Neutral Citation Number: [2017] EWHC 188 (Admin)

Case Nos CO/4165/2016, CO/5087/2016
& CO/6456/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Cardiff Civil Justice Centre
2 Park Street
Cardiff
CF10 1ET

Date: 10/02/17

Before :

MR JUSTICE HICKINBOTTOM

- -

Between:

THE QUEEN on the application of
SARAH ZAHID

Claimant

- and -

THE UNIVERSITY OF MANCHESTER

Defendant

-and-

THE OFFICE OF THE INDEPENDENT ADJUDICATOR FOR HIGHER EDUCATION

Interested Party

THE QUEEN on the application of
MAAZ RAFIQUE-ALDAWERY

Claimant

- and -

ST GEORGE'S, UNIVERSITY OF LONDON

Defendant

-and-

THE OFFICE OF THE INDEPENDENT ADJUDICATOR FOR HIGHER EDUCATION

Interested Party

THE QUEEN on the application of
MITHILAN SIVASUBRAMANIYAM

Claimant

- and -

THE UNIVERSITY OF LEICESTER

Defendant

-and-

THE OFFICE OF THE INDEPENDENT ADJUDICATOR FOR HIGHER EDUCATION

Interested Party

- -
- -

David Lawson (instructed by **Sinclairslaw**) for the **Claimants**
Tom Cross (instructed by **Office of the General Counsel, The University of Manchester**) for **The University of Manchester**
Aileen McColgan (instructed by **Gateley PLC**) for **St George's, University of London** and **The University of Leicester**
The **Interested Party** was not represented and did not appear

Hearing date: 24 January 2017
Further written submissions: 3-6 February 2015

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Approved Judgment

Mr Justice Hickinbottom :

Introduction

1. Where a student has a complaint against his or her university or college, and has exhausted the internal complaints mechanism of that higher education institution ("HEI"), he or she can refer the matter to the Office of the Independent Adjudicator for Higher Education ("the OIA") which operates a students' complaints scheme, under which it can review the complaint and determine whether it is wholly or partly justified. If it is justified, the OIA is able to make appropriate recommendations to the relevant HEI.

2. In the claims before me, each of the Claimants has made a reference to the OIA; but has also sought judicial review of the decision of the HEI in respect of which complaint has been made. In each case, the Claimant seeks a stay of the judicial proceedings to allow the reference to the OIA to run its course, because each recognises that, depending upon the outcome, the OIA procedure may in practice make any claim in this court redundant. A stay is of particular importance because, where there are court proceedings in relation to the same subject matter that are not stayed, the OIA is proscribed from considering a complaint.

3. The University of Manchester agrees to a stay in the claim against it; but the other two Defendants object in the claims brought against them. On 29 December 2016, Cranston J directed that the three applications be heard together, as "no clear practice has been established", and "the Court, the parties (including parties bringing similar claims in the future) and the OIA would benefit from definitive guidance on what procedure should apply".

4. At the hearing before me, David Lawson appeared for the Claimants, Tom Cross for the University of Manchester, and Aileen McColgan for the other two Defendants. At the outset, I thank all for their contribution. Whilst the OIA did not appear at the hearing, it lodged written representations which helpfully outline the legal framework under which it operates.

Student Complaints

5. For students, the completion of their education is important. They pay significant sums for their higher education – currently £9,250 per annum for home students, and significantly more for overseas students – for several years. Medical and PhD students, for example, can expect to study for at least five years. Furthermore, for students who fail to complete a course, that can result in a loss of job opportunities and thus life-time income, particularly for those pursuing professional or vocational courses.

6. The legal relationship between a student and his or her HEI is complex, and has been described as "hybrid… governed partly by contract and partly by the principles of public law enforceable by way of judicial review" (R McManus, Education and the Courts (3rd Edition) (2012) at paragraph 8.7).

7. In addition, an HEI has various obligations imposed upon it by the Equality Act 2010 ("the Equality Act"), notably the broad prohibition of discrimination against a student on grounds of disability. Section 6 defines "disability" as follows:

> "A person (P) has a disability if –
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

Section 15 of the Act provides that:

> "(1) A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

Section 91 specifically prohibits HEIs from discriminating against a student, in the following terms:

> "(2) The responsible body of [an HEI] must not discriminate against a student –
>
> (a) in the way it provides education for the student;
>
> (b) in the way it affords access to a benefit, facility or service;
>
> (c) by not providing education for the student;
>
> (d) by not affording the student access to a benefit, facility or service;
>
> (e) by excluding the student; or
>
> (f) by subjecting the student to any other detriment.
>
> (3) The responsible body of such an institution must not discriminate against a disabled person –
>
> (a) in the arrangements it makes for deciding upon whom to confer qualifications;

> (b) as to the terms on which it is prepared to confer a qualification on the person;
>
> (c) by not conferring a qualification on the person; or
>
> (d) by withdrawing a qualification from the person or varying the terms on which a person holds it."

Where a person is disabled, his or her HEI has a duty to make reasonable adjustments (section 91(9)).

8. The complexity of the relationship between an HEI and student is compounded in the case of medical students, who are likely to have contact with patients early in their course, increasing until, in their fifth year, they may have responsibility for patient care – albeit, of course, subject to supervision.

9. Guidance in relation to the obligations of an HEI for its medical students has been issued by the General Medical Council ("the GMC"), from September 2016 in the form of a document, "Professional behaviour and fitness to practise" ("the GMC Guidance"), which replaced earlier guidance, "Medical students: professional values and fitness to practise" which, for the purposes of this claim, was in similar substantive terms. The GMC Guidance emphasises that the relevant HEI is responsible for its students' fitness to practise ("FtP") medicine during the period of the relevant course; that medical graduation amounts to a declaration by the HEI that the student is fit to practice medicine (paragraph 17); and that, in the event of allegations of unfitness to practise being made against their students during Years F1 and F2 (the first two years of medical practice), the HEI remains responsible for investigating and otherwise dealing with such allegations. The possible reasons for FtP being impaired for students are listed by reference to those for fully qualified members of the profession (table 1 page 41, referring to section 35C(2) of the Medical Act 1983).

10. The GMC Guidance suggests that HEIs should consider appointing a student and someone with legal knowledge to its FtP panels (paragraph 116); and there is guidance on fair procedure including that (i) "all parties have an equal opportunity to present evidence" (paragraph 118), (ii) students are encouraged to have a supporter or legal representative at the hearing (paragraph 119) and (iii) student representatives should have the opportunity to ask questions of witnesses (paragraph 121).

11. It is said that, where sanctions are considered appropriate, they should not be designed to punish (paragraph 125); and the panel should start with consideration of the least serious sanction, giving reasons for rejecting a less a severe sanction than that imposed (paragraphs 126-127), students only being expelled if that is the only way to protect the public. Expelled students, it is said, should be added to the "excluded student database" (paragraph 145), so that other HEIs offering medical degrees and other relevant courses are aware of the decision. Expulsion on the basis that a student is not fit to practise medicine may therefore result in a permanent exclusion from the opportunity of entering the medical profession, at least in the UK.

12. Thus, a decision by an HEI in relation to a medical student may have a particularly profound impact on that student's future; and may be more likely to draw a challenge,

by way of complaint or legal proceedings. It is no coincidence that, at the time of the events that provoked the HEI decision about which complaint is made, each of the Claimants was a medical student.

13. Where a student is dissatisfied with a decision of an HEI, there are a number of courses open. He or she may complain to the HEI; and, if dissatisfied with the result of that complaint, refer the matter to the OIA. I consider that procedure in more detail below (see paragraphs 23 and following). In appropriate cases, the student also has the option of making a claim against the HEI in contract or for discrimination under the Equality Act, usually brought in the county court; or by way of judicial review in the Administrative Court. In this context, this court has accepted a wide range of HEI decisions affecting students as being justiciable by way of judicial review, including – as we know as a result of Mr Lawson's diligence – a decision to expel a student for poor academic performance without prior warning or notice as required by the relevant rules (R v Sheffield Hallam University ex parte R [1995] ELR 267), a failure of an HEI disciplinary panel to follow a fair procedure (R v Chelsea College of Art and Design ex parte Nash [2000] ELR 686), a decision on the level of fees by reference to the classification of home and overseas students (R (Mitchell) v Coventry University [2001] EWHC 167 (Admin)), and the decision to expel a student from a medical course on grounds of unfitness to practise (Higham v University of Plymouth [2005] EWHC 1492 (Admin)).

14. The relationship between a reference to the OIA by way of complaint and legal proceedings arising out of the same facts is at the heart of the applications before me. Each of the claims before me is for judicial review of a decision of the relevant HEI to expel the Claimant from his or her medical course. Therefore, although some of the things I say may be applicable to claims brought in the county court, the focus of this judgment is upon the relationship between an OIA reference and judicial review proceedings in this court.

Relevant Procedural Provisions in Judicial Review Proceedings

15. As I have indicated, each claim before me is a challenge by way of judicial review to a decision to terminate the Claimant's participation in a medical course, which is equivalent to expulsion. In relation to the applications to stay those claims, there are two relevant procedural provisions.

16. First, CPR rule 54.5(1) provides that, in a judicial review claim, the claim form must be filed promptly and, in any event, not later than three months after the grounds to make the claim arose, i.e. usually the date of the decision which is sought to be challenged. Generally, the courts recognise the importance of finality in administrative decisions. Therefore, whilst the court may grant an extension of time for filing a claim under its case management powers (see CPR rule 3.1.2(a)), it will not do so unless persuaded that there is a good reason for the delay. Section 31(6) of the Senior Courts Act 1981 particularly provides that:

> "Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant (a) leave for the making of the application or (b) any relief sought on the application, if it considers that

> the granting of the relief sought would likely cause substantial hardship to, or substantial prejudice the rights of, any person or would be detrimental to good administration."

17. Second, in each of the applications before me, the Claimant seeks a stay pending completion of the OIA procedure. The court has an inherent power to stay the whole or any part of proceedings, which is recited in CPR rule 3.1(1)(f). In recognition of the fact that stays might be appropriate in a very wide variety of circumstances, that power is general and unrestricted. The CPR generally encourage stays to allow for the settlement of a claim (see, e.g., CPR rule 26.4).

18. None of the claims is in the county court; but complaints by students in respect of HEIs may fruit in county court claims, notably in contract or for discrimination. I should briefly refer to the provisions in relation to the time in which those claims must be brought, as they are indirectly relevant to the applications before me.

19. Contract claims have a limitation period of six years, although a claimant may have difficulties if a contract claim is in substance a public law claim (Clark v University of Lincolnshire and Humberside [2000] EWCA Civ 129 at [17]).

20. The time limit for bringing a discrimination claim under the Equality Act is generally six months (section 118). However, in respect of certain claims, the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 (SI 2015 No 1392) have extended that period, where there has been a reference to the OIA. Those regulations are made expressly to comply with article 12 of Directive 2013/11/EU of the European Parliament and Council of 21 May 2013 on alternative dispute resolution ("ADR") for consumer disputes ("the ADR Directive"). The ADR Directive requires Member States to ensure that recourse to non-binding ADR does not prevent a party from "initiating judicial proceedings in relation to that dispute as a result of the expiry of limitation or prescription periods during ADR procedure" (article 12). By article 2(1)(i), the ADR Directive does not apply to the public providers of further or higher education; but this exemption was not incorporated into the law of England and Wales (see regulation 7 of the Alternative Dispute Resolution for Consumer disputes (Competent Authorities and Information) Regulations 2015 (SI 2015 No 542). In any event, in my view it is both telling and right that, for the purposes of the Directive, a reference to the OIA is regarded for these purposes as a means of Alternative Dispute Resolution ("ADR") and the OIA has been approved as the consumer ADR body for higher education.

21. The time limit for discrimination claims has been extended in two ways. First, a new section 118(3) of the Equality Act extends the six-month period to nine months where a reference to the OIA has been made within six months of the date of the discriminating act (e.g. the decision of the HEI of which complaint is made). Second, a new section 33B of the Limitation Act 1980 and a new section 140AA(3) of the Equality Act have the effect of extending the time limit to "eight weeks after the non-binding ADR procedure ends".

22. Although the weight to be given to this is necessarily limited, these new provisions recognise the importance and public interest in disputes being resolved without recourse to the courts; and the need, in some circumstances, to allow sufficient time

for any ADR procedure to be concluded before requiring court proceedings to be commenced and pursued.

OIA References: The Legal Framework

23. As a result of perceived deficiencies in the visitors' jurisdiction, section 13 of the Higher Education Act 2004 ("the 2004 Act") empowered the Secretary of State to designate an independent body to operate a student complaints scheme. The OIA, a body corporate and a registered charity, was so designated in 2005.

24. By section 14 of the 2004 Act, a designated operator must comply with the duties set out in Schedule 3 to the Act. That provides that the designated operator must provide a scheme for the review of "qualifying complaints" against "qualifying institutions", which meets the conditions set out in Schedule 2. A "qualifying complaint" is defined in section 14, to be "a complaint about an act or omission of a qualifying institution" which is made by a student or former student of that institution, except to the extent that it relates to academic judgment. Section 11 defines "qualifying institution" to include all universities which have been granted the power to award degrees by Act of Parliament, Royal Charter or identified statutory provisions; and, as amended by the Consumer Rights Act 2015, it now includes all HEIs with degree-awarding powers, and all HEIs in receipt of student support funding whether or not they have degree-awarding powers. Each Defendant in the claims before me is a "qualifying institution".

25. In line with its statutory obligation, the OIA has formulated a scheme, as set out in the Rules of the Students' Complaints Scheme ("the OIA Scheme Rules"), the most recent version of which was published in July 2015. (References in this judgment to a "rule" are references to a rule within the OIA Scheme Rules, unless otherwise apparent.) All qualifying institutions are obliged to subscribe to the scheme, which effectively excludes the visitors' jurisdiction over student complaints (section 20 of the 2004 Act). Some HEIs which are not obliged to subscribe, nevertheless voluntarily do so. Over seven hundred HEIs now subscribe to the scheme. The scheme is funded by the subscribing HEIs (rule 15.2). The scheme does not charge fees to students, for whom it is – and must be – a free service (paragraph 8 of Schedule 2 to the 2004 Act ("Condition G"), and rule 15.1).

26. In describing "Condition B", paragraph 3(1) of Schedule 2 to the Act requires the scheme to enable every qualifying complaint made about a qualifying institution to be referred under the scheme; but paragraph 3(2) provides that:

> "A scheme does not fail to meet Condition B only because it contains some or all of the following –
>
> …
>
> (c) provision that a qualifying complaint is not to be referred under the scheme if –
>
> (i) relevant proceedings have been concluded, or

> (ii) relevant proceedings that have not been concluded have not been stayed."

"Relevant proceedings" are defined in paragraph 3(3) as "proceedings relating to the subject matter of the qualifying complaint that have been brought at first instance before a court or tribunal."

27. Once any complaint is received, the OIA's first task is to determine whether it is within the jurisdiction of the scheme as provided for by the OIA Scheme Rules; and it must dismiss the complaint if it does not have jurisdiction (rule 5.3). In this regard, there are provisions in respect of the time within which a complaint must be made, and provisions identifying complaints not otherwise covered by the scheme.

28. A student wishing to make a complaint to the OIA must normally first exhaust the internal complaints or academic appeals procedures of his or her HEI (rule 4.2). The HEI should issue a Completion of Procedures Letter at the end of that process (rule 4.3). The student must bring any complaint to the OIA within 12 months of the date of the Completion of Procedures Letter (rule 4.5).

29. In line with paragraph 3(2) of Schedule 2 to the 2004 Act, rule 3.3 duly provides, under the heading "Complaints Not Covered":

> "The Scheme does not cover a complaint to the extent that… the matter complained about was the subject of court or tribunal proceedings and those proceedings have been concluded, or the matter is the subject of court or tribunal proceedings and those proceedings have not been stayed."

30. The OIA provides further guidance on this in its "Guidance Note on Eligibility and the Rules", which, in respect of rule 3.3, says:

> "The OIA will not consider matters which have already been decided by the courts. We cannot consider complaints where the matter is or becomes the subject of court or tribunal proceedings which have not been stayed (adjourned or put on hold). In signing the Complaint Form the student acknowledges that s/he must inform the OIA immediately if any part of the complaint is being dealt with in the courts or by another body.
>
> We may ask to see the claim form and any defence filed in order to establish whether the legal proceedings relate to the same subject matter. If the legal proceedings have been 'stayed' or 'adjourned' by the court, we may ask to see the relevant court order.
>
> If a student has applied for permission to bring a judicial review claim against the Member HE Provider and has been refused permission, we would normally consider that those proceedings have been concluded and we would not look at their complaint. However, we may accept the complaint if the

> judge has identified the OIA as an 'alternative remedy' available to the student, and has refused permission on that basis. We would only accept such a complaint for review provided the judge has not made any findings on the merits of the case."

31. Therefore, the OIA will not consider a complaint if the courts have already considered and concluded a claim based upon the same subject matter. Furthermore, on the basis of this guidance (as presaged in paragraph 3(2)(c) of Schedule 2 to the 2004 Act), it seems that the OIA will regard a judicial review where permission to proceed has been refused on the merits of the claim as being circumstances in which "proceedings have been concluded" for these purposes; but not where permission is refused without consideration of those merits. That seems to me to be consistent with a proper construction of the rule. I do not consider R (Carnell) v Regent's Park College [2008] EWHC 739 (Admin), to which I was referred, suggests anything to the contrary.

32. Once it has been determined that the OIA has jurisdiction over the complaint, it proceeds with its review, appointing an individual "reviewer" to perform the task. Rule 6 sets out the relevant procedure:

> "6.1 Once a determination has been made under Rule 5.3 [that the complaint is eligible for review], the Reviewer will carry out a Review of the complaint to decide whether it is Justified, Partly Justified or Not Justified.
>
> 6.2 In deciding whether a complaint is Justified the Reviewer may consider whether or not the Member HE Provider properly applied its regulations and followed its procedures and whether or not a decision made by the Member HE Provider was reasonable in all the circumstances.
>
> 6.3 The Review will normally consist of a review of documentation and other information and the Reviewer will not hold an oral hearing unless in all the circumstances he or she considers that it is necessary to do so.
>
> 6.4 The Reviewer shall not be bound by legal rules of evidence nor by previous decisions of the OIA.
>
> 6.5 The nature and extent of the Review will be at the sole discretion of the Reviewer. When the Reviewer has determined that he or she has all of the material he or she considers necessary to make a decision, the Reviewer will issue a Complaint Outcome."

Rule 6.3 indicates that the default position is a review without an oral hearing; and the evidence was that, in practice, the review is almost invariably done on the basis of the papers lodged, without oral evidence or submissions.

33. The reviewer has to determine whether the complaint is justified, partly justified or not justified. Rule 7 provides that, where it is justified in whole or part, then the

reviewer may make recommendations that the relevant HEI "should do something or refrain from doing something". Those recommendations (it is said) might include, but are not limited to, the following:

> "7.1.1 that the complaint should be referred back to the [relevant HEI] because its internal procedures have not been properly followed in a material way;
>
> 7.1.2 that the [HEI] should take a course of action that the Reviewer considers to be fair in the circumstances;
>
> 7.1.3 that the [HEI] should change the way it handles complaints;
>
> 7.1.4 that the [HEI] should change its internal procedures or regulations;
>
> 7.1.5 that a financial remedy should be paid to the Complainant, including, at the Reviewer's discretion, an amount for inconvenience and distress;
>
> 7.1.6 that the complaint should be considered in another forum."

Compared with restricted remedies available to the court, it is clear that the OIA is able to make wide ranging recommendations that are particularly tailored to the case before it, including a flexible response to any unreasonableness or unfairness it concludes has occurred.

34. The OIA expects the relevant HEI to comply promptly with any recommendations made (rule 12.1); although there is no sanction, other than publicity (rules 12.3 and 12.4), if it does not. I understand that, in practice, HEIs invariably do comply with any recommendation made.

35. Where the reviewer considers the complaint is not justified he cannot make recommendations, but nevertheless may make suggestions that the HEI should consider taking a course of action or amending its internal procedures or regulations (rule 7.5).

36. The evidence is that the OIA meets its key indicator target of processing and closing 75% of its references within six months of receipt, with an average period to complete its review of 99 days.

37. The nature of the OIA scheme has been considered in a number of cases to which I was referred, notably by the Court of Appeal in R (Siborurema) v OIA [2007] EWCA Civ 1365, R (Maxwell) v OIA [2011] EWCA Civ 1236 and R (Burger) v OIA [2013] EWCA Civ 1803, as well as this court in Carnell (cited at paragraph 31 above), R (Peng Hu Shi) v King's College, London [2008] EWHC 857 (Admin), R (Hamilton) v Open University [2011] EWHC 1922 (Admin), R (Matin) v University College, London [2012] EWHC 2474 (Admin), R (Kwao) v University of Keele [2013] EWHC 56 (Admin), R (Crawford) v University of Newcastle upon Tyne (No 1)

[2014] EWHC 162 (Admin), R (Crawford) v University of Newcastle upon Tyne (No 2) [2014] EWHC 1197 (Admin), R (Thilakawardhana) v OIA [2015] EWHC 3285 (Admin) and R (Gopikrishna) v OIA [2015] EWHC 1224 (Admin). Of particular importance and value are relevant principles set out by Mummery LJ in Maxwell at [23], which have been adopted and developed in the later cases.

38. For the purposes of the applications before me, it is unnecessary to consider each of these authorities in detail. The following relevant themes appear in them.

39. When exercising a variety of functions, including those relating to disciplinary matters, FtP and complaints, although the HEI and student are likely to be in a contractual relationship, an HEI is exercising public functions that are susceptible to challenge by way of judicial review. In the various cases in which decisions of HEIs have been challenged, it has never been suggested otherwise (see, e.g., Carnell, Peng Hu Shi and Crawford (No 1)); and, in Clark (a pre-OIA case) at [29], Lord Woolf MR stated in terms that, for the purposes of this court's supervisory jurisdiction, "A university is a public body". Specifically, in respect of complaints by a student of an HEI he or she has attended, as Pill LJ said in Siborurema (at [49(f)]):

> "There is a strong public element and public interest in the proper determination of complaints by students to HEIs".

40. Equally, the OIA exercises the public function of conducting a fair and impartial review of a student's unresolved complaint about the acts and omissions of an HEI, on the basis of the materials before it and drawing upon its own expertise and experience of higher education, with a view to determining whether the complaint is justified in whole or part, and, if so, making recommendations to the HEI. There is, again, no suggestion that this is not a public function, or that decisions of the OIA are anything but justiciable in this court by way of judicial review. Of course, as the case names above suggest, its decisions too have been regularly judicially reviewed, and it has always been accepted that the court has jurisdiction.

41. On a reference of an unsatisfied complaint, the OIA considers, not only whether the HEI has acted with procedural propriety (i.e. in accordance with the relevant regulations and its own procedures), but also whether its decision was reasonable in all the circumstances. "Reasonable" here means broadly reasonable in the non-technical sense, and is not restricted to the antithesis of legally perverse or Wednesbury unreasonable.

42. The OIA has a broad discretion both as to the scheme it formulates, and as to the form, nature and extent of its investigation into a particular case. However, its procedures are intended by Parliament to be an alternative to court, procedures which are free of charge, confidential, informal and inquisitorial, with a view to resolving complaints in a non-judicial manner and without recourse to the court, by determining whether the HEI's actions were procedurally compliant and reasonable in all the circumstances, without adjudicating on formal rights and obligations; and making recommendations for steps that may be more flexible, constructive and acceptable to all parties than the restricted remedies available to a court of law. Given that Parliament has determined the role of the OIA, and conferred a broad margin of

discretion in how it exercises its functions, the court will only interfere with its decision in a particular case with especial caution.

43. The function of the OIA scheme is therefore inherently different from that of the court, which is to determine the rights and obligations of the parties, following a full fact-finding investigation involving the application of relatively stringent rules including those which apply to evidence, before awarding restricted formal legal remedies such as damages and declarations.

44. Because of these different functions, a reference to the OIA does not provide a coextensive remedy to a challenge by way of judicial review. As a result, the availability of an OIA reference to a student does not mean that that student is denied all access to this court. To the extent that cases such as Peng Hu Shi and Carnell suggest the contrary, respectfully I do not agree. As Mummery LJ put it in Maxwell (at [23(5)]:

> "It is not the function of the OIA to determine the legal rights and obligations of the parties involved, or to conduct a full investigation into the underlying facts. Those are matters for judicial processes in the ordinary courts and tribunals. Access to their jurisdiction is not affected by the operations of the OIA."

Several later cases have supported the view that, although the court may be willing to delay consideration of a judicial review challenge unless and until an OIA reference has been made and has run its course, the availability of this alternative procedure does not in practice effectively exclude judicial review: see, e.g., Matin at [33] per Wyn Williams J, Kwao at [70]-[71] per His Honour Judge Graham Wood QC, and Crawford at [143] per Andrew Grubb sitting as a Deputy High Court Judge. With respect to those who have suggested a contrary view, that must be right: in the exercise of its supervisory jurisdiction, while this court is willing to exercise temporary restraint to encourage ADR, it is only usually unwilling to entertain a judicial review challenge at all where the alternative procedure is intended to exclude that jurisdiction altogether, e.g. where there is a right of appeal. It is clear that that is not the intention of this statutory scheme, which expressly envisages both procedures being applied, in order, to the same subject matter (see paragraph 26 above) .

45. The OIA scheme and court proceedings thus respectively offer advantages and disadvantages to a student who is dissatisfied with his or her treatment by an HEI. As Parliament specifically intended, and as a result of the characteristics I have identified, the former offers an attractive alternative to formal legal proceedings; but, although its findings and decision may give pointers to its view on the formal legal position, it does not and cannot determine legal rights and obligations. The latter offers a forum for the resolution of issues in relation to formal legal rights and obligations, but at some considerable cost, not only in terms of money but also publicity and lack of flexibility in terms of both process and remedies. As Mummery LJ succinctly put it in Maxwell (at [37]):

> "The new processes have the advantage of being able to produce outcomes that are more flexible, constructive and

> acceptable to both sides than the all-or-nothing results of unaffordable contests in courts of law."

46. Because of the advantages of the OIA scheme, most students who have unsatisfied complaints against an HEI at which they have been studying refer the matter to the OIA, and do not wish to pursue legal proceedings. The OIA receives about 2,000 complaints per year.

47. However, some students do wish to pursue a legal claim. For example, some are intent on establishing the fact that the HEI has been guilty of unlawful discrimination against them, and wish to have a legal determination to that effect. Others wish to pursue legal remedies, but only if and when reference to the OIA does not result in an outcome acceptable to them. Such students issue proceedings instead of, or as well as, referring the matter to the OIA; or at least wish to preserve and protect their position on proceeding in the court, dependent upon the result of the OIA reference.

48. Where the OIA has concluded its investigation – and has reported and made any appropriate recommendations or suggestions to the HEI – because it is not obliged to make specific factual findings and it is no part of its function to determine rights and obligations, whatever its conclusions may be, subject to relevant time limits, the student has the right to apply to the court for relief on the basis of his or her strict legal rights as determined on the basis of the facts as found by the court. However:

    i) Unless the student has issued protective proceedings, it is likely that any claim for judicial review will be outside the three-month time limit for issue of proceedings, and will be dependent upon the court exercising its discretion to extend that time (see paragraph 16 above).

    ii) Because of the OIA's particular experience and expertise in HEI complaints, the court, although not bound, will give some deference to any findings made and conclusions drawn by the OIA. The degree of deference given will, of course, depend upon the circumstances of the particular case. Where findings and conclusions have been drawn by the OIA on the same evidence as is available to the court, then considerable deference may be appropriate; but less so where the evidence before the court is different from that lodged with the OIA, or has been more rigorously tested through the court process.

49. Although the functions of the OIA and the courts are conceptually and legally distinct, the OIA procedure may make court proceedings unnecessary in practice, as it is designed to do, because, even when the student is otherwise intent on pursuing legal proceedings, it may result in a recommendation accepted and implemented by the HEI which represents an acceptable outcome for the student, e.g. where a student who has been expelled from a course is reinstated. Therefore, although resolving disputes in a different way, the OIA procedure is ADR properly so called.

Judicial Review as a Remedy of Last Resort and Alternative Remedies

50. In the debate before me, the proposition or maxim that judicial review will not be available where there is an alternative remedy was examined in some depth; and it is also considered in a number of the authorities to which I have referred. Whilst it may

be impossible to reconcile all of the observations that have been made in this context, I consider the public law principles involved to be well-established.

51. A body, when making any decision in the exercise of public functions, is subject to the supervisory jurisdiction of this court in the form of judicial review. If it acts improperly in exercising those functions, this court has the power to intervene; although it has a discretion as to whether to accept and hear such a claim and, having done so, as to what relief, if any, it should grant.

52. However, in addition to recourse to this court, an individual affected by such a decision may have other avenues of redress. The availability of an alternative forum and so a potential alternative remedy – and the nature of that remedy – may have a substantial effect on the exercise of the court's discretion in these circumstances. I should emphasise that the availability of a such a potential alternative remedy does not – indeed, cannot – exclude the supervisory jurisdiction of the court; but there are circumstances in which the availability of an alternative course will result in the court exercising restraint in the exercise of that jurisdiction, notably when considering whether the court should accept and hear the claim (i.e. prior to, or no later than at, the permission stage), but also when considering relief if unlawfulness is proved. In either event, there is no hard-edged question concerning jurisdiction, but rather the exercise of discretion on the basis of the circumstances of the particular case. In deciding whether to exercise restraint in the face of an alternative remedy, the court will consider the potential for the alternative to provide a means of redress, taking into account relative convenience, expedition, cost and effectiveness; and exercise its judgment to determine whether the alternative remedy is more suitable, so that the court proceedings should be dismissed, or at least stayed, to allow it to proceed to a conclusion.

53. Usually, the court can properly consider the issue of whether an alternative remedy is more suitable at the outset of a judicial review claim, before the defendant files any summary grounds; or, if some response to the claim is necessary to consider the issue in a properly informed way, immediately after those grounds are filed, at the permission stage. It is well-established – but worth emphasising here – that a claimant is required to state in the claim form whether a remedy alternative to judicial review exists; and, if so, whether or not a claimant is pursuing that remedy; and, if not, why not, setting out reasons why judicial review is appropriate notwithstanding alternative remedies (see, e.g., C Lewis: Judicial Remedies in Public Law (5th Edition) (2014) ("Lewis") at paragraph 9-062, and D Brennan et al: Bullen, Leake and Jacob's Precedents of Pleadings (18th Edition) (2015) ("Bullen, Leake & Jacob") at paragraph 80-06, both citing R v Humberside County Council ex parte Bogdal (No 2) [1992] COD 467). If the claim form fails to identify an available alternative, the defendant should do so in its Acknowledgment of Service, so that the court is aware of it no later than when it considers permission to proceed.

54. Where the court concludes that an alternative course to court proceedings is more appropriate, at least in the immediate term, then the court may dismiss the judicial review claim or refuse permission to proceed with it (e.g. when the alternative course will dispose of all issues between relevant parties, such as when there is a statutory appeal to another court, so that the judicial review will never have substance); or simply stay the judicial review proceedings either indefinitely or until the alternative

course has been played out (e.g. where the alternative course will not necessarily dispose of all the issues between the parties).

55. Consideration of a stay, again, involves the exercise of judicial discretion, which in itself involves the fact-specific exercise of judgment. No particular circumstance in a case will necessarily be determinative, e.g. even where potentially crucial legal issues arise, the court is entitled to take into account the potential for ADR to resolve the dispute in practice, even if that procedure will not formally determine those issues.

56. The potential benefits, to both parties and the administration of justice, of resolving public law disputes without recourse to the courts, should be neither forgotten nor underestimated. Thus, in his report, Access to Justice (1996), Lord Woolf said (at page 251):

> "Judicial review ought to be conserved as a remedy of last resort. Before an application is made to initiate proceedings for judicial review, the proposed [claimant] should have taken advantage of any system of dispute resolution available, unless it would be unreasonable to do so, for example because the complaints procedure is too slow".

57. In practice, ADR is not prevalent in the sphere of public law disputes. To an extent, this is understandable (see D Foskett, Foskett on Compromise (8th Edition) (2015) at paragraph 33-06). In many such cases, the decision-maker may consider that the relevant decision, particularly if judicial or quasi-judicial, cannot appropriately be the subject of compromise, because of the nature of the public obligations imposed upon the decision-maker who is required to act within the relevant bestowed powers, and the fact that any decision may have a knock-on effect for other individuals affected, directly or indirectly. Furthermore, either the decision-making authority and/or the individual who is the subject of the relevant decision may, understandably and properly, wish to have, not just a practical solution, but a positive finding in his, her or its favour (e.g. where the decision is said to be discriminatory).

58. However, where there is a statute-based complaints procedure, intended by Parliament to be not only more attractive to both the prospective parties but to be used by them as an alternative to court proceedings – without affecting their substantive rights, and without shutting out access to the court to prove and enforce those rights – the factors which may make ADR inappropriate in other circumstances fade in significance.

59. In this context, R (Cowl) v Plymouth City Council [2001] EWCA Civ 1935 is instructive. The case has to be read against the backdrop that CPR rule 1.4(1) imposes an obligation on the court to "further the overriding objective by actively managing cases". By virtue of rule 1.4(2), "active case management" is defined to include, not only "helping the parties to settle the whole or part of the case" (rule 1.4(2)(f)), but also, in rule 1.4(2)(e):

> "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure".

Since the introduction of these provisions, recognising the benefits to both parties and to the administration of justice, the courts have encouraged means of resolving disputes, in whole or in part, otherwise than by the courts themselves.

60. In Cowl, the seven claimants were residents in a care home owned and operated by the defendant ("Plymouth"). They sought judicial review of a decision of Plymouth confirming the decision to close the home. Plymouth's response was to say that it was willing to treat the claimants' grounds for seeking judicial review and the evidence submitted in support as a complaint, which it was prepared to consider under the provisions of section 7B of the Local Authority Social Services Act 1970, by setting up a panel to be convened as soon as reasonably practicable and chaired by an independent person. Although the panel's decision would not be binding on the local authority, Plymouth said that it was conscious of the need to give proper consideration to its conclusions, and to the possible consequences of not doing so, as set out in earlier authorities.

61. Scott Baker J refused the substantive judicial review. The claimants appealed. In the Court of Appeal, Lord Woolf LCJ, giving the judgment of the court, described Plymouth's proposal concerning the complaints procedure as "a very sensible proposal to make". Unfortunately, it was not taken up, and lengthy judicial review proceedings were initiated and contested. In dismissing the appeal, Lord Woolf said this:

> "1. The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible. Particularly in the case of these disputes both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress.
>
> 2. The appeal also demonstrates that courts should scrutinise extremely carefully applications for judicial review in the case of applications of the class with which this appeal is concerned. The courts should then make appropriate use of their ample powers under the CPR to ensure that the parties try to resolve the dispute with the minimum involvement of the courts. The legal aid authorities should co-operate in support of this approach.
>
> 3. To achieve this objective the court may have to hold, on its own initiative, an inter partes hearing at which the parties can explain what steps they have taken to resolve the dispute without the involvement of the courts. In particular the parties should be asked why a complaints procedure or some other form of ADR has not been used or adapted to resolve or reduce the issues which are in dispute. If litigation is necessary the courts should deter the parties from adopting an unnecessarily

> confrontational approach to the litigation. If this had happened in this case many thousands of pounds in costs could have been saved and considerable stress to the parties could have been avoided.
>
> ….
>
> 14. It appears that one reason why the wheels of the litigation may have continued to roll is that both parties were under the impression that unless they agreed otherwise the complainants were *entitled* to proceed with their application for judicial review unless the complaints procedure on offer technically constituted an "alternative remedy" which would fulfil all the functions of judicial review. This is too narrow an approach to adopt when considering whether an application to judicial review should be stayed. The parties do not today, under the CPR, have a right to have a resolution of their respective contentions by judicial review in the absence of an alternative procedure which would cover exactly the same ground as judicial review. The courts should not permit, except for good reason, proceedings for judicial review to proceed if a significant part of the issues between the parties could be resolved outside the litigation process. The disadvantages of doing so are limited. If subsequently it becomes apparent that there is a legal issue to be resolved, that can thereafter be examined by the courts which may be considerably assisted by the findings made by the complaints panel.
>
> ….
>
> 27. This case will have served some purpose if it makes it clear that the lawyers acting on both sides of a dispute of this sort are under a heavy obligation to resort to litigation only if it is really unavoidable. If they cannot resolve the whole of the dispute by the use of the complaints procedure they should resolve the dispute so far as is practicable without involving litigation. At least in this way some of the expense and delay will be avoided….".

62. As emphasised in this passage, the focus here is on the *potential* for the dispute, in whole or major part, to be resolved outside the judicial review process. For the court to exercise restraint, it does not have to be satisfied that the alternative is coextensive, or guaranteed to determine every issue that would have to be determined in a judicial review; nor is it necessary for the remedies available in a judicial review to be available by way of the alternative.

63. It is also noteworthy that, although the court did not criticise the judge who gave permission to proceed, Lord Woolf suggested (at [13]) that the use of the complaints procedure could and should have been investigated by the court at a very early stage; and consideration given to an adjournment (or, presumably, a stay) to allow that

procedure to run its course, before the judicial review was progressed even to consideration of permission to proceed, because:

> "A great deal of expense, a great deal of time and a great deal of anxiety to the claimants could have been avoided if the complaints procedure had been used."

64. These strains were taken up by Scott Baker J, then the lead judge of this court, in his Practice Statement (Administrative Court: Listing and Urgent cases) [2002] 1 WLR 810 at [5], in which he said:

> "I draw attention of litigants and legal advisers to the decision of the Court of Appeal in [Cowl]. The nominated judges are fully committed to resolving disputes by alternative means where appropriate and are exploring ways of promoting this."

65. Academic texts continue to exhort the message in Cowl (see, e.g., Lewis at paragraph 9-028, 9-049 and 12-043, and Bullen, Leake and Jacob at paragraph 80-06) – but, in this court, it appears to be a largely forgotten authority, perhaps because, for the reasons I have given above (see paragraph 57), ADR is regarded as inappropriate for many public law claims. However, in my respectful view, the observations made by Lord Woolf in that case continue to be apt today where there is an internal complaints procedure, or a procedure to complain to an external body such as the OIA, in circumstances in which, by pursuing such a procedure, the need for recourse to the court may be eliminated or at least reduced in scope. Lewis suggests that ADR may be particularly useful in cases involving education (see paragraph 9-062, and especially footnote 219); and it seems to me that it is most likely to have a role to play in any circumstances in which there has been a relationship between the decision-maker and the individual over some time, particularly when that relationship will or may continue.

66. The continuing aptness of Lord Woolf's observations to OIA cases was also recognised by Andrew Grubb sitting as a judge of this court in Crawford (No 2), which involved a claim for judicial review which was initially stayed pending an OIA reference. Having referred to Cowl, Mr Grubb expressed the view that Lord Woolf "did not exclude from the ambit of ADR procedures, particularly in public law cases, dealing with complaints including ombudsmen, such as the OIA". Lord Woolf did not; and, as I have indicated, for good reason. A reference to the OIA is properly described as an ADR procedure.

67. The early finality of executive and administrative decisions is an important principle, and consequently, as a general principle, prompt resolution of public law claims by the courts is considered to be in the public interest – hence the relatively tight and strict time limit for the issuing of judicial review proceedings. However, the courts have also recognised that that principle may sometimes have to bow in the face of other interests, both public and private. Where there is an available ADR procedure – especially when it is provided by Parliament – the interests of the public body and citizen in having a more attractive procedure and, very importantly, the public interest in resolving claims outside the court system where possible, will be of such weight that the balance of interests will be in favour of giving a proper opportunity for the

dispute to be resolved, in whole or in part, by the alternative procedure; even if that may delay the final resolution of the dispute, if recourse to the courts is in the event necessary.

68. Consequently, where there is such a complaints procedure as provided by the 2004 Act through the OIA, the court should be slow to become engaged with issues arising out of the same subject matter, unless and until that procedure has been given reasonable time and opportunity to run to a conclusion; and, where either a claimant or a defendant (or both) wish to progress court proceedings before then, they must provide the court with good reasons for doing so. In my view, both parties and the court should approach the issues raised in the applications such as those before me – and all issues that arise as a result of the relationship between a reference to the OIA and judicial review proceedings – with this uppermost in mind.

The General Issues

Introduction

69. As I have described, when a student makes a complaint to an HEI at which he or she has been studying, and the outcome of the internal complaint procedure is not considered satisfactory, the student might (i) refer the complaint to the OIA Scheme and/or (ii) seek to challenge the HEI's decision about which complaint is made by way of judicial review in this court. In any case in which the student issues judicial proceedings against an HEI in circumstances in which an OIA reference has been pursued (or, if not pursued, is available), as I have indicated, the student has an obligation to notify the court, in the claim form itself (but the obligation is a continuing one thereafter), that an OIA reference is a potential alternative course and remedy to judicial review proceedings; if he or she has (or intends to) make a reference to the OIA; and, if not, give reasons why not. In any case in which a student challenges a decision of an HEI in circumstances in which a reference to the OIA is available, the OIA should normally be made an interested party; although, of course, whether or not it then plays an active part in a particular claim will be a matter for it to decide.

70. No doubt reflecting its attractions, most students refer complaints to the OIA, and do not pursue court proceedings. If the outcome of the OIA procedure is not regarded by the student as satisfactory, it is unlikely that the OIA decision will, in practice, be challengeable. Such a challenge can only be brought on traditional judicial review grounds; and a claim of Wednesbury unreasonableness is likely to be an uphill struggle, because, as I have described, the OIA's decision involves the exercise of considerable judgment and it has a wide margin of discretion in exercising that judgment.

71. As well as pursuing a reference of a complaint against an HEI to the OIA, a few students wish to reserve the right to pursue court proceedings against the HEI, if the outcome of the OIA procedure is not regarded by them as satisfactory. Furthermore, some students – a very few – wish to pursue judicial review proceedings to the exclusion of an OIA reference. Because the OIA and the court exercise different functions, there are no conceptual difficulties in any of that.

72. However, whichever course is adopted, there are a number of practical issues.

i) If the student wishes the OIA reference to be concluded, and in the meantime simply reserve the position in relation to judicial review, then he or she may issue a protective claim and seek a stay of those proceedings pending the outcome of that reference. That is what has happened in each of the claims before me. However, the student faces the risk that the defendant HEI will not agree to a stay – as is the case in the St George's and the University of Leicester claims – and, in any event, the risk that the court does not order a stay, whatever the attitude of the HEI might be. If the court does not stay the proceedings, the OIA is proscribed from considering the complaint. The student may therefore be faced with the unattractive and unwanted choice between pursuing the OIA reference or judicial review, but not both. Furthermore, the student will have to bear the costs of preparing and issuing the claim; and, if the court does not order a stay immediately upon issue of the claim, significant costs may be incurred by the HEI in preparing summary grounds of opposition. Very quickly, before any stay is imposed, the student and the HEI will be exposed to formal proceedings and a high level of costs, which the OIA Scheme is designed to avoid. Where protective proceedings are issued, even if early stayed, the litigation costs expended (by both sides) will have been wasted, and many of the benefits of the OIA Scheme lost. As judicial review proceedings are generally front-loaded, those costs may well be significant (see, by way of an example, paragraph 109 below).

ii) However, if protective proceedings are not issued, then the student faces different risks. Generally, a judicial review claim has to be issued within three months of the challenged decision (see paragraph 16 above). If the student waits to issue proceedings until after an OIA reference has been concluded, relatively quick as that might be, it is likely to result in that time limit being exceeded. Without protective judicial review proceedings, a student then risks being refused an extension of time by – and, thus, effective access to – the court.

iii) If the student is intent on pursuing litigation in any event – whether or not accompanied by a parallel OIA reference – he or she may face an application by the HEI to stay the proceedings whilst an OIA reference is made, or the court of its own motion considering such a course. If a stay is imposed, the issue of proceedings will have resulted in delay, and likely additional cost, in ultimately resolving the student's complaint about the HEI.

73. In respect of these, although most (if not all) of the relevant decisions to be made by the court – e.g. as to permission to proceed, or an extension of time for the claim to be issued, or a stay – involve the exercise of discretion, and so they are quintessentially fact-specific, and so there can be no rules of universal application, I consider some guidance can be given in relation to three sets of circumstances, as follows.

A. <u>Where no proceedings have been issued, but the student wishes to reserve the right to bring such proceedings</u>

Where an OIA reference has been made and no court proceedings have been issued, but the student wishes to reserve his or her position with regard to legal proceedings, some observations can be made as to whether the student is

required to issue protective proceedings, to ensure compliance with the requirement in the Administrative Court to commence proceedings promptly and no later than three months after the decision sought to be challenged. Given the evidence on how long references to the OIA take (see paragraph 36 above), although they are relatively speedy, if protective proceedings are not issued, the student will almost certainly have to rely upon the court exercising its discretion to extend time for the commencement of proceedings. Consequently, the real issue upon which some guidance might be given concerns the factors that the court will take into account when considering an extension to the time limit for filing a judicial review claim where a student has, first, exercised his or her right to refer a complaint to the OIA which has not resulted in a satisfactory outcome.

B. Where protective proceedings have been issued

Where proceedings have been issued, but the student does not wish to pursue those proceedings unless and until an OIA reference has been concluded with an outcome unsatisfactory to the student, as in each of the cases before me, some observations can be made as to the factors that the court will take into account when considering a stay of those proceedings.

C. Where proceedings have been issued, and the student does not wish to refer the complaint to the OIA

Some observations can be made as to the court's likely approach when the student has issued judicial review proceedings, but has not referred a complaint to the OIA and does not intend to do so.

74. I will consider these in turn.

A. Where no proceedings have been issued, but the student wishes to reserve the right to bring such proceedings

75. Where a student has a complaint against his or her HEI, which remains unsatisfied despite completing internal complaints procedures and which the student wishes to pursue further, then, ordinarily, that student should make a reference to the OIA. That should usually be the next step.

76. Where the student and the HEI agree that there should be an OIA reference, but, pending that reference, the student wishes to reserve his or her position with regard to judicial review, the issue of protective proceedings will result in the expenditure of court fees for the issue of the proceedings and any application to stay – and, usually, at least some other costs and expenses, for the student if not also for the HEI. If the OIA reference is successful in resolving the complaint, then further money will have to be spent on having the court proceedings brought to an end. The money spent on the court proceedings will have been wasted; and, to an extent, the purpose of the OIA procedure to be an alternative means of resolving disputes, that is straightforward and cheap – indeed, free to students – will have been undermined. Additionally, the proceedings will have added to the already large burden being borne by the court, without advancing at all the resolution of the issues between the parties – or the cause of justice.

77. The courts have indicated that they can be – and usually are – willing to extend time for the issue of judicial review proceedings to allow time for alternative remedies to be explored (see, e.g., R v Rochdale MBC ex parte Cromer Ring Mill Limited [1982] 3 All ER 761 especially at page 764j per Forbes J). In R v Hammersmith & Fulham London Borough Council ex parte Burkett [2001] Env LR 684 at [14], the Court of Appeal said this:

> "Judicial review is in principle a remedy of last resort. It follows, as it always does when a potential applicant for judicial review expeditiously seeks a reasonable way of resolving the issue without litigation, that the court will lean against penalising him for the passage of time and will where appropriate enlarge time if the alternative expedient fails."

78. After considering Burkett and Cowl, M Supperstone, D Stilitz and C Sheldon, in ADR and Public Law ([2006] PL 299 at page 315) said, compellingly:

> "In the light of these judicial pronouncements, claimants can expect a certain amount of latitude from the court where judicial review proceedings have been delayed by early and serious attempts to settle a dispute through ADR".

Given our better understanding of the advantages of ADR, and with due respect, I do not consider that obiter suggesting the contrary (see, e.g., R v Education Committee of Blackpool Borough Council [1996] ELR 237 at pages 240-1 per Kay J) have any continuing force.

79. Given the principles in relation to alternative remedies and judicial review being a remedy of last resort, I do not see the need for the routine issue of protective proceedings in cases in which an OIA reference has been made, so long as the student issues any judicial review claim that he or she wishes to pursue within a reasonable period from the OIA's determination of the complaint. In the ordinary course, the student should be able to issue proceedings within one month of that determination; and it seems to me that the court would need compelling reasons to be persuaded that longer was reasonably required.

80. I understand that the parties (i.e. the student and the relevant HEI) need some degree of certainty. However, if they agree that any court proceedings can await the outcome of the OIA reference – as they should, and will, in the vast majority of cases – absent extraordinary circumstances, it seems to me that they can have confidence that the court will be driven to exercise its discretion to allow an extension of time to file any proceedings if that reference is not successful in resolving the complaint.

81. Although under the OIA Scheme Rules, the student has twelve months from the date of the Completion of (Internal) Procedures Letter to make a reference to the OIA (see paragraph 28 above), if he or she wishes to reserve the right to pursue judicial review proceedings, then the decision to refer should be made sooner. In the ordinary course, a three-month period from the date of the Completion of Procedures Letter should, in the circumstances, be sufficient to make the reference; and, so as not to mislead the student into a false sense of security, HEIs should consider indicating, in any Completion of Procedures Letter, that, although the Rules prescribe a twelve month

period, if the student wishes to maintain his or her right to judicially review the relevant HEI decision, then it would be advisable to notify the HEI as soon as possible and make a reference to the OIA within three months, to avoid a contention that any subsequent proceedings are too late. It seems to me that, again, the court would need compelling reasons if it were to be persuaded that more than three months had been reasonably required to make an OIA reference in these circumstances.

82. That period should also be sufficient to correspond with the HEI to obtain its agreement not to take any point on delay. An HEI should be able to respond to a request for no point to be taken on delay within two weeks. It would be open to the HEI to give conditional agreement, making it clear that it will not take a time point provided that (e.g.) the student both makes any reference to the OIA within a reasonable time (say, three months) and issues any judicial review proceedings within a reasonable period following the OIA's determination (say, one month).

83. However, in the event that the student does not make that request – or makes a request, to receive no, or only an ambivalent, reply – unless the HEI makes clear that it proposes to take a point on delay if judicial review proceedings are later issued, given the backdrop I have described, the court is in any event unlikely to refuse a student an extension of time. Unless an HEI positively indicates that it will take a point on delay, a student is entitled to proceed on the basis that it will not.

84. If an HEI does positively indicate that it will take a point on delay if judicial review proceedings are issued more than three months after the challenged decision was made, then the student, if he or she wishes to have the right to have the benefit of an OIA reference and reserve the right to pursue judicial review proceedings, should carefully consider issuing proceedings and applying for a stay. If the student does not issue a judicial review claim within three months of the HEI decision, then he or she risks the court agreeing with the contention of the HEI that the claim should be time barred. The student should set out in the claim form the availability of an OIA reference, and that the HEI has refused to agree not to take a point on delay, including an application for interim relief in the form of a stay, which should be considered by the court after receiving the HEI's response to the claim and application. The HEI will have to set out its reasons for opposing a stay in that response.

85. If the court considers that there is no good ground for opposing the stay, then it is likely that it will order the HEI to pay the student's costs of the application, which, in appropriate cases, may include the costs of issuing proceedings. Similarly, in the future, if a student simply issues protective proceedings without engaging with the HEI, then the student may well face a costs order in relation to staying that claim and/or for the costs wasted if, in the event, it proves unnecessary to take that claim forward in the light of the result of the OIA procedure.

B. <u>Where protective proceedings have been issued</u>

86. For reasons that will by now be obvious, where a student has already issued protective proceedings with the object of preserving his or her legal rights if the OIA reference does not result in a satisfactory outcome, the court will be sympathetic to an application to stay those proceedings, at the earliest reasonably practicable stage, to

allow the OIA reference to proceed to a conclusion, particularly if the relevant HEI agrees.

87. Unless the claim is stayed, in the face of the court proceedings, the OIA reference will not proceed (see paragraphs 26-30 above). However, I accept that, on rare occasions, there may be a good reason why the HEI does not wish to have a stay, but would properly prefer the court proceedings to go ahead instead of the OIA reference, e.g. where the student raises legal issues, or makes allegations of unlawfulness such as discrimination, which the HEI considers need to be investigated and determined in any event. As I have indicated, simply because the complaint raises issues of law etc – even if those issues are central to (or, on the face of it, will be determinative of) the dispute, does not mean that an OIA reference will not in practice resolve matters between the student and the HEI, or will be an inappropriate ADR procedure. In considering a stay, the court will assess and take into account the extent to which it is likely that, in any event, the claim for judicial review will proceed and, to await the outcome of an OIA reference will result in a delayed ultimate outcome for the parties; and the extent to which an OIA reference will or may in practice help in resolving issues between the parties.

88. For the reasons set out above (paragraphs 75-85), even where the student wishes to reserve his or her rights to pursue a judicial review challenge in respect of a decision of an HEI that is the subject matter of a complaint reference to the OIA, in the ordinary course, he or she need not issue a protective claim in this court pending completion of that reference.

89. However, where a protective claim has nevertheless already been issued, the student claimant should seek the HEI's consent to a stay and, if forthcoming, should file an application for a consent order staying the proceedings for a period to expire (say) one month after the OIA has concluded the reference to it. The stay should not be open-ended. That application should be made as soon as possible, and certainly before the HEI has expended time and effort on (e.g.) preparing and filing summary grounds. The court may – and, in ordinary circumstances in such cases as this, should consider the existence of an alternative remedy as a preliminary issue, before dealing with the substantive grounds of challenge, even at permission stage (see Lewis at paragraph 12-076). Unless the court has particular concerns about (e.g.) delay, in the usual course, it should endorse such a consent order.

90. If the HEI does not consent to such a stay, then it should indicate, at the earliest opportunity, why it objects and why it considers it is inappropriate to allow the OIA reference to run its course before the court proceedings are progressed. However, in doing so, it will need to bear in mind the advantages of ADR (including OIA references); the fact that, if a stay is refused, that is likely to mean that the OIA reference will never be progressed; and the general wish of the court to encourage ADR, so that the court will not usually refuse a stay of proceedings sought by a student absent compelling reasons. Refusals of a stay in these circumstances are likely to be rare.

91. Where an HEI contests a stay, without good grounds for doing so, then it is likely that the court will make an adverse costs order against it.

C. Where proceedings have been issued, and the student does not wish to refer the complaint to the OIA

92. Where a student does not make a reference to the OIA, but wishes instead to file and pursue a claim for judicial review, given the public interest in resolving disputes by way of ADR, the court will nevertheless wish at least to consider whether the claim should be stayed, whether or not the HEI applies for a stay.

93. In these circumstances, in the claim form, the student should make the availability of the OIA procedure clear; indicate that he or she does not propose to seek an OIA reference; and, crucially, why. The HEI, in its Acknowledgment of Service, should apply for any stay that it seeks. In any event, prior to or at the permission stage, the court should consider whether a stay is appropriate. The parties' wishes, although of course an important factor, will not necessarily be determinative. Where one or both parties indicate they do not wish to use the OIA procedure, the court will need to assess the extent to which that unwillingness will undermine the appropriateness of an OIA referral as an alternative remedy.

94. Where the court in any event grants a stay, it may again make any costs order that it considers appropriate; including, of course, an order for costs against the student if he or she opposed a stay.

The Parties' Contentions

95. The Claimants each wish to stay the current proceedings (which each issued protectively of their right to have their legal rights determined and enforced by the court, if the OIA reference does not have a satisfactory outcome), pending the conclusion of the OIA reference. In Ms Zahid's case, the University of Manchester agrees to a stay on that basis.

96. In the other two claims, the HEIs (St George's and the University of Leicester, respectively) oppose a stay; although, initially, St George's did not do so, even indicating its willingness to agree a stay by signing a consent order to that effect. Ms McColgan on behalf of those two medical schools now submits that to stay proceedings in the circumstances of these cases is objectionable in principle, because, insofar as the Claimants' complaints are not of discrimination – which could equally well and, indeed, more appropriately be brought in the county court – they are matters which the OIA is best suited to address. She submits (in paragraph 44 of her skeleton argument) that:

> "The grant of such stays rewards those who ignore the general rule that judicial review is a remedy of last resort, which will not generally be granted where an alternative remedy is available (that of a complaint to the OIA, which will by definition be open to the applicants concerned. It also involves inevitable wasted expenditure, much of it from the public purse, and has the potential to impose significant additional burdens on the court system to no real benefit."

97. The OIA, it is submitted, thus provides a suitable alternative remedy, which excludes any practical scope for judicial review. In the event that the OIA does not perform its

function correctly, then "the obvious course is by way of challenge… to the OIA". Where the relevant HEI has acted unreasonably, then, citing Gopikrishna, Ms McColgan submits that that can be reflected in a costs order against that HEI as an interested party to such a claim.

98. It will be very apparent that I accept the main premise upon which these submissions are made, namely that a reference to the OIA, as an appropriate ADR procedure for a continuing complaint by a student of his or her HEI, is an alternative remedy to judicial review. However, I do not accept the secondary premise, namely that it is an alternative that should normally exclude the practical scope of judicial review. For the reasons I have given, I accept that the court should be slow to entertain a judicial review of a decision where a reference to the OIA could be made in respect of the same subject matter; and that the court will give due deference to any relevant findings and conclusions the OIA make in the reference. However, I do not accept that there is no residual scope for judicial review if (e.g.) the student is not satisfied with the outcome of the reference and wishes to pursue his or her strict legal rights in this court.

99. For the reasons I have given, I do not consider that the issue of purely protective proceedings was necessary in these claims – because, if the claim had not been issued until the relevant OIA reference had been concluded, then, provided the Claimant had acted reasonably promptly to issue and pursue a judicial review claim after the conclusion of the reference, this court would have granted an appropriate extension of time. However, I accept that the position in relationship between an OIA reference and judicial review proceedings arising out of the same subject matter has been the subject of some uncertainty – hence the consolidated hearing before me – and it was both understandable and reasonable for each Claimant respectively to have taken a cautious approach and issued a protective claim. To the extent that I were to refuse the stays now sought, the OIA references would not proceed – the OIA is proscribed from progressing a reference where there are un-stayed court proceedings arising out of the same subject matter (see paragraphs 26-30 above) – and so each affected Claimant would have to choose between progressing an OIA reference or pursuing a judicial review. In the circumstances of these cases, to require them to make that unattractive choice would be contrary to principle and contrary to the spirit of the OIA Scheme (see paragraph 44 above).

100. With those observations upon Ms McColgan's submissions, I now turn to the individual applications for a stay of proceedings in the three claims before me.

Individual Cases

R (Zahid) v The University of Manchester

101. The Claimant Sarah Zahid began studying as a medical student on the MBChB course at the Medical School of the University of Manchester in September 2009.

102. On 23 October 2014, the Medical School's Health and Conduct Committee decided to refer Ms Zahid to the Faculty of Medical and Human Sciences' FtP Committee on the basis of allegations of dishonesty, in particular in relation to plagiarism and in respect of a week's holiday in Turkey she had taken in term time. It was said that Ms Zahid's first recourse, when under pressure, was to lie; and she had demonstrated a lack of

insight into the seriousness of her dishonesty and into the level of professionalism required to practise medicine. Ms Zahid challenged the decision to refer, but that decision was upheld by the Health and Conduct Committee on 10 March 2015.

103. The FtP Committee met on 12 November 2015. By this time, Ms Zahid had obtained a report from a consultant psychiatrist, which indicated that, at the time of the various incidents of dishonesty, she had been under considerable distress and was suffering from a moderate depressive illness.

104. On 19 November 2015, the FtP Committee issued its decision, concluding that;

a. Ms Zahid's FtP was impaired;

b. her behaviour had been fundamentally incompatible with her remaining on the course or eventually practising as a doctor;

c. her studies on the MBChB programme would be terminated; and

d. subject to it being determined by the medical school that she had met the necessary requirements, she would be permitted to exit the university with a degree of BMedSci.

105. On 15 December 2015, Ms Zahid appealed to the university's FtP Appeals Committee, an appeal that was supported by further medical evidence as to her psychiatric condition. Following a hearing on 27 April 2016, Ms Zahid was informed on 18 May 2016 that her appeal had been dismissed.

106. On 10 August 2016, Ms Zahid issued an application for judicial review of that 18 May 2016 decision, indicating the claim "raises issues that cannot be determined nor remedied by the OIA". In the claim, she submits that, at all material times, she was disabled within the meaning of the Equality Act, as a result of mental illness; and alleges that the university:

i) failed adequately to consider the human rights arguments advanced by Ms Zahid at her FtP appeal, in particular that her article 8 right to a private life had been breached when the university made inquiries as to what she was doing whilst recovering from a mental illness (i.e. holidaying in Turkey); and had failed to give adequate reasons in this regard;

ii) failed to consider or to make reasonable adjustments for her during the FtP procedures and in its decision, breaching the duty imposed on it by s91(9) of the Equality Act;

iii) discriminated against her by reason of her disability;

iv) treated her in a procedurally unfair manner in its FtP procedures; exhibited an appearance of bias and pre-determination; refused her legal representations; failed to take into account relevant considerations including in relation to her mental health; took account of irrelevant factors; failed to give adequate reasons for its decision; and

v) acted irrationally in reaching its decision on her FtP.

107. The application seeks declarations, a mandatory order compelling the university to refer the matter of her FtP back for reconsideration, and damages under the Human Rights Act 1998.

108. As part of her claim, Ms Zahid also sought a stay on proceedings immediately following issue, "to allow [her] to pursue a complaint to the [OIA]", in an application to which the university consented. Ms Zahid referred her complaint to the OIA on 18 August 2016, including a copy of the judicial review grounds.

109. On 19 August 2016, David Gardner, an Administrative Court Lawyer acting under delegated powers, made no order on the application to stay; but ordered the university to file and serve any Acknowledgment of Service and Summary Grounds within 21 days of service of his Order, and the matter then to be put before a judge to consider both the application for permission to proceed and the application for a stay.

110. The Claimant sought a review of that order, which was performed on the papers by His Honour Judge Jarman QC sitting as a judge of this court on 11 September 2016. He ordered the university to file an Acknowledgment of Service and Summary Grounds within 21 days, and the claim be stayed for three months from the date of filing with any extension of the stay to be the subject of an application with evidence as to the stage at which the OIA reference had reached. On 22 September 2016, the university filed an Acknowledgment of Service, which opposed the challenge and claimed £3,060 for preparing the Summary Grounds. That sum did not include any amount for the university's in-house solicitor, who had been acting in the matter. Upon that document being filed, in accordance with Judge Jarman's Order, the claim was automatically stayed for three months.

111. The stay automatically expired on 22 January 2017 until, at the commencement of the hearing on 24 January 2017, I renewed the stay pending my judgment on the application. That allowed the OIA to continue its investigation into the complaint, which, in line with the OIA Scheme Rules, was automatically halted when the stay lapsed (see paragraphs 26-30 above).

112. Without any criticism of the legal officer or judge who have given directions in relation to this matter, the potential adverse consequences of protective proceedings being issued and not immediately stayed are evidenced by this claim. Of course, I do not know whether the OIA reference will result in a satisfactory conclusion for Ms Zahid; but, if it were to do so, then she and the university will have unnecessarily expended considerable time and money on this claim, and the ultimate resolution of the issues between them will have been delayed by the period the claim was extant and not stayed.

113. The Defendant agrees to a stay; and, indeed, has always agreed that the claim should be stayed pending the outcome of the OIA reference. It is clear to me that the claim should be so stayed.

114. At the hearing, I ordered there to be a stay pending this judgment. Subject to any submissions on the form of the order, I shall now order:

i) Except for the purpose of complying with this order, the claim be stayed for a period to expire one month after the OIA reference has concluded.

ii) The Claimant shall by the expiry of that period notify the court and the Defendant if she intends to proceed with her claim, and, if so, make any application to amend her claim.

iii) Costs of the application to stay shall be costs in the claim.

iv) Permission to apply.

R (Rafique-Aldawery) v St George's, University of London

115. In 2010, the Claimant Maaz Rafique-Aldawery commenced studying for a five-year MBBS degree at St George's Medical School. In 2015, he completed an intercalated BSc degree.

116. In September 2015, just as Mr Rafique-Aldawery was beginning the final year of his medical degree, a disability adviser working for the university found him to have Attention Deficit Hyperactivity Disorder, so that (the adviser said) he might find it difficult to concentrate and organise his thoughts. He was advised that he would need specialist equipment and learning support in his final year.

117. In April 2016, shortly before his final examination (the Objective Structured Clinical Examination ("the OSCE")), Mr Rafique-Aldawery was the subject of FtP proceedings, in which it was alleged that he had attempted to obtain information about that exam from a student of the University of Nicosia, who took the exam a day earlier than he was due to take it. In return, Mr Rafique-Aldawery offered to supply information from past written papers that he had obtained by improper means. That other student reported the matter to the University of Nicosia, who in turn notified St George's. When put to him, Mr Rafique-Aldawery denied that he had attempted to obtain information about the OSCE. In the event, he was not allowed to take that examination.

118. The university appointed an investigator, who reported that Mr Rafique-Aldawery had admitted seeking to obtain advantage for himself, by attempting to barter written examination papers for prior knowledge of the OSCE, but put forward mitigation including that he had been suffering from depression at the relevant time.

119. The FtP Panel met to consider two allegations, namely (i) having in his possession information about previous written papers that he ought not to have had, and (ii) the attempt at bartering that information for prior knowledge of the OSCE, which he admitted. At a hearing on 21 June 2016, the FtP Panel considered that expulsion was the only appropriate remedy, a decision notified on 4 July 2016. On 22 August 2016, following an application to appeal, the university wrote to Mr Rafique-Aldawery saying that there were no grounds upon which an appeal could be considered. On 14 October 2016, the university refused to reopen the decision not to re-open his expulsion, despite the fact that Mr Rafique-Aldawery had lodged further medical evidence of his condition.

120. On 21 September 2016, Mr Rafique-Aldawery issued a claim for judicial review of the 14 October 2016 decision, on the grounds that (i) the university erred in concluding that it had no power to consider late psychiatric evidence that he had submitted, which (it is said) it was bound to consider in order to comply with its obligations under the Equality Act; and (ii) the sanction imposed was "disproportionate or not properly arrived at".

121. In the claim, Mr Rafique-Aldawery seeks an order quashing the decisions of the FtP Panel of 4 July 2016 (challenged out-of-time), as well as those of 22 August and 14 October 2016 not to hear his appeal; and also mandatory orders that the university reconsider sanction afresh and/or at least consider establishing an appeals committee.

122. Mr Rafique-Aldawery submitted a complaint form to the OIA on 12 November 2016, with an indication that an application to stay the judicial review proceedings would be made. The OIA indicated that, once a stay had been obtained, it would consider eligibility of the complaint.

123. A formal application for a stay was made on behalf of Mr Rafique-Aldawery on 20 December 2016.

124. The university opposes the stay on the basis I have outlined, namely that the OIA reference provides an adequate – and, essentially, an exclusive – alternative remedy to judicial review. For the reasons I have given (see, especially, paragraphs 94-99 above), I do not accept that to be the case.

125. This case, too, should be stayed. Leaving aside the interests of the parties – although, in my view, they too are promoted by this course – the public interest in allowing the OIA reference to run its course prior to the judicial review claim being progressed is overwhelming.

126. As I indicated, I stayed the claim at the hearing, pending judgment, to enable the OIA to progress the reference. Again subject to any submissions on the form of the order, I shall now order:

    i) Except for the purpose of complying with this order, the claim be stayed for a period to expire one month after the OIA reference has concluded.

    ii) The Claimant shall by the expiry of that period notify the court and the Defendant if he intends to proceed with her claim, and, if so, make any application to amend her claim.

    iii) Permission to apply.

127. I shall deal with the issue of costs following further submissions of the parties on the basis of this judgment.

<u>R (Sivasubramaniyam) v The University of Leicester</u>

128. The Claimant Mithilan Sivasubramaniyam commenced an MBChB degree at the University of Leicester in 2011. At the end of his first year, which he failed, he was

diagnosed with dyslexia, and successfully repeated that first year with appropriate adjustments

129. He also failed the second year, and his course was terminated; but an appeal against termination was later allowed, as he was diagnosed with both depression and dyspraxia. The expulsion was replaced with a year's suspension, designed to enable him to complete a plan of treatment and support before returning to his studies.

130. Mr Sivasubramaniyam returned to the university in September 2015, when he was asked to sign an agreement in which he would acknowledge that he would not be allowed to take a further period of suspension, due to the operation of a university-imposed time limit for completion of an MBChB course, of seven-years from commencement.

131. On 8 August 2016, he was notified by the university that he had failed his second year examinations, and his course would be terminated as he could not complete the course within seven years. He appealed against that decision, lodging further medical evidence in support. That appeal was dismissed on 13 October 2016.

132. Mr Sivasubramaniyam submitted a complaint form to the OIA on 17 November 2016, complaining of discrimination on grounds of disability. On 21 December 2016, he issued an application for judicial review of the decision of 13 October 2016, seeking a declaration that the university had acted in breach of the Equality Act, and a mandatory order requiring it (i) to reconsider its policies and rules, and (ii) to reinstate him.

133. On 8 December 2016, Mr Sivasubramaniyam's solicitors proposed a stay of the proceedings to allow the OIA to conclude its investigation. The university refused to consent to such an order; and the matter of the stay has proceeded by way of application.

134. The university opposes the stay on same basis as the defendant opposed the stay in Mr Rafique-Aldawery's case. For the same reasons, however, I consider that this claim, too, should be stayed. Ms McColgan submitted that the case against a stay was strong, because the Claimant challenged the university policy of having a seven-year time limit for the course – a time constraint that the GMC has abandoned. However, as I understand it, the university has a discretion to disapply that time limit, depending on the facts and circumstances of an individual case; and, therefore, the OIA reference clearly has some scope.

135. As with the other two claims, I stayed this action at the hearing, pending judgment, to enable the OIA to progress the reference. Again subject to any submissions on the form of the order, I shall now make the same order as that proposed in Mr Rafique-Aldawery's case (see paragraph 126 above).