Neutral Citation Number: [2011] EWCA Civ 1614

Case No: C1/2011/0511

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR DAVID HOLGATE QC (Sitting as a Deputy High Court Judge)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

Before :

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LADY JUSTICE BLACK
and
THE RIGHT HONOURABLE SIR DAVID KEENE

- -

Between :

THE QUEEN ON THE APPLICATION OF SANDHAR	**Appellant**
- and -	
OFFICE OF THE INDEPENDENT ADJUDICATOR FOR HIGHER EDUCATION & ANR	**Respondents**

- -
- -

Mr Michael Beloff QC & Ms G White (instructed by **Balsara & Co Solicitors**) for the **Appellant**
Mr Sam Grodzinski QC (instructed by **E J Winter & Son LLP & Mills & Reeve LLP**) for the **Respondents**

Hearing dates: 22nd November 2011

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Approved Judgment

Lord Justice Longmore:

Introduction

1. This appeal (pursued with the permission of Arden LJ) from previous refusals of permission to apply for judicial review raises the question whether the Office of the Independent Adjudicator for Higher Education ("OIA") is appropriately independent for the purpose of dealing with students' complaints in relation to their examination results. It also raises the question whether, if it is independent, the OIA should in the present case have adopted an emergency procedure and thus enabled Mr Sandhar, a final year medical student, to take up junior doctor positions which he had been offered or should now be required to proceed to a "full merits" oral hearing.

2. The question of OIA's independence is a question which is logically prior to any question relating to the procedures adopted (or not adopted) by the OIA. It is difficult to see how Mr Sandhar could benefit from any decision in his favour since, if this court decides that the OIA is not an independent body, any decision made to date will have to be set aside and Mr Sandhar will have no redress save for a singularly unpromising application (now in any event well out of time) for permission to review the decision of the university examiners not to award him a degree. Mr Beloff QC explained on his behalf that, since it could not be taken for granted that his other complaints about the procedures of the OIA would succeed, it would be some consolation for Mr Sandhar if the court decided that the OIA was not an independent tribunal on the basis that some other adjudicative procedure would have to be put in place which would then be available for other students, even if it would be too late to be of any benefit to him.

3. I must confess to some doubts whether that is a proper basis for an application for judicial review but I have swallowed those doubts on the basis (1) that the question of the OIA's independence is not a question which will go away (it has already been the subject of an obiter pronouncement by Mr C.M.G. Ockelton sitting as a deputy High Court Judge of the Administrative Court in Budd v OIA [2010] EWHC 1056 (Admin)) and (2) that, if an aggrieved student cannot take the point, it is difficult to see who can.

4. In these circumstances the court has decided that all aspects of the case are sufficiently substantial to warrant the grant of permission to apply for judicial review and we now proceed to decide the substantive judicial review application. We are acutely aware that in R (Siborurema) v OIA [2007] EWCA Civ 1365, which established that the OIA was in law amenable to judicial review, both Moore-Bick and Richards LJJ envisaged (paras 70 and 74) few cases could be expected to get through the permission filter, let alone succeed. But this case, like that case, does raise issues of general principle.

5. It is necessary, however, first to set out the factual background.

Facts

6. In September 2002 Mr Sandhar began a MBChB degree at Manchester University and successfully completed year 1 for the academic year 2002 – 3. In year 2 he failed Semesters 3 and 4 and failed re-sits in respect of those Semesters. In the academic

year 2004-5, he took year 2 again and passed Semesters 3 and 4. In the academic years 2005-6 and 2006-7 (years 3 and 4) he progressed normally passing the requirements for those years.

7. In June 2008 Mr Sandhar failed two elements of the Final Examinations for year 5. He was referred to the University's "Progress Committee". Before the Committee met, Mr Sandhar appealed against his examination results on the basis of mitigating circumstances, namely the death of his uncle and his mother having to travel to India leaving Mr Sandhar to look after his grandparents. He contended that he should be deemed to have past his Final Examinations. The Progress Committee decided that he could not be deemed to have qualified but that he should be allowed to re-sit the final exams in October 2008, or preferably May 2009 after repeating year 5.

8. On 28th July 2008 the University Faculty told Mr Sandhar that his appeal against his examination result had been dismissed, but that the opportunity to re-sit in October 2008 or May 2009 still stood. Mr Sandhar appealed this decision to the Registrar of the University, but this appeal was also dismissed.

9. In May 2009 he re-sat the two Final papers he had failed previously and failed both papers again. He was informed that he had been excluded from the MBChB programme as a consequence.

10. On 25th June 2009 he appealed against the decision to exclude him, on grounds of mitigating circumstances namely, anxiety caused by the previous year's appeal and the illness and then death of his grandmother; and on grounds of alleged procedural irregularities in the assessment process.

11. On 7th July 2009 the University Faculty allowed Mr Sandhar's appeal in part; it revoked his exclusion from the degree programme and confirmed that he was entitled to repeat year 5 (for a second time) and re-sit all elements of the Final Examinations in May 2010. Mr Sandhar has not availed himself to this offer and has never retaken year 5 or re-sat his Final Examinations.

12. On 8th August 2009 he appealed the Faculty's decision to the Registrar, claiming that he should be awarded the MBChB degree without retaking year 5 or re-sitting any of the papers he had failed. He relied in particular on his mitigating circumstances and he again complained that the correct procedures had not been followed.

13. On 2nd September 2009 the University completed its internal appeal procedures and decided that the Faculty's decision to revoke Mr Sandhar's exclusion and to allow him to retake year 5 and all elements of his Final Exams was reasonable. It accordingly dismissed his appeal but alerted him to the potential route of a complaint to the Office of the Independent Adjudicator for Higher Education ("the OIA").

14. On 27th October 2009 Mr Sandhar submitted a complaint to the OIA requiring an "emergency remedy from the OIA for specific performance of the contract", seeking a declaration and injunction requiring the University to award Mr Sandhar his degree, and asking for a "full merit review, oral hearing and fast track".

15. On 18th November 2009 Ms Anne Lee, the Adjudication Manager at OIA, wrote to Mr Sandhar explaining:-

i) The remedies he sought requiring the University to award him a degree could not be given by the OIA, because they were matters of academic judgment;

ii) In response to his request for a full merits review, she explained that "The nature and extent of the review is for the case handler at the OIA to decide";

iii) In response to his request for an "emergency remedy" she explained "I have assessed your case as requiring the full, more extensive procedure so that I will need to obtain a full response from the University";

iv) In response to Mr Sandhar's request for an oral hearing, she explained that "I will assess the question of whether it is necessary to hold an oral hearing, in order to undertake a full and fair review of your complaint, once I have the University's representations".

16. In December 2009 the University submitted its representations to the OIA, defending its position in full.

17. On the 12th January 2010 the OIA sent the University's representations to Mr Sandhar, inviting his comments by 9th February 2010. He has never provided his comments on the University's representations.

18. Instead on 22nd January 2010 his solicitors write a first pre-Action Protocol ("PAP") letter, challenging the decision of 18th November 2009 not to decide his complaint on an "emergency" or expedited basis.

19. On 26th January 2010 his solicitors wrote a second PAP letter, challenging the alleged failure to deal with the request for the oral hearing and full merits review.

20. On the 2nd February 2010 the OIA responded to the letters, explaining why the grounds of challenge were, in its view, misconceived. The letter also indicated that the OIA was still awaiting comments from Mr Sandhar on the University's submissions and that, once these had been received, a draft decision could be made about the substantive complaint to the OIA.

21. On the 10th March 2010 the OIA sent a further letter noting that Mr Sandhar had still not provided comments on the University's submissions and said that, on the assumption he had nothing further to say, a decision would be made on the material which they had as soon as possible. This elicited a reply from Mr Sandhar's solicitors saying that the OIA should not proceed to issue a decision. OIA then agreed to suspend their consideration of the decision.

22. On 23rd April Mr Sandhar's solicitors wrote a 3rd PAP letter challenging OIA's independence and on 30th April 2010 they issued judicial review proceedings asking for a full merits review and an oral hearing and also challenging the OIA's independence. Burnett J on the papers and Deputy High Court Judge David Holgate QC on a renewed oral hearing refused permission to bring judicial review proceedings but Arden LJ gave permission to appeal on 27th May 2011.

The independence of the OIA

23. The argument is that, because the OIA is funded by the Higher Education Institutions ("HEIs") it is unable to avoid the appearance of bias for the purpose of the well-known test set out in Magill v Porter [2002] 2 AC 357 at para 103 per Lord Hope of Craighead namely:-

> "would a fair minded and informed observer, having considered the facts, conclude that there was a real possibility that the tribunal was biased for lack of either impartiality or independence?"

24. The OIA is a body which has been set up to deal with student complaints as was envisaged by Part 2 (headed "Review of Student Complaints") of the Higher Education Act 2004 ("the Act"). Section 13 of the Act empowered the relevant Secretary of State to designate a body corporate as "a designated operator" if he was satisfied (inter alia) that such a body (1) met the conditions set out in schedule 1 to the Act that the body corporate

> "is capable of providing in an effective manner … a scheme for the review of qualifying complaints which meets all the conditions set out in schedule 2"

and (2) provided a scheme

> "for the review of qualifying complaints that meets all the conditions set out in schedule 2."

The Secretary of State was satisfied that the OIA was capable of providing a scheme for the review of student complaints and accordingly designated OIA pursuant to section 13 of the Act. This then displaced, pursuant to section 20 of the Act, the disparate jurisdictions formerly exercised by Visitors to HEIs in relation to student complaints.

25. The OIA itself was formed as a company limited by guarantee in 2003 with Articles of Association which provided for a Board of Directors numbering not fewer that 13 and not more than 16. The OIA originally had six members each of whom was entitled to appoint a director and the Articles provided that there had to be at least 7 independent directors co-opted by the Board from persons with experience or skills relevant to the purposes of the company.

26. Paragraph 2 of schedule 3 of the Act provides that the designated operator must provide a scheme for the review of qualifying complaints which meets all the conditions set out in schedule 2 of the Act and the OIA has established such a scheme; section 15 of the Act provides:-

> "(1) The governing body of every qualifying institution in England … must comply with any obligation imposed on it by a scheme for the review of qualifying complaints that is provided by the designated operator.
>
> …

> (3) The obligations referred to in sub-section (1) include any obligation to pay fees to the designated operator."

27. The conditions set out in schedule 2 required that the scheme for the review of qualifying complaints should apply to all qualifying institutions and must apply to all qualifying complaints (Condition A and B). Condition C requires the scheme to provide that every qualifying complaint

> "be reviewed by an individual who
>
> (a) is independent of the parties, and
>
> (b) is suitable to review that complaint."

28. The rules of the scheme provide, as one might expect, that the scheme does not cover a complaint to the extent that that it relates to a matter of academic judgment (Rule 3.2). Other relevant rules are:-

> "4.1 A complainant must first have 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.
>
> 6.1 Once a complaint has been accepted the Reviewer will carry out a review of the complaint to decide whether it is justified, partly justified, or not justified.
>
> 6.2 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.
>
> 6.3 The nature and extent of the review will be at the sole discretion of the reviewer and the review may or may not include matters that a court or tribunal would consider.
>
> 6.4 The normal review process for dealing with a complaint will be as follows:
>
> 6.4.1 The Reviewer will decide what further information (if any) he or she needs for his/her review; this may include a requirement that the HEI provides a copy of the information that it considered at the final stage of its internal complaints procedures (and any related records) and at any time the reviewer may require the parties to answer specific questions and/or provide additional information.
>
> 6.4.2 Prior to issuing a formal decision the Reviewer will (unless the Reviewer considers it unnecessary to do so) issue a

> draft or preliminary decision (and any draft/preliminary recommendations).
>
> 6.4.3 Where a draft decision is issued the parties will be given the opportunity to make limited representations as to any material errors of fact they consider have been made and whether the draft recommendations are practicable.
>
> …
>
> 7.3 In deciding whether a complaint is justified the review 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.
>
> 8 The Independent Adjudicator is appointed by and responsible to the Board. In determining any complaints under these Rules the Independent Adjudicator shall act independently of the Board, HEIs and complainants. The Independent Adjudicator is not an officer of the Company for the purposes of the Companies Act.
>
> …
>
> 10 The OIA and its property and affairs shall be under the control and direction of the Board. The Board … shall be responsible for …
>
> 10.2 Preserving the independence of the scheme and the role of the Independent Adjudicator … ."

29. It is not exactly a matter of surprise to discover that the OIA has to employ a considerable number of people to discharge its duties including the Independent Adjudicator, his or her deputy and a number of reviewers to review individual cases. They all have to be paid and there is no obvious source for such payment apart from the HEIs themselves unless it is to be said that the expenses of the complaints scheme which benefits the specific body of university students should somehow be met by the general body of taxpayers. That is no doubt an irrelevant consideration if a fair-minded and informed observer would conclude that there was a real possibility of bias. But would such an observer so conclude?

30. The evidence on which lack of independence is based is summarised in two witness statements of Mr Benjamin Elger, the Chief Operating Officer and Company Secretary of the OIA of 17th March 2009 the first of which was produced for the purposes of the Budd litigation but was again in evidence in the present case. From that evidence it appears that the OIA has 14 directors of whom six are nominated by the members of (and shareholders) in OIA. 5 of those 6 are said to represent the HEIs although none of them is a member of the respondent HEI in this case, Manchester University. These directors are duty bound to act in the interests of the OIA not in the interests of their nominators and there is no evidence that any of them have ever been in breach of that duty. The sixth nominated director is a nominee of the National

Union of Students. The other eight directors are Independent Directors appointed in open competition under Nolan Rules and are not drawn from the higher education sector. The Chairman of the Board is one of these independent directors.

31. Mr Sandhar's skeleton argument (para 20.2) asserts that the directors nominated by HEIs constitute a majority of the Board of Directors which approves the rule and procedure by which the OIA conducts reviews of HEIs but that is not, in fact, the case. It is the independent directors who constitute a majority.

32. It is, moreover, the Independent Adjudicator who has the responsibility for the adjudication of individual cases. Rule 8 of the scheme requires the Independent Adjudicator to act independently of the Board of Directors, the HEIs and complainants. He or she is appointed by the Board under Nolan Rules. Rule 10 of the scheme provides that the Board is to be responsible for (inter alia) preserving the independence of the scheme and the role of the Independent Adjudicator. There is no evidence that the Board has ever failed to live up to that responsibility and, pursuant to that rule, the Board of Directors is not involved in the adjudication of any individual complaint.

33. As far as funding is concerned, it is correct that the funds come from subscriptions made by the participating HEIs, as expressly envisaged by section 15 (3) of the Act. The allegation, faintly put forward at one time by Mr Sandhar, that that provision of the Act was incompatible with Article 6 of European Convention on Human Rights was rightly not pursued in the oral argument made on his behalf. In those circumstances it is legitimate for a well-informed and fair-minded observer to have particular regard to the fact that Parliament has envisaged that the OIA is to be funded by the universities. The OIA scheme is free to students and there is no link between the amounts paid and the number of or outcome of complaints made against any particular HEI. It is clear that the wages of individual case-handlers are not paid by the university against whom the complaint is levelled but come from the funds generally available to the OIA from all HEIs.

34. In all these circumstances I just do not see how it can be said that any fair-minded and informed observer could say that there was a real possibility that the OIA in general or its Independent Adjudicator or any individual case-handler was biased in favour of the HEI under scrutiny in any particular case or lacked independence in any way. Considerable care has been taken to ensure that the case-handler should be seen to be independent of the HEI whose conduct is under challenge and there is no reason to suppose that such independence is not achieved.

35. If the OIA were adjudged to lack the necessary independence, it is hard to see why the same objection would not apply to many Ombudsman schemes funded by levies on the businesses which come within the purview of such schemes or indeed to the disciplinary tribunals of many professional bodies such as the GMC or the Law Society.

36. Mr Ockelton in Budd, albeit not as a matter of direct decision, came to the same conclusion as I have done, see paras 98-104 of Budd v OIA. I agree with him

37. I turn therefore to the allegations of procedural impropriety, the supposed refusal on the part of the OIA to conduct a "full merits" review or an oral hearing.

Full Merits/Oral hearing

38. It is easier to treat these complaints together rather than separately since it is difficult to be sure what a full merits hearing is if it is different from a oral hearing. Conversely it is difficult to see how an oral hearing could be other than a full merits hearing. The distinction drawn by Moore-Bick LJ in para 70 of Siborurema between any examination of the underlying merits and a review of the University's decision may be thought to be somewhat elusive in practice.

39. I have already set out the gist of Ms Lee's reaction of 18th November 2009 to the requests for a full merits review in which she said that the nature and extent of the review is for the case handler at the OIA. It emerged at the hearing before us that Ms Lee was now the case handler and, if that had been the position at the time, no doubt she ought to have said so in order to achieve full transparency. The difficulty from Mr Sandhar's point of view, however, is that what he really wants (or at least wanted in 2009) was a decision that the Board of Examiners should deem him to have passed his final medical examinations in 2009 rather than allow him (for the second time) to retake year 5. The response of the University in December 2009 was at first blush persuasive in relation to that application and, until Mr Sandhar provides his comments to that response and the OIA reacts to that response, it is not possible to say that the OIA is not providing (or is not prepared to provide) a full merits review, whatever that may precisely mean. In this context I agree with (and would approve) the reaction of Mr Ockelton to a similar point being made to him when he said at para 73 of Budd v OIA:-

> "It is unnecessary and unrealistic to describe the OIA as having a discretion to enter upon a "merits review" or a "full merits review" as though those phrases marked fixed thresholds in the OIA's investigative process. They do not. The OIA does its task properly if it continues its investigation until it is confident that it has all the material it needs in order to make a decision on the individual complaint, and then makes its decision. The exercise of a discretion in this context is simply the continuous consideration of whether any more information is needed in order to make a decision on the particular complaint."

Subject, therefore, to any question of an oral hearing, it is for the complainant to produce the evidence and arguments he wishes to the OIA and its case-handler to consider. Provided that such evidence and arguments are considered, there will have been a full merits review.

40. As far as any oral hearing is concerned, Mr Beloff submitted that it was possible here and now to say that an oral hearing was required for 3 particular reasons and that it had been refused. Since the three particular reasons were only articulated for the first time in the skeleton argument for this court, that is a difficult submission. But Mr Grodzinski for the OIA rose to the challenge and submitted that the particular matters relied on did not justify an oral hearing. He did, moreover, accept that, if Mr Sandhar submitted a response which raised matters which, in the reasonable view of the OIA did require an oral hearing, then an oral hearing would be provided.

41. The specific matters on which Mr Beloff on behalf of Mr Sandhar relied for the purpose of saying that on any view an oral hearing was now required were these:-

    i) Whether the original Progress Committee had actually considered the nature of the appellant's mitigating circumstances when the minutes of its meeting gave no indication that it had. The minutes of that Committee simply stated:

    > "The student submitted a supporting statement to the Committee but did not attend the meeting […] The Committee discussed the student's case in his absence and noted that he had submitted an appeal against his examination results, which was being investigated by the Chair of the Assessments Committee."

    ii) Whether the claimant had not received any teaching in 2008/9.

    iii) Whether the question of whether to award him his degree had been referred back to the original Examination Board after the success of his appeal pursuant to para b point 7 of Regulation XIX Academic Appeals of the University's Examination Regulations.

42. The suggestion that the original Progress Committee, which considered the effect of Mr Sandhar's first failure of his final examinations in June 2008, may not have considered his mitigation has, to my mind, no relevance since it is long in the past. Mr Sandhar's complaint relates to the University's decision in 2009 to allow his appeal in relation to exclusion but to require him to retake year 5 for a second time before a degree could be awarded. A decision not to hold an oral hearing on the question whether the Progress Committee considered Mr Sandhar's mitigation in 2008 is entirely justifiable.

43. As to tuition for 2008-9 after Mr Sandhar's first failure, it is true that Mr Sandhar asserts that he was not provided with tuition. The University agrees that tuition was not provided but says that that was Mr Sandhar's choice. Mr Sandhar has not yet said whether he denies that that was his choice and asserts that he requested tuition which was refused. It is impossible therefore to say whether an oral hearing on that issue is required. One might also legitimately wonder whether, on any view, an oral hearing could be required on that point in the light of the fact that Mr Sandhar's mitigation was, in any event, accepted by the University in 2009 to the extent that his exclusion from the degree programme was revoked and he was told that he would be entitled to re-sit his finals in May 2010.

44. The question whether the University has failed to comply with Regulation XIX cannot be usefully resolved by an oral hearing. The University has not, so far, suggested that it did comply with Regulation XIX. There is not on the face of it any disputed area of fact. The consequences of non-compliance (if any) are, of course, a matter for the OIA but can hardly be assisted by having an oral hearing.

45. There is, therefore, no current reason to suppose that any oral hearing is required and certainly no ground on which this court could quash such refusal as there has so far been of an oral hearing.

46. I would therefore refuse the application for judicial review so far as it relates to the failure of the OIA to hold a full merits review or an oral hearing.

Emergency procedure

47. That only leaves the (now theoretical) complaint that the OIA should have adopted but failed to adopt an emergency procedure in October 2009 so as to enable Mr Sandhar to take up conditional offers of employment he had received. The refusal to adopt the particular emergency procedure suggested by Mr Sandhar was eminently justifiable since he appeared to be wanting the OIA to say there and then that he should be deemed to have passed his finals and to have been awarded his degree so that he could take up one or more prospective appointments. To do that by any emergency procedure (or indeed at all) would be to interfere with matters of academic judgment which is outside the OIA's jurisdiction. Ms Lee did say in her letter of 18th November 2009 that the OIA did have a Preliminary Decision procedure but that she had decided a full response from the University was required. That was also justifiable since Mr Sandhar's complaints about the procedures adopted by the University obviously called for an answer. It is no doubt highly disappointing for a student in Mr Sandhar's position not to be able to take up conditional appointments as a result of failing his final examinations but it was never intended that the OIA should second guess the University's academic judgment in that regard.

Conclusion

48. I would therefore dismiss Mr Sandar's application for judicial review despite giving permission for it to be brought.

Lady Justice Black:

49. I agree.

Sir David Keene:

50. I also agree.