Neutral Citation Number: [2007] EWCA Civ 1365

Case No: C1/2006/2589

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QBD ADMINISTRATIVE COURT
Mr JUSTICE MITTING
[2006] EWHC 3170 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2007

Before :

LORD JUSTICE PILL
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE RICHARDS

- -

Between :

THE QUEEN ON THE APPLICATION OF SIBORUREMA	**Appellant**
- and -	
OFFICE OF THE INDEPENDENT ADJUDICATOR	**Respondent**

- -

Gregory Jones (instructed by **Messrs AP Law**) for the **Appellant**
Oliver Hyams (instructed by **Messrs E J Winter & Sons**) for the **Respondent**
John Hamilton (instructed by **Lupton Fawcett**) for the **Interested Party**

Hearing dates : 6 & 7 November 2007

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Approved Judgment

LORD JUSTICE PILL :

1. This is an appeal by Mr Gaston Siborurema against the refusal of Mitting J to grant him permission to apply for judicial review of a decision of the Office of the Independent Adjudicator for Higher Education ("OIA") made by a letter dated 7 December 2005. OIA found that the appellant's complaint against London South Bank University ("the University"), under the Scheme operated by OIA in accordance with the Higher Education Act 2004 ("the 2004 Act"), was unjustified. The appeal is brought by permission of Sir Henry Brooke on consideration of the papers. He directed that, if permission to apply for judicial review was granted by this court, the application for judicial review should be retained in this court.

2. In his reasons for granting permission, Sir Henry Brooke, having set out the basic facts, stated:

> "On the face of it, this application seems hopeless".

Sir Henry Brooke added:

> "However, the appellant has raised issues about the fairness of the process adopted by the Independent Adjudicator and the power of [OIA] which, in my view, warrant the consideration of the Court of Appeal, since this is a comparatively new jurisdiction. [OIA] has raised an issue as to whether [OIA] is amenable to judicial review at all, and this should also be decided".

An extension of time was granted. Mitting J had found that the appellant's central submission was "simply unarguable". As to the issue whether OIA could be challenged by way of judicial review, he stated:

> "There is no point in having it decided in a vacuum in a case such as this without legal merit".

3. In recent years, the need has been perceived in Higher Education Institutions ("HEIs") for a procedure by which students may make a complaint about decisions of the HEI affecting them, other than matters of academic judgment. OIA was formed as a company limited by guarantee in 2003. The first members of the company were figures prominent in the academic world. Provision was made in the Articles of Association for a Board of Directors comprising not fewer than 13 and not more than 16 directors. Each of the 6 members of the company was to appoint a director and there were to be at least 7 independent directors co-opted by the Board of Directors from among persons with experience or skills relevant to the purposes of the company. The Board was empowered to appoint an Independent Adjudicator. They could also appoint a Deputy Adjudicator who would be responsible for the administration and organisation of the Scheme and the company. Initially, the company was funded by the Government.

The Statute and the Scheme

4. The 2004 Act was, in its short title, stated to be an Act to make provision (amongst other things) for complaints by students against institutions providing higher education. Part 2 is headed "Review of Student Complaints". Section 13, in so far as is material, provides:

> "(1) The Secretary of State may, for the purposes of this Part, designate a body corporate as the designated operator for England as from a date specified in the designation.
>
> (2) The [Welsh] Assembly may, for the purposes of this Part, designate a body corporate as the designated operator for Wales as from a date specified in the designation.
>
> (3) The Secretary of State or the Assembly may not designate a body under subsection (1) or (2) unless he or the Assembly is satisfied that the body –
>
> (a) meets all of the conditions set out in Schedule 1,
>
> (b) is providing a scheme for the review of qualifying complaints that meets all of the conditions set out in Schedule 2, or is proposing to provide such a scheme from a date not later than the effective date,
>
> (c) has consulted interested parties about the provisions of that scheme, and
>
> (d) consents to the designation.
>
> (4) . . .
>
> (5) In this Part –
>
> (a) . . .
>
> (b) any reference to the designated operator is –
>
> (i) in relation to an institution in England, a reference to the body designated under subsection (1), and
>
> (ii) in relation to an institution in Wales, a reference to the body designated under subsection (2)".

5. Section 14 provides:

> "The designated operator must comply with the duties set out in Schedule 3 during the period specified in that Schedule".

Section 15(1) provides:

> "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".

6. Section 17 of the 2004 Act provides, in subsection (1):

> "For the purposes of the law of defamation, any proceedings relating to the review under the scheme of a qualifying complaint are to be treated as if they were proceedings before a court".

Section 19 amends the time limits for bringing claims under the statutes dealing with discrimination by extending the period allowed where the dispute concerned is referred as a complaint under the Scheme. Section 20 excludes Visitors' former jurisdiction in relation to student complaints.

7. It is accepted in the present case that the University was a "qualifying institution" within the meaning of Section 11 of the Act and the complaint was a "qualifying complaint" within the meaning of Section 12.

8. OIA is the first body designated by the Secretary of State under Section 13(1) and by the National Assembly for Wales under Section 13(2). It is a non-profit making body now funded entirely by subscriptions paid by HEIs.

9. By virtue of Schedule 1 to the Act, it is a condition to be met by the operator of the Student Complaints Scheme 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".

10. Schedule 2 provides, at paragraph 3(2)(b), that where a qualifying institution 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 procedures at the HEI.

11. By paragraph 4, it is required that every qualifying complaint referred under the Scheme is reviewed by an individual who is independent of the parties and is suitable to review the complaint. "Reviewer" is defined in paragraph 14 as "the Independent Adjudicator or the Deputy Adjudicator or such other person to whom the review of a complaint has been delegated". Under paragraph 5, the reviewer must make a decision, as soon as reasonably practicable, "as to the extent to which a qualifying complaint is justified". Provision is also made for the dismissal of a qualifying complaint without consideration of the merits if the "reviewer considers the complaint to be frivolous or vexatious".

12. Paragraph 2 of Schedule 3 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". Paragraph 5 provides: "The designated operator must comply with any requirements that the Scheme imposes on it". Paragraph 6 provides for the production of an annual report by the designated operator on the Scheme and its operation.

13. The rules of the Scheme established by OIA were its own draft. It is accepted that in most respects they reflect the requirements of the Statute. Paragraph 6.1 provides:

> "The Reviewer will carry out a review of the complaint to decide whether it is justified in whole or in part".

Paragraph 6.2 provides:

> "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".

Save as cited, Schedule 2 of the Act is silent as to the extent of OIA's duty to investigate when deciding whether a complaint is justified.

14. There is a dispute about the duties and powers of OIA when considering complaints and I summarise it. On behalf of the appellant, it is submitted that the Statute requires OIA to conduct a full merits review, an enquiry de novo, into the student's complaint. Alternatively, it is submitted, it has a duty to consider whether to conduct such an enquiry before deciding, if it does, that a more limited review is appropriate in the particular case.

15. OIA takes a more limited view of the duties imposed on it. Schedule 2 does not require it to operate a Scheme by which such full enquiry is always required. The powers and duties are properly expressed, it is submitted, in paragraph 7.3 of the Scheme. Paragraph 7.2 having provided that the formal decision and any recommendation shall be in writing, and contain reasons for the formal decision, and for any recommendation, 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".

16. Paragraph 7.4 of the Scheme provides a Reviewer with a range of options when making recommendations to the HEI, having found a complaint to be justified in whole or in part. These include a power to recommend that the HEI's internal procedures or regulations should be changed, that they had not been followed properly and that compensation should be paid to the complainant. So far, there has been no failure by an HEI to comply with a recommendation made.

17. In her witness statement, the holder of the office of Independent Adjudicator of Higher Education, Baroness Deech, stated:

> "Rule 7.3 of the Scheme is in permissive terms, but in practice OIA only asks itself the question set out in that rule".

Baroness Deech provided a commentary on the Scheme, as she believes it should operate. OIA desires "to avoid a legalistic approach":

> "Many of those complaints could be taken to the courts, but students choose to come to us because we offer a speedy, user-friendly and free service and because our decisions are based on fairness and a consideration of higher education practices rather than legal rights. If a student does not accept the determination of a complaint under the Scheme, then he or she is free to seek a remedy by going to the courts".

18. As to judicial review, Baroness Deech stated:

> "In our experience, the mere possibility of judicial review causes delay and expense. OIA deals with over 500 complaints a year, all of which will have already been subject to the rigours of an HEI's own internal complaints procedures. Students and HEIs need to have complaints reviewed swiftly without excessive formality or legalism so that the parties can move on".

Baroness Deech added:

> "For all of these reasons, I firmly and strongly believe that the efforts of OIA to serve students and HEIs cheaply and efficiently would be hindered significantly if decisions made under the Scheme were to be subject to judicial review".

19. Mr Michael Reddy, Deputy Independent Adjudicator and Chief Executive of OIA, stated his view of the role of the Scheme: "We at the OIA see our role as being to review a decision of a higher education institution, not to carry out a new investigation of the substantive issues complained about". He set out the background to the application.

The Facts

20. The complainant came to the United Kingdom from Rwanda in March 2000 and registered on a student nursing course at the University in September 2003. A part of the course is a unit entitled Sciences for Nursing and Social Work. Students must pass this unit in order to go on to the second part of the programme. The unit comprises four elements, biology multiple choice, and unseen examinations in biology, psychology and sociology. In May 2004, the appellant failed biology, psychology and sociology and failed them again at the second attempt in July 2004. On a third attempt in October 2004, he failed psychology and sociology. He had been strongly advised to seek support and guidance from the unit leader prior to sitting the exams. He again failed those examinations on a fourth attempt in March 2005. The University's Examination Board decided on 19 April 2005 to withdraw him from the course for failing to make academic progress, notifying the decision on 28 April.

21. The appellant had, on 1 February 2005, been offered "fourth and final attempts", said to be exceptional, at the two failed elements of the unit. He was allowed to attempt for the fourth time with tutorial support.

22. On 3 May 2005, the appellant appealed against the Board's decision to withdraw him, describing mitigating circumstances to which I will refer. The appeal was dismissed by a letter dated 27 May 2005, signed by a Student Appeals Officer. The appellant submitted a Scheme Application Form to OIA on 6 June 2005. The complaint was allocated to Ms Isabel Brown, a Reviewer. Under the procedure followed, Ms Brown made a preliminary decision on the papers and, on 27 July 2005, issued a Preliminary View that the complaint was not justified. An opportunity to respond was given and, on 5 August 2005, a Student Advisor wrote from the Students' Union to Ms Brown asking her to reconsider the Preliminary View. That was followed by a letter, dated 16 September 2005, from the appellant's solicitors, and other correspondence. The formal decision letter stating that the complaint was not justified was signed by Mr Reddy and sent to the appellant on 7 December 2005.

23. In dismissing the appeal against the Board's decision on 27 May 2005, the Appeals Officer referred to paragraph 10.10 of the Student Handbook 2004/2005. That provides:

> "If there are mitigating circumstances (serious illness or the death of a close relative) which prevent you from taking an examination or from handing in your coursework, or which you think has adversely affected the quality of your work, you can claim mitigating circumstances. It is important to do this BY THE PUBLISHED DEADLINE, which is always BEFORE the Examination Board. Do not wait until you have your results; it will be too late then".

The appeal had been based on mitigating circumstances which, it was claimed by the appellant, could not be divulged to the Examination Board. The Appeals Officer stated that "there appears to be no valid reason why you could not disclose these mitigating circumstances by the published date to do so". It was also stated:

> "Moreover, the documentary evidence you have presented as evidence does not appear to cover or support the episodes of stress/illness and marital breakdown you have referred to in your appeal".

24. In his application form to OIA, the appellant stated:

> "It is not acceptable to simply state that I should have disclosed my mitigation according to a regulation rather than actually considering my mitigation on the nature of my circumstances effect on my ability to study. My overall profile is high and my failure in these units is simply a reflection of my stressful extenuating circumstances".

The appellant stated that he was unaware of any published date for claiming mitigating circumstances. He added:

> "I am on a professional course and it is not encouraged on a professional course to bring your personal problems into this environment. As far as I was aware the appeals process was

> the appropriate forum and I disclosed my mitigation at this point and I do not feel it was appropriately considered. My overall profile is high and I do not believe that the Exam Board should have withdrawn me for failure on these two units only. Rather they should have reviewed my profile and considered that there must be a reason why I should fail these two units when generally I receive good marks. In my completion of procedures letter it is stated that my documentary evidence does not appear to cover or support the episodes of stress/illness and marital breakdown referred to in my appeal. I would like to reiterate that my problems were ongoing not isolated dates relating to my exam. I came over to England as an asylum seeker in 2000".

25. The appellant set out in the form the mitigating circumstances he relied on. He had believed that his mother was dead but she arrived in England in 2004. He stated that he has attended court many times trying to prove that the woman was his mother. His mother was living with him, his wife and small child. Due to the stress, his relationship with his wife deteriorated and she separated from him:

> ". . . when you have been through terrible times resulting in you having to leave your country for safety and believing all your family are dead it is not easy to disclose this information as it results in you reliving painful times from the past which you are trying to put behind you. The entire situation with my mother and my wife has been very stressful. . . . the evidence that I have sent to support my appeal was not to show a correlation between events and exam dates but to shed light on the turmoil which I have to go through every day".

A Personal Development Advisor at the University also became involved and on 15 June 2005 he referred the appellant to a consulting service for assessment.

26. The complaint was accepted as a qualifying complaint under the Scheme. In her Preliminary View of 27 July 2005, Ms Brown stated:

> "The University did not find any valid reasons why your mitigating circumstances could not be disclosed at the appropriate time. We accept that it is a student's responsibility to make tutors/other staff aware of personal difficulties affecting his or her work at the time at which they are of concern.
>
> The University's Regulations state that a student cannot claim mitigating circumstances on the grounds that he/she was unaware of the regulations. It is reasonable that the HEI should have such regulations and that it is the student's responsibility to make himself / herself aware of them.
>
> Furthermore, the University noted that the dates of the documentary evidence submitted in support of your claim did

> not correlate with the episodes of stress / illness and marital breakdown referred to in your appeal. Although Mr Siborurema states that the documentary evidence indicates that his problems were ongoing, I do not find this relevant to your complaint as the mitigating circumstances were submitted out of time".

27. Written representations were then made on behalf of the appellant by a Student Advisor and by his solicitors. The mitigating circumstances relied on were set out. The solicitors referred to University regulation 11.6.2, which provides:

> "If a student has three failures on the second submission, the student will normally be required to repeat the units with attendance. Students will interrupt their programmes and rejoin another group".

They added:

> "Our client was not offered the opportunity to attend lectures again in order that he would prepare fully for his re-sit".

The reference to "his re-sit" is difficult to reconcile with the requirement in fact in 11.6.2 to "repeat the unit".

28. In a further letter dated 23 September 2005, the appellant's solicitor stated:

> "We note that you stated in respect to our point that our client was not offered the opportunity to attend lectures again, that you would not be able to look at this point as it had not been through the Internal Complaints Procedure. This is not a complaint as such but more a remedy that the university should have offered when our client failed his examinations. The university failed to do this even though it is set out in their rules and regulations and therefore, it will clearly be for the Office of the Independent Adjudicator to adjudicate on this matter".

Ms Brown replied that she would ask the University for its comments as to why the appellant "was not offered further help for his re-sits" or the opportunity to "repeat the units with attendance".

29. In a reply, dated 21 November, that was not, until after OIA's decision, shown to the appellant or his advisors, the University referred to paragraph 11.6.2 of the Regulations already cited. It was further stated that, "as [the appellant] had only 2 of the 4 elements to repeat, the Board did not wish to financially penalise the student should [he?] be allowed to progress, be offered tutorial support".

30. OIA's "Formal Decision Letter", dated 7 December 2005, provided:

> "On 27 July 2005 Isobel Brown of this office advised you that her preliminary view of your complaint was that it was not justified.

> I am in receipt of your letters of 16 September and 23 September 2005. Having reviewed the file and taken into account further information provided by the University, I do not consider that it would serve any purpose to investigate your complaint further. This is because I consider the University's decision to be reasonable in the circumstances, and that they have followed their procedures. Regulation 11.6.2 states that "if a student has three failures on a second submission, the student will normally be required to repeat the unit with attendance". We note that the University did consider offering Mr Siborurema the opportunity to repeat the unit with attendance but that it was considered to be more appropriate to allow him to resit the exams with tutorial support.
>
> Furthermore although Mr Siborurema states that he was unaware of the published date for submitting mitigating circumstances, the University did consider these and we consider it reasonable that the University came to the decision that these were invalid as no medical evidence was supplied to support Mr Siborurema's claim. Accordingly you should regard this letter as our formal decision that your complaint is not justified. I enclose a copy of the letter which was sent as part of the University's submission.
>
> I am sorry that my letter will be disappointing to your client. Your client is free to pursue other action against the institution if you wish".

31. Following further representations by the solicitors, Mr Reddy wrote, on 16 January 2006:

> "We do not normally enter into correspondence about the merits of a complaint once our Formal Decision is issued.
>
> Your client's situation is a sad one but the University is entitled to exercise its discretion having regard to maintaining professional standards in nursing as well as to your client's own situation.
>
> Our decision does not affect your client's right to take other action against the University".

32. In a witness statement prepared for this hearing, the appellant said that, had he known of the University's reference to penalising him financially, he would have replied that he would not have been financially penalised because his attendance on the course was publicly funded. He would, in any event, have preferred to repeat the unit because it would have given him the best opportunity to pass.

Submissions

33. On behalf of the appellant, Mr Gregory Jones submits, first, that OIA is subject to the supervision of the High Court by way of judicial review and, secondly, that OIA is in breach of its statutory duty, and also in breach of the provisions of its own Scheme, in the manner it dealt with the complaint made to it about the University's conduct. The object of providing students with an avenue for complaint as an alternative to immediate recourse to the courts is achieved only if students have confidence in the Scheme and that can exist only if OIA acts under the supervision of the courts by way of judicial review. Moreover, such recourse is to be preferred to lengthy litigation in the County Court. Mr Jones describes OIA's function as that of an honest broker.

34. As to jurisdiction, the Scheme is one created under Statute and underpinned by Statute, it is submitted. It performs public functions derived from Statute. OIA is the "designated operator" having been designated by the appropriate authority under the statute in both England and Wales. Reliance is also placed on the privilege in relation to the law of defamation conferred on OIA by Section 17 of the 2004 Act and to the extension of time limits under the discrimination Acts. That underscores the public status of the proceedings. Confining OIA's executive powers to making recommendations, rather than giving directions, is not material to the issue, having regard to the purpose of the Scheme, it is submitted. The Board's Annual Reports reveal that in every case a recommendation of OIA has been accepted by the HEI.

35. As to the second point, it is essential that OIA looks at the underlying merits of complaints, it is submitted. Its overarching duty is that set out in paragraph 6.1 of the Scheme:

> "The Reviewer will carry out a review of the complaint to decide whether it is justified in whole or in part".

That requires a consideration of the merits, it is submitted, including an investigation of the facts. Paragraph 7.3, already cited, is unlawful if it does not require consideration by OIA of the merits of a complaint. The provisions of paragraph 6.1 are comprehensive and must be read into paragraph 7.3. Mr Jones relies on the statement of Baroness Deech that OIA's decisions "are based on fairness and a consideration of higher education practices rather than legal rights". That requires a merits enquiry, it is submitted.

36. Reliance is placed on the statement of Simon Brown J about the then powers of Visitors to Universities, in *R v Judicial Committee ex parte Vijayatunga* [1988] QB 322 at 344:

> "The Visitor enjoys untrammelled jurisdiction to investigate and correct wrongs done in the administration of the internal law of a Foundation to which he is appointed: a general power to right wrongs and redress grievances and if that on occasions requires the visitor to act akin rather to an Appeal Court than to a Review Court, so be it. Indeed there may well be occasions when he could not properly act other than as an essentially appellate tribunal".

That latter approach, it is submitted, should be followed by OIA.

37. In the alternative, it is submitted that if the duty to examine the underlying merits of the complaint does not exist in all cases, the power to do so does and consideration must in all cases be given to exercising that power. In *Stovin v Wise* [1996] AC 923, at 950B, Lord Hoffmann stated:

> "A public body almost always has a duty in public law to consider whether it should exercise a power".

The power should have been exercised in this case, it is submitted.

38. In seeking to demonstrate the breadth of the Scheme, Mr Jones relies on an amendment to paragraph 6.3 of the Scheme in September 2006, that is after the date relevant in the present case. Whereas the earlier paragraph provided: "If the Reviewer considers it necessary, further investigation or enquiries will be made", the amended paragraph provides: "The nature and the 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". The amended paragraph, we are told, spells out the practice already followed. I say at this stage that I do not consider the amendment to be material to the present issues. It is no doubt helpful to have the powers of the Reviewer spelt out more fully but, in substance and in context, they have not, in my view, changed.

39. It is submitted that OIA has applied the wrong test. The underlying merits of the appellant's complaint have not been considered. Further, the Independent Adjudicator has stated, at paragraph 7 of her statement:

> "Rule 7.3 of the Scheme is in permissive terms but in practice the OIA only asks itself the questions set out in that rule".

It is unlawful, it is submitted, to follow that practice, which is categorised by Mr Jones as applying a rigid and exclusive rule.

40. It is also submitted that, even if the correct test was applied, the decision of OIA should be quashed because of the manner in which it considered the appellant's complaint, as revealed in the correspondence:

(a) Because the University's letter of 21 November was not disclosed to the appellant, he had no opportunity to comment on the reference to not wishing to penalise him financially.

(b) While OIA need not have considered University Regulation 11.6.2, because it had not been raised during the internal University procedures, OIA did raise it and, having done so, had to deal with it adequately, which it did not.

(c) OIA considered only the validity of the mitigating circumstances and not, as it should have done, their weight, as the University had purported to do. OIA's reference to medical evidence related merely to whether the mitigating circumstances should be considered at all on the ground that they had not been raised before the examination was sat. The merits were not considered.

(d) The Formal Decision Letter must be sufficient in itself and the decision was not adequately reasoned in that letter.

41. As to the amenability of OIA to judicial review, Baroness Deech in her statement expressed the firm belief that the efforts of OIA to serve students and HEI's cheaply and efficiently would be hindered significantly if decisions made under the Scheme were to be subject to judicial review. OIA regarded the Scheme as a true alternative system to recourse the courts, without precluding such recourse.

42. It is accepted, on behalf of OIA, that a complaint to OIA should not prejudice a subsequent resort to legal proceedings against the University by a student. However, it is accepted that, in this case, there is unlikely to be an alternative remedy if the complaint to OIA is found not to be justified.

43. Mr Hyams, for OIA, submits that, in terms of assessing its susceptibility to judicial review, there is no organisation quite like it. It provides essentially a form of alternative dispute resolution and OIA must have a very broad discretion as to how to deal with complaints. Although set up under Statute, it is entirely independent of the Secretary of State who has no power to appoint Board Members. The Statute permitted OIA to devise its own scheme for dealing with complaints, subject to very general requirements in Schedule 2 of the Act. The Act did not prescribe an approach and OIA was entitled to adopt the approach specified in paragraph 7.3 of the Scheme.

44. Mr Hyams concedes that OIA may be reviewed judicially on natural justice grounds, that is, if it is alleged to have been biased in a particular case or if it has failed to give a student the opportunity to make representations. The court's power to intervene is very limited, it is submitted.

45. The duty upon a Reviewer is, by virtue of paragraph 5(1) in Schedule 2 to the 2004 Act, "to make a decision as to the extent to which a qualifying complaint is justified". That is a specialist jury question and, OIA and its Reviewers being specialists, the courts should respect its decisions. The annual number of complaints has reached 600, of which about a third result in recommendations being made to an HEI.

46. In relation to the decision letter, Mr Hyams submits:

(a) OIA was entitled to find that the University's decision was reasonable in the circumstances and that they had followed their procedures. Reference was made to regulation 11.6.2 and the merits of the University's decision were considered.

(b) A finding that a complaint was not justified because the option offered was for a re-sit was a lawful finding. The University had offered more than its Regulations, which are not challenged as such, required, when offering a further opportunity to pass.

(c) The absence of an opportunity to re-sit, with attendance at lectures, was not, according to the solicitors' letter of 23 September 2005, "a complaint as such".

(d) The reference to financial position had not been through the University's internal procedures and was not eligible for consideration.

(e) Further submissions on the financial point now raised could not have affected the decision.

(f) The reference in the decision letter to medical evidence demonstrates that the weight as well as the validity of the mitigating circumstances claimed was considered.

(g) The Formal Decision Letter should be read with the Preliminary Review of 27 July 2005 in which both the formal and substantive aspects of the claim were considered.

47. OIA has offered to conduct a further investigation under the Scheme, applying current procedures and following the approach in paragraph 7.3.

48. The University have made representations as an interested party. Mr Hamilton supports OIA's submission that the objective of the Scheme is to divert complaints from the courts. He refers to the public interest in ensuring the competence of the professions and in the orderly regulation of University courses.

Conclusions

a) General

49. I have no difficulty in concluding that OIA is amenable to judicial review:

(a) Though it is not necessarily determinative, the entire procedure for dealing with student complaints about the decisions of HEIs is set up by statute. That is an important aspect.

(b) The Secretary of State (and the Assembly in Wales), may designate a body corporate as the designated operator for review of student complaints (Section 13 of the 2004 Act).

(c) OIA has been so designated.

(d) The body must not be designated unless the designating body is satisfied that it is providing a scheme for the review of qualifying complaints that meets conditions set out in Schedule 2 to the Act (Section 13(3)).

(e) The designated operator must comply with duties set out in Schedule 3 (Section 14).

(f) The governing body of every qualifying institution must comply with any obligation imposed on it by the scheme (Section 15(1)). There is a strong public element and public interest in the proper determination of complaints by students to HEIs.

(g) The range of potential complaints is broad and the function contemplated for OIA cannot be categorised merely as regulating contractual arrangements between student and HEI.

50. The designated operator should, in my view, be subject to the supervision of the High Court. The wish of OIA, which I readily accept to be genuine and well-intentioned, to be free from supervision should not be upheld. Its aspiration to be an informal substitute for court proceedings is not inconsistent with the presence of supervision by way of judicial review. OIA's decisions, will, it is to be hoped and expected, be based on fairness and a consideration of higher education practices, as Baroness Deech puts it, but I do not see that impeded by the existence of a limited remedy in the courts if OIA has exceeded its powers or acted in a manner inconsistent with the Statute under which it operates. However well-intentioned, an important scheme available to resolve a wide range of disputes affecting HEI's and the large number of students who attend them should not be free from that supervision. For it to become a law unto itself would not achieve the statutory intention.

51. The nature and extent of that review must, however, be based on the nature of the Scheme, the duty involved and the powers exercised. Schedule 2 of the Act does not require that the duty to review complaints be exercised in any particular way. The duty is to make a decision as to the extent to which a complaint is justified. The degree and manner of supervision to be exercised by the court will vary from institution to institution and from statutory scheme to statutory scheme (*R v Parliamentary Commissioner for Administration Ex Parte Dyer* [1994] 1 WLR 621, at 626).

52. I cannot accept either the submission that OIA is operating the Scheme unlawfully or that the decision in this particular case was unlawful. On the first of those issues:

    (a) Reference by OIA to the HEI's regulations and procedures is not inappropriate. Respect is due to the regulations and procedures of an HEI and to the decisions of those who operate them. In many cases, consideration of the regulations and procedures will be an appropriate starting point for an assessment of whether a complaint is justified.

    (b) The second limb of paragraph 7.3 is amenable to a very broad construction. That is appropriate given the broad range of complaints which may be made. It does not prevent a review of the merits in a particular case.

    (c) The paragraph does not limit the very generally expressed provision in paragraph 6.1: "The Reviewer will carry out a review of the complaint to decide whether it is justified in whole or in part".

53. 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.

54. Initially, the regulations can be assumed to be a reliable bench mark. The provision in the second part of paragraph 7.3, read with paragraph 6.1, to "consider whether or not a decision by the HEI was reasonable in all the circumstances", is, however, to be read broadly. It empowers OIA to comment upon the reasonableness of those regulations and procedures. It empowers OIA to conduct its own investigation into the facts underlying the complaint. There may be cases in which OIA will decide that is appropriate course to take but I do not accept that OIA is under a general obligation to rehear the merits of the case made to the HEI. However, there could be cases in which a decision as to whether a complaint is justified requires that course to be taken, following the principle stated by Simon Brown J, in relation to Visitors, in *Vijayatunga*.

55. It is neither necessary, nor appropriate for present purposes, to say more by way of generality. The Statute leaves OIA with a broad discretion. Decisions may, however, be challenged where, for example, there have been breaches of the rules of natural justice, by way of bias or relevant procedural injustice, or where there has been such scant or inappropriate consideration of a complaint that what had occurred could not fairly be described as a review.

56. In its decision on complaints, OIA is expected to follow rational and fair procedures and to give adequate reasons for its decisions and recommendations. Thus the procedures followed and the decision letters which emerged can properly be scrutinised with that object in mind.

b) The Particular Case

57. I turn to the complaint in this case. While there is some force in the criticisms made of the procedures followed in this case, I do not consider they lead to a conclusion that OIA erred in law in deciding that the complaint was not justified. The focus must be upon the particular complaint made.

58. The two decision letters can be read together. The complaint was of a refusal to permit the appellant to continue with his training at the University. It turned on a complaint that the mitigating features present when tests were failed were not considered or were insufficiently considered by the University. A second complaint, although not acknowledged on his behalf to be a complaint as such, and not put to the University, was that the appellant should have had the opportunity to re-sit, with attendance at lectures. Associated with that, is the allegation, in relation to OIA's procedure, that no opportunity was given to comment on the University's letter of 21 November 2005.

59. Clearly there must come a point at which an HEI is not obliged to permit further examination attempts. It has a public duty, the existence of which OIA should recognise, to keep college places available for new students which may, on occasions, require that unsuccessful students not be granted a further opportunity to take a place on a course. There is also a duty of course to keep up standards in the professions for which training is offered. I do not consider it appropriate for the court to intervene when the OIA has found a complaint not justified on the basic facts in this case.

60. There was, in my view, a procedural failure. The appellant should have been shown the further information supplied by the University in the letter of 21 November 2005

in reply to OIA's request. The applicant could have argued, it is submitted, as he now does in a statement made only shortly before the hearing, that he would not have been financially disadvantaged if application had been made on his behalf, to "repeat these 2 units in their entirety". His attendance on the course was publicly funded.

61. The sequence of events was as follows:

(a) The University's Appeals Officer, in dismissing the appeal to him on 27 May 2005, relied on the failure of the applicant to make his claim that there were mitigating circumstances at the appropriate time, that is before the decision of the examination board.

(b) The Appeals Officer also expressed a view on the relevance of the mitigating circumstances.

(c) In his application to OIA, the applicant argued that as far as he was aware the appeals process was the appropriate forum in which to disclose his mitigation. He also argued that the Appeals Officer had not considered his mitigation and that any inconsistency of timing between the mitigating circumstances and the examination failure was irrelevant because the problems were "on going".

(d) The applicant had been strongly advised to seek support and guidance from the unit leader prior to sitting the exams and in the summer of 2005 he was assisted by a Student Advisor and a Personal Development Adviser at the University.

(e) In her Preliminary View, the Reviewer found the University's Regulation 10.10 and their reliance on it to be reasonable. She also referred to their comment on the merit of the circumstances relied on.

(f) Following the Preliminary View, the point was taken on behalf of the appellant that he was not offered the opportunity to re-sit with attendance at lectures. OIA took the point that, on this issue, the appellant had not exhausted the internal complaints procedure, as required by paragraph 4.1 of the Scheme (and contemplated by paragraph 3(2)(b) of Schedule 2 to the 2004 Act).

(g) In the Formal Decision Letter, the University's decision was said by OIA to be reasonable in the circumstances. That conclusion had regard to the decision not to give the opportunity to repeat the Unit but to allow a re-sit with tutorial support.

(h) OIA also considered that the decision reached by the University on the mitigating circumstances was reasonable.

62. It is not clear whether, in the last full paragraph of the Formal Decision Letter, OIA was expressing its own view on the merits of the mitigating circumstances. I regard the reference to medical evidence as a comment on the University's approach, and one OIA was entitled to make. On neither view does it render unlawful OIA's decision that the complaint was not justified.

63. The appellant has to establish that OIA erred in law in holding that the complaint was not justified. That would involve finding that OIA was legally obliged to find the University's conduct such that it ought to interfere. OIA was not, in my judgment,

obliged to conduct a full factual investigation into the underlying facts. Reliance could properly be placed on the University's requirement that mitigating circumstances be expressed before the date of the examination board. It is clear that guidance was available to students at the University, and was taken up by the appellant at a later stage. Reliance could also be placed by OIA on the University's reaction to the mitigating circumstances, insofar as the Appeals Officer did refer to them. OIA was also entitled to find that the University's failure to offer an opportunity to re-sit the entire unit was not unreasonable and that the opportunity offered was appropriate.

64. It must be kept in mind that the question before OIA was whether the complaint was justified. OIA decided that the complaint was not justified because the University could reasonably terminate the course in April 2005 in the circumstances which had arisen. As to the procedural allegation, it is based on OIA's failure, before making its final decision, to disclose the University's letter of 21 November 2005. That has led to the suggestion that the appellant would have argued, had he known the contents of that letter, that he would not have been penalised financially if the alternative of a complete re-sit of the unit had been offered. The suggestion that it should have been offered was not made until after the final decision. OIA could have declined to consider it because the internal procedures at the HEI had not been exhausted, but did refer to it.

65. What the appellant's solicitor contemplated in the letter of 16 September 2005, by reference to Regulation 11.6.2 was "the opportunity to attend lectures again in order that he could fully prepare for his re-sit". In the letter of 23 September 2005 it is "the opportunity to attend lectures again" which is mentioned and not the repeating of the entire unit and rejoining another group contemplated by Regulation 11.6.2. In any event, the Regulation applies to a second failure and not to a third, which occurred in this case.

66. The procedural failure does not, in my judgment, invalidate OIA's decision. The absence of the opportunity to refer OIA to the appellant's financial circumstances does not in the circumstances require it to be quashed. Application for a full re-sit of the unit had never been made, and not surprisingly, given the option of a fourth attempt to pass just two subjects. Reference to financial circumstances which would have made the alternative possible, cannot be decisive at this stage. There is no real possibility that it would have affected OIA's decision and I am doubtful whether it rationally could have done. I do, however, welcome OIA's assurance that, in similar circumstances, a letter such as the University's would now be disclosed to an applicant to OIA.

67. For the reasons given, I would refuse the application for judicial review.

LORD JUSTICE MOORE-BICK :

68. I agree that this appeal should be dismissed for the reasons given by Pill L.J. and Richards L.J. (whose judgment I have had the advantage of reading in draft). However, since this is the first occasion on which this court has had an opportunity of considering the position of the Office of the Independent Adjudicator for Higher Education ("OIA"), I add a few words of my own on the first of the two questions that arises for consideration in this case.

69. Pill L.J. has described the constitution of the OIA itself, the provisions of the Higher Education Act 2004 under which it has been designated the body responsible for dealing with student complaints and the circumstances giving rise to this appeal, all of which I gratefully adopt. I think it is clear that the purpose of the Act was to create a system under which students at higher education institutions could take complaints quickly and with a minimum of expense to a central body for consideration by people with experience of the world of higher education in order to obtain a speedy decision on the merits of their grievances and, where necessary, an appropriate solution without the need to resort to formal proceedings, whether within the institutions themselves or through the courts. The Act therefore contemplates that the designated operator, currently the OIA, will be performing a public function, albeit not one that involves the determination of the legal rights and obligations of the parties involved in the complaint. As such it cannot be equated to a body established by one or more institutions to act as an arbitrator, mediator or conciliator in a purely private capacity. Moreover, I do not think that there can be any doubt that Parliament intended the designated operator to undertake a fair and impartial investigation into the complaint in each case and to reach a conclusion based on the materials before it, while drawing on its own experience of higher education. For these reasons, as well as the more detailed reasons given by Pill L.J., with which I agree, I too am satisfied that decisions of the OIA are amenable to judicial review.

70. However, it does not follow that the procedures and decisions of the OIA are to be treated as if it were a judicial body or that every complaint must be investigated in the same way. The nature and seriousness of complaints referred to the OIA is likely to vary widely and is therefore likely to call for a variety of different approaches. I am unable to accept, therefore, the submission that in every case the OIA is bound to examine the underlying merits of the dispute and cannot properly limit itself to a review of the decision which has given rise to the complaint. It is for the OIA in each case to decide the nature and extent of the investigation required having regard to the nature of the particular complaint and on any application for judicial review the court should recognise the expertise of the OIA and is likely to be slow to accept that its choice of procedure was improper. Similarly, I should not expect the court to be easily persuaded that its decision and any consequent recommendation was unsustainable in law.

71. As far as the present appeal is concerned, I agree that, despite the procedural shortcoming to which Pill LJ refers, the OIA's decision was lawful for the reasons he gives. I too would refuse the application for judicial review.

LORD JUSTICE RICHARDS :

72. I agree. Because this is the first time that an attempted judicial review of one of the OIA's decisions has come before the courts, I think it helpful to add a short summary of my own views on the main issues.

73. That decisions under the Scheme are amenable to judicial review is plain from the statutory context within which the Scheme has been established and the nature of the function being performed by the OIA in reviewing qualifying complaints against HEIs. The concession that judicial review would lie in a case of bias or other procedural unfairness was inevitable; but there is no principled basis for drawing a

line at procedural unfairness and not accepting the availability of judicial review to correct other legal errors in the decision-making process.

74. 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.

75. The core requirement under paragraph 6.1 of the Scheme to "carry out a review of the complaint to decide whether it is justified in whole or in part" does not prescribe the form that such a review is to take. Nor does paragraph 7.3 of the Scheme, which is in permissive terms. A review of the kind contemplated by paragraph 7.3, under which the reviewer considers "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", is entirely consistent with paragraph 6.1 and with the purpose of the Scheme. But so too is a more intensive form of review, involving an enquiry *de novo* and a fresh decision on the merits. Which of those approaches to take, or whether to take some middle or different course, is a matter of discretion. In this, as in other matters, little assistance is to be derived from reference to the former jurisdiction of the university visitor, which the statute abolished. The Scheme represents a new approach to the review of qualifying complaints and is not intended to replicate the old system.

76. Baroness Deech says in her witness statement that it is the practice of the OIA only to ask itself the question set out in paragraph 7.3. I read that not as a mere observation of fact but as indicating the policy of the OIA. The OIA is entitled to have such a policy provided that it is prepared to make an exception to the policy in an appropriate case and, in particular, that it gives proper consideration to representations by or on behalf of a complainant as to why it should take a different approach in an individual case.

77. There was nothing in the facts of the present case or in the representations made that could realistically be said to have required the OIA to consider whether to make an exception to its policy or to approach the case otherwise than in accordance with paragraph 7.3. There was no reason why it should not carry out a review in accordance with its standard practice. It did not fetter its discretion by doing so.

78. The University's letter of 21 November 2005 ought, as a matter of procedural fairness, to have been disclosed to the claimant so as to enable him to make representations on it. But I am satisfied that the failure to do so made no difference to the outcome. The OIA has now changed its procedures so that a problem of this kind ought not to recur.

79. The OIA's decision letters were not well expressed, but should in my view be read with a degree of benevolence. On that basis I do not think that they reveal any misdirection or misunderstanding of how the University had approached the claimant's representations. Moreover, elaborate reasoning is not required in a decision of this nature. On the facts it was plainly open to the reviewer to find that the complaint was not justified.

80. Accordingly, I too would dismiss the application for judicial review.