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

Claim No. CO/5366/2016

Civil Justice Centre
Priory Courts
33 Bull Street
Birmingham
B4 6DS

Friday, 31st March 2017

Before:

THE HONOURABLE MR JUSTICE SINGH

Between:

THE QUEEN
ON THE APPLICATION OF
AC

Claimant

-v-

OFFICE OF THE INDEPENDENT ADJUDICATOR FOR HIGHER EDUCATION

Defendant

Counsel for the Claimant: MR DAVID LAWSON
MS ANNA TKACZYNSKA (for judgment)

Counsel for the Defendant: MS LAURA FARRIS MS KIRSTEN SJØVOLL (for judgment)

Counsel for the Interested Party,
The University of Leicester: MS AILEEN McCOLGAN

HEARING DATE: 28th MARCH 2017

JUDGMENT APPROVED BY THE COURT

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JUDGMENT

THE HONOURABLE MR JUSTICE SINGH:

Introduction

1. The claimant was at one time a medical student at the University of Leicester, which is the interested party to the present claim for judicial review and to which I will refer as the university. She withdrew from her course but later applied to the university to be permitted to study medicine there again. When this was refused she sought to complain to the defendant, which is a public body established to consider complaints by students against institutions of higher education. The defendant concluded that her complaint was not within its jurisdiction because it concerned admission to a university. The decision under challenge was taken on 22nd July 2016. Permission to bring this claim for judicial review was granted by Mr Justice Lewis on 19th December 2016.

2. Turning to the issues in this case in outline: The claimant challenges the defendant's decision not to consider her complaint on two grounds. First, she contends that her complaint fell within the jurisdiction of the defendant when its rules are properly interpreted. Secondly, and alternatively, she contends that if the rules do not permit the defendant to exercise jurisdiction over such a complaint as hers the relevant rule is *ultra vires* the enabling Act, the Higher Education Act 2004.

Anonymity

3. In making his order Mr Justice Lewis declined at that time to order anonymity to the claimant. However, he directed that that application should be considered at the substantive hearing. The hearing before me was conducted in open court in the normal way. However, at the end of the hearing Mr Lawson, who appeared on behalf of the claimant, renewed his application for anonymity. The other parties were neutral on the matter and were content to leave it to the judgment of the court. I made enquiries if anyone was present at the hearing from the media, but there was no one at that time. Any order I make will be subject to the possibility of variation or discharge should there be an application by any representative of the media.

4. The court has power to make an order for anonymity if it considers that non-disclosure of a party's identity is necessary in order to protect the interests of that party, see the Civil Procedure Rules, rule 39.2(4). Indeed the court, as a public authority within the meaning of section 6 of the Human Rights Act 1998, will have a duty to make such an order if it is necessary to protect the right to respect for private and family life in Article 8, see the notes to the 2017 edition of the White Book, paragraph 39.2.14.

5. As the same passage also says, the court may make such an order even where a hearing has taken place in public. Indeed it may be, and Mr Lawson has submitted that this is such a case, that the appropriate and proportionate way to strike a fair balance between the right to respect for private and family life and the principles of open justice is:

   (i) To conduct a hearing in public, but;

   (ii) To direct that there shall be anonymity granted to a claimant.

This has the consequence that the wider dissemination of a judgment will not have a further and continuing intrusive effect on a person's private and family life which is unnecessary.

6. On the facts of the present case I am satisfied that this is such a case where it would be appropriate to grant the application for anonymity. The issues in this case are issues of law. The background facts which give rise to those issues of law are not in dispute and the identity of this particular claimant is not necessary for interested members of the public or the media to understand and report on the issues and the judgment of this court. On the other side of the balance, if the claimant's name were to be set out in the judgment and could be more widely reported that would, in my opinion, constitute an unnecessary intrusion on her private and family life. This is because, as will become clear in the course of this judgment, the factual background includes some very personal and distressing information, including that relating to the claimant's mental health and her family life. I therefore direct that the claimant shall be referred to as AC in any reporting of this judgment.

Factual Background

7. The claimant began her medical degree, which was to last five years, in October 2006. In the academic year 2010/2011 she temporarily withdrew from the course as she was suffering from clinical depression, panic attacks and severe family pressure arising from her mother's disapproval of the man she wished to marry and to whom she is now married.

8. From October 2011 the claimant took an "intercalated" degree, which was an MA in humanities. On 10th October 2012 the claimant withdrew permanently from her medical degree at the university. During the course of 2013 the claimant began to get better. In 2014 she contacted the university with a view to returning to her medical degree, see for example an email dated 18th August 2014. However, the university refused to permit the claimant to return to her medical degree, see for example an email dated 24th September 2014. Also in 2014 the claimant began an MSc in molecular biology and therapeutics of cancer at the university, but later she withdrew from that course too.

9. In 2016 the claimant learned from a third party that there might be the prospect of complaining to the defendant. Before doing so she again approached the university on 20th April 2016. On 4th May 2016 the university again refused to consider her application. The university relied upon the general policy of its medical school that it does not permit a student who has withdrawn from a medical degree, wherever that degree may have been started, to enrol again as a medical student.

10. That selection policy by the Leicester medical school dates from September 2015 so far as relevant. Paragraph 14 of that policy has the heading "Transfers from Other Medical Schools" and states:

> "Applications for transfer from other UK or non-UK medical schools are not considered. Applications from candidates who have previously started a medical degree and have subsequently withdrawn, for whatever reason, will not be considered."

It was common ground before me that despite the heading to that paragraph, which might at first sight be thought to limit its scope to applications to transfer from other medical schools, the second sentence, which I have quoted, is of general application and applies to a case such as the present.

11. The claimant contends that that policy is at the heart of her complaint. Mr Lawson submits on her behalf that the policy is absolute in its terms and admits of no possible exception, no matter what the reason for a student's withdrawal from a previous medical degree may have been. It may, or may not, be justified either generally or in its particular application to the facts of the present case. However, Mr Lawson submits all that the claimant seeks is for there to be an independent review by the defendant of those issues as a matter of substance. His complaint to this court is that rather than address those issues as a matter of substance on their merits the defendant has ruled the complaint inadmissible at the threshold stage on the ground that it concerns admission to an HEI (Higher Education Institution).

12. On 1st June 2016 the university sent the claimant a completion of procedures letter, which is a formal letter required before any complaint can be made to the defendant. On 23rd June 2016 the claimant submitted the complaint form to the defendant, which is familiar to the parties and should be considered in detail, as it has been by this court.

13. On 27th June 2016 the defendant set out the results of its initial consideration of the complaint in a letter from David Hebblethwaite, the case handler acting on behalf of the defendant. That initial decision was that the complaint was inadmissible because it concerned an admission issue.

14. On 7th July 2016 the claimant sent an email to the defendant taking up its offer to ask for a review of that initial decision. On 22nd July 2016 the defendant in a letter from Chris Pinnell, who is the head of case work support and resolution, maintained its earlier decision. So far as material the letter stated:

> "I have carefully considered your concerns about our decision not to look at your complaint. I am afraid I see no grounds for changing our decision. As we have previously explained to you the rules make clear that the OIA does not consider complaints which concern admission to a member HE provider. I consider that your complaint relates entirely to the university's decision not to admit you onto a programme and as such it is not eligible for review. Whilst I acknowledge the background to your case and recognise that you have experienced some challenging personal circumstances these do not alter the fact that your case amounts to a complaint about admission. It is not necessary for me to comment on the other points that you have made in your email because these are not material to the eligibility of your complaint.
>
> There is no further right of appeal against my decision. We are therefore closing our file on this matter. I am sorry to disappoint you."

Material Legislation

15. The primary legislation which governs this area is the Higher Education Act 2004. Section 13 of that Act confers power on the Secretary of State, so far as it relates to

England, to designate a body corporate as "the designated operator for England", see sub-section (1)

16. Sub-section (3) provides that:

> "The Secretary of State may not designate a body under sub-section (1) unless he is satisfied that the body:
>
> (a) meets all of the conditions set out in schedule one;
>
> (b) is providing a scheme for the review of qualifying complaints that meets all of the conditions set out in schedule 2 or is proposing to provide such a scheme from a date not later than the effective date;
>
> (c) has consulted interested parties about the provisions of that scheme; and
>
> (d) consents to the designation."

17. The defendant is the "designated operator" of the students' complaint scheme for present purposes. A designated operator is required: first to provide a scheme which meets all of the conditions in schedule 2, section 13(3) and schedule 1, and also schedule 3 paragraphs 2 and 5; and secondly to comply with the duties set out in schedule 3, and section 14.

18. Schedule 2 sets out the criteria which the scheme itself must meet. Paragraph 3(1) provides condition B, which is that the scheme provides that every qualifying complaint made about the qualifying institutions to which it relates is capable of being referred under the scheme. Paragraph 3(2) of the same schedule sets out exceptions to that obligation. It is common ground that none of those exceptions apply in the present case.

19. Paragraph 5(1)(a) of schedule 2 requires a reviewer to make a decision as to the extent to which a qualifying complaint is justified. Again it is common ground that no such decision has been made in the present case because the complaint was held to be inadmissible in the first place.

20. Section 15 of the Act provides in sub-section (1) that the governing body of every qualifying institution in England and Wales must comply with any obligation imposed upon it by a scheme for the review of qualifying complaints that is provided by the designated operator.

21. Section 11 sets out the definition of "qualifying institutions". It is common ground that the University of Leicester is a qualifying institution.

22. Section 12 of the Act lies at the heart of this case and provides as follows:

> "(1) In this part 'qualifying complaint' means, subject to sub-sections (2) and (3), a complaint about an act or omission of a qualifying institution which is made by a person:
>
> (a) as a student or former student at that institution...

(2) a complaint which falls within sub-section (1) is not a qualifying complaint to the extent that it relates to matters of academic judgment..."

23. All parties have also drawn my attention to the provisions of section 20 of the Act, which they submit support their rival contentions as to the correct interpretation of section 12. Section 20, so far as material, provides:

"(1) The visitor of a qualifying institution has no jurisdiction in respect of any complaint which falls within sub-section (2) or (3);

(2) A complaint falls within this sub-section if it is made in respect of an application for admission to the qualifying institution as a student;

(3) A complaint falls within this sub-section if it is made by a person;

(a) as a student or former student at the qualifying institution..."

Relevant Rules and Guidance

24. The defendant has established a set of rules relating to its scheme which has evolved over time since it was first established in 2005. The development of the scheme is described in more detail in the witness statement of Felicity Mitchell, the deputy adjudicator with the defendant. She informs the court that the rules governing the student complaint scheme first came into effect on 1st January 2005 when it became the designated operator of the scheme under the 2004 Act. She sets out the terms of relevant provisions of the rules in their various iterations from that time onwards. These are familiar to the parties.

25. The current version of the rules, as she explains at paragraph 7 of her witness statement, came into effect on 9th July 2015. The current wording of rule 1 is as follows:

"(1) Purpose. The main purpose of the scheme is the independent, impartial and transparent review of unresolved complaints by students about acts and omissions of member HE providers and, through learning from complaints, the promotion of good practice."

26. Rule 3.1, which is another key provision in the present case, has not changed in the various iterations of the rules. Rule 3.1 provides that the scheme does not cover a complaint to the extent that "it concerns admission to a member HE provider..."

27. The defendant has also published guidance on the application of its rules. This, in its current version, also dates from 9th July 2015. It is headed: "Guidance Note: Eligibility and the Rules." In relation to rule 3.1 against the heading "It Concerns Admission to a Member HE Provider" the guidance states as follows:

"We cannot consider a complaint from a prospective student whose application for study is rejected or badly handled. Such a prospective student would also be precluded from complaining to the OIA because they were not a registered student at the member HE provider. However, we will normally consider a complaint if a student, having registered at the

member HE provider, is required to leave because of some irregularity in his/her application for admission. We may also consider complaints from registered students which relate to the information given by member HE providers to prospective students prior to admission.

We will not normally consider complaints from a former student who has either withdrawn from a programme of study or has been required to leave and who subsequently re-applies for admission to the member HE provider. If a student is already at a member HE provider that is applying to join another course or to transfer to PhD status we will look at the provider's procedures to decide whether the complaint is an admission issue."

28. In the introduction to the guidance it is stated that: "In the event of any conflict between this guidance note and the rules, the latter will prevail."

The Grounds of Challenge

29. On behalf of the claimant Mr Lawson advances two grounds of challenge in this claim for judicial review as I have outlined. First, he submits that the claimant's complaint falls within the jurisdiction of the defendant when the scheme is correctly interpreted. In particular he submits that the complaint is not caught by rule 3.1. He submits that the claimant is not seeking to be admitted to a university in the normal usage of the word "admitted". Secondly and alternatively Mr Lawson submits that if rule 3.1 does apply to complaints such as the present it is *ultra vires* the 2004 Act. He submits that section 12 of that Act allows a complaint to be made about any act or omission of a qualifying institution by a current or former student unless it falls within a permitted exception. Mr Lawson submits that the claimant's case must succeed either on the first ground or on the second ground of challenge.

30. On behalf of the defendant Ms Farris, whose submissions are supported by Ms McColgan who appeared on behalf of the university, submits that neither ground is made out. She submits that the defendant's rules and guidance do not on their correct interpretation permit, still less oblige, the defendant to consider a complaint such as this because it concerns admission to an HEI. She further submits that the defendant's rules are *intra vires* the Act.

Ground One

31. In support of the first ground of challenge Mr Lawson makes the following subsidiary submissions. First, he submits that the claimant's complaint was not, on its proper analysis, confined to one about admission. He submits that when its terms are examined with care and in detail it was concerned with the circumstances in which the claimant had withdrawn from the university in 2012.

32. I do not accept that submission. It seems to me that on a fair reading of the complaint by the claimant to the defendant, read as a whole, it did concern her wish to be admitted to the university to study medicine, starting again in the first year rather than resuming the degree she had previously started and then withdrawn from. Furthermore, the essence of the claimant's complaint against the university did not relate to any act or omission of which it was said to have been guilty in 2012.

Although the claimant did request that the circumstances of her withdrawal from her medical degree in 2012 should be taken into account that was because those circumstances were said to be highly relevant to the university's decision in 2016, namely, whether or not to permit, or even to consider, her application for admission to a medical degree then. In my view this is what distinguishes the present case from others in which the defendant has been prepared to consider a complaint that related to the circumstances in which a student had withdrawn from a university course.

33. In her witness statement Ms Mitchell on behalf of the defendant refers to an example of such a case, namely, *R on the Application of Matin v University College London [2012] EWHC 2474 (Admin)*. She explains that he argued that the withdrawal was procedurally flawed and unreasonable and argued that he had not formally withdrawn from his course at all. The defendant accepted the complaint for review, says Ms Mitchell, because it challenged the events leading up to the withdrawal and the proper process followed by the university. In the event, as she informs the court, the OIA in fact found the complaint to be not justified on its merits.

34. I agree with that analysis of the case of *Matin*, which was decided by Mr Justice Wyn Williams, see for example paragraph 17 of the judgment which quotes from the grievance lodged by the claimant in that case which makes it clear for material purposes:

> "My withdrawal from the MBBS programme was wrong, invalid and ineffective because the process was procedurally flawed and unreasonable. I would like to be reinstated on my medical course..."

35. Next Mr Lawson submits that the claimant was entitled to have her complaint considered by the defendant under the guidance which it has issued on the application of rule 3.1. In particular the use of the word "normally" indicates, he submits, that there will be situations, even if they are exceptional, in which a complaint relating to admission can be considered by the defendant.

36. I do not accept that submission either. In my view it turns on an incorrect reading of the guidance. I accept the submission which was particularly advanced by Ms McColgan that when the relevant passage commenting on rule 3.1 is read fairly and as a whole it is making it clear that there may be circumstances in which the defendant will have to look at the provider's procedures in order to decide whether the complaint is indeed an admission issue. In any event if and insofar as there is any conflict between the rules and the guidance, which in my view there is not, it is clear that the rules are to prevail. That is what the guidance itself says.

37. Finally in the context of ground one Mr Lawson relies upon the doctrine of legitimate expectation. He submits that the claimant was entitled to expect that the defendant would apply its own guidance in considering her complaint. He submits that she is entitled to hold the defendant to what is said in that guidance. In the circumstances of this case that submission adds nothing, in my view, to what has already been said in relation to the correct interpretation of the guidance. As I have already said, the guidance simply does not bear that interpretation.

38. In any event, I accept the submissions made by both Ms Farris and Ms McColgan that reliance on the doctrine of legitimate expectation is misplaced in the present case for

the simple reason that it falls at the first hurdle. There was no promise, representation or other statement which was clear, unambiguous and devoid of relevant qualification that a case such as the claimant's would be considered by the defendant, see the well known statement of principle by Lord Justice Bingham, as he then was, in *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Limited [1990] 1 WLR 1545* at 1569. See also the opinion of Lord Hoffman in *R on the Application of Bancoult v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2009] 1 AC 453* at paragraph 61, where he said of that case: "In my opinion this claim falls at the first hurdle, that is, the requirement of a clear and unambiguous promise..."

39. Mr Lawson submitted before me that the requirement that there should be a clear and unambiguous promise was not a necessary and essential ingredient in order to found the doctrine of legitimate expectation in all cases. Rather he submitted that it was one of the factors to be taken into account in assessing the proportionality of any purported departure from the doctrine. He relied in that regard on the decision of the Court of Appeal in *Nadarajah v Secretary of State for the Home Department [2005] EWCA Civ 1363*, in particular in the judgment of Lord Justice Laws at paragraphs 68 to 69. I do not accept that anything said by Lord Justice Laws in that case contradicts the well established principle of the law relating to legitimate expectation to which I have already made reference. In any event, what Lord Justice Laws said in that passage was expressly obiter, see paragraph 67 of his judgment.

40. In *R on the Application of Bhatt Murphy v Independent Assessor [2008] EWCA Civ 755* Lord Justice Laws himself explained what he had said in *Nadarajah* in the following way at paragraph 30:

> "...good administration... (paragraph 68 of my judgment in *ex parte Nadarajah)* ... generally requires that where a public authority has given a plain assurance it should be held to it. This is an objective standard of public decision making on which the courts insist..."

41. Returning to the facts of the present case, there was at most in its guidance an acknowledgement by the defendant that there might be exceptional circumstances in which its normal policy of not considering complaints about admissions might be disapplied. In my view that is too insecure a foundation on which to build the edifice which Mr Lawson seeks to do in invoking the doctrine of legitimate expectation.

42. Before I leave ground one I should observe that Mr Lawson submitted that the Equality Act 2010 might have some relevance to the present case, in particular the duty to make reasonable adjustments in the case of a person who has a disability within the meaning of that Act. Mr Lawson is right to point out that complaints of disability discrimination are in principle eligible complaints that may be made to the defendant and reviewed by it, although they may also be brought in the ordinary courts and tribunals if a person wishes to pursue traditional legal remedies instead, see the decision of the Court of Appeal in *R on the Application of Maxwell v Office of the Independent Adjudicator [2012] PTSR 884* at paragraph 30 in the judgment of Lord Justice Mummery.

43. However, the complaint must still be one which is admissible under the scheme which is operated by the defendant. That threshold question was not in issue in the *Maxwell* case. By way of contrast it is at the heart of the dispute in the present case under

ground one. I accept the submissions made by Ms Farris and Ms McColgan that in the present case the reasonable adjustment which the claimant was contending for was that she should be admitted to a medical degree again having withdrawn from one earlier. That complaint, as they both submitted, was in substance one again that concerned admission to an HEI. For the reasons I have given earlier it fell outside the scope of the scheme which the defendant operates. Accordingly I reject the first ground of challenge.

Ground Two

44. In support of the second ground of challenge Mr Lawson submits that the interpretation of section 12 is a matter that goes to the defendant's jurisdiction and therefore is a question for this court to determine and not one for the defendant to determine subject only to review by the court on well established Wednesbury grounds. In support of that submission Mr Lawson relies on the judgment of Mr Justice Males in *Mustafa v Office of the Independent Adjudicator [2013] ELR 446* at paragraph 53.

45. In considering the academic judgment exception in section 12(2) of the 2004 Act in that passage Mr Justice Males said, so far as material:

> "...The OIA has a duty to consider those complaints which fall within the definition of 'qualifying complaint' and cannot consider those which do not. The role of the court, therefore, will be to determine one way or the other whether or to what extent the complaint is excluded from consideration by the OIA by virtue of section 12(2), and not merely to review the OIA's decision on that point for rationality..."

46. In making that submission Mr Lawson is plainly correct. Indeed I did not understand either Ms Farris or Ms McColgan to contend otherwise. What they did emphasise was that the defendant is given a broad discretion not only in applying the scheme created by its rules in particular cases, but also in formulating that scheme itself, see *R on the Application of Siborurema v Office of the Independent Adjuciator [2008] ELR 209* at paragraph 53 in the judgment of Lord Justice Pill. See also the judgment of Mr Justice Hickinbottom, as he then was, in *R on the Application of Zahid v University of Manchester [2017] EWHC 188 (Admin)* at paragraph 42, where he said:

> "The OIA has a broad discretion both as to the scheme it formulates and as to the form, nature and extent of its investigation into a particular case..."

47. Before leaving that passage I will quote another part of the same paragraph because it will be relevant to a later part of this judgment. Mr Justice Hickinbottom said:

> "... Its procedures are intended by Parliament to be an alternative to court, procedures which are free of charge, confidential, informal and inquisitorial with a view to resolving complaints in a non-judicial manner and without recourse to the court and by determining whether the HEI's actions were procedurally compliant and reasonable in all the circumstances without adjudicating on formal rights and obligations and making recommendations for steps that may be more flexible, constructive

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> and acceptable to all parties than the restricted remedies available to a court of law..."

48. However, the point cannot be taken too far, as both Ms Farris and Ms McColgan acknowledged as they accept that the interpretation which arises in the present case goes to the defendant's jurisdiction. Either it has jurisdiction according to the remit which Parliament has conferred upon it through the designation by the Secretary of State under the 2004 Act, or it does not. As all parties therefore agree the question is what is the meaning of section 12 of the Act on its true construction?

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49. On that issue Mr Lawson submits that section 12 should be given its natural meaning and that according to that meaning it is broad enough to include cases such as the present, even if it does concern admission to a university. He submits that the section does not expressly exclude admission complaints. He does concede that the majority of cases relating to admissions will fall outside the jurisdiction of the defendant, but this is because they are likely to be brought by individuals who are not either current or former students. However, he reminds this court that the present claimant is a former student of the university. He submits that being an applicant and being a former student are not mutually exclusive categories under the 2004 Act.

C

D

50. On behalf of the defendant Ms Farris submits that the terms of section 12 are limited to acts or omissions by an HEI which relate to the time when a person either is or was a student. The point has been variously expressed in the documents before the court on behalf of the defendant. A flavour can be seen from the following. First, the defendant's summary grounds in this claim for judicial review where it was said at paragraph 24.1: "Nothing in schedule 2 of the 2004 Act prevents the defendant from excluding complaints which are unrelated to the student experience..."

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51. At paragraph 27.1 of the summary grounds it was stated that:

> "...A qualifying complaint must relate to matters occurring during the period of study notwithstanding the fact that their course may have terminated when they bring their complaint..."

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If read literally that latter passage is clearly incorrect even on the defendant's own understanding of its jurisdiction, as will become apparent later in this judgment.

52. Secondly, I would go to the witness statement of Felicity Mitchell again at paragraphs 12 and 13. She states there that:

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> "...It is the OIA's view that the purpose of the provision permitting complaints from former students is to allow those students whose relationship with the higher education provider has been terminated to make complaints about events which took place before the termination. Typically a former student might bring a complaint:
>
> 12.1 After he or she has withdrawn from his or her studies about events giving rise to the withdrawal;

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> 12.2 After his or her studies have been terminated or completed following unsuccessful appeal against his or her results or degree classification about the appeal process; or
>
> 12.3 After he or she has been expelled from the university following the disciplinary proceedings about the disciplinary process...
>
> The OIA regularly considers complaints from students who have been withdrawn from their course about the decision to withdraw them. If the OIA finds their complaint to be justified, or partially justified, the OIA's recommendations might well lead to their reinstatement."

53. At paragraph 13 of her witness statement Ms Mitchell states:

> "The fact that an individual was once a student at a higher education provider does not mean that he or she can complain about something unrelated to his or her studies long after he or she has left. There is not an open ended right for all former students to bring a complaint about their former higher education provider which arose after their studies had ended. It would not make sense to have such a right as the OIA's function is to resolve complaints by students arising from their studies..."

54. On behalf of the university Ms McColgan emphasises that what section 12 refers to is that a person must be a student or former student "at that institution." She submits that in the present case the claimant was not considered for admission because she had withdrawn from a medical degree and not because she had withdrawn from a degree at this particular university. The policy would have applied to her even if she had been at another university and had withdrawn from a medical degree there before applying to this university to study medicine.

55. Both Ms Farris and Ms McColgan emphasised the word "as" in section 12. They submit that the section does not simply say that a complaint may be brought "by a student or former student..." They submit that the word "as" makes it clear that the complaint must relate to a person in the capacity of a current or former student.

56. Both counsel also submit that some assistance can be found from the provisions of section 20 of the 2004 Act which I have already set out earlier. They draw attention to the fact that sub-section (3) contains a formulation which is very similar to that to be found in section 12. They submit that by way of contrast sub-section (2) of section 20 concerns a complaint made in respect of an application for admission to a qualifying institution as a student. They submit that if Parliament had wished to include admission cases in section 12 it could easily have said so expressly by using a formula such as that to be found in section 20(2). They submit that the formulation in section 20(3) should be interpreted in the same way as the relevant formulation in section 12 and should not be read so as to include admission cases.

57. Both counsel also drew my attention to several reports which, on their submission, assist in the interpretation of the legislation with which this case is concerned. My attention was drawn to two reports which had preceded the enactment of the 2004 Act. The first was the second report of the Committee on Standards in Public Life chaired by Lord Nolan in 1996. In particular its recommendation R9 stated:

> "Students in higher education institutions should be able to appeal to an independent body and this right should be reflected in the higher education charters."

My attention was also drawn to the fact that there was a similar recommendation in the Dearing report.

58. I have not found those reports to be of assistance in resolving the issue of statutory interpretation which arises in the present case. Neither directly led to the enactment of the 2004 Act. Furthermore the recommendations in those reports to which my attention has been drawn were expressed in broad terms and do not directly address the issue which falls to be decided in this case. I note that the passage I have quoted from the Nolan report does not in terms refer to former students at all. Yet that is what Parliament decided when enacting the 2004 Act should be included in the formula used in section 12.

59. My attention was also drawn to a report which has post dated the enactment of the 2004 Act, known as the Pathway Report in 2010. This was compiled by the defendant itself after consultation. My attention was drawn in particular to recommendation 6, which stated:

> "The OIA accepts and shares the strong consensus in the sector that seeking to expand the remit of the OIA's scheme by accepting complaints about admissions from non-registered students would divert the OIA from its core purpose. The OIA has no plans to seek to undertake to review student admissions."

60. Again I have not found that to be of assistance in resolving the question of statutory interpretation which arises in the present case. This is because the report post dates the enactment of the 2004 Act and there is no reason to suppose that it is relevant to the intention of Parliament in enacting it. It is also because no one, certainly not Mr Lawson, suggests that there is jurisdiction on the part of the defendant to consider admission complaints generally.

61. I have come to the conclusion in relation to ground two that Mr Lawson is correct in the interpretation of the Act which he urges upon this court. First, I agree with him that the language of section 12 is on its natural reading broad and is capable of including a person such as this complainant. She has brought the complaint as a former student at the university. What that phrase makes clear is that a person who was a student at some other institution cannot make the complaint.

62. Secondly, I accept his submission that the interpretation would not lead to the consequence that all admission cases would come within the defendant's jurisdiction. They would not do so because most applicants who wish to make a complaint about admissions would not be either a current or a former student at that institution.

63. Thirdly, the fact that section 20 is cast in the way that it is in relation to curtailing the jurisdiction of visitors is consistent with the intention of Parliament being that the generality of admission cases should not fall within the jurisdiction of the defendant. However, that does not necessarily mean that Parliament wished to exclude all cases of

admissions from the jurisdiction of the defendant. It could expressly have said so if that had been the intention of Parliament.

64. It also seems to me that the defendant's position leads to some fine and potentially arbitrary distinctions having to be drawn. For example, despite what is said in some of the passages which I have already cited, it is accepted, as was made clear at the hearing before me, that reference cases do fall within the jurisdiction of the defendant even though a complaint may well be that an HEI has today done something which is unjustified in drafting that reference.

65. The response given by Ms Farris was to say that the reference still relates to things that happened at the time when a person was a student at the HEI concerned. That may be so, but the substance of the complaint may have nothing to do with how the student was treated by the HEI at the time when he or she was a student. It may have everything to do with how he or she has been treated now in drafting the reference.

66. Similarly, as Mr Lawson submits, the present claimant may on one view be complaining about the acts or omissions of the university in 2016, but the subject of her complaint relates to the policy of this university. By its own terms that policy refers to the fact that she withdrew from a medical degree in the past. That means, in my view, that there is a nexus between what the university has done now and the circumstances of her withdrawal from her degree in 2012. The university asserts by applying that policy that no matter what the reason for the claimant's withdrawal from her medical degree in 2012 she cannot be considered for admission to a medical degree now. In my judgment that provides a sufficient nexus between its decision in 2016 and what happened to the claimant as a student in 2012 that the case does fall within the defendant's jurisdiction.

67. Finally, it seems to me that this would be consistent with the overall purpose of the 2004 Act. That Act contemplated that there would be a scheme that should be relatively informal and would provide a means of alternative dispute resolution for students or former students who have a complaint about the way in which the acts or omissions of an HEI have affected them as students or former students, see again the judgment of Mr Justice Hickinbottom in the *Zahid* case at paragraph 42 to which I have already referred.

68. The claimant is such a person. She is not a busybody. She is not a prospective student only. She is a former student who wishes to have an independent adjudicator consider the merits of her complaint that the circumstances of her decision to withdraw from her medical degree in 2012 are relevant to the decision of whether or not to admit her in 2016. That complaint may fail on its merits because the absolute policy which is operated by this university is justified. However, as things stand she has been unable to get through the gateway to have her complaint considered on its merits by the defendant at all.

69. I am not persuaded by Ms McColgan's submission that the policy operated by the university does not apply to the claimant as a former student "at that institution" because, she says, the same policy would have applied to the claimant even if she had been at another university and had withdrawn from a medical degree from there. In my view this is to permit the terms of a particular university's policy to affect the interpretation of a statute enacted by Parliament. Suppose the university's policy had

been expressed differently and had said that a person would not be considered for admission to the medical degree offered by it if he or she had previously withdrawn from a medical degree at the same university. Ms McColgan would not, I dare say, then concede that the complaint fell within the defendant's jurisdiction. If that is right it seems to me that the words "at that institution" cannot bear the weight that has been placed upon them by Ms McColgan, supported by Ms Farris in this respect.

70. The fact is that the claimant is a former student at this university. She did make the complaint in this case as a former student. In my judgment she falls squarely within the words used by Parliament in section 12. Accordingly I conclude that the defendant does have jurisdiction to consider her complaint. The decision of 22nd July 2016 was therefore taken on an erroneous basis in law. Insofar as the defendant's scheme in rule 3.1 prevents the defendant from considering such a complaint it is, in my judgment, *ultra vires* the Act.

Conclusion

71. For the reasons that I have given this claim for judicial review succeeds on ground two but not on ground one. I will consider counsel's submissions as to the question of remedies and any other ancillary matters.

THE JUDGE: Can I just check who appears for the claimant?

MS TKACZYNSKA: *[Inaudible]*. The application in respect of the remedies that are set out in the grounds, which appear at page A19 of the bundle, is the remedy sought by the claimant, a *[quashing?]* order in respect of the decision of 22nd July 2016 and of rule 3.1 of the defendant's rule which *[inaudible]* follows from the decision that ground two should succeed and accepting that there should be a mandatory order that the claimant's complaint is therefore given a substantive consideration.

THE JUDGE: Right. Can we just take that in turn? First of all, just on formalities, would you please take carriage of drafting an order which reflects everything that I decide today?

MS TKACZYNSKA: Yes.

THE JUDGE: And if possible agree it with counsel for the other parties and then submit it by email to the court for my consideration. All right. Let us just take these in turn. Subject to anything that other counsel may have to say, it seems to me that it follows from my judgment that a quashing order should be granted in respect of the decision of 22nd July 2016.

However, I am not sure that it is either appropriate or necessary to grant a quashing order in relation to the rules or a mandatory order. The reason for that provisionally is that the judgment says what it says. Secondly, if necessary and appropriate I could make a declaration, but I am not sure that even that is necessary because everyone can read the judgment and know what the law is. Thirdly, it is very unusual for this court to grant a mandatory order for consideration. What this court expects as a matter of constitutional practice is that public authorities comply with judgments of the court. The decision will have been quashed so it has to be retaken and of course it has to be retaken in accordance with law as pronounced by the court.

So that is my provisional view. Do you want to say anything more about that before I hear from the other counsel?

MS TKACZYNSKA: No, my lord.

THE JUDGE: Thank you. Yes, who is going next? Yes, good morning.

MS SJØVOLL: I will, Miss Sjøvoll, for the Office of the Independent Adjudicator. I would agree with your view on the making of any mandatory order and likewise a quashing order in relation to the rules. They would be unnecessary at this stage.

THE JUDGE: What about a declaration in relation to rule 3.1?

MS SJØVOLL: My lord, I would say at this stage that is unnecessary. As you say, your judgment says what it says. We will have to take that into consideration and so I would submit, my lord, that that is also unnecessary.

THE JUDGE: I do not agree with you. Miss McColgan, do you have anything to add?

MS McCOLGAN: *[I have nothing to add?]*.

THE JUDGE: Very good. Those are the directions and orders I make on that first issue then, all right? Is there anything else?

MS TKACZYNSKA: Then there is an application for costs. So in the circumstances you should—

THE JUDGE: Are you on legal aid?

MS TKACZYNSKA: No. It is a... So the application we would like to make is an application against the defendant for our costs. The circumstances here are that while the claimant has succeeded on only one of its grounds the argument is, as permission was given by Mr Justice Lewis, that the two arguments ran together and were interrelated but that it was obvious from the start that they could not both be successful, so it was always going to be the case that the defendant was going to be successful on one or the other. In those circumstances the submission is that it is not appropriate for this to be a drop hand situation in the fact that the defendant has won one argument and the claimant has won another. It is appropriate that the claimant should be entitled to her costs in respect of the claim.

THE JUDGE: Shall we first decide the issue of principle and possibly any discard if that is contended for by the defendant? As I understand it you are not asking for costs against the interested party?

MS TKACZYNSKA: No, not against the interested party.

THE JUDGE: Very good.

MS TKACZYNSKA: Only against the defendant.

THE JUDGE: Let me hear counsel on the point of principle and then I will take it from there. Yes, Miss Sjøvoll, what do you say about the point of principle? Should you have to pay the costs?

MS SJØVOLL: My lord, it is difficult for me to resist an application for costs in the circumstances. What we will be seeking in the circumstances is a contribution from the interested party. I accept that the claimant is not seeking her costs from the interested party but that is a submission that I will be making and perhaps I can address you on that.

THE JUDGE: Yes, very good. You do not contend, as I understand it, there should be some discount in the costs as a matter of principle because only one ground succeeded because the point is made that the two were always interrelated and in the alternative?

MS SJØVOLL: I think it would be difficult for me, my lord, to make that argument, certainly insofar as it would result in a drop hands offer—

THE JUDGE: I agree.

MS SJØVOLL: —and there is a separate argument to be made about whether the defendant should bear the entirety of the costs in the circumstances.

THE JUDGE: I see, all right. That is very helpful. So the claimant will certainly have the costs without any discount as a matter of principle, subject to any issues of assessment, and that will be as against the defendant and not against the interested party. Do you want to make an application as against the interested party?

MS SJØVOLL: My lord, the defendant's position is that given the facts of this case and given the nature of the underlying rule, which was the interest party's rule, and the factual proximity between that rule and the ruling that you have made today, my lord, that the defendant should certainly be entitled to a contribution, a significant contribution, to its costs from the interested party.

THE JUDGE: Can you just remind me where is the power to make a contribution order against the interested party?

MS SJØVOLL: I am sorry, my lord, my submission is that the order should be made... the claimant should be entitled to get her costs from both the defendant and the interested party and the fact that the claimant is not seeking her costs from the interested party does not prevent you, your lordship, as a matter of principle from making an order that the costs should be shared between the defendant and the interested party.

THE JUDGE: Oh, I see.

MS SJØVOLL: As a matter of general principle in the award of costs. That is my submission.

THE JUDGE: In that case then you are suggesting—

MS SJØVOLL: Yes. I am sorry, that is—

THE JUDGE: No, it is all right. Miss McColgan is going to have to address me on whether she should be liable at least in part for the claimant's costs.

MS SJØVOLL: Yes.

THE JUDGE: All right, shall I hear from her then? Yes?

MS McCOLGAN: My lord, I would rely on *[inaudible]* position in these matters, which is that the interested party neither receives nor is responsible for costs in the normal case. In this case the ground on which the claimant has succeeded is a straightforward ground pertaining to the defendant's interpretation of its own jurisdiction. So in those circumstances and given the way the case has been run it is my submission that the interested party really fades into the background for the purposes of costs and that the defendant should bear the costs.

THE JUDGE: Thank you. Do you want to say anything in response to that?

MS SJØVOLL: Simply that as the claimant pointed out and as your attention was drawn to the two grounds are very closely linked and so it is difficult on the one hand to say that there should be no discount because those two grounds are very linked and on the other to say that you decided it on ground two and so there is a clear distinction and it should be the defendant that bears the costs. There is a clear and close link between those two grounds and so in my submission, my lord, the costs should be split between the defendant and the interested party.

THE JUDGE: I see, thank you. The order I make is that the claimant shall have her costs against the defendant. I make no order for costs in respect of the interested party. I accept the submissions that have been made by both counsel for the claimant and counsel for the interested party that at heart what this case concerned was the jurisdiction of the defendant. Both grounds, in my view, related principally, if not exclusively, to the defendant. For example, ground one, although it failed in my judgment was about the correct interpretation of the defendant's rules and its guidance note. Is there anything else?

MS SJØVOLL: My lord, I think just that I should reserve my position and ask for permission to appeal.

THE JUDGE: What do you mean by reserve your position?

MS SJØVOLL: That I should ask for permission to... I do not think I am obliged to ask for permission to appeal now, but I am going to ask for permission to appeal against your ruling on ground two.

THE JUDGE: All right. Do you want to say anything about that?

MS TKACZYNSKA: Without any reasons as to why the decision is wrong or anything being put forward as to explain why it is wrong it is difficult to respond to it, but if an

application were to be brought it can be brought on papers in the usual way, it is not necessary for you to consider it today.

THE JUDGE: All right. Do you want to deal with it on the papers then?

MS SJØVOLL: I think that would be preferable, my lord, yes.

THE JUDGE: Yes, all right. Do I have to set a timetable for that?

MS SJØVOLL: I think you might. I believe the normal rule is within 21 days.

THE JUDGE: Yes, 21 days. Can you include that in the draft order, a direction that any application for permission for appeal must be made to me within 21 days of today's date and I will deal with it on the papers?

MS SJØVOLL: Yes, I am grateful.

THE JUDGE: Because, of course, I will not be sitting here, but wherever I am in the country I will deal with it by email.

MS SJØVOLL: Yes.

THE JUDGE: All right, is there anything else?

MS SJØVOLL: Not from me, my lord.

MS McCOLGAN: *[Inaudible]*.

THE JUDGE: Thank you all for your assistance and would you please pass on my thanks to counsel that appeared at the hearing as well.

[Hearing ends]