Neutral Citation Number: [2010] EWHC 1056 (Admin)

Case No: CO/6521/2009

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/05/2010

Before :

MR C. M. G. OCKELTON
(sitting as a deputy High Court Judge)

- -

Between :

STEPHEN BUDD	**Claimant**
- and -	
OFFICE OF THE INDEPENDENT ADJUDICATOR FOR HIGHER EDUCATION	**Defendant**

- -
- -

Gregory Jones and Annabel Graham Paul (instructed by **AP Law**) for the **claimant**
Sam Grodzinski (instructed by **E. J. Winter and Son, Reading**) for the **defendant**

Hearing dates: 23-24 March 2010

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Judgment Approved by the Court for handing down

(subject to editorial corrections)

Mr C. M. G. Ockelton :

Introduction

1. Mr Stephen Budd, the claimant, took the course W300, Agreements, Rights and Responsibilities, as part of his Open University (OU) Law degree. There were assessments during the course, and an unseen written examination at the end of it. He obtained high marks in his assessments, but when the results of the written examination became available in December 2007, he found that he had been awarded an overall examination score of 50%. He has found it difficult to accept that mark, because he expected a higher one. He took the matter up with the OU, first simply by querying the result, and then by invoking the formal appeals procedure. When the OU did not uphold his appeal, he made a complaint to the Office of the Independent Adjudicator for Higher Education (OIA), the defendant. In a decision made on 25 March 2009, the OIA rejected Mr Budd's complaint.

2. Mr Budd now brings these proceedings for judicial review, challenging the OIA's decision. The OU is joined as an interested party.

3. The essence of Mr Budd's complaint to the OU was that he had written a good script, and that something must have gone wrong in the marking process. Either the script had been marked badly, for example by the examiner missing, and failing to give credit for, good points that he had made; or the marks had at some stage been wrongly entered or transcribed; or perhaps the script attributed to him had not been his at all. These proceedings are not concerned to resolve those issues. But the terms of the original appeal to the OU form the background to these proceedings, because the complaint to the OIA related to the way in which the OU dealt with the appeal, and these proceedings are concerned with the OIA's investigation into the OU's process. In brief, the claim is that the OIA did not adopt the procedure that it should have adopted in assessing whether the precise issues raised by Mr Budd had been properly dealt with by the OU.

The Proceedings

(i)The original claim

4. The Claim Form was filed on 24 June 2009. The remedies sought are listed as follows:

> "1. A declaration that the OIA's formal decision of 25 March 2009 is unlawful.
>
> 2. An order quashing that decision.
>
> 3. An order requiring the OIA to conduct a full merits review."

5. In the detailed statement of grounds, the claimant raised six issues. The first is headed "Procedural Unfairness". The crucial part of it is an assertion that "no reasonable review body could reach an informed decision on the complaint lodged without checking the script for procedural irregularities". In other words, the OIA should have called for the script and looked at it. That assertion is said to be supported by the

following. The report of the Examination and Assessment Board (EAB) showed that, of the four questions attempted by the claimant, three had been marked at 45%. It was inherently unlikely that he would have scored identical marks in three questions, and so the very fact of the three identical marks raised questions about whether those were indeed the marks awarded on the script, whether they had been correctly transcribed, and whether the EAB had made the checks it should have done. Ground 5, which is headed "Irrationality", contends that the OIA's decision not to call for and consider the script itself was irrational.

6. Ground 2 is that the OIA failed to take account of a relevant consideration, in that the list of documents considered by it does not include the minutes of the EAB.

7. The claimant's third ground for review is that the OIA had failed to consider whether to conduct a "full merits review". Not merely had it failed to exercise its discretion: it appeared to have fettered its discretion by a policy that it would only consider "whether the University has followed its own procedures correctly and whether any decision made by the University was reasonable in all the circumstances". The fourth ground is that the OIA breached the right to a fair hearing, secured by Article 6 of the European Convention on Human Rights, in declining to hold an oral hearing of the claimant's complaint. This ground asserts that the small number of oral hearings held by the OIA suggests that on this issue too the OIA has adopted a policy fettering its discretion.

8. The sixth and final ground is that, in accordance with assurances given to Parliament, the OIA should provide a "transparent means of redress" for student complaints. The ground is as follows:

> "The claimant asserts that transparency depends on disclosure of material relevant to the complaint. As he has set out above, *he has been denied access* to arguably the most important document: the marked examination script. Consequently, the claimant contends that the OIA's omission was contrary to the will of Parliament."

9. I have added the emphasis and it as well at this stage to note also that the precise terms of ground 1, which I have summarised above, are that "the OIA refused to disclose the marked examination script attributed to him during their review".

10. The claimant was acting in person when he submitted the claim form and he drafted the grounds himself. There is no doubt in my mind that he intended to plead both that the OIA should have called for the script, because they could not assess his complaint without it, and that they should have disclosed it to him, in order to show what the course of their investigation had been. The latter claim is clearly made in ground 6. The former is made in essence in ground 1, but the sentence I have quoted from that ground perhaps should have been in terms that the OU refused to disclose the script to the OIA during the OIA's review. Because complex grounds on a complex matter were prepared by a claimant acting in person, and because of subsequent developments in these proceedings, I am particularly concerned to ensure that I have properly taken account of every point that the claimant indicated that he wished to pursue. Despite the infelicity to which I have alluded, there is no doubt that the key complaint is that the OIA should have called for the script. There is, as it happens,

nothing in the additional point about disclosure to the claimant, because the OIA's procedure is to make available to the complainant documents it has considered in the course of its review. If they had considered the script, they would have disclosed it to the claimant.

11. Permission to apply for judicial review was granted by HHJ Langan QC, sitting as a deputy judge of this Court on 25 August 2009. He said this:

> "Almost all of what the claimant has said seems to me to be unarguable: e.g. the points made about failure to double-mark, or marking by the Examining Board itself, or failure to hold an oral hearing. He has, however, raised one question on which I regard him as having an arguable case: and the question may, in any event, be one of general importance. This is whether the defendant's decision is undermined by reason of its failure to call for the examination script – not, of course, for the purpose of reviewing matters of academic judgment, but simply to make sure that the script gives the appearance of having been properly marked and to make sure that [there] were no errors in matters such as addition and transcription of marks. Looking at the script might be regarded as essential where, as in this case, there was such a great disparity between the marks awarded for coursework and marks awarded on the examination paper."

(ii) Renewal

12. The claimant, now fully represented, gave notice of the intention to renew his application orally. The grounds for renewal refer in terms only to ground 3, but in substance to grounds 3 and 4. Those are the grounds that the OIA fettered its discretion to hold a "full merits review" or an oral hearing. The grounds suggest that the substantive application and the renewal be dealt with together, and that there be a "rolled up" hearing on the renewed grounds; that is to say, that the substantive hearing on those grounds follow immediately, if permission be granted. There was no order for a rolled up hearing, but as I understand it the parties prepared for the hearing on 23-24 March on the basis that that was what it would be.

(iii) Further grounds?

13. About two weeks before the hearing, the claimant filed further witness statements, and on the eve of the hearing indicated that he might seek to pursue a number of other matters, essentially that the decision under review is rendered unlawful by a failure of independence in the OIA itself. In connection with that, the claimant anticipated the need to seek disclosure of certain documents, and to obtain leave to amend the grounds for review in order to add a further ground about independence. The claimant's suggestion, made in a supplementary skeleton argument, was that if pursued these matters should be dealt with by way of mention at the end of the hearing, because the claimant would only want to pursue them if his claim on other grounds was unsuccessful. The defendant's position was that they should not be considered at all: the new assertions had nothing to do with the claim as pleaded, and their being brought forward at such a late stage was abusive. In the end, although the

witness statements dealt with the issue in some detail, this matter was not pursued by the claimant with any vigour. I refer to it further below.

(iv) Summary

14. I thus have before me an application for judicial review, pursuant to HHJ Langan QC's grant of permission; a renewed application on further grounds, with the substantive hearing to follow if permission is granted; and evidence unrelated to those grounds but which might be thought to cause concern on others.

The Office of the Independent Adjudicator

(i) Origins and statute

15. Traditionally, universities and colleges had a Visitor, to whom complaints could be referred after internal procedures had been exhausted. The expansion of the Higher Education sector in the last part of the twentieth century included the granting of university status to many institutions without a traditional background. The result was that whereas previously the lack of a Visitor was an unusual feature of a university or college, there were now many such institutions with no Visitor, and accordingly no ready access to the independent review of a complaint against the institution.

16. The OIA was set up in 2003. It is a company limited by guarantee, formed by leaders in the Higher Education sector with the aim of providing a complaints facility for students at universities and colleges that had no Visitor. The company's board of directors is to consist of at least 13 and no more than 16 directors. Each of the six members of the company appoints one director, and the rest are to be co-opted by the Board as independent persons with appropriate knowledge and experience. It follows that those co-opted are always a majority of members of the board. The board has power to appoint an independent adjudicator and a deputy adjudicator, the latter to be responsible for the day-to-day running of the company.

17. The Higher Education Act 2004 made provision in Part 2 for the review of complaints by students in Higher Education Institutions (HEIs). Section 20 abolishes the jurisdiction of Visitors in relation to student complaints. Section 13 enables the Secretary of State and the Welsh Assembly to designate a body corporate as "the designated operator" for the purposes of the review of student complaints, but only (s.13(3)) if that body meets the requirements of the Act. For those purposes qualifying institutions are defined in s.11. There is no doubt that, as it is a university, the OU falls within s.11(a). Section 12 defines qualifying complaints. For present purposes it is sufficient to say that a qualifying complaint is a complaint "about an act or omission of a qualifying institution" made by a student or former student. But subsection 2 is important:

> "12(2) A complaint which falls within subsection (1) is not a qualifying complaint to the extent that it relates to matters of academic judgment."

18. A designated operator must have a scheme complying with schedule 2 to the Act, and must (this is s.14) comply with the duties set out in schedule 3. Qualifying institutions are obliged to comply with any obligations imposed on them by a scheme (s.15); and

there are provisions in sections 16 to 18 relating to the termination of designation and the extension of privilege in the law of defamation to the review process. Schedule 3, with which by s.14 a designated operator must comply, is concerned primarily with the provision and publication of a scheme for the review of qualifying complaints. By paragraph 2 of schedule 3, a designated operator must provide such a scheme, which must meet all the conditions set out in schedule 2. The scheme is to be published, and is not to be changed without consultation and notification. A designated operator must comply with any requirements that the scheme imposes on it. It must produce and publish an annual report and must conduct a review of the scheme or its operation at the request of, and provide any information reasonably required by, the Secretary of State or the Welsh Assembly as appropriate.

19. Schedule 2 sets out a number of conditions with which the scheme which a designated operator is required to have must comply. Conditions A and B are designed to secure universality. The scheme must be framed in such a way that it applies to all qualifying institutions in England, or Wales, or England and Wales as appropriate, and must apply to all qualifying complaints, save that it may provide for (a) a time limit within which complaints are to be brought; (b) the institution's internal review procedures to be exhausted before a complaint is brought; (c) that a complaint will not be dealt with under the scheme if it has been or is being dealt with by a court or tribunal.

20. 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"

21. Condition D is that the scheme requires the reviewer, as soon as is reasonably practicable, "to make a decision as to the extent to which a qualifying complaint is justified". Condition E is that the scheme provides that, if a complaint is justified or partly justified, the reviewer may recommend the institution to do or refrain from doing something but may not require it to do so. Condition F relates to notification to the parties of the reviewer's decision and the reasons for it. Conditions G and H relate to fees. In fact the OIA when first established was funded by government; it is now funded entirely by HEIs.

22. The OIA is, I understand, the only corporation so far designated as a designated operator under Part 2 of the 2004 Act. It is designated both for England by the Secretary of State and for Wales by the Welsh Assembly.

(ii) The OIA's Scheme

23. The OIA's Scheme is contained in the Rules of the Student Complaints Scheme. The current version, applicable to the complaint the claimant made, came into force on 1 May 2008. The rules relevant to these proceedings are as follows:

> 3. The Scheme does not cover a complaint to the extent that:
>
> ...

3.2 It relates to a matter of academic judgment.

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 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.

> 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 Acts.
>
> ...
>
> 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 ... .

Data Protection

24. It is convenient here to allude briefly to the issue of data protection. The effect of section 7 of the Data Protection Act 1998 is that individuals are entitled, under certain conditions, to have disclosed to them personal details relating to them, held by institutions and others. Sections 8 and 9 relate to examinations. Section 8 relates to examination *marks* and delays the duty under the Act to prevent examination candidates having access to their marks before the publication of results. Section 9 relates to examination *scripts:*

> "9(1) Personal data consisting of information recorded by candidates during an academic, professional or other examination are exempt from section 7."

25. As will be seen, the OU had relied on s.9 in deciding not to release the claimant's script to the OIA. At the hearing there was a difference between the parties as to whether the OIA had indicated any influence from s.9 in making its decision. It was said on behalf of the claimant that some universities do release scripts to the OIA, and that the OIA is entitled to call for whatever documents are necessary for its investigation, and to draw adverse inferences against a party who declines to produce them. However that may be, given the OIA's principle of disclosing all documents to the complainant, and that the OIA was aware of the provisions of the Act, it is obvious that the OIA would treat with some caution a requirement that an HEI produce to it, and hence to the complainant, a document that the complainant has otherwise no right to see.

The claimant's appeal to the OU

26. As required by the scheme, Mr Budd first appealed under the OU's own internal complaints procedure. The OU's responses were amongst the documents available to the OIA's Reviewer.

27. On 11 January 2008, in response to an informal query, a letter from the OU's Head of Examinations and Assessment confirmed that the result notified to the claimant was

correct, that all his examination answers had been marked, and that the marks awarded agreed with those held on the assessment record. The response to individual points raised by the claimant was as follows. First, as is common practice when there is a significant difference between the results of course assessments and examination, the script was given individual consideration during the board meeting. Secondly, it is not uncommon for a candidate's own assessment of his examination performance to be at variance with the EAB's requirements: discontent with the result is not therefore evidence of any irregularity in assessment. I do not think I need to set out the responses to other points that the claimant had raised, save that he had indicated that he wanted to appeal against the result. The response was as follows:

> "Please note that a formal appeal may be made only if there is evidence of procedural irregularity in the determination of your course result."

28. The letter gave details of how to obtain information on the procedures.

29. Following the claimant's appeal, the Head of Assessment, Credit and Awards wrote to the claimant on 18 February 2008. He said that the large difference of 37 percentage points between the claimant's results in assessment and in the written examination did not constitute prima facie evidence of any irregularity in the marking or determination of his course result. He explained the reasons why such differences occur, and stated that EABs are asked to consider whether there is any reason for concern when there is a difference of 30% or more. The writer of the letter states that he has reviewed the arrangements made for marking the claimant's script and the procedures followed by the EAB in determining his result. The claimant had not identified any basis for irregularity and the writer of the letter had not found any in the investigations he had made. The claimant's assessment achievements were reviewed individually by the EAB in determining the final outcome. The letter goes on to refer to the fact that the claimant had by then made a subject access request under the Data Protection Act. He was being sent a transcript of the comments the examiner had made on the script and it was hoped that they would be found helpful in understanding the basis of the examination score.

30. There are two letters dated 11 April 2008. Both are from Will Swann, Director, Students, at the OU. The first letter communicates the result of the claimant's appeal:

> "The issue that was considered in relation to your appeal was the difference between your examination score and your continuous assessment score.
>
> The final decision of the University is that your appeal is not upheld because no evidence of any irregularity or maladministration has been found in the assessment process."

31. The second letter deals in detail with a number of points raised by the claimant, in particular in response to the material that had been disclosed to him as a result of his Data Protection Act request. The Director, Students confirmed that the person marking the claimant's script was identified by number and that the marker's performance had been assessed by the EAB. The script had been stamped "considered at award board" as it had been reviewed by a member of the EAB at a meeting. So far

as concerns the comments made by the marker on the script itself (marks and comments made by examiners on scripts are not exempt from disclosure under the Data Protection Act 1998), it was true to say that some of them had been mistranscribed by the person responsible for fulfilling the Data Protection Act request, but that did not mean that there was any error in the (earlier) transcription of the marks for the purposes of, and by, the EAB. Nor did the number of positive comments mean that the mark should have been higher. The assigning of a mark to what the candidate had written was a matter for the assessment of the Board; all examination procedures were subject to external scrutiny by the External Examiner, and the assessment and quality assurance procedures of the University had been subjected to internal and external audit and always been found to be fit for purpose. The claimant's script had not been re-marked as a result of his appeal. The response to the claimant's suggestion that the script attributed to him was not his was as follows:

> "You appear to be in doubt that the marks awarded relate to your script. However it is the student who records their personal identifier on all work submitted during the examination and furthermore the University has in place a barcode system, used for handling scripts and other examinable work to avoid any possibility of confusion".

32. The two final substantive paragraphs of the letter are as follows:

> "Notwithstanding the contents of your "grounds of appeal" document, the basis for your appeal is essentially the divergence between your Overall Examination Score (OES) and your Overall Continuous Assessment Score (OCAS). As [the head of assessment] indicated in his letter of 18 February, it is not uncommon for students to have a variation between OES and OCAS and where the difference is large, the EAB considers each student case individually. Your case was considered individually. My investigations have produced no evidence to suggest that there has been any irregularity in the process and I am satisfied that our assessment procedures have been carried out correctly and in accordance with our policies and procedures. My authority is limited to reviewing the policies and procedures used in determining your course results; I am not able to intervene in matters of academic judgment. In the circumstances outlined above, your appeal is refused. The course result already advised to you therefore remains unchanged. This represents the final position of the University.
>
> I note that in your letter of 29 March, you make a further request to be sent a copy of your examination script. I believe Mrs Midwood, the University's planning officer (legislation and information) dealt with your subject access request and you are aware that some material was exempted from the documents under the provisions of the Data Protection Act 1998. The examination scripts are one of the exemptions noted. Whilst some universities may choose to waive the exemption

> relating to examination scripts, the Open University does not. The University has supplied to you a transcript of the examiner's comments, in compliance with the Act."

The claimant's complaint to the OIA

33. The claimant's complaint to the OIA was initiated by his "scheme application form", which is dated 7 July 2008. The detailed statement of "What I consider the Open University has done wrong" is in a separate document, but, as required by the form, the key points of complaint are summarised on it. The two documents read together constitute the complaint that the claimant was asking the OIA to investigate. Some of the issues then raised have not been pursued in these proceedings. I shall do the claimant no injustice if I cite his summary on the application form, with my comments, partly derived from his separate statement of grounds and partly on whether the individual matter is still pursued.

> (a) Unrealistic appeal time limit. (This has not been pursued further.)
>
> (b) Maladministration/procedural irregularities: (i) single examiner marked script (The grounds indicate that the claimant has no knowledge of what review of his academic performance was undertaken by the EAB: 'for all I know, it could be limited to someone adding up the examiner's scores'.); (ii) appeal process fails to properly consider merits of a complaint (This is not further expanded in the grounds.) (iii) irregularity in respect of three identical scores (This is based on a statistical assertion as to the unlikelihood of three marks of 45% occurring by chance – the statistical argument is obvious nonsense as nobody would suggest that marks for examination questions are assigned randomly, or that the marks are independent of one another in the statistical sense: it has not been pursued further.)
>
> (c) Legitimate expectation: (i) that a higher pass grade is merited as justified by standard of assessment; (ii) EAB decision should be based on logic rather than feelings. (This ground relates to the OU's procedures for awarding a final assessment where there is a large variation between the results of continuous assessment and the unseen examination. It is not pursued in these proceedings, which are concerned only with the marks for the unseen examination.)
>
> (d) Unreasonableness: (1) OCAS of 40% (47% less than achieved) would have made no difference to the overall course result (This is a complaint about the marking scheme, similar to that in (c), and has not been pursued.); (ii) refusing to accept any possibility of error in procedure even though factual errors are evident in both transcripts and review. (The grounds point out the errors in transcription of the examiner's comments on the script, and a number of other errors in correspondence between the claimant and the OU in connection with his appeal.

> The burden of the complaint is that, in the circumstances, it was impossible to have confidence in the accuracy of the OU's process for assigning the correct mark to the claimant.)
>
> (e) Proportionality: The greater the impact of a decision, the more extensive should be the investigation. (The grounds point out that Level 3 courses like W300 carry double the weighting of earlier courses, and therefore have a greater impact on the final degree classification and hence, possibly, the candidate's career. More serious results, it is argued, demand more rigorous procedure on appeals.)
>
> (f) Teaching: (1) approach recommended in course materials held to be "poor technique"; (2) model answers not available to all students. (This matter has not been pursued in these proceedings.)
>
> (g) Mitigating circumstances: Query regarding whether student unaware of mental impairment around the time of examination should now be allowed to have this taken into account. (This ground has not been pursued in these proceedings.)

34. Setting out further the key points of his complaint, the claimant notes again the importance of the result for his future career, and says that he had expected a much more thorough investigation of his appeal, given his previous good academic record and his tutors' and his expectations of a good result in addition to the points previously mentioned. The examination result and the result of the appeal had caused him to be depressed and, as a result, he had underperformed in the present year's course. He felt demotivated, having discovered that an excellent assessment result could be effectively wiped out by a low examination result. On page 4 of the form is a part which in my judgment is important. It is headed "What would you like done about your complaint?" The claimant wrote as follows:

> "1. Recommend that the OU follow the policy of some HEIs in providing examinees with a copy of their entire examination script. Alternatively, persuade the OU to exercise discretion in this particular instance.
>
> 2. If the script is mine, then a re-examination to be performed by an independent marker, who is familiar with the OU W300 course and marking guidelines.
>
> 3. I am by no means the first OU law student to have trod the appeal path. I enclose a copy of *R v Open University ex parte Briggs* (2000), QBD. May I draw your attention in particular to paras 4, 5 and 14 of the judgment. Mr Briggs, unfortunately, did not have the benefit of the Human Rights Act 1998."

The OIA's procedure and decision

35. On receipt of the application form and supporting documentation, the OIA, in the person of an assistant adjudicator, to whom the matter had been assigned, wrote to the OU. It sought the OU's comments on the complaint, and sought various documents. Amongst the documents sought was:

> "3. A copy of the minutes of the examination and assessment board meeting at which Mr Budd's results and grading were decided, together which any other documents considered by it in determining his results."

36. The letter went on to say that material provided by the OU to the OIA would be disclosed to the claimant for his comments.

37. The OU responded with a substantial bundle of documents and its response to the complaint. It opposed the complaint on the basis that it had dealt properly with the claimant's appeal. Mr Jones submits, and I am inclined to agree, that the wording of request number 3 in the OIA's letter, which I have set out above, must include a request for the examination script. In his comments on what the OU had provided to the OIA, the claimant remarked in strong terms on its absence. The OU's Director, Students, responded to that and other issues raised by the claimant as follows:

> "Firstly I must state that I do not accept that we have failed to disclose relevant material. Mr Budd alleges that his examination script should have been sent to you, as it was one of the documents 'considered by the Examination and Assessment Board at their award meeting'. As Mr Budd states, it was of course one of the documents so considered. It has never been our practice to send the scripts to your office, as the script is something that the Board will use in making its academic decision. Mr Budd's use of the term 'attributed to me' is perhaps worth commenting upon. Students complete the front page of our answer books with their PI and name – both these will have been checked when the marking was carried out – in Mr Budd's case they will have been checked a second time, during the 'course result query' process.
>
> With the exception of the examination script, we have sent the documents relating to the Board's consideration of Mr Budd's individual result, although not those dealing exclusively with the setting of the thresholds. ... [S]tudents whose scores fall close to a threshold are considered, as are students whose scores are unusual in some way, or who have submitted special circumstances.
>
> ...
>
> Where an investigation carried out as part of stages 1, 2 or 3 of an appeal against a course result has revealed a procedural irregularity, a script may be re-marked. This does not mean that scripts are not double-marked other than in these circumstances. Many are, both during the monitoring process

> and by being reviewed at the award meeting, as Mr Budd's was. It is not our practice to reveal the names of markers. However, the reviewer was a member of the W300 Examination and Assessment Board. As part of the review the script was read, and the original mark confirmed."

38. There is no correspondence in which the OIA queries with the OU its decision not to disclose the examination script. In his submission at the hearing, Mr Jones attributed that to a number of possible failures by the OIA. Perhaps it was too readily persuaded that the script was relevant only to matters of academic judgment, when it might have been relevant to the simple process of transcription and addition. Or perhaps the OIA was too readily persuaded that the OU's policy not to disclose examination scripts was justified.

39. The assistant adjudicator who had written the letter of 25 July 2009 was not the Reviewer who made the OIA's decision. It appears that the claimant's complaint was in the portfolio of more than one other person before the final decision was made by a Senior Reviewer. The parts of her decision relevant to these proceedings are the following:

> OIA Review Process
>
> 11. The purpose of the OIA's review is to decide whether a complaint is justified in whole or in part. In deciding whether this complaint is justified, we have considered whether the University has followed its own procedures correctly and whether any decision made by the University was reasonable in all the circumstances.
>
> 12. In considering the complaint, we have taken into account all of the documentation provided by Mr Budd and the University. The University made representations in respect of the complaint and these were sent to Mr Budd who was given the opportunity to make further comments.
>
> 13. The OIA cannot interfere with the operation of an institution's academic judgment. We cannot put ourselves in the position of examiners in order to re-mark work or pass comment on the marks given. We can only look at whether an institution has breached its procedures or acted unfairly.
>
> Review and Findings
>
> Regulations
>
> 14. I have considered the following documents in reviewing this file:
>
> [They are listed]

15. From these documents, I have formed the following views about the Marking Process:

- A co-ordination meeting will be held before marking begins;

- At the co-ordination meeting, the marker may have to mark scripts under the direction of their team leader and there will be a discussion of the marks awarded by the individual script markers;

- Once examinations have been marked, the transcriptions of marks and question numbers must be checked by the marker and then by another person. A Marks Transcription Certificate must be completed by the marker certifying this.

- The Marking Scheme for W300 recommends that tutors mark in increments of 5 and adjust upwards or downwards to allow for any uncertainty in the script. It is recommended that if the mark is a clear Pass 4, it should be given a grade of 45.

- There is a standardisation meeting following marking to ensure that each of the markers is marking consistently and in accordance with the Marking Scheme;

- When the EAB meets, it must confirm the grade boundaries (these may be moved at the EAB's discretion depending on how the cohort performs and / or on the standard of the assessment) and then determines the grades of all students including any borderline students.

...

Findings

18I have carefully considered all of the information submitted by both the University and Mr Budd. In my view, on the basis of the Regulations I have considered, the onus for establishing that the University has failed to comply with its Regulations rests on the student and the appeal procedure and OIA review should not be used by students as a "fishing expedition". Although Mr Budd has articulated a number of complaints, there is little evidence to support the complaints he has made.

Unrealistic Appeal Time Limit

...

Maladministration / Procedural Irregularities

20Although Mr Budd's examination paper was marked by only one marker, there is no requirement under the Regulations for it to be subjected to a formal second marking. In any event, there

> is evidence (by way of EAB stamp) that his script was considered individually by the EAB and that the marker of his script was subjected to quality assurance checks at the standardisation meeting which revealed no concerns relevant to the marking of his script. These actions were taken in accordance with the regulations and I have seen no evidence that the EAB acted outside the Regulations.
>
> 21 I am not satisfied that the identity of the person who considered Mr Budd's examination script at the meeting of the EAB is relevant: it is enough that it was considered by the Board. The manner of review and the marks awarded are a matter of academic judgment and not amenable to review by the OIA. For these reasons, I do not find this aspect of Mr Budd's complaint to be justified.

40. The decision letter goes on to consider the other grounds of complaint and rejects them all. In particular, the University had no obligation to consider any mitigating circumstances in the claimant's case, because he had neither put them to the University as required by regulations, nor had he given the University any good reason why they should be considered otherwise than in accordance with the regulations. The letter continues:

> Response to Draft Decision
>
> 29 In response to our findings in the Draft Decision, Mr Budd stated that we had failed to understand the examination marking procedures and have rejected a major part of his case without proper consideration. Mr Budd says that the marker's decision to use only those scores divisible by five (instead of the full range of marks) is a procedural irregularity. I am not persuaded by this argument: the only evidence Mr Budd presents in support of it is the fact that the marks are all the same. The only way to test Mr Budd's contention that his examination questions were not properly marked is to consider the answers he gave on their merits and this constitutes a challenge to the academic judgment of the marker, which falls outside the remit of the OIA.
>
> 30 Mr Budd also says that we must view his examination script to ascertain whether it was properly marked. I am not persuaded that this is necessary as I have seen the relevant Examination Board minutes and am satisfied that his script was individually considered. As set out above, the actual marks awarded are a matter of academic judgment, with which I cannot interfere.
>
> Conclusion
>
> 31 For the reasons set out above, I do not find this complaint to be justified.

41. Following receipt of its decision, the claimant wrote to the OIA indicating that he was unhappy about the way in which his complaint had been handled. He said that he had been denied a fair hearing because the OU refused to disclose his examination script. He queried how the OIA could have "reasonably and rationally" reached a decision without checking the script, given that one of the grounds of the complaint was whether the marks were transcribed correctly. He challenged the view that the only way to resolve his complaint would be to have the script re-marked on its merits, because part of his complaint had been whether there had been some other error. He identified a small inaccuracy in the decision letter. He raised issues as to the OIA's timeliness. He said that it was hard to accept the OIA's view that the OU's decision was "reasonable in all the circumstances" as there had been (he asserted) only a single marker, no indication of the level of review, and an uncertainty about the review process adopted by the EAB. He said that the OIA's predecessor – the university Visitor – was held to have breached Article 6 of the ECHR by not allowing oral hearings, and asked for an oral hearing. Finally, he pointed out that the OIA has power to conduct its own investigation into the facts and said that it was not clear that the OIA had considered whether to exercise its discretion to do so.

42. There was a final response from the OIA refusing to go further into the substance of the complaint to the OIA, and rejecting the claimant's comments on procedural matters. The writer of the letter on behalf of the OIA adds as follows:

> "Finally I should comment that the OIA is under no obligation to provide hearings or to investigate complaints from the beginning".

43. That document represents the OIA's final position on the claimant's complaint.

Other documentation

44. There are two other documents requiring to be set out at length. First, following HHJ Langan QC's grant of permission, the OU wrote to the OIA on 10 Novemebr 2008 expressing concern, which I take as an indication that as an interested party the OU supports the OIA's defence of these proceedings. The parts of that letter relevant to the matters before me are as follows:

> The University secures the integrity and quality of its marking through rigorous internal processes which provide comprehensive mechanisms for ensuring that students' assessments and examinations are properly considered, marked and further processed. Each marker is instructed to double check their addition of marks, and their transcription to the pre-printed Desk Record for the student. The marker signs a transcription certificate to confirm their completion of this task. The addition of marks and the transcription to the desk record is then checked by clerks in the Examination and Assessment area when they log receipt of the scripts from the markers. They will also at this stage check that all pages have some 'red pen' marks on them such as a tick, a comment or an actual mark, to make sure the marker hasn't turned two pages together by mistake.

> Marks are double entered from the desk record onto the University's mainframe assessment system, that is, they are independently entered twice and the system checks the marks and rejects entries where they are not identical.
>
> I would note that in actual fact Mr Budd's examination script has been further checked on four occasions since it has been through the marking process (in addition to having been individually considered by the University's Examination and Assessment Board as part of the marking process due to the disparity between Mr Budd's continuous assessment and examination marks). In the first instance, a member of clerical staff in the Examination and Assessment Department checked Mr Budd's marked script following receipt of his Course Result Query on 7 January 2008, in a similar way to the initial check. When the administrative officer prepared the University's response, the marks on the script would have been checked against the records on the University's assessment mainframe. Mr Budd wrote again, and the matter was dealt with by the Head of Assessment, Credit and Awards. He again checked the script against the marks on the mainframe, and responded to Mr Budd on the 18 February. Mr Budd then subsequently made a DPA Subject Access Request (as he is entitled to do) in respect of the script. It was therefore reconsidered by the Assessment Policy Office and a schedule of marks and comments provided to Mr Budd. I therefore make the obvious point that if an error had occurred on the original script, it would clearly have been detected during this process. To consider that an error in marking or transcription would have been made and then undetected through these further checking processes does seem most unlikely.

45. Secondly, the defendant's case is supported by a witness statement by Felicity Mitchell, a deputy adjudicator of the OIA who was at the date of the decision under challenge Senior Reviewer, and who signed the decision on behalf of the OIA. It forms an important part of the information before me about how the OIA conducts its business generally and how it investigated the claimant's complaint in particular. I need to set it out almost in full.

> ...
>
> 6 The OIA review of a complaint follows the following general pattern:
>
> 6.1 The first step is to determine whether a complaint falls within the rules of the Scheme.
>
> 6.2 Once a complaint has been accepted for review, the casehandler writes to the student (or his or her representative, if one has been appointed) and to the HEI, setting out his or her

understanding of the complaint, and asking for any further information s/he considers necessary.

6.3 When the casehandler has all the information s/he considers necessary, s/he will normally issue a draft Formal Decision, in consultation with a senior adjudicator.

6.4 The parties are given the opportunity to point out any material inaccuracies which they have identified in the draft.

6.5 The complaint is then reviewed by a senior adjudicator and any necessary amendments are made to the draft. The Formal Decision is signed by the senior adjudicator (in this case, myself), on behalf of the OIA.

(This summary does not cover the cases which are considered to be suitable for our "Fast Track" procedure.)

The OIA's approach

7 The OIA reviews complaints to determine whether they are justified, partly justified, or not justified. In deciding whether a complaint is justified, we consider whether the HEI has followed its own procedures correctly and whether any decision made by the HEI is reasonable in all the circumstances. That approach is set out in paragraph 11 of the Formal Decision in the Claimant's case, and reflects rule 7.3 of the Scheme. It was endorsed by the court of Appeal in the case of *R (Siborurema) v OIA* [2007] EWCA Civ 1365.

8 In order to determine whether the HEI's decision was reasonable, it is sometimes necessary to look at the merits of the original complaint to the HEI. The test which we apply is the test commonly applied by ombudsman-type organisations: whether the decision or action taken can be said to be "fair and reasonable in all the circumstances". It is not the same as the *Wednesbury* test. The OIA's procedures are informal and the review is usually based on written representations by the parties. Students do not need to appoint legal representatives because of the informality of our approach.

9 The OIA is wholly different to the legal system and the Visitor system. We offer an informal, independent and (generally) speedy route for students to air their complaints. Where we find that a complaint is justified or partly justified, we can make recommendations which are much wider than the award of compensation. In many cases we have recommended that a HEI should give a student a further opportunity to take exams or submit work, or to repeat an academic year, or should remove the cap from resit marks. We have recommended that a HIE hold a fresh disciplinary hearing or appeal, reconsider the

case at a fresh examination board, or remark work where procedures have not been followed correctly. In some cases, the result of our review is that the student is reinstated, or their degree result is upgraded.

10 As well as that, we often make recommendations that a HEI should review its procedures. That results in an improvement for the student body as a whole.

...

18 The Claimant's complaint, which is summarised at paragraph 10 of the Formal Decision, was under many heads. The material heads of complaint for the purposes of this claim are (b) maladministration/procedural irregularities and (d) unreasonableness. Essentially, the Claimant contends that (1) his exam mark for module W300 cannot be his: that either the exam script is not his, or it has not been marked appropriately; and (2) that the mark is unreasonable because there is a significant divergence between the exam mark and the coursework mark.

19 On the two relevant heads of complaint, we concluded that Mr Budd's script had been marked in accordance with the University's regulations, and the script reviewed by a second marker, also in accordance with the regulations. The script had been individually considered because of the divergence of marks between the exam and the coursework. The marking itself, and the way in which the University calculated the overall module mark, were matters of academic judgment and not amenable to review under the OIA Scheme.

20 The Claimant asked for a copy of the exam script during the course of our review. We generally do not require universities to submit exam scripts to us although we do, on occasion, call for the front sheet of the script. This is for several reasons:

20.1 The OIA cannot interfere with the exercise of a university's academic judgment. It is not, therefore, appropriate or necessary for us to see the contents of exam papers, or indeed other written assessments.

20.2 The OIA's normal practice, endorsed by the Court of Appeal in *Siborurema*, is to review the final decision of the University to determine whether it had followed its procedures correctly and whether any decision made by the University was reasonable in all the circumstances. It is not generally necessary for us to carry out a check of the physical script. Instead, we review whether the University has proper procedures in place for checking scripts, and whether those procedures have been correctly followed. If students believed that they could refer

their scripts to the OIA for checking, we would no doubt be inundated with requests from students who had no actual evidence to support their belief that their scripts had not been properly marked.

20.3 Exam scripts are subject to an exemption to the DPA (Schedule 7(9)). Many universities rely on that exemption and have a policy of not disclosing scripts to students. That is a matter for the individual universities to decide. If we generally obtained scripts and, under our policy of openness and transparency, disclosed them to students, the students would be able to circumvent the DPA exemption.

20.4 The information and comments written on scripts are not subject to the DPA exemption. That information is made available to us – indeed, in this case, the Claimant himself obtained the information via a DPA request, and the University submitted the information to us in response to our initial request for information.

21 The judge's concern in this case about the addition and transcription of marks was met by our ability to view the information recorded on the script. During our review, we determined that the University had carried out checks of the script to establish that it was correctly attributed to the Claimant, and that the script had been individually considered at the Examination Assessment Board because of the disparity between the coursework mark and the exam mark. The evidence which we took into account can be found at exhibit FM1: (letters from the University dated 11 January 2008, 18 February 2008, 11 April 2008, 29 August 2008), and page 37-38 of the JR Bundle (letter from the University dated 10 November 2008). Whether the University had, indeed, conducted those checks is a question of fact. We are familiar with the University's procedures from our consideration of other cases. I exhibit as FM2 a letter dated 13 November 2009 from the University which provides some further details of the checks which it undertook of the Claimant's script.

22 In addition, as mentioned in paragraph 20, above, we had access to the information recorded on the script. This was disclosed by the University on 12 March 2008, in response to a subject access request from the Claimant for information under the Data Protection Act 1998. Amongst other documents, the University disclosed: (a) a report from the "course result processing system", the "Scriptmarker comments" and the "notes made on your script by the Examination Board". I exhibit as FM3 the University's letter of 12 March 2008 and enclosures. The "scriptmarker comments" can be found at pages 13-15 of exhibit FM2. It was apparent from these documents that in relation to the four questions in the

examination that Mr Budd had chosen to answer, namely Questions 1, 3, 7 and 8 he had been awarded marks of 45, 64 [sic], 45 and 45 respectively. It is also apparent from this material that the overall marks given for the answers to each question were not the aggregate of a number of sub-marks which might have been incorrectly added up. Thus there was no arithmetical adding-up exercise for us to check. Further, it is clear from the "External Script Markers' Handbook October 2007" paragraph 4 (a)(iii) (page 12 of the JR Claim Bundle) that ticks are simply required in order to show that the marker has seen and considered every page of the answer book: they are not indicators of marks.

23 The Claimant has suggested repeatedly that we asked for a copy of the script and the University refused to disclose it to us. That is not correct. We asked for "a copy of the minutes of the Examination and Assessment Board meeting at which Mr Budd's results and grading were decided, together with any other documents considered by it in determining his results" (letter of 25 July 2008, page 33 of the JR Claim Bundle). That was a request for general information considered by the Board; it was not a specific request for sight of the script. We did not expect the University to supply the script and therefore we had no reason to question it when it confirmed that it had not done so.

24 The Claimant suggests that it was necessary to see the script in order to establish whether the marking procedures had been correctly followed and, in particular, whether the marking was done in single digit increments. He says that to conduct that check would not be to question the academic judgment of the examiner.

25 Our decision recorded our conclusion (paragraph 29) that:

"The only way to test Mr Budd's contention that his examination questions were not properly marked is to consider the answers he gave on their merits and this constitutes a challenge to the academic judgment of the marker, which falls outside the remit of the OIA."

26 It is difficult to see how it would be possible to look at a script and assess whether an answer had been correctly awarded a certain mark without making an academic judgment on the standard of the answer. Similarly, we cannot assess whether it was appropriate for an examiner to award particular arithmetical marks for a point made. That is a judgment which only an academic can make. As noted above, the script marker comments (exhibit FM2, pages 13-15) do not record individual

marks; only a total mark for each question. We could, and did, check whether the marks had been correctly transcribed and added up, with reference to the information recorded in the DPA disclosure. If there had been a discrepancy between the marks recorded by the University and the information copied from the script in the DPA disclosure, it is likely that we would have called for sight of the front page of the script.

Oral Hearing and Merits Review

27 The application to extend the grounds on which permission has been granted relates to two further issues: (1) whether we should have held an oral hearing; and (2) whether we should have conducted a full merits review.

28 Rule 6.2 of the Scheme (page 365) says,

"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 circumstance he or she considers that it is necessary to do so."

29 In practice, we have not found it necessary to hold an oral hearing because we have been able to determine whether or not the complaints we have reviewed so far are justified from our consideration of the evidence submitted in writing (or where appropriate by telephone) under our procedures. The main reasons why this is so are:

29.1 We are reviewing the final decision of the University. Where we determine that there has been a flaw in the decision making process, we would normally refer the matter back to the University to take the decision again. The decision impugned may relate to academic matters which are beyond our jurisdiction, or may require consideration of other matters which are within the expertise of the University, and so it would not be appropriate for us to substitute our own decision for that of the University. In cases where we find that the process is so tainted that a fair reconsideration is no longer possible, we may recommend that the decision should be quashed altogether.

29.2 Our scheme is inquisitorial. We ask questions of the parties until we have the information we need to reach our decision. The parties see the information submitted and have the opportunity to comment on it. We do not consider that, in the circumstances, it is necessary to hold an *oral* hearing in order to give the parties a *fair* hearing.

29.3 If we were required to hold an oral hearing every time a student indicated that they wanted one, that would have a

significant impact on our resources – both in terms of staffing and physical premises. (The Claimant refers to the Visitor jurisdiction. Some but not all Visitors held oral hearings. It is to be noted that not all universities had a Visitor, and under the jurisdiction complaints took considerably longer to consider than under the OIA Scheme). We, therefore, determine whether a hearing is *necessary* in order to determine the complaint. Individual casehandlers make that judgment on each case.

30 Casehandlers are aware that our Rules provide that an oral hearing is an option available to the reviewer if one is necessary. If the casehandler considers that a hearing might be necessary, the complaint will be referred to a senior adjudicator to make that decision. If a student requests a hearing, then the casehandler decides, in consultation where necessary with a senior adjudicator, whether a hearing is necessary. He or she will then write to the student explaining his or her decision.

31 In the Claimant's case neither Ms Pell nor Mr Knowles considered that the complaint was the sort of complaint where the review would have benefited from an oral hearing. There was, for example, no dispute of fact which could be resolved by hearing and testing oral evidence. If they had considered a hearing was necessary, or if the student had requested one, the complaint would have been referred to me for a decision, which would have been communicated to the Claimant. The Claimant requested an oral hearing for the first time after our Formal Decision had been issued. By that stage, our procedures had been concluded, and so it was too late for us to hold such a hearing even if we had considered it appropriate to do so, which we would not have done.

32 It is correct that the OIA does not have a written policy on when to conduct a full merits review. It is not clear how it would be possible to formulate such a policy since each complaint is considered on its own individual facts. The distinction which the Claimant seeks to make is artificial. It is often necessary for us to consider the merits of a complaint, as evident from the information available to the University, in order to determine whether the University's final decision was reasonable in the circumstances. We always set out the background to the complaint in our decisions. However, it is rarely necessary or appropriate for us to conduct our own investigation, nor to put ourselves in the position of the University decision maker or to substitute our own decision.

33 The Claimant in this case wanted the OIA to conduct a "full merits review" of his complaint about marking. Since we cannot consider matters of academic judgment, we could not look into the marking of his script; we could only look at

> whether the University had applied its procedures correctly and whether its decision was reasonable. This is what we did. It is not clear in these circumstances what the Clamant means by a "full merits review".

46. I should also add short extracts from one document that was among those available to the OIA. In the OU's external script markers' handbook, dated October 2007, paragraph 3.b.ii) reads as follows:

> "Each script will have attached to it a desk record ... which contains a barcode.
>
> **The desk record MUST remain attached to a script at all times throughout the marking process, and will be used to record question scores."**

47. At 5.c is this:

> "Checking of Marks
>
> Script markers are responsible for the accurate recording of marks. Great care must be taken to ensure that the answers to all questions have been marked, and it is essential for each script marker to check very carefully the transcription of marks and question numbers onto the desk records. These transcriptions must be checked by another person. Experience has shown that the transcription of marks is frequently a source of error which, if undetected, may lead to great injustice to the candidates. Part of your fee for marking the scripts relates to reimbursement for the checking process. The desk record must always be securely attached to its corresponding script and must not be removed.
>
> The script marker is required to sign the Marks Transcription Certificate (M13, Appendix 6) certifying that the above checks have been carried out. One copy of this form must be returned with each batch of scripts."

The parties' submissions

48. The claimant's grounds for review are supplemented by a full response to the defendant's summary grounds of defence, Mr Jones's skeleton arguments and his submissions at the hearing. The response to the defendant's summary grounds does not appear to have been before HHJ Langan QC when he considered whether to grant permission on the papers.

49. The basis of the claimant's claim in relation to the examination script is that the OIA could not properly consider the claimant's complaint and in any event could not satisfy itself that the claimant's complaint was not well founded except by comparing markings on the script with the marks attributed to the candidate by the EAB. The argument is therefore both that the OIA failed to carry out its duty to investigate the

complaint and that its decision on the complaint was irrational. It should not have excluded the script from the material it considered; but, in any event, without the script, it was not entitled to reach the conclusion it did. Alternatively, in the circumstances, the OIA's decision not to call for the script was in the circumstances an irrational one, with the result that its decision followed a failure to carry out its statutory duty of investigation.

50. In support of his submissions, Mr Jones points out that in this context irrationality refers to a defect in logic, a proposition for which he cites dicta of Sedley J (as he then was) in R v Parliamentary Commissioner for Administration ex parte Morris and Balchin [1997] JPL 917 at 927. He reminds me that the OIA had originally asked for the examination script, but had not taken any action on the OU's refusal to disclose it. He argues that the complaint made in the present case demanded sight of the script itself, and that assurances by the University were no substitute for seeing the script.

51. Mr Jones further submits that the failure to call for the script prejudiced the claimant. Without seeing it, he could not make the case he needed to make in support of his case to the OIA. As a result, the claimant was in a similar position to that of the plaintiff in Fairmounts Investments Limited v Secretary of State for the Environment [1976] 1 WLR 1255. In the words of Lord Russell of Killowen at 1265,

> "[he] has not had – in a phrase whose derivation neither I nor your Lordships could trace – a fair crack of the whip".

52. Mr Jones's second principal head of submissions relates to the OIA's fettering of its discretion. As in the original grounds for review, there are two issues here. The first relates to the extent or depth of the investigation that the OIA should have or could have undertaken. The claimant accepts that the OIA has no obligation to undertake what Mr Jones calls "a full merits review" in all cases. But it has discretion as to the intensity of the review it undertakes. The claimant's case is that the OIA should have considered whether to conduct a "full merits review" into his complaint. Not only is there no suggestion in the OIA's decision letter that it gave consideration to that question, but, on the contrary, at paragraph 13, which I have set out above, the OIA states that "we can only look at whether an institution has breached its procedures or acted unfairly". That statement, in Mr Jones's submission, is both wrong and is clear evidence of an unwillingness or perhaps a refusal to exercise the discretion to look at other matters. Further, if the OIA has a policy on whether to look further into a case than paragraph 13 of the decision letter in the present case suggests, that policy has not been published, but ought to have been.

53. In her witness statement, Felicity Mitchell states that "it is rarely necessary... for us to conduct our own investigation" into a student's complaint. Mr Jones submits that that phraseology suggests that the OIA is applying a test which has an inappropriately high threshold.

54. It is in any event submitted that if the OIA had decided to look at the matter in more depth than it did, it would have needed to call for the examination script.

55. The second issue raising questions as to the OIA's exercise of discretion is that relating to an oral hearing. Rule 6.2 of the Scheme requires the OIA to consider whether an oral hearing is necessary on the facts of a particular case, and in published

documents as well as one of the letters in the present case, the OIA states that the question whether an oral hearing should be held is one of the issues which Reviewers are required to consider. There is nothing in the documents relating to the present case, however, that indicates that any such consideration was given.

56. It has to be accepted that the claimant did not request an oral hearing until after receiving the OIA's decision. But Mr Jones says that that is not relevant to his submission. Nor is the point that the OIA should have held an oral hearing, nor that the claimant had no right to have an oral hearing. The point is simply that the OIA should have considered whether to have an oral hearing, and did not do so.

57. Mr Jones draws an analogy with R v Warwickshire County Council ex p Collymore [1995] ELR 217, a case concerned with discretionary awards under Section 2 of the Education Act 1962. Evidence before Judge J (as he then was) showed that, save in a few early cases where there was a need to honour existing commitments, no discretionary awards had been awarded by the authority following appeals to it in the preceding three years. At 227, Judge J said this:

> "I find that, in practice, the result is remarkable: approximately 300 appeals, all unsuccessful; three years without a single discretionary award. In Professor de Smith's *Judicial Review of Administrative Action* [Sweet and Maxwell, 1980] he advances the following proposition:
>
> 'A course of conduct involving the consistent rejection of applications belonging to a particular class may justify an inference that [the] competent authority has adopted an unavowed rule to refuse all.'
>
> He cites a decision in the House of Lords in 1874. If I may say so, however, the proposition is a proposition of common sense as well as good law. Without suggesting that, in this case, what happened resulted from the adoption of an unavowed rule to refuse all cases, or bad faith, it is impossible to escape the conclusion that in practice the policy has been implemented far too rigidly and that, as a result, Miss Collymore's application was not properly considered."

58. Mr Jones draws attention to the fact that the OIA appears never to have held an oral hearing. He asks me to draw the conclusion that the discretion whether to hold an oral hearing is being "implemented far too rigidly".

59. Mr Jones also points out that Visitors often held oral hearings, which may be some support for his assertion that the complete lack of oral hearings may be a matter for the concerns he has outlined. That there were oral hearings before Visitors is not in dispute. Mr Jones cites R (Varma) v HRH The Duke of Kent [2004] ELR 616, no doubt because that was the case in which there was what was described as "a meeting... at which the claimant was able to make further representations".

60. As I have indicated, Mr Jones does not base his case on a right to an oral hearing, whether under the Scheme or Article 6 of the European Convention on Human Rights.

There clearly is no such right under the Scheme, and, so far as concerns Article 6, the observation of Collins J in Varma at [25] are relevant.

61. Mr Grodzinski's submissions on behalf of the defendant can be summarised more briefly. The OIA considers, under its Scheme, whether 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. In the present case, the OIA was entitled to reach the conclusion it did on the basis of the material before it, without calling for the examination script. In particular, there was substantial evidence, which the OIA was entitled to accept, that there had been numerous checks of the sort which would have identified administrative failures of the sort alleged by the claimant if any had taken place. In Mr Grodzinski's submission, supported by Felicity Mitchell's witness statement, the OIA had in fact not sought the script in its original letter, and had not expected to receive it. Thus there was nothing in Mr Jones's argument that the OIA had too readily accepted the OU's refusal to provide it. Mr Grodzinski also submitted that there was nothing in the claimant's argument that the OIA's failure to call for the script prevented the claimant from presenting his case fully.

62. The claimant had also, in Mr Grodzinski's submission, failed to show what a "full merits review" would have entailed, other than it would have involved calling for the script. But that was essentially the same as saying that the OIA was not entitled to reach a conclusion on the claimant's complaint without calling for the script. As Mr Grodzinski put it in his oral submission, the OIA's position was that there was no difference between what it had done and what it would have done in a "merits review".

63. In relation to whether there should have been an oral hearing, or whether the OIA should have considered whether to hold one, Mr Grodzinski submitted that the claimant had failed to identify any matter which could have been better decided by means of, or after, an oral hearing. In his assertion that the OIA had fettered its discretion, or had failed to consider whether to exercise its discretion, the claimant had ignored Felicity Mitchell's witness statement, which set out the procedure in some detail. In any event, the issue was simply one of procedural fairness: the claimant would need to demonstrate that the procedure adopted in his case was unfair to him. Mr Grodzinski referred me to R (Heather Moor & Edgecombe Ltd) v Financial Ombudsman Service [2008] EWCA Civ 642.

Siborurema

64. Both the claimant and the defendant sought to derive assistance from the decision of the court of appeal in R (Siborurema) v Office of the Independent Adjudicator [2007] EWCA Civ 1365, [2008] ELR 209. It is the leading case in this area of the law and must be my starting point.

65. The claimant was a student who had failed a unit of his course four times. The University withdrew him from the course. The claimant appealed to the University, bringing forward evidence of mitigating circumstances, but failing to meet the University's requirements for the advancing of such circumstances. His appeal to the University was dismissed largely for that reason. The claimant complained to the OIA, asserting that it was not sufficient for the University simply to rely on its regulations rather than considering the mitigation. The OIA found that the complaint

was not justified, because the University's decision was reasonable in the circumstances and had followed its procedures. The claimant sought judicial review.

66. The Court of Appeal had before it the rules of the Scheme. Particular reference is made in the judgments to paragraphs 6.1, 6.2, 6.3 and 7.3. Those were in the same terms as the rules applicable to the present case, with the exception of a difference in wording at paragraph 6.3, which Pill LJ at [38] said was no difference in substance. There was also a witness statement by the then independent adjudicator, Baroness Deech. She outlined the OIA's procedure. Amongst other things, she said that:

> "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".

67. Mr Gregory Jones appeared for the claimant. A number of his submissions were markedly similar to those he made to me. He argued that the OIA's duty to review complaints required a consideration of the merits, including an investigation of the facts. Alternatively, if there was not a duty in all cases to examine the underlying merits of a complaint, there was a power to do so, and consideration must in all cases be given to exercising that power. Mr Jones also submitted that the OIA acted unlawfully in restricting itself to the questions set out in rule 7.3.

68. The Court held that the OIA was amenable to judicial review, but each member of the Court added observations about the scope of judicial review of the OIA. Pill LJ put it this way:

> "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."

69. Moore-Bick LJ, after agreeing that the decisions of the OIA are amenable to judicial review, continued as follows:

> "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."

70. Richards LJ agreed in general terms, but may be regarded as taking a more critical approach to paragraph 7.3 of the Scheme, and to the Independent Adjudicator's evidence about it. He said this:

> "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."

71. But:

> "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."

72. I see nothing in the judgments in Siborurema that gives any support either to the submissions made by Mr Jones to the Court of Appeal on behalf of the claimant in that case, and repeated before me, or to the additional different submissions he made in the present case.

The duty of the OIA

73. The duty of the OIA is to review complaints and decide whether they are justified. The OIA has power to decide what form the review shall take in any particular case. Although, after the event, the review in a particular case may or may not be described as a "merits review", I do not think that any useful purpose is served by importing into the OIA's process terminology drawn from other areas of administrative law. In particular, it does not seem to me that it is right to divide the types of investigation the OIA might undertake into discrete categories with names taken from general administrative law, and regard the passing from one category to the next as involving a specific and separate exercise of discretion. 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.

74. I agree with Mr Jones that the statement at paragraph 13 of the decision letter in the present case that "we can only look at whether an institution has breached its procedures or acted unfairly" is simply wrong. The OIA is not so restricted. That statement ought not to appear in decision letters. Whether its inclusion in the present case vitiated the decision is a matter I consider below.

The OIA's decision in the present case

(i): Did the OIA need to call for the script?

75. In assessing the lawfulness of the OIA's decision in Mr Budd's case, it is important to remember what were the terms of the complaint as put to the OIA. I have set out above what the grounds of complaint were, but I have also set out what it was that the claimant said he wanted as the outcome of his complaint. There can be no conceivable doubt that he sought a re-marking of his script by a person independent of the OU. In other words, he sought a review of the matters of academic judgment. There is not the slightest suggestion in his form of complaint that he was prepared to accept the result, if only it were clear that his examination script had indeed been marked at that level.

76. Mr Jones asserts that the OIA recognised that the claimant's complaint related to procedure, not to academic judgment. He refers to the setting out of the heads of complaint in paragraph 10 of the decision letter (they are taken from the grounds set out in the application form) and to paragraphs 20 and 21 of the decision. It is indeed clear that the OIA was concerned to disentangle matters that it could review from matters that it could not. As a complaint about matters of academic judgment is not a qualifying complaint, the OIA could not be concerned with whether the claimant had been awarded the correct marks for the questions he attempted. But it is also the case that even within the procedural issues raised by the claimant, there are concerns about the accuracy of the marking itself rather than its transcription: indeed, his complaint about whether at the examination board the script was re-marked or whether there was merely a check as to whether the adding up had been done correctly is precisely such a complaint.

77. In that context the OIA began its investigation. It was aware that the claimant was dissatisfied with his exam result. It was aware that he had a concern whether there had been some error in assigning marks to him, either because the wrong script had been assigned to him, or because there had been an error of transcription or addition. If the correct script had been marked, and the marks had been correctly transcribed and added, there was no further matter that the OIA could or should investigate.

78. The OIA sought material from the OU. Although I note Felicity Mitchell's statement that the wording of the request was not intended to include the examination script, it does appear to me, as I have already said, that, whatever was the intention, on its face the examination script is included, as a document considered by the EAB in reaching its decision. That is evidently the way the letter was understood by the OU, as can be seen from its response refusing to forward the script. But the fact that the OIA did not persist in that particular request or challenge the OU's decision not to disclose the script does not of itself show any irregularity. The OIA's job was to investigate the complaint, not to do so in any specific way. Its initial request for information and documents imposed neither an obligation nor a limitation on the OIA's investigative process in the complaint. The position is surely this. It had not received the examination script. If, in the course of its investigation, it decided that it needed the examination script, it should have called for the script: and that is the case whether or not it had previously asked for it. On the other hand, if it was satisfied that it could resolve the complaint without seeing the script, it did not need to call for it, and was not bound to consider it simply because it had previously asked for it.

79. Having identified the area of complaint that it could properly investigate, the OIA obtained information from the OU about the processes by which scripts are attributed to particular candidates, and marks assigned by examiners are transcribed into the record. It also obtained information about the checks that had been made in the claimant's case, and the occasions on which there had been a check as to the accuracy of transcription. The information received was that candidates themselves are responsible for entering their personal identification number and that thereafter a barcode system is used. Examiners are required to have a second person check the accuracy of the transcription of marks; the claimant's script was reviewed by a member of the EAB during the course of the meeting and the mark attributed to him on that script was confirmed; and in the course of the University's consideration of his appeal, the marks had again been checked on a number of separate occasions. Further,

no question of addition arose. The marks for the four questions were recorded separately. The effect of those four figures on the assessment of the claimant's entire performance in module W300 was a matter for academic judgment.

80. In submitting that it was irrational, or a failure in carrying out its duty, not to call for the script or to make a decision without the script, Mr Jones cited a number of authorities. R v Hillingdon LBC ex parte Islam [1983] 1 AC 688, Bryan v UK [1996] 1 PLR 47 and R (Haringey) v Secretary of State for Communities and Local Government [2008] EWHC 1201 (Admin) are decisions of the Court of Appeal, the European Court of Human Rights and the Administrative Court respectively in cases raising issues (or in Bryan, considering potential issues) arising from a decision maker's finding of a fact where there was no evidence supporting the conclusion or only evidence that was insufficient to support it. Those decisions are simply irrelevant to the present case. Questions of the evaluation of evidence and of the amount of weight to be given to evidence are classically questions for the decision maker, not for a court on review. In the present case the OIA had, on the one hand, the evidence I have set out. On the other hand it had only (a) the claimant's dissatisfaction with his result and (b) evidence of errors made by the OU in administrative tasks other than the attribution and transcribing of examination marks.

81. Mr Jones cited another case, Office of Fair trading v IBA Health Ltd [2004] EWCA Civ 142 at [93] as authority for the proposition that "there is no doubt that the Court is entitled to enquire whether there was adequate material to support [the] conclusion." Quite so. In my judgment the OIA was amply entitled, on the evidence it had, to reach the conclusion that none of the errors suspected by the claimant had taken place. Once the OIA had reached that view, and had reached it lawfully, it was under no obligation to consider further evidence or make further investigations. In the present case it reached that conclusion without call for or looking at the script. It reached that conclusion on evidence adequate to support it. There is in my judgment no trace of irrationality in failure to call for the script or in the conclusion on the evidence. There is no trace of a failure to make a proper review of the complaint.

82. Mr Jones's submission that making a decision without calling for the examination script put the claimant at a disadvantage is somewhat difficult to grasp. It was supported by reference to Fairmounts, R (Persaud) v Cambridge University [2001] EWCA Civ 534 and R v Chelsea College of Art and Design ex parte Nash [2000] ELR 686. Again, none of those cases is in point. All of them deal with decisions in which there was or was said to be an element of unfairness arising from a failure to show, put to a party, or give a party an opportunity to comment on, material taken into account by the decision maker. None of them appear to me to support a contention that a decision maker is required to call for material he does not propose to take into account in order speculatively to enable one party to present a better case. Mr Jones did not cite Siborurema on this point. In that case, the court did identify a similar procedural failure by the OIA, but considered that, on the facts, it had not vitiated the decision.

83. In my judgment there is simply nothing of merit in the claim that the OIA should have called for the script in order to avoid prejudicing the claimant in making his complaint. It had no obligation to call for a document it did not need to see in order to determine the complaint. And it had no obligation to assist the claimant to obtain a document simply because he sought to have it.

84. For those reasons the claimant fails on the ground on which he has permission.

(ii) Did the OIA fetter its discretion in relation to a 'full merits review'?

85. This is a ground that the claimant needs permission to argue. As I have said, the question whether there should have been a 'full merits review' appears to me to be a wholly artificial one. The only proper question is whether the OIA did less than it ought to have done. In my judgment the answer to that question is in the negative, for the reasons I have given.

86. The sentence in the decision indicating that the OIA is restricted in the type of enquiry it can undertake might readily suggest that the OIA has fettered its discretion. But it does not have any impact at all in the present case, because, for the reasons I have given there was no enquiry that in this case the OIA ought to have done other than that which it did do. Having reached the point at which it could make a decision its power to conduct a deeper or more intensive enquiry had no need to be exercised.

87. In a different case it might conceivably be arguable that by failing to go beyond the questions set out in Rule 7.3 the OIA had fettered its discretion in a manner that had prevented it from conducting a proper review of the complaint. On the facts of this case, however, any fetter of discretion had no effect at all. For that reason even if the terms of the letter made the claimant's original ground 3 arguable, permission on this ground should in my judgment be refused because no useful purpose would be served by arguing it on the facts of this case, and I refuse it.

(iii) Did the OIA fetter its discretion in relation to holding an oral hearing?

88. On this ground, there is nothing in the decision letter hinting at a fetter on the relevant discretion. The fetter would have to be deduced from the claimant's assertion (which I am prepared to accept is true) that the OIA has never conducted an oral hearing.

89. It goes without saying that the greatest respect is due to the observations of Judge J in Collymore, but they have to be read in context. The context there was the administration of a discretionary award scheme, and it was no doubt inherently unlikely that there would have been no awards in three whole years if the respondent had been taking a properly open approach to whether appropriate circumstances for an award had been shown. But the force of the argument varies with the context. If a man in a main street in London tells me he is not aware of any cars, I may suspect him of not looking very hard: if he says he is not aware of any carriages I do not have the same suspicion, unless there has been reason to expect some. The fact that there have been no oral hearings can only be evidence of a disinclination to hold them if there is some reason to suppose that otherwise there might have been some.

90. An initial application under the OIA's Scheme is made in writing and is followed by correspondence between the OIA and the parties. Material produced by one party is shown to the other, and written comments are invited. Although the OIA is obliged to investigate the complaint it is not obliged to allow one party to address another directly in the course of its investigation. It is difficult to see why there should be any general need for an oral hearing. I regard the argument from that the fact that there has been no oral hearing as a very weak one indeed.

91. To set against it there is the evidence of Felicity Mitchell's witness statement at paragraphs 28-30. There is no reason to doubt anything in those paragraphs, and they have not been challenged save in the way I have indicated. I find as a fact that the OIA has done nothing to fetter its discretion to hold a hearing in any case in which one is needed.

92. In the present case the claimant had, and apparently took, every conceivable opportunity to put a considerable number of issues to the OIA and to comment on the material received by the OIA from the OU. Nothing has been identified that needed an oral hearing to resolve. That the claimant asked for an oral hearing only after the decision had been made is not, I think, of any great relevance: as he points out, he was offered no opportunity to request one. But I have no reason to suppose that the terms of rule 6.2, and the procedure set out in Felicity Mitchell's witness statement, were not followed in his case. The decision letter had no need to set out that procedure, or to indicate specifically that the Reviewer had decided not to hold an oral hearing. The evidence shows that the OIA was aware of the possibility of an oral hearing in this as in every case and that whether there should be one was properly considered. In those circumstances the matter becomes one of procedural fairness. The claimant cannot succeed unless he can show that the procedure adopted was unfair without an oral hearing: Smith v The Parole Board [2003] EWCA Civ 1269 at [37] and [55]. He identifies nothing that could properly support that contention.

93. The ground in this regard is unarguable on the facts. Even if it were arguable on the facts that the OIA had fettered its discretion to hold an oral hearing, the claimant has not begun to show that an oral hearing was in his case necessary to resolve his complaint. That would be a reason for refusing permission. On this ground the claimant needs permission. I refuse it.

(iv) Is the OIA independent?

94. As I have said, new evidence was put in on the claimant's behalf shortly before the hearing. There was a response to it in the form of evidence on behalf of the defendant. At the hearing there was a supplementary skeleton argument, and a written application to amend the grounds for review was handed up. It is not clear whether the application was formally withdrawn or whether it was in the end not argued. But the evidence is before me and in my judgment demands comment, because the claimant's evidence is framed so as to carry the clear allegation that the OIA is not independent.

95. I have read the witness statements of Jaswinder Gill on behalf of the claimant and Benjamin Paul Elger on behalf of the defendant. Jaswinder Gill's statements contain much that a witness of fact would not be entitled to say in evidence. It appears to me that there is a considerable amount of factual material that would be likely to be disputed if the issue of the OIA's independence were to be argued on the basis of these documents.

96. It is, however, clear that Jaswinder Gill's statements are intended to demonstrate that the OIA fails in its duty of independence, because it is (and hence also the costs of defending any litigation against it are) funded by HEIs; because it offers workshops on 'Learning from Complaints'; and because five of the six nominated members of the company entitled to nominate directors (see paragraph 16 above) represent higher

education institutions and have in fact, it appears, nominated themselves: the sixth is a nominee of the National Union of Students.

97. The first thing to say is that if this issue was to be raised in these proceedings, it could and should have been raised earlier. The basic facts, on which the suggestion that the OIA is not independent are erected, that is to say the identity of the members of the OIA as a company, the source of its funding, and its programme of workshops, are all public knowledge. (If the source of funding was previously not clear, the judgment of Pill LJ in Siborurema reveals it, at [3] and [8].) Any concerns about the implication of these facts could have been expressed long ago, and, if necessary, there could have been orders for disclosure then, and arrangements made for the resolution of any dispute of fact. It is simply not right to say that any need to raise the issue at this stage has arisen from material only recently available.

98. But in fact the allegation or implication that the OIA is not independent is not made out on the evidence before me, for the following reasons.

99. First, it cites requirements in Rules 8 and 10.2 of the Scheme that the Independent Adjudicator shall act independently of the Board of Directors, HEIs and complainants, and that the Board shall be responsible for "preserving the independence of the Scheme and the role of the Independent Adjudicator". One ought not to take these few provisions out of context: the Independent Adjudicator is also responsible to the Board, which has the task of fixing the pay and conditions of the Independent Adjudicator as well as the Independent Adjudicator's appointment and removal in such a way as recognises the independence of that office. It is very far from clear what is meant by 'preserving the independence of the Scheme'. The OIA does not have a general supervisory role in the Higher Education Sector. Its compliance with the terms of the Act is guaranteed by the possibility of cesser of designation, and the duty of the Secretary of State under s.13(3) not to designate an organisation unless it meets the requirements of the Act. The material before me does not suggest anything endangering the designation of the OIA.

100. The important points about independence in my judgment are that the person who examines any complaint should be independent of the parties to that complaint, and that the Independent Adjudicator should be independent of any pressure from anyone. Those are the matters of independence secured by the Rules and, as to the former, required by condition C in schedule 2 to the Act. There is simply no evidence that the Independent Adjudicator is not independent, nor that the Board, however constituted, attempts to influence the Independent Adjudicator. In fact, though, Jaswinder Gill's statement does not describe the constitution of the Board in full. As I pointed out earlier, the nominated directors are always a minority of the Board. Mr Elger's witness statement says that there are currently 14 directors. I cannot see that five of them being representative of HEIs can be a cause for concern, especially in the absence of evidence that the Board is actually failing to preserve "the independence of the Scheme and the role of the Independent Adjudicator".

101. Further, there is no proper ground for saying that in the present case the Reviewers who took any part in the investigation of Mr Budd's complaint were not independent of both him and the OU; and there is no proper ground for saying that the OIA allows any departure from condition C.

102. Secondly, like many things that take people to law, complaints are on the whole not desirable. It is better if there are fewer causes for complaint than more. The OIA has power to make recommendations to an HEI when it finds a complaint justified, and that must include power to make recommendations to reduce the likelihood of a similar complaint being found justified again. There is equally no good reason why it should not provide general advice to HEIs, whether by workshops or otherwise, on how to conduct themselves so as to avoid justified complaints arising.

103. As it happens, the workshops are open to Students' Unions too. The 'independence' of the OIA clearly does not require it to provide parallel advice to individual students (who would, clearly, have to be students who had not made a complaint). Its primary function is to determine whether a complaint is justified, not to encourage complaints to be made.

104. Thirdly, the point about funding is a wholly bad one. The OIA is there to sort out problems that have arisen within HEIs and there is no reason at all why HEIs should not pay for that, by reference to the number of students in each HEI. The fact that the funding of the OIA is derived wholly from HEIs does not of itself point to any lack of independence of the Scheme or of any decisions under it; and no other relevant fact appears from the evidence.

Conclusion

105. The suggestion that the OIA fails in its duty of independence is not made out on the evidence. For the reasons given above, the substantive application for judicial review and the renewed application for permission will both be dismissed.