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CO/10710/2006

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

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 17th November 2008

B e f o r e:

MR DAVID HOLGATE QC
(Sitting as a Deputy High Court Judge)
Between:
THE QUEEN ON THE APPLICATION OF STEPHAN ARRATOON
Claimant

v

THE OFFICE OF THE INDEPENDENT ADJUDICATOR FOR HIGHER EDUCATION
Defendant

UNIVERSITY OF GREENWICH
Interested Party

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Clive Rawlings` (instructed by AP Law) appeared on behalf of the **Claimant**
Oliver Hyams (instructed by EJ Winter & Son) appeared on behalf of the **Defendant**
The Interested Party was not represented and did not attend

J U D G M E N T
(Approved by the court)

1. THE DEPUTY HIGH COURT JUDGE: This is an application for judicial review of a decision made by the Office of the Independent Adjudicator, received by the claimant on 26th September 2006, relating to a complaint made by Mr Arratoon in relation to the handling of an academic appeal made by him under rules promulgated by the University of Greenwich.

Background

2. The formal decision helpfully sets out the factual background:

> "1. Mr Stefan Arratoon registered with the University of Greenwich ('the HEI') to study PGCE Design Technology Education in September 2001.
>
> 2. As part of the course Mr Arratoon was to complete three school placements (A, B and C).
>
> 3. In October 2001, Mr Arratoon started Placement A at the Sydney Russell School in Dagenham.
>
> 4. On completion of this placement, Mr Arratoon went on to Placement B at Stoke Newington School in East London.
>
> 5. The duration of the placement was from February 2003 to April 2003. After this time Placement C was due to start (April to July 2003).
>
> 6. Mr Arratoon received a poor performance report for Placement B and was advised to repeat it in the same school so he continued to work there until July 2003.
>
> 7. On 17 September 2003 Mr Arratoon was informed that he had failed Placement B and would have to repeat Placement B for the third time before being able to commence Placement C.
>
> 8. On 6 October 2003, the HEI confirmed that Mr Arratoon had failed Placement B as well as two pieces of coursework. He also failed to submit any teaching plans.
>
> 9. On 3 November 2003 Mr Arratoon made a formal complaint to the HEI. The complaint was made on the grounds of institutional racism by the HEI and breach of duty of care by his mentor and tutors. He also questioned academic judgment regarding failing Placement B."

That matter is dealt with in paragraph 18 of the formal determination:

> "In November 2004, the formal complaint which Mr Arratoon made in November 2003 was considered by the Independent Chair of the University Student Complaints Committee. Mr Arratoon was informed that the HEI had considered his complaint and did not uphold any aspect

of it."

No part of that process falls within the ambit of the proceedings before this court.

3. Paragraph 10:

> "As part of the HEI's internal complaints procedure, the HEI met with Mr Arratoon on 8th March 2004. It was agreed that Mr Arratoon could make an academic appeal if he wished regarding Placement B on the basis of administrative or material error, even though the appeal was out of time."

4. It is clear from the minutes, or note, of that meeting on 8th March that Mr Arratoon was assisted by a representative of his solicitors, Ashok Patel & Co (now known as AP law), the solicitors who have been advising Mr Arratoon in connection with the proceedings in this court. It appears from the papers that they were first acting on his behalf at least as far back as February 2004.

5. The same minutes record, under the heading "Academic progression", the following:

> "'B' Placement was extended and failed.
>
> A further 'B' placement would be necessary before moving on to the 'C' placement."

6. At paragraph 6 the following appears:

> "Mr Arratoon was informed that disputing academic judgment was not part of the student entitlement but that disputing the grading on the basis of administrative/material error was. Students have the entitlement to appeal on this basis and it was agreed that, even though an appeal was out of time, Mr Arratoon could make use of this entitlement."

7. Reverting to the formal determination, paragraph 11 states:

> "On 15 March 2004 Christine Rose, Director of Student Affairs, wrote to Mr Arratoon and confirmed that it would be possible for him to start Placement B with the normal 8 week period but with a formal review after 5 weeks. If all was well at 5 weeks he could then move onto Placement C in the same school."

However, it appears that Mr Arratoon did not take up that offer. Instead, as is recorded by paragraph 12 of the determination, on 31st May 2004 he submitted an academic appeal under the regulations of the university regarding Placement B.

The Claimant's Academic Appeal

8. I have been taken through the relevant parts of his appeal documentation and I do accept that, unlike other documents that were submitted during the ensuing process, this was a document which he prepared by himself. He stated, in paragraph 1, that his

course tutor, Mr Webster, who had said at the time of his recommendation to the Progression and Award Board of the university that Mr Arratoon had failed the course, did not take into account all the relevant information which was available to him.

9. In paragraph 2 Mr Arratoon stated that:

> "The letter received by me from the Academic Board makes no mention of having to repeat teaching practice: it states that certain academic work has not been submitted and suggests that in order to pass the course, I must submit the outstanding written assignments. These assignments have now been submitted."

That latter comment made by him regarding "assignments" related to only one part of his course. It is not suggested that that was concerned with the problems he had experienced with regard to the placement part of the course.

10. The key part of the document (at page 88 of the bundle) indicates the nature of the appeal being made. Mr Arratoon stated:

> "In conclusion, I believe that this B/C Placement was
>
> 1. Inappropriate in the first instance
>
> 2. Not conducted in accordance to the regulations (ie. Regular feedback and guidance for improvement) 3. Feedback that was given, was contrary to the final grading
>
> 4. The Progress and Award Board made an assessment without a full and accurate profile being presented. 5. I was not informed in an appropriate manner that I needed to redo the placement(s)".

11. It is fairly said by Mr Arratoon's counsel, Mr Rawlings, that if one reads through this document, and I say this uncritically, one finds a mixture of points on the merits of the academic assessment which, it is accepted, do not fall to be dealt with in these proceedings. But, more pertinently, there were a series of complaints being made, under the heading "Material irregularities", of the procedure which had been followed in the assessments of Mr Arratoon.

Regulations for Academic Appeals

12. The relevant regulations that the court has been shown are said to have applied with effect from May 2003. Regulation 3 deals with an appeal against a decision of a Progression and Award Board and reads as follows:

> "An appeal by a student against the decision of a Progression and Award Board may only relate to grounds that there has been a material administrative error... or that some other material irregularity has occurred."

13. Regulation 6 gives a right of appeal against a decision of the Progression and Award Board to the Academic Appeals Committee. Regulation 6(b) defines the time within which ordinarily such an appeal should be submitted and the manner in which it should be submitted.

14. Regulation 7 sets out the composition of the Academic Appeals Committee. It is to include, amongst others, the Pro Vice-Chancellor with responsibility for academic planning, who is to chair the committee.

15. Regulation 8 deals with meetings of the Academic Appeals Committee:

> "(a) A meeting of the Academic Appeals Committee shall be convened by the Director of Student Affairs as soon as possible after the receipt of such an appeal as is mentioned in Regulation 6 hereof and, in any event, within 20 working days of such receipt or within such longer period of the Chair of the Academic Appeals Committee shall, for good cause, allow."
>
> (b) The student concerned shall have the right to be heard in person by the Academic Appeals Committee and to be accompanied by a friend who may speak on his or her behalf, provided that the friend has not been connected with the decision appealed against."

16. Regulation 9 deals with the records and notices of the proceedings of the Appeals Committee. Subparagraph (a) requires a secretary to keep a record of the decisions. Subparagraph (b) provides:

> "The Director of Student Affairs shall send by ordinary first class post to the student concerned in any appeal at his or her last known address normally within a working week after the determination of such appeal, notice of the decision of the Academic Appeals Committee."

<u>Proceedings up to the Complaint to the Adjudicator</u>

17. Having submitted the appeal to the university, a reply was sent to Mr Arratoon from the university on 21st June 2004, acknowledging receipt of the formal appeal form and accompanying correspondence. It then goes on to say:

> "I am writing to advise you that an internal investigation into the grounds of your appeal has begun. I will write to you again in the near future to advise you whether or not your appeal will be heard."

18. On 30th June 2004, under the heading "Academic Appeal", a letter was sent by Dionne Glennon, Head of Examinations and Standards, to the claimant, in which she says that, further to her letter of 21st June, she was writing to inform the claimant about the current status of his academic appeal. She referred to the meeting which had taken place on 8th March 2004 and then said this in the third paragraph:

> "One of the outcomes of this meeting was to allow you the entitlement to submit an academic appeal outside of the usual time frames identified

> within the University Academic Appeal Regulations. Please be advised that your academic progression and your current position on the programme shall be the only area investigated through the appeals route."

19. I take up the chronology from the formal decision issued by the adjudicator. Paragraphs 13 and 14 say as follows:

> "13. On 27 July 2004, Mr Arratoon received a letter from Mr Robert Young, Director of Learning and Quality, stating that the Progression and Award Board for PGCE Design Technology Education was unable to make a decision regarding his progression/award. I understand this letter arose from the annual consideration of students' results profiles by the Progression and Award Board and as such this letter was separate to the Academic Appeal process.
>
> 14. On 17 September 2004, Robert Young wrote to Mr Arratoon and informed him that the Progression and Award Board had agreed that Mr Arratoon may continue with his programme of study in the next session. Again, I understand this letter to be part of the annual consideration of students' results profiles by the Progression and Award Board and separate to the Academic Appeal process."

I interpose simply to say that that letter did not alter the previously stated position that Mr Arratoon's continuation of his studies would be dependent on his re-doing Placement B.

20. There then follows what became an important letter, dated 4th October 2004, written by Dionne Glennon and headed "Academic Appeal". This letter stated:

> "Further to my letter of 30th June I have been advised by the School of Education and Training that you have received conformation (sic) of your marks and associated tutor feedback for the two assignments...
>
> I also understand that you are required to undertake your 'C' placement, and associated assignments for ACAD0610 and ACAD0724."

21. The chronology is then taken up again in paragraph 16 of the determination. In October 2004, subsequent to the letter to which I have just referred, Mr Arratoon went to enroll but was unable to as the registry was unclear about his right to do so.

22. However, from paragraph 17 we see that on 26th October 2004 Mr Arratoon received an e-mail from James Golden confirming that he had still failed Placement B and would have to repeat this again and complete outstanding coursework before being able to progress to Placement C. That e-mail is set out at paragraph 37 of the determination.

23. In summary, the position was that Mr Arratoon claimed for some time that he had thought, from the letter of 4th October 2004, that he was able to proceed to Placement C without re-sitting or re-doing Placement B, despite the clear statements to the contrary which had previously been made by various officials of the university.

Nonetheless, he now accepts that by 26th October 2004 he had been disabused of that notion.

24. On 17th November 2004 a letter was sent by the independent chair dealing with the separate complaints procedure. In summary, the independent chair, Suzanna Stein, Head of Pastoral Support and Student Success and Deputy Director of Student Affairs, rejected the complaints as being unfounded. She said this:

> "You made an Academic Appeal but the Board confirmed their earlier decision that you could re-register and complete your course. What is required for a successful outcome has been made clear to you."

25. It is apparent from the university's regulations that an academic appeal could only be determined by the Appeals Committee. It was, after all, an appeal against a decision of the board. That, too, would have been obvious to the claimant's solicitors, Ashok Patel & Co, who wrote a letter to Mr Golden at the University of Greenwich on 12th January 2005. They specifically addressed the academic appeal in paragraphs 3-7 of the letter. Having recited parts of the chronology which they thought important, they said this in the fourth paragraph:

> "This letter of 4 October 2004 was a response to our client's Academic Appeal against the University's decision to fail him on his 'B' placement and associated work."

They made it perfectly plain on behalf of their client, and continued to do so throughout the appeal and complaint process, that they took the view that letter of 4th October 2004 was a binding decision on the part of the university. They claimed that it was a determination of the appeal process in favour of their client.

26. In their letter of 12th January 2005, having referred to the subsequent change of stance, as they saw it, on the part of the university, whereby it was stated that the claimant would have to re-do Placement B, the solicitors also said this:

> "Please identify the regulation that allows you as the Head Tutor to unilaterally change the decision of the Academic Appeal Committee and the Progression and Award Board."

So at that stage, rightly or wrongly, they and the claimant proceeded on the basis that the appeal had been determined by the committee.

27. I am bound to say that no particular interest was manifested by the solicitors or the claimant in the formalities of that process, or indeed in obtaining any reasoned decision on the part of the committee. The only explanation that can be discerned from the papers is that they took the view that the matter had been effectively determined by the external communication from the university in the form of the letter of 4th October 2004. That is why they questioned the entitlement of officials at the university to resile from that decision in subsequent communications.

28. It is also pertinent to note that on the second page of the letter of 12th January 2005 the solicitors cited regulations 25 and 28 of the academic appeals regulations of the university. As was accepted in argument today on behalf of the claimant, they were maintaining a legitimate expectation argument at that early stage.

29. The complaint to the adjudicator was made in May 2005. It was a document which is set out as if it was being submitted by the claimant in person, but it is accepted that at this stage it was in fact the result of a joint effort involving the solicitors. I will turn to the terms of that document in just a moment, but before doing so I should briefly summarise the statutory framework and the rules under which the defendant was to operate.

Higher Education Act 2004

30. The framework is set out in Part 2 of the Higher Education Act 2004. Section 20 abrogated the visitorial jurisdiction which had previously existed for certain academic institutions of higher education. Instead, Part 2 set up, for all qualifying higher education institutions, a new system whereby complaints could be referred to an independent adjudicator.

31. Section 11 defines the qualifying institutions falling within the ambit of Part 2. Section 12 defines what is known as a "qualifying complaint":

> "(1)In this Part 'qualifying complaint' means, subject to subsection (2), a complaint about an act or omission of a qualifying institution which is made by a person—
>
> (a) as a student or former student at that institution...
>
> (2) A complaint which falls within subsection (1) is not a qualifying complaint to the extent that it relates to matters of academic judgment."

32. Section 13 deals with the designation of operators of student complaints schemes. Subsection (1) enables the Secretary of State to designate operators for that purpose. Under subsection (3), it is provided that the Secretary of State may not designate a body under subsection (1) unless he is satisfied that the body meets a number of conditions, including all those set out in Schedule 1 and, secondly, that it provides a scheme for the review of "Qualifying complaints" that meets all of the conditions set out in Schedule 2.

33. Section 14 imposes duties on the designated operator requiring it to comply with the duties set out in Schedule 3.

34. Section 15(1) imposes a duty on qualifying institutions in the following terms:

> "The governing body of every qualifying institution in England and Wales must comply with any obligation imposed upon it by a scheme for the review of qualifying complaints that is provided by the designated operator."

Schedule 2, enacted pursuant to section 13, sets out a number of conditions A to H which are to be met by a student complaints scheme. Paragraph 3 deals with the referral of qualifying complaints. It sets out what is referred to as a "condition B". Subparagraph (2) says:

> "A scheme does not fail to meet condition B only because it contains some or all of the following...
>
> (b) provision that, where a qualifying complaint is made about a qualifying institution which provides an internal procedure for the review of complaints, the complaint is not to be referred under the scheme until the complainant has exhausted the internal procedure..."

35. Paragraph 6 deals with the recommendations of reviewers where a complaint is found to be justified. It reads:

> "Condition E is that the scheme provides that, in a case where a reviewer decides that a qualifying complaint is to any extent justified, the reviewer—
>
> (a) may recommend the governing body of the institution to which the complaint relates—
>
> (i) to do anything specified in the recommendation (which may include the payment of sums so specified), and
>
> (ii) to refrain from doing anything so specified, but
>
> (b) may not require any person to do, or refrain from doing, anything."

One can therefore readily see why paragraph 33 of the explanatory memorandum accompanying the statute states that the reviewer of student complaints under the scheme may make recommendations to an institution but they are non-binding.

36. Paragraph 7 sets out condition F for qualifying schemes in these terms: it requires a reviewer to notify the parties to a qualifying complaint in writing of:

> "(a) the decision the reviewer has made
>
> (b) the reviewer's reasons for making that decision, and
>
> (c) if the reviewer makes a recommendation—
>
> (i) that recommendation, and
>
> (ii) the reviewer's reasons for making that recommendation."

37. The relevant rules which have been made by the OIA are the rules which were applicable at the time the complaint was made in 2005 and therefore do not include the amended rules which came into effect for complaints made on or after 1st September 2006. No criticism is made about the content of these rules or that they fail to comply with the requirements of the legislation.

The OIA Rules for Student Complaints

38. Rule 1 sets out the purpose of the scheme, namely "the review of unresolved complaints by students about acts and omissions of HEIs and the making of recommendations". It is therefore apparent, both from the legislation to which I have referred, and also that particular rule, that the ambit of an investigation which is conducted by the OIA is, in broad terms, defined by the complaint, or the unresolved complaint, which is made by a student. I do accept the submission which has been made on behalf of the claimant that this is not to be looked at in an excessively legalistic way or as if one were dealing with a set of pleadings. Instead, one should look at the substance of the matter in order to see what it was that a student was asking to be investigated. Indeed, I would imagine that the OIA would need to consider that aspect in any event, in order to satisfy themselves of the extent to which a complaint properly falls within the ambit of the scheme. Paragraph 3, for example, identified matters which are not covered by the scheme.

39. Paragraph 4.1 provides:

> "A complainant must have first exhausted the internal complaints procedures of the HEI complained about before bringing a complaint to the OIA. In exceptional circumstances a Reviewer may accept a complaint for review even if the internal complaints procedures of the HEI have not been exhausted if he or she considers it appropriate to do so."

40. Paragraph 7.3 provides:

> "In deciding whether a complaint is justified the Reviewer may consider whether or not the HEI properly applied its regulations and followed its procedures, and whether or not a decision made by the HEI was reasonable in all the circumstances."

I pause there to note that by the use of the word "may" a discretion is conferred on the adjudicator as to the extent to which such matters should be pursued in the circumstances of a particular case.

41. 7.4 provides that the reviewer may, where the complaint is justified in whole or in part, make recommendations that the HEI should do something or refrain from doing something. Those recommendations may include, but are not limited to, the following:

> 7.4.1 that the complaint should be referred back to the HEI for a fresh determination because its internal procedures have not been properly followed in a material way..."

The Complaint to the OIA

42. It is then necessary to consider the substance of the points which were being made by or on behalf of Mr Arratoon insofar as they are now relevant to the proceedings before this court. The document was submitted to the adjudicator in May 2005.

43. At paragraph 23 of the complaint, reliance was placed once again upon the letter of 4th October 2004 and submissions were made as to the consequences of that letter. In particular, at paragraph 26, Mr Arratoon reiterated that he had a legitimate expectation, on receiving the letter of 4th October 2004, that his academic appeal had been successful and that he could continue his course.

44. The academic appeal regulations were dealt with in section D of the document, between paragraphs 33 and 36. The submissions reiterated the substance of the letter from Ashok Patel & Co of 12th January 2005, in particular the second page of that letter. They continued to place reliance upon the university's letter of 4th October 2004, and at paragraph 36 said this:

> "It therefore seems clear that the University's regulations stated that the decision of the director of student affairs is the final decision. The final decision clearly states that I must re-enrol at the University to undertake my C placement associated essays. It does not state that I should complete my B placement. It clearly states that the Progression and Award board have decided that I can continue on to my third year."

Once again, one can perceive an ambiguity on the part of not just the university, but also the claimant, as to whether the matter had been determined by the board or by the Appeals Committee.

45. It does rather appear to me that there was not sufficiently careful attention being paid to the terms of the regulations which, in my judgment, ought to have been at the forefront of the minds of the legal advisers pursuing a complaint of this nature to an independent adjudicator.

46. Lastly, from the document, it is important to note the conclusions and the relief sought from the adjudicator. Paragraph 92 summarised the basis upon which Mr Arratoon and his advisers said that he had been treated unfairly, including a failure to respect the legitimate expectation, based on the 4th October 2004 letter. At paragraph 93 he requested:

> "(a) A full apology
>
> (b) To be allowed to immediately move on to my 'C' placement
>
> (c) Compensation for my lost time."

It is plain from the context in which that paragraph was drafted, that the claimant and his advisers were proceeding on the basis that, because of a legitimate expectation, he believed that he was entitled to move directly to the C placement and that there was no

need for any further appeal process to be conducted. So far as he was concerned, it had been concluded, and in his favour. However, during the course of oral argument this morning, in this court, it is accepted on behalf of the claimant, and in my view rightly, that at this stage, assuming that any relief were to be granted to the claimant in these proceedings, he would not be able to proceed directly to a C placement without the university's stance, indicated from 26th October 2004 onwards, being altered through a successful outcome to that appeal process.

47. On 26th May 2005 the OIA wrote to AP Law, the renamed solicitors acting on behalf of the claimant, and set out their understanding as to the basis for the complaint and asked for certain information. On 2nd June 2005 AP Law responded. In particular, they asked that the adjudicator should add the following ground of complaint:

> "(a) Mr Arratoon had a legitimate expectation that he would be able to move onto a 'C' placement following the result of his academic appeal stated in the letter of 4 October 2005..."

I pause to note once again that Mr Arratoon and his advisers thought that that letter was evidence of the conclusion of the university's appeal process, despite the fact that in at least some of the material emanating from Mr Arratoon (for example, the complaint to the adjudicator) the view was expressed that the decision had been taken by the "board".

48. On 25th July 2005 the OIA wrote once again to AP Law, enclosing submissions which had been received from the University of Greenwich. They were given in a letter dated 12th July 2005 and were addressed to the person then acting as the case handler for the complaint, Mr Matthew Such. On page 3 of the letter, having stated that the university did not accept that Mr Arratoon was entitled, in part of the complaint, to question academic judgment regarding the B placement, they added as follows:

> "The University has exhausted its procedures regarding the complaint but has yet to hold an Appeals Committee hearing, which Mr Arratoon is entitled to. The only areas that would be considered by the committee would be those surrounding his academic progression and whether material irregularity had occurred in the grade awarded for the 'B' placement. Internal procedures relating to the appeal would technically then be exhausted."

49. On any view, that must have been a startling revelation to Mr Arratoon and his advisers. Contrary to their previously held belief and assertion that the appeal had been determined, it was now made crystal clear on behalf of the university, and has not been challenged, firstly that the Appeals Committee hearing had not taken place; secondly, that Mr Arratoon was entitled to such a hearing; and, thirdly, it was made clear that the internal procedures relating to the appeal would not be exhausted until that appeal process had been completed, that view being compatible with the statutory scheme which I have already summarised.

50. One might have thought that somebody who was anxious, or even interested, to take part in an appeal process, whether by way of oral hearing or written representations, would have responded positively to that opportunity. One can well understand a sense of frustration on the part of the claimant that that had not been made clear before, but it is of importance to note the way in which Mr Arratoon and his advisers did react.

51. I should just interpose a reference to a question which was raised in the OIA's letter of 25th July 2005. The second question they asked was:

> "Confirmation that Mr Arratoon's alleged expectation that he would be able to move to a 'C' placement lasted 22 days. It is claimed Mr Arratoon's expectation was based on the letter from Dionne Glennon dated 4 October 2004 and continued until he received the email from James Golden dated 26 October 2004."

That question was answered at paragraph 13 of a response document sent by AP Law on behalf of the claimant dated 20th August 2005, in which it was confirmed that the legitimate expectation did last 22 days. There was no suggestion in that paragraph that the legitimate expectation was something which could not be resiled from or modified in the way in which the university had done. Instead it was accepted that that expectation, if it ever had arisen, had had a duration of only 22 days.

52. Insofar as one can see any reaction to the university's acceptance that the entitlement to an appeal hearing still subsisted, it is contained within paragraphs 24-29 of the same response document. In paragraph 24 it is stated:

> "The University have stated that I am entitled to an Academic Appeals Committee Hearing."

At paragraph 28 Mr Arratoon expressed surprise that he was now being offered an Academic Appeals Committee hearing and at paragraph 29 he said that it was unclear why that offer had not been made at an earlier stage. There was no indication given by him that he wished to take up an entitlement to an appeal hearing before the Assessment Committee.

53. On 15th March 2006 the OIA wrote to AP Law, pointing out that Mr Such, who had been dealing with the matter, had left the office and that the matter would be re-allocated to a new case handler. On 26th April 2006 the new case handler wrote to AP Law. In the third paragraph she said:

> "However, I have come across a discrepancy in the case that needs to be clarified: In Mr Arratoons response to the university's representations (received at the OIA in August 2005) he states that the 'University is now offering an Academic Appeals Committee Hearing'
>
> Can you please let me know if Mr Arratoon attended such a hearing and what the outcome was, or, if relevant, why Mr Arratoon chose not [to] pursue this further. This has a bearing on the decision as I can not make one, unless I know that the university has exhausted all its procedures."

That last sentence was a clear reference to the statutory framework under which the adjudicator operates and the ordinary requirement that internal procedures should be exhausted before a complaint is handled by the adjudicator.

54. The import of the questions was obvious. The response given by AP Law on 27th April 2006 was as follows:

> "We refer you to paragraphs 33 to 36 of our client's appeal to the OIA. It is clear that the University's letter dated 4 October 2004 at page 83 of our client's appeal was the Academic Appeal Committee's final decision."

I pause there to simply observe that, even at this stage, once again the solicitors for the claimant were relying upon the legitimate expectation argument that they had previously advanced and they were still maintaining that the Academic Appeals Committee had reached the decision on 4th October 2004.

55. I take up the letter again:

> "Section 28 of the Academic Appeal Regulations stated there shall be no further appeal. Therefore, it is clear that this was the final decision and there are no other internal procedures that can be taken in this matter. It is clear that the University's final decision was to allow our client to reenrol at the university to undertake a C placement and associated essays. In our response to the University's representations we were simply expressing our surprise that at page 3 of the university's response to our client's appeal they have stated that our client is entitled to an Academic Appeals Committee hearing.
>
> We confirm that our client has not attended such a hearing but the outcome of the Academic Appeals Committee was clearly communicated to our client on the 4 October 2004. It was clear from the University's regulations that this was the final decision of the University and they had clearly exhausted all their procedures. Further, in our correspondence with Mr James Golden on the 24 October 2004 our client was not advised by the University that he should appeal against the decision and he could have an academic appeal hearing. In fact the client was told he would have to re register at the University and then see his future (sic) to discuss issues before he could rejoin the University. It is therefore clear that even the University took the view that the client had completed the internal procedures."

56. In May 2006 the Office of the Independent Adjudicator issued a draft determination so as to enable the parties to comment thereon. A response was supplied on 5th June 2006 by AP Law, acting on behalf of the claimant. In paragraph 15 they expressed their extreme concern about certain aspects of the draft determination. They relied once again on the letter of 4th October 2004 and suggested the OIA had failed to properly address that document. At paragraph 19 they say:

> "Once again, on the balance of probabilities, it is fair to say that our client would have had a legitimate expectation that he could move on to his C placement and that his academic appeal had been accepted."

57. Then in section D of the document, under the heading "Academic appeal regulations", between paragraphs 21 and 24, the solicitors once again relied upon paragraphs 33-36 of their client's appeal document submitted in May 2005, which was, as is accepted on behalf of the claimant in this court, "a reiteration of the legitimate expectation argument".

58. The legitimate expectation matter was dealt with by the adjudicator in the final determination issued in September 2006 between paragraphs 33 and 44. In summary, it was found by the adjudicator, not surprisingly given the concession which had already been made on behalf of the claimant, that the duration of any expectation had been limited to 22 days. For that reason, in paragraph 46 the adjudicator said this:

> "For these reasons I find this aspect of the complaint to be justified in part and I recommend that the HEI offer Mr Arratoon the sum of £75 in compensation for failing to provide clear information about the outcome of his appeal and for misleading him into false expectations for a short period."

59. It is clear to me that the words referring to his having been misled into to false expectations relates unambiguously to the conclusions on the legitimate expectation argument in paragraphs 43 and 44. There has been some discussion during argument today about the words in line 3 of paragraph 46, which relate to a failure to provide clear information about the outcome of his appeal, implying that this might have related to the revelation of the university in its correspondence on 12th July 2005 that the Appeal Assessment Committee hearing had not taken place, but, read in context, it seems to me that that is a reference back to the first part of paragraph 44: the language is almost identical and the context clearly relates to the rejection of the legitimate expectation argument.

60. The upshot of all of that is that the legitimate expectation argument is not pursued in this court and no criticism is made of those parts of the determination which dealt with that part of the claim and upheld it only to a limited extent. Notwithstanding that, it is worth noting that the pre-action protocol letter which was sent by the solicitors on behalf of the claimant on 26th November 2006, following the formal determination, still persisted in arguing a legitimate expectation point. It was only in the claim form for judicial review settled by counsel, which was lodged with the court, that a different approach was taken for the first time in Ground 1, which in paragraph 37(i) reads as follows:

> "(i) the OIA has failed to properly consider whether the HEI in this case has applied its Academic Appeal Regulations properly and followed its own procedures correctly, and in doing so the OIA failed to make a proper finding that the HEI had failed to complete the academic Appeals procedure properly or at all and the OIA ought to have recommended that

Mr Arratoon's Academic Appeal be heard and adjudicated upon by the HEI..."

61. A second ground was pleaded, but when the matter came before His Honour Judge Gilbart QC on paper, he granted permission for these proceedings to go forward purely on the basis of Ground 1. There was no further application to renew permission, seeking to widen the grounds, and it is accepted today that Ground 2 cannot be pursued.

62. In the skeleton arguments which have been helpfully supplied by both counsel, and for which I am grateful, two further grounds were advanced on behalf of the claimant, the first of which, it is accepted by Mr Rawlings on behalf of the claimant, cannot be pursued. The second additional ground seeks to challenge the decision on compensation by the adjudicator, and he very fairly and properly accepts that the merits of that ground is dependent upon the outcome of Ground 1.

63. For completeness, I should record that the University of Greenwich was served with the papers as an interested party. Apart from serving grounds of opposition in summary form on their own behalf, they have taken no active part in these proceedings.

64. Before dealing with the grounds which have been argued today, I should briefly refer to a decision of the Court of Appeal in **R (Siborurema) v Office of the Independent Adjudicator** [2007] EWCA Civ 1365. That was a hearing which was mainly concerned with the question of whether the OIA is amenable to judicial review. Arguments were advanced on the adjudicator's behalf to the effect that it was not, but the Court of Appeal took the contrary view. It was partly because of the need for that issue to be resolved that the present proceedings were held in abeyance for a period of time to await the outcome of that litigation.

65. The essential principles which can be derived from that case are not in dispute and can be seen from the judgment, first of all, of Pill LJ, in particular between paragraphs 51 and 56, in the judgment of Moore-Bick LJ between paragraphs 69 and 70, and in the judgment of Richards LJ at paragraphs 74, 75 and 79.

66. It is common ground in these proceedings that a considerable degree of discretion is afforded to the adjudicator as to how to handle a particular complaint in the light of the nature of that particular complaint and the matters which are raised. Secondly, there is an appropriate degree of deference to the expertise of the OIA in handling such matters. Thirdly, the court did accept that the 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.

67. I pause there to note that it is the essence of Mr Rawling's submissions that, on the facts of this particular case, this was something which the adjudicator was not only entitled to do, but obligated to do. In my judgment, that must fall to be considered in the context of the nature of the complaint that was being pursued.

68. Fourthly, it is to be seen from paragraph 54 of Pill LJ's judgment that the OIA is empowered to conduct its own investigation into the facts underlying the complaint. That is primarily a matter for the discretion of the OIA.

69. Fifthly, at paragraph 79 it was recognised by the Court of Appeal that in that particular case the decision letters of the OIA had not been well expressed but, in accordance with established principles concerning decisions of this nature, Richards LJ stated that the decision should be read with "a degree of benevolence".

70. The grounds for quashing really fall into three parts. The first part challenges the last two sentences of paragraph 44 of the determination. To put the matter into context, I should read the relevant text at paragraphs 44 and 45:

> "44... It is unclear from the information provided whether the appeal process as set out in the Academic Appeals Regulations took place or was completed. I note that Mr Arratoon did not attend an appeal hearing and the OIA sought to clarify with his solicitors whether he wishes to attend such a hearing. By letter of 27 April 2006 his solicitors indicated that they believed the outcome of the Appeals Committee was communicated to their client on 4 October 2004 and this is the final decision. Their letter suggests that Mr Arratoon does not wish to pursue an appeal hearing. It appears therefore that the appeals procedure has not been completed but that Mr Arratoon does not wish to have a hearing.
>
> 45. I note that Regulation 6.4.7 of the Academic Appeals Regulations effective from April 2004..."

I interpose there to say that I have not seen the version effective from April 2004; the version I have been shown was effective from April 2003. I assume that nothing turns on any difference between the two sets of rules.

71. In any event the decision letter goes on to say that that regulation states:

> "... that an appellant should be notified in writing of the decision of the Academic Appeals Committee as soon as reasonably practical following the appeal hearing. In this case, there was no appeal hearing. There was a meeting in March 2004, but this preceded the appeal. The regulations setting out the appeals procedure require students to be informed about the consideration of their appeal. The information provided to me indicates that Mr Arratoon was not informed clearly in writing of what had happened to his appeal, nor whether an actual decision had been taken by the Appeals Committee, nor the reasons for such decision."

72. The first part of the challenge focuses on the last two sentences of paragraph 44 and the inference drawn by the adjudicator that Mr Arratoon did not wish to pursue an appeal hearing and that he had not wished to have a hearing. It is said that this was an improper inference to draw on the material which was before the adjudicator.

73. It is common ground in these proceedings that the challenge to the inference which was drawn in paragraph 44 depends on showing that the adjudicator's reasoning was perverse or irrational. It is well understood that when presented with a given set of evidence, different decision-makers may properly reach different conclusions. The question is whether or not that particular conclusion goes beyond the range of what could reasonably be inferred, or rationally inferred.

74. I have no hesitation, I am afraid, in rejecting that submission. It seems to me that it lay well within the range of judgments that could be come to on the facts of this particular case. The context in which the university's letter of 12th July 2005 was put before the claimant's solicitors for comment was abundantly clear. Amongst other things, it was being made clear to the claimant that an appeal entitlement still remained in existence. It was also made clear that the approach taken by the claimant could well determine whether or not it was appropriate for the adjudicator to deal with the matter, because it would have been inappropriate, in ordinary circumstances, for the adjudicator to deal with a matter where the internal procedures had not yet been completed.

75. The reaction of the claimant to those issues was to reassert that the procedure had indeed been completed. That was by virtue of the letter of 4th October 2004. In those circumstances, it was obviously incumbent upon the adjudicator to deal with the issue as to whether there was a legitimate expectation, based upon that decision. That was the primary case that was being put forward by the claimant. However, although there was a clear opportunity to advance an alternative case or to abandon reliance upon legitimate expectation as the primary basis for this claim, the claimant chose not to do so and I do not see how the inference that was drawn by the adjudicator can be impugned.

76. The second part of the challenge is that it is said that there was a failure by the adjudicator to make a recommendation. It was not clear, until the matter was clarified in submissions, what the claimant was really seeking. It is said that the adjudicator should have gone further in the final determination and should have recommended to the university that the incomplete appeal should be completed.

77. I have to decide whether the adjudicator has gone wrong in law, whether an error of law has been committed, and I have to do so in the context of the scheme under which the adjudicator was operating, and, in particular, the complaint which the adjudicator was dealing with. I remind myself that the claimant, in this context, unequivocally sought relief from the adjudicator, as expressed in paragraph 93 of the complaint to the adjudicator in May 2005, in which, in particular, he asked "To be allowed to immediately move on to my 'C' placement".

78. There is no doubt from the argument in this court, that that request was based entirely upon the letter of 4th October 2004. Equally, there is no doubt that that request was incompatible with any alternative request, which was never put forward on behalf of the claimant, that an appeal process should instead be completed. His case was always that it had been completed by the time of the letter of 4th October 2004. The position on the part of the claimant was not merely that he did not take up the offer of a hearing; he went further than that and continued to maintain that the appeal process, with or

without a hearing, had been completed. Bearing in mind that this was somebody with the benefit of legal representation, it is significant that no alternative claim for relief from the adjudicator was ever put forward. In those circumstances, I do not see why the adjudicator is to be criticised in this court for having failed, as it is said, to have made a recommendation that the appeal process be followed or that the claimant be offered a hearing before the committee.

79. I accept the submission that has been made on behalf of the adjudicator that, as explained in the affidavit of Baroness Deech, part of the ethos of the OIA's scheme was to offer a mediation service, a service which was intended to be, as it was then thought, less legalistic than might otherwise appertain in other jurisdictions. What has happened in this decision is that the adjudicator has, in an attempt no doubt to be helpful, gone further than was strictly speaking necessary in order to resolve the issue before her, but I do not see any legal basis for this court to quash the decision of the adjudicator in the circumstances I have described.

80. In this case the claimant showed no interest in taking up the entitlement to a hearing, accepted by the university in July 2005, at that stage, and he showed no interest in obtaining a decision on that appeal, with or without a hearing, if that decision had not already been reached by the time of the letter of 4th October 2004.

81. The third part of the challenge relates to the adequacy of the reasons, which were expressed in the formal determination in paragraph 62, where it is said:

> "I find that the decision of the Academic Appeals Committee regarding the requirement that Mr Arratoon re-take Placement B before completing Placement C, was not communicated to him clearly and this gave Mr Arratoon a false expectation for 22 days."

It is said that this reveals an inconsistency on the part of the adjudicator and therefore the reasoning was flawed (alternatively, inadequately expressed), because the reference there to a decision of the Academic Appeals Committee is incorrect, given the earlier statements on behalf of the university and also in the adjudicator's decision that the Academic Appeals Committee had not met and had not issued a decision.

82. It is accepted on behalf of the adjudicator, that that sentence is unfortunately expressed, but nonetheless I should in this instance construe that sentence with a degree of benevolence referred to by Richards LJ in the **Siborurema** case. I agree with that submission. I am influenced to some extent by the confusion of language or labelling which can be observed in documentation emanating both from the university and from the claimant. I have already referred to the letter of the independent chairman of 17th November 2004, in which she stated that an academic appeal had been made but the "board confirmed their earlier decision that you could re-register and complete your course". The response of Ashok Patel, of 12th January 2005, to that letter asked the university to identify the powers which would enable an official, in particular the head tutor, to unilaterally change the decision of the Academic Appeals Committee and the Progression and Award Board. It does not seem to me, having looked at the papers carefully, that the claimant or his advisers had carefully distinguished, before

submissions were formulated on his behalf by counsel, the difference between the two bodies: the Academic Appeals Committee, on the one hand, and the board on the other hand. It seems to me, on a fair reading of paragraph 62, that it is perfectly proper to read the reference to the Academic Appeals Committee as a reference to the claimant's case as advanced in his complaint to the adjudicator, which had asserted that the Committee had reached a decision. It is an unfortunate choice of words but, read in the context of the decision as a whole, it is clear from the earlier paragraphs as to what had been found by the adjudicator and I do not think it would be right to treat part of that single sentence in a summarising paragraph as justifying the quashing of the decision.

83. Accordingly, I dismiss the application for judicial review.

84. I should just add that there has been argument as to whether alternative remedies would be available to the claimant against the university directly. I have not heard submissions from the university on this and there has been some brief discussion as to the position of a claimant in circumstances such as this in comparing the availability of private law remedies, as opposed to public law remedies, and the appropriate time limits. It would be quite wrong for me to say anything about this, given that submissions have not been made by the university, but I will say this: the rejection by this court of the claim for judicial review against the adjudicator's decision in no way affects any obligations which the university holds towards the claimant under other legal principles and any remedies which may be available.

85. This case has caused me some concern because of the unfortunate manner in which the university discovered, at some stage in the middle of 2005, that it had not completed the appeals process. I go no further than to express the hope that the university will consider the matter carefully in the light of what was said on their behalf in the letter of 12th July 2005.

Thank you both. Is there anything more that I need to do?

86. MR RAWLINGS: My Lord, the claimant is the subject of a Legal Services Commission funding certificate so I would ask for a detailed assessment of the claimant's costs.

87. THE DEPUTY HIGH COURT JUDGE: Yes, indeed.

88. MR HYAMS: I ask for the usual order in relation to costs against a legally aided or publicly funded claimant.

89. THE DEPUTY HIGH COURT JUDGE: Yes.

90. MR HYAMS: I never can quite remember the wording.

91. THE DEPUTY HIGH COURT JUDGE: I was going to look to you for help on that.

92. MR HYAMS: Can I say, my Lord, if there is any difficulty about it, it is dealt with by e-mail correspondence within the next day or two, but there is some standard wording.

93. THE DEPUTY HIGH COURT JUDGE: I wonder where the standard wording is already available.

94. MR HYAMS: I am hoping it is. In the old days one got an order for costs, not to be enforced without the leave of the court. Now there is a requirement for assessment.

95. THE DEPUTY HIGH COURT JUDGE: That cannot be dealt with.

96. MR HYAMS: Quite, but during the course of that assessment there is an opportunity to say why costs should not be enforced against the claimant, I believe. Is that not right?

97. THE DEPUTY HIGH COURT JUDGE: Can I just ask the associate? **(Pause).** I think you may be assisted shortly. I do think this ought to be dealt with very quickly so there is no delay in drawing up the order.

98. MR RAWLINGS: I agree. We can draw the order up together.

99. THE DEPUTY HIGH COURT JUDGE: If it can be done today, I would be very grateful. If not, could it be done within the next 2 days max?

100. MR HYAMS: It will be done today at the very latest, my Lord.

101. THE DEPUTY HIGH COURT JUDGE: Thank you both very much.