. One can beseech a person to exercise a broad discretion to depart from established rules as many times and for as many reasons as one wants but if they do not have the broad discretion contended for then the end result is an inevitability: that broad discretion which does not exist cannot and will not be exercised in the manner sought.

ii. Delay

30. It is contended that there was a delay in replying to the R30 Extenuating Circumstances form and/or that there was a delay in issuing the annual examination results. However, as is clear from the outline of the exchanges of correspondence above, it was repeatedly made clear to Ms Galbraith that, consistent with the applicable rules (as described above) she would have to repeat Year 3 after having missed the entirety of SP3. So while she might not have got an immediate reply to her submission of the R30 form, she was left in no doubt and was repeatedly advised that the consequence of having missed SP3 was that she would have to repeat Year 3. As to delay in the issuance of the summer results, this was not actively canvassed at the hearing and there is no basis in any event for contending that the results should have issued sooner.

iii. Duty to Give Reasons

31. I do not propose to re-visit in any detail the law on giving reasons. This is an area that has been well-treaded in recent years in cases such as *Mallak v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 297 and *Connelly v. An Bord Pleanála* [2018] IESC 31. In *Connelly*, it was indicated that at the end of a decision-making process, the person affected by a decision should (a) at least know in general terms why the decision was made, and (b) have enough information to consider whether she should appeal (or seek judicial review of) a decision.

32. Here, it was made clear to Ms Galbraith from an early stage that the best she could hope for was a deferral mark (because she had missed the entirety of SP3) – and why that was the best she could hope for (again because she had missed the entirety of SP3). The notion that Ms Galbraith needed some sort of amplification from DCU (PAB/EAB) as to why she was getting a deferral mark when she had repeatedly been advised as to the consequences of failing to complete SP3 is, with all respect, unconvincing. And, as it happens, she did get reasons from the EAB. So her only complaint could lie against the PAB (itself a somewhat unusual proposition when she had got a reasoned appeal decision). Indeed, if one thinks about it, Ms Galbraith's whole complaint in this regard is somewhat surprising. After all, both PAB/EAB issued the most favourable possible decision that could issue to Ms Galbraith under the applicable rules (most notably the B.Ed. Programme Regulations). So what Ms Galbraith is in truth complaining about is that she did not get a more fulsome explanation as to why she got the most favourable decision that could issue to her under the applicable rules when it had been made clear to her (and her own correspondence of the time indicated her to understand) what was the decision she could hope to receive on appeal and why.

iv. Ms Looney's Advice as to the Result of the Appeal

33. It will be recalled that on 31st May last, the Dean of the Institute of Education (Ms Looney) indicated during a telephone conversation with Ms Galbraith that in the event that Ms Galbraith appealed her results, a deferral would be upheld. It has been contended that an error of fact and/or law arose in this regard. No such error arose. All Ms Looney did was tell the truth by reference to her correct knowledge of the B.Ed. Regulations. I respectfully do not see that Ms Looney committed some sort of error of fact and/or law, still less that she falls to be criticised, by virtue of having told the truth as she (correctly) saw it.

Conclusion/Costs

34. Ms Galbraith has failed in her application and no reliefs will issue from the court. I appreciate that this decision will likely come as a disappointment to Ms Galbraith. And I have no doubt that she is disappointed that her present situation arises from a sports-related accident. However, I would respectfully note that (a) her grades so far have been great and any future employer will see this, (b) oftentimes the unexpected in life can prove unexpectedly enriching, and (c) while a year extra may seem a long time to someone who has the good fortune to be as young as she is, I am confident that she will likely find the year to fly by.

35. This judgment is being issued electronically to the parties during the vacation period, following on last week's one-day hearing of the application. It became the practice during the Covid lockdowns for the court to indicate in its judgments where it contemplated that costs would lie. Though I am of course satisfied to hear any argument in this regard that either side may wish to make, it seems to me that Ms Galbraith has lost this case in every significant respect and that an order for costs will consequently lie against her. This means that a young woman could potentially be lumbered with a bill running to many thousands of euro, at a time in life when she will, within the next year or two, embark on a doubtless personally satisfying but not especially well remunerated teaching career in an age of rising rental and other costs. I would, therefore, respectfully ask of DCU that it might consider an arrangement whereby each side to these proceedings would bear their own costs. However, it is entirely for DCU as to how it wishes to proceed in this regard. Should it ask for an order for costs against Ms Galbraith I do not see (subject to any argument that counsel for Ms Galbraith might make) that such an order can properly be refused.

TO MS GALBRAITH:
WHAT DOES THIS JUDGMENT MEAN FOR YOU?

Dear Ms Galbraith,

I have written a detailed judgment about your application which I heard last week. The judgment contains a lot of legal language which can be hard (perhaps even boring) to read. In a bid to make my judgments easier to understand by those who receive them I often now attach a note in 'plain English' briefly summarising what I have decided. As you are a young (though clearly accomplished) university student, I thought it might assist for me to add such a note in this case.

This note is a part of my judgment. However, it does not replace the text in the rest of my judgment. It is written to help you understand what I have decided. Your lawyers will explain the rest of my judgment in more detail. DCU is copied on this note, though (as an institution) I do not see that it requires any note of explanation; it is more used than you are to court cases.

I know that your decision to bring these proceedings will not have been taken lightly. And I know from last week's hearing how eager you are to proceed to Year 4 of your degree at this time. However, as a matter of law I have concluded that (1) the decisions which you have challenged in these judicial review proceedings cannot in law be challenged properly by way of judicial review proceedings, and (2) even if I am wrong as regards point (1) (and I respectfully do not see that I am) you would not in any event have succeeded on any of the points that you have raised.

I am sorry to be the bearer of bad news. When you do come to finish your B.Ed. degree (as I have no doubt you will) I wish you a long and satisfying teaching career.

Yours sincerely

Max Barrett (Judge)

Date: 14th September, 2022.

cc: DCU.