Neutral Citation Number: [2018] EWCA Civ 2520

Case No: C1/2017/0574 & 0575

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION ADMINISTRATIVE COURT
MR JUSTICE HICKINBOTTOM
[2017] EWHC 188 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/11/2018

Before:

LORD JUSTICE LINDBLOM
LORD JUSTICE IRWIN
and
LADY JUSTICE NICOLA DAVIES DBE

- -

Between:

ST. GEORGE'S, UNIVERSITY OF LONDON	**First Appellant**
- and -	
THE QUEEN on the application of MAZZ RAFIQUE-ALDAWERY	**First Respondent**
- and -	
OFFICE OF THE INDEPENDENT ADJUDICATOR	**Interested Party**
UNIVERSITY OF LEICESTER	**Second Appellant**
- and -	
THE QUEEN on the application of MITHILAN SIVASUBRAMANIYAM	**Second Respondent**
- and -	
OFFICE OF THE INDEPENDENT ADJUDICATOR	**Interested Party**

- -
- -

Aileen McColgan (instructed by **Gateley Plc**) for the **First and Second Appellants**
Laura Farris (instructed by **EJ Winter & Son LLP**) for the **Interested Party**
The First and Second Respondent did not appear and were not represented

Hearing date: 9 October 2018

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Approved Judgment

Lady Justice Nicola Davies DBE:

1. The first and second appellants appeal the decision of Hickinbottom J (as he then was) of 10 February 2017 to issue stays in respect of the first and second respondents' applications for judicial review against the appellants. Permission was granted on 2 January 2018 by Jackson LJ. The appeal is not opposed by the first and second respondents who have taken no active role in the appellate proceedings. The interested party, the Office of the Independent Adjudicator ("OIA"), has responded to the appeal in writing and in oral representations at the hearing. It does not oppose the appeal, its concern is that the court should not extinguish a legal right held by a student.

2. The appellants are providers of higher education. The first and second respondents are former medical students who had been undertaking courses of study at the respective appellant universities, each of which was terminated either by reason of fitness to practise issues (first respondent) or repeated examination failure (second respondent). Each respondent challenged the decision. The first respondent sought to rely on late medical evidence provided to the first defendant following termination of his registration. The second respondent sought to challenge the second appellant's application of a rule that students must complete a five-year medical degree within seven years.

3. Each respondent issued judicial review proceedings against the respective appellants and obtained orders staying their applications pending the conclusion of their complaints to the OIA. Following the decision under challenge, the OIA rejected both complaints, the applications for permission to bring proceedings for judicial review proceeded, permission was refused on the papers by Judge Allen on 9 and 4 August 2017 in the case of the first and second respondent respectively. The respondents renewed their applications for permission which were dismissed by Leigh-Ann Mulcahy QC sitting as a Deputy High Court Judge on 21 September 2017.

4. It is the appellants' case that in granting the stay sought by the respondents Hickinbottom J erred in law in failing to take into account, alternatively give due weight to, the status of judicial review as a remedy of last resort. Further, the judge gave detailed guidance to be followed in three types of cases, namely:

   i) OIA proceedings have been issued, no judicial review proceedings have been issued but the student wishes to reserve the right to bring such proceedings;

   ii) OIA and protective judicial review proceedings have been issued;

   iii) Judicial review proceedings have been issued but the student does not wish to refer the complaint to the OIA.

   The respondents take issue with this guidance which is said to be rigid and too prescriptive. In granting permission Jackson LJ observed that if the appeal did not succeed the Civil Procedure Rule Committee should "consider whether to amend CPR Part 54 in order to address the problem highlighted by" the cases.

5. Prior to 2004 aggrieved students could bring their complaints against their Higher Education Institutions ("HEIs") either as a visitor in the case of HEIs established by Charter or in the civil courts in the case of post-1992 HEIs. Where an HEI had a visitor,

the visitor's jurisdiction was final and exclusive. Students were not entitled to choose to seek redress in the ordinary courts instead of before the visitor. Decisions of the visitor were challengeable only by way of judicial review and then only very narrowly.

6. The Higher Education Act 2004 ("the 2004 Act") established a system for review of student complaints, providing that the Secretary of State may designate a body corporate as the designated operator for England and the Welsh Assembly may designate a body corporate as the designated operator for Wales. Pursuant to section 13 of the 2004 Act the OIA, a company limited by guarantee and a registered charity, is designated to be the operator of this scheme. Section 14 provides that the designated operator must comply with the duties set out in Schedule 3. Paragraph 2 of Schedule 3 obliges the OIA to provide a scheme ("the Scheme") for the review of "qualifying complaints" which include a complaint by a student or former student about an act or omission of a university, other than to the extent that it "relates to matters of academic judgment" (section 12). Schedule 2 sets out the conditions that are to be met by the Scheme, paragraph 3 of which states:

> "Referral of qualifying complaints
>
> 3. (1) Condition B is that the scheme provides that every qualifying complaint made about the qualifying institutions to which it relates is capable of being referred under the scheme.
>
> (2) 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."

7. The relevant OIA's Rules, which have since been updated, include the following:

> "1. Purpose
>
> The main purpose of the Scheme is the independent, impartial and transparent review of unresolved complaints by students about acts and omissions of Member HE Providers and, through learning from complaints, the promotion of good practice.
>
> 3. Complaints not covered
>
> The Scheme does not cover a complaint to the extent that….
>
> 3.3 the matter complained about was the subject of court or tribunal proceedings and those have been concluded or the

> matter is the subject of court or tribunal proceedings and those proceedings have not been stayed."

8. The OIA publishes a Guidance Note on Eligibility and Rules. The relevant Guidance, which has since been updated, relating to Rule 3.3 states:

> "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."

9. The ambit of the review performed by the OIA is set out in Rule 6:

> "6. Review Procedures
>
> 6.1 Once a determination has been made under Rule 5.3, 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."

10. The OIA is approved by the Chartered Trading Standards Institute as the consumer Alternative Dispute Resolution ("ADR") body for higher education complaints (pursuant to Directive 2013/11/EU).

11. The OIA's role and remit has been considered by the courts. In *R (Siborurema) v OIA* [2008] ELR 209, the Court of Appeal gave guidance upon the ambit of the OIA's discretion and the hurdles in a claim for judicial review against the OIA:

> "Parliament has conferred on the designated operator a broad discretion. It is not prescriptive as to how complaints should be considered when making a decision whether they are justified. OIA is able, both in defining its scheme and in deciding whether particular complaints are justified, to exercise a discretion in determining how to approach the particular complaint. OIA is entitled to operate on the basis that different complaints may require different approaches. In assessing whether a complaint has been approached in a lawful manner, the court will have regard to the expertise of OIA, which in turn should have regard to the expertise of the HEI. OIA is entitled in most cases, if it sees fit, to take the HEI's regulations and procedures as a starting point and to consider, when assessing a complaint, whether they have been complied with." [[53]: Pill LJ]

> "The OIA's concern that the availability of judicial review will impair the efficient operation of the Scheme by introducing undue formality and legalism is misplaced. The number of cases in which an application for judicial review could get past the permission stage is likely to be very small. There is a broad discretion under the Scheme as to how the review of a complaint will be carried out (see below). The decision whether a complaint is justified involves an exercise of judgment with which the court will be very slow to interfere. A complainant dissatisfied with the OIA's decision will often have the option of pursuing a civil claim against the HEI, which may well be an appropriate alternative remedy justifying in itself the refusal of permission to apply for judicial review of the OIA's decision. In the present case, permission was granted only because certain issues of general principle were raised. In the ordinary course a case of this kind could be expected to have little chance of getting through the permission filter." [[74]: Richards LJ]

12. In *R (Maxwell) v OIA* [2011] EWCA Civ 1236, a discrimination case, Mummery LJ drew a distinction between the judicial processes of the court in determining the rights and obligations of the parties and the role of the OIA in reviewing student complaints at [23]:

> "… (1) The OIA is amenable to judicial review for the correction of legal errors in its decision-making process.
>
> (2) That process involves conducting, in accordance with a broad discretion, a fair and impartial review of a student's unresolved complaint about the acts or omissions of an HEI and to do so on the basis of the materials before it, also drawing on its own experience of higher education, all with a view to making recommendations.
>
> (3) The function of the OIA is a public one of reviewing a 'qualifying complaint' made against an HEI and of determining 'the extent to which it was justified.'
>
> (4) For that purpose the OIA considers whether the relevant regulations have been properly applied by the HEI in question, whether it has followed its procedures and whether its decision was reasonable in all the circumstances.
>
> (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.
>
> (6) The review by the OIA does not have to follow any particular approach or to be in any particular form. The OIA has a broad discretion to be flexible in how it reviews the complaint and in deciding on the form, nature and extent of its investigation in the particular case.
>
> (7) The courts will be slow to interfere with review decisions and recommendations of the OIA when they are adequately reasoned. They are not required to be elaborately reasoned, the intention being that its operations should be more informal, more expeditious and less costly than legal proceedings in ordinary courts and tribunals"

Mummery LJ rejected the idea that the function of the OIA was to act as a surrogate of the county court. He stated:

> "32. … the practice and procedures for the review and resolution of a wide range of student complaints under the independent scheme operated free of charge and largely as an inquisitorial on a confidential basis by the OIA under the 2004 Act, is quite different from civil proceedings. Its informal inquisitorial methods, which are normally conducted on paper without cross examination and possibly leading to the making of recommendations in its Final Decision, mean that the outcome is not the product of a rigorous adversarial judicial process dealing with the proof of contested facts, with the application of

> the legislation to proven facts, with establishing legal rights and obligations and with awarding legal remedies, such as damages and declarations. ...
>
> 33. In my judgment, the courts are not entitled to impose on the informal complaints review procedure of the OIA a requirement that it should have to adjudicate on issues, such as whether or not there has been disability discrimination. Adjudication of that issue usually involves making decisions on contested questions of fact and law, which require the more stringent and structured procedures of civil litigation for their proper determination.
>
> …
>
> 37. If the approach advocated by [the Claimant] were correct, it is difficult to see what point there would be in having a scheme, which was established under the 2004 Act not as another court of law or tribunal, but as a more user friendly and affordable alternative procedure for airing students' complaints and grievances. The judicialisation of the OIA so that it has to perform the same fact-finding functions and to make the same decisions on liability as the ordinary courts and tribunals would not be in the interests of students generally.
>
> 38. Recent years have seen the growth of alternative processes of inexpensive dispute resolution: they are not intended to be fully judicial, or to be operated in accordance with civil law trial procedures, or to be dependent on what is fast becoming a luxury of legal advice and representation. 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."

13. This relationship as between the OIA and the courts was considered in *R (Peng Hu Shi v King's College London)* [2008] EWHC 857 (Admin). At [45] Mitting J stated:

> "Judicial review is a remedy of last not first resort. I wish to make it clear, both to this claimant and to others in a similar position to her, that complaints of this nature should not ordinarily be pursued by judicial review, but should be pursued where a sensible offer is made, as here, by accepting that offer or, in the absence of such an offer, by complaint to the Office of the Independent Adjudicator. That is the appropriate procedure for resolving complaints about allegedly unfair expulsion from a university."

The facts

14. The first respondent issued an application for judicial review on 21 November 2016 in respect of a decision of the first appellant dated 14 October 2016 not to re-open a decision to terminate his registration on Fitness to Practise ("FtP") grounds in light of

evidence provided some four months after the FtP hearing that he had been suffering from depression at the time of the conduct (cheating and subsequent additional dishonesty) because of which he had been found unfit to practise.

15. The first respondent's application for judicial review was upon the ground that the first appellant was wrong in law to conclude that it had no power to consider late psychiatric evidence submitted by the first respondent because:

> "The [first appellant] has a power to consider appeals lodged outside the primary time limit [set out in its rules];
>
> Any decision on an application of the rules was a matter for the Chair of Council [rather than the Head of Governance, Legal and Assurance Services];
>
> In order to comply with its duties under the Equality Act [specifically sections15, 19, 20 and 91, also the Public Sector Equality Duty] the [first appellant] needs to operate its rules to consider evidence of a disability, particularly where it was hard for that evidence to be obtained earlier in proceedings;
>
> The sanction imposed was disproportionate or not properly arrived at".

16. The second respondent, who had submitted his complaint to the OIA, issued an application for judicial review on 21 December 2016 in respect of a decision of the second appellant dated 13 October 2016 to dismiss an appeal against a decision to terminate his registration by reason of his failure to make appropriate academic progress. He sought a stay of seven months. His application for judicial review asserted that the second appellant had, by relying on a rule to the effect that students must complete a five-year medical degree within seven years:

    i) Offended the provisions of the Equality Act 2010, in particular section 149 of that Act (the Public Sector Equality Duty);

    ii) Failed to make adjustments to accommodate the second respondent's disabilities;

    iii) Breached the prohibition on direct disability discrimination;

    iv) Acted unreasonably, irrationally and unlawfully;

    v) Failed to give adequate reasons;

    vi) Breached the Consumer Rights Act 2015, section 62.

Discussion and conclusion

17. It is not the appellants' case that it would never be appropriate for a stay to be ordered in judicial review proceedings arising from a student's complaint against a HEI, paragraph 3(2)(c)(ii) of Schedule 2 of the 2004 Act expressly contemplates such an

event. The appellants' contentions are that the ruling of the judge, in particular the detailed guidance given in respect of timings and procedure to be followed, would:

i) Impel students to issue judicial review proceedings for fear of losing a legitimate means of protecting themselves and their rights. This could result in the instruction of lawyers, a step they would be unlikely to take in respect of complaints to the OIA;

ii) Deprive the HEI of its normal protection in judicial review proceedings, namely short time limits. The timings in the guidance are longer and incompatible with the timings in judicial review proceedings. The effect would be to place student claimants in a different position to other claimants in judicial review proceedings;

iii) Undermine the statutory complaints procedure by encouraging the students protectively to issue applications for judicial review simultaneously with complaints to the OIA.

In my view there is force in each of these points.

18. The OIA is, and is recognised by the courts as being, a suitable alternative remedy to judicial review. It is relatively swift and cost effective, one which students can invoke without recourse to instructing lawyers. It is rare for an OIA review to exceed twelve months, the current average review time is below one hundred days. It is a remedy which is amenable to judicial review. It does not provide rulings upon legal rights and obligations, however the OIA does scrutinise the behaviour of the HEI to a standard which would reflect that contained in judicial review proceedings. Moreover, the redress it can provide has a practical flexibility which judicial proceedings lack e.g. it can recommend the student's reinstatement on the course of study. In practice it is rare for an HEI not to follow the findings/recommendations of the OIA. Further, as the courts have made clear, judicial review is a remedy of last resort in circumstances where an alternative, albeit not identical, remedy exists.

19. The judge in providing guidance was doing so with the best of intentions in order to assist any student in the future. My concern is that such guidance provides a general rule which students would or could feel obliged to follow in respect of what, in reality, would be only a limited number of cases. Such detailed guidance could result in a rigidity of approach, meaning that a student would feel compelled to contemplate judicial review proceedings, which could involve consulting lawyers, when available to the student would be a relatively informal and swift means of practical resolution which the student could embark upon without the need for and cost of lawyers.

20. By the time the student makes the decision to raise a complaint against an HEI he/she will be in receipt of the reasons for the decision and the sanction complained of. It is likely that such reasoning will provide a good indication of whether the OIA will provide an effective means of review and resolution of the particular problem. The ambit and powers of the OIA are a matter of public record of which anyone embarking upon a complaint would or should be aware. This would provide guidance as to whether the OIA could provide appropriate review and resolution.

21. In the event that a student is uncertain as to the course to be taken, it would be open to the student to write to the HEI stating that they do not, at that time, wish to institute proceedings for judicial review but putting the HEI on notice of the detail of the complaint and indicating that it may be necessary to apply for judicial review in the event that the OIA procedure does not provide a suitable remedy. If in those circumstances the HEI later sought to take a time bar point in any subsequent judicial review proceedings the student's letter could be filed in the proceedings. The fact that the HEI were on notice of the detail of the complaint from the outset would be a significant factor of which the court could take account in exercising its discretion to extend time. This course would likely serve to protect the legal position of the student without recourse to separate legal proceedings when the complaint to the OIA is made. It would address the concerns raised by the appellants summarised at paragraph 17 above and those of the interested party.

22. For the reasons I have given, I would allow the appeal.

Lord Justice Irwin:

23. I agree.

Lord Justice Lindblom:

24. I also agree.