Neutral Citation Number: [2011] EWCA Civ 1236

Case No: C1/2010/2049

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
THE HON MR JUSTICE FOSKETT
Case No CO/2778/2009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/10/2011

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE HOOPER
and
LORD JUSTICE McFARLANE

- -

Between :

R (SHELLEY MAXWELL)	**Applicant**
- and -	
THE OFFICE OF THE INDEPENDENT ADJUDICATOR FOR HIGHER EDUCATION	**Respondent**

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- -

MR GREGORY JONES QC and **MS REBECCA CLUTTEN** (instructed by Balsara & Co) for the Applicant/Appellant
MR SAM GRODZINSKI QC (instructed by EJ Winter & Son) for the Respondent

Hearing date: 26th July 2011

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Approved Judgment

Lord Justice Mummery:

Introduction

1. The judicial review claim dismissed by Foskett J on 23 July 2010 was directed at a decision of the Office of the Independent Adjudicator (OIA) on a review of a student's complaint of disability discrimination against a Higher Education Institution, in this case a university.

2. The OIA issued a Final Decision by the Independent Adjudicator (Mr Robert Behrens, who was also Chief Executive) that a complaint by Ms Shelley Maxwell against the University of Salford (the University) was justified to the extent of making certain recommendations favourable to her. However, Ms Maxwell was not satisfied with the outcome, as it did not, in her view, go far enough. She says that, in breach of its statutory and common law duties, the OIA erred in law, because its Final Decision did not contain a conclusion that the University was guilty of unlawful disability discrimination and failed to give adequate reasons for its recommendations.

3. Ms Maxwell was very disillusioned when the OIA did not make findings explicitly on the disability point, as to her that was the whole point of submitting her complaint to the OIA. She was led to believe that disability discrimination would be taken into account and that a finding would be made, since that was what her complaint was all about. She was still in the dark as to whether or not disability discrimination did or did not take place and she was left feeling very confused and frustrated by the whole process. A definitive answer in her favour would mean that she could embark on future studies in the knowledge that she should expect to receive a certain level of assistance from the University with regard to the implementation of support packages.

4. The University was joined in the proceedings as an Interested Party, but played no part either in them or in this appeal.

Brief background

5. In 1999 Ms Maxwell was diagnosed as suffering from a serious sleep disorder, narcolepsy. It is a recognised disability. It was no impediment to her enrolment in September 2004 on a 3 year undergraduate degree course in Contemporary Military and International History at the University. She declared her disability to a member of staff from the University's Equality and Diversity Office at the time of her application. A needs assessment was carried out by the Access Skills Group as part of her application for Disabled Students Allowance, but the recommendations made were not implemented. She had ongoing difficulties with the course. She developed Irritable Bowel Syndrome due to stress. In January 2005 she was unable to sit her exams due to failure to implement the recommendations of the needs assessment.

6. For the past 6 years or so Ms Maxwell has not benefited from a course of higher education at the University. Instead, she has been pursuing procedures and proceedings of one kind or another, first in, and then against, the University, and then against the OIA, even though it had upheld her complaint as justified. Despite the measure of success achieved by her in the internal and external complaint procedures, Ms Maxwell decided to take the matter to the Oldham County Court, where proceedings under the Disability Discrimination Act 1995 were started but then

stayed by consent, and then to the Administrative Court, where she failed to secure an order quashing the Final Decision of the OIA. Now she is in this court.

7. Litigation in the courts against Higher Education Institutions (HEIs) for more favourable outcomes than those obtained in the special internal and external complaints procedures is not, except in very special circumstances, a course that anyone fortunate enough to be accepted for a course of higher education should be encouraged to take up. Most people would agree it is not in the interests of students, or of the HEIs that exist to provide them with educational courses, to engage in a stressful and expensive activity like litigation, when something more fulfilling, as higher education aims to be, is a more attractive long-term investment for life. This is particularly so when Parliament, taking the sensible line that there are more important things in life than generating a *lis* out of every grievance, has facilitated the provision of a less formal and affordable out-of-court scheme for reviewing and remedying justified complaints by students.

8. As long ago as 30 March 2005 Ms Maxwell lodged a complaint through the University's internal complaints procedure. That resulted in a "Without Prejudice" letter from the Academic Registrar (Dr KA Whyte) dated 16 September 2005 and a decision of a Pro-Vice Chancellor of the University (Mr M Garrity) dated 22 November 2005. The outcome of the internal complaint was an acknowledgement of failings on the part of the University, an unreserved apology and an offer to meet her tuition fees for 2005/6, which she would have to repeat. She was unable to re-start the course at that time.

9. On 24 February 2006 Ms Maxwell lodged a complaint with the OIA which delivered its Final Decision on 23 December 2008. The complaint was of the decision of the University to reject her complaint about its failure to take her disability into account. The Complaints Scheme Application Form was completed and submitted along with a 28 page document setting out the factual and legal basis of her contention that there had been disability discrimination in the University's treatment of her in failing to put in place adequate reasonable adjustments at the appropriate time. As a result she had suffered detriment in her performance in the degree course. The written submission cited detailed legislation and numerous legal precedents on disability discrimination law, negligence and breach of contract. Ms Maxwell stated that she did not believe that the University had acted fairly or reasonably; that, despite her efforts to inform her personal tutor of the situation, nothing was done; that she had been disadvantaged; and that she was not satisfied with the outcome of her stage 4 complaint. The remedy offered by the University was totally unacceptable, as it did not make up for her loss and she requested reimbursement for her financial losses, including £7,500 compensation for the distress and inconvenience caused to her. There were indications in the evidence filed on behalf of Ms Maxwell that she had received advice on quantum of compensation in the region of £24,000 to £34,000.

10. The OIA followed its normal procedures for dealing with students' complaints. There was no oral hearing. It is not usually considered necessary. The court was informed that the OIA has never in fact had an oral hearing. There is nothing surprising about that: the OIA is not a court or tribunal with jurisdiction to make binding decisions about contested rights. In its Final Decision the OIA recommended, without expressing a concluded view whether there had actually been disability discrimination, that within 28 days the University re-iterate the offer to meet full

tuition fees for repeating the first year of the course. That was subject to successful re-enrolment at the University, which was also to offer to pay her £2,500 compensation in recognition of the inconvenience and distress caused to her. That offer was to be open for 2 months. It was also recommended that the University should review its procedure in relation to adjustments for disabled students, including the manner and timescale for implementing adjustments. It should ensure that its procedure for this makes clear who is responsible for carrying out and overseeing the implementing process and the University should report back to OIA within 6 months with the result of the review of its procedures. The recommendations are not legally binding.

11. The decision of the OIA had been issued in draft to Ms Maxwell and the University for their comments in October 2008. The University identified an error in paragraph 37 of the draft decision, which wrongly stated that the issue of disability discrimination was not raised by Ms Maxwell in the University's Complaints Procedure. The draft paragraph stated that the review had not considered any question of discrimination, but that the OIA had taken the question into account in considering whether the University had followed its procedures correctly and whether its decision was reasonable.

12. The OIA was invited to review the accuracy of that draft paragraph. Ms Maxwell's solicitors agreed with the University that there was an error in that paragraph and that it was confused. They invited the OIA to include in the review decision the issue whether Ms Maxwell had been subjected to disability discrimination by the University. In the light of the comments the OIA deleted paragraph 37 of the draft from the Final Decision. Paragraph 33 of the draft was modified to state that "This Decision does not make findings about disability discrimination" it having been stated earlier in that paragraph that, in considering issues related to disability discrimination, the OIA does not act as a court, either in investigating in the same manner as a court or in making findings.

13. Ms Maxwell then sought judicial review of the OIA decision. Her application was for an order quashing it and requiring the OIA to re-consider her complaint against the University. In dismissing the application Foskett J held that the OIA did not have to express a view on the matter of disability discrimination, even though it had formed one.

14. On behalf of Ms Maxwell Mr Gregory Jones QC submits that she is entitled in law to a conclusion by the OIA on the issue of disability discrimination, which was the subject of her complaint against the University. The central issue was whether the University had breached its statutory obligations under the 1995 Act. It is contended that the OIA was under a duty to reach a conclusion on the disability discrimination matter raised in the complaint and to express it for her benefit as the person making the complaint. That is the essence of the grounds of appeal.

15. On dismissing the claim Foskett J ordered the applicant to pay half of the defendant's costs after the filing of the detailed grounds of resistance, such costs not to be enforced without the leave of the court. He refused permission to appeal.

16. On 13 October Jackson LJ refused permission to appeal. On a renewed application I adjourned the application to the full court with the appeal to follow immediately, if permission were granted. At the hearing this court decided to grant permission to

appeal. The issues raised and argued in detail could have an impact on access by users of the service provided by the OIA, on the operations of the OIA under its procedures and in its legal framework, and on the interests of the institutions served by it. (According to statistics supplied to the court about 4% of all complaints to the OIA are of discrimination).

17. As for the other legal proceedings, those started in the Oldham County Court in February 2006 for damages for discrimination, breach of contract and negligence and contested by the University have been stayed by a consent order since 21 June 2006. That was done to enable the OIA to review her complaint, which, in the absence of a stay, it would have no power to do under its rules. The County Court case is now in danger of becoming quite stale.

Judgment of Foskett J

18. In a thoughtful and careful judgment Foskett J concluded as follows:-

> "82. At all events, I am not satisfied that there is any general obligation to express an opinion on the strengths of a discrimination case in the Final Decision of an OIA ruling (although it is possible to do so in the general discretion of the OIA) and I am not satisfied that it was irrational not to do so in this case."

19. Earlier in his judgment Foskett J said that the OIA could not make a "finding" of disability discrimination in the sense of resolving an issue of fact or law. The correctness of that conclusion is challenged on this appeal. After summarising the rival submissions and explaining the process by which courts and tribunals make findings, Foskett J held as follows:-

> "70. In the overall context of dispute resolution, it is, in my judgment, difficult to see how a "finding" can be other than one that is arrived at by any process other than the kind of court or tribunal process to which I have referred.
>
> 71. To that extent, I would understand and accept the OIA's general position that it is not for it to make "findings" in the accepted legal sense about a disability discrimination; that is a matter for the County Court given the jurisdiction conferred on that court by the DDA.
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> ...
>
> 78. Overall, it seems to me that a party (whether it is the HEI or the student) who wishes to obtain a "finding" in the truly accepted sense of the term, either of no discrimination or of discrimination, will have to go to the County Court to obtain it. Not unnaturally, no party will want this to happen unless it is absolutely necessary; it is time-consuming, costs-consuming, emotion-consuming and will result in the delayed resolution of something that ordinarily ought to be resolved quickly, efficiently and with the minimum of public exposure, whether for the individual concerned or the HEI itself. That, as I perceive it, is the essential *raison d'etre* of the OIA and

why it has been invested with such a wide discretion in the way it seeks to achieve this kind of resolution…

79. Notwithstanding this wide discretion and the undesirability of making a formal "finding", is there anything to prevent the OIA from expressing a view about the strength or otherwise of a disability discrimination allegation as part of its review process? Subject to the considerations to which I will refer below, I can see no reason in principle why it should not do so. Whilst I cannot accept the submission of Mr Jones and Miss Sackman that it is illogical not to make a"finding" of disability discrimination, there is logic in the proposition that the formation of a view on the apparent strength of the student's discrimination case is of importance in determining whether the HEI's response to it has been fair and reasonable in all the circumstances. At the one end of the spectrum, the OIA could form the view that the claim for disability discrimination was so weak or flawed that the HEI's dismissive response to it was perfectly acceptable and reasonable in the circumstances. At the other end of the spectrum, the case may be apparently so strong that the HEI's response was plainly and entirely inadequate. Within that broad spectrum there may be many shades of opinion for the OIA legitimately to form. Provided that the OIA makes clear that any view it expresses is provisional and cannot be as authoritative as the decision of a court after hearing all the evidence, then in principle I cannot see any reason why such a view should not be expressed if it is thought appropriate. It could of course inform the nature and extent of any recommendation made.

80. That having been said, is there a necessity for expressing such a view in every case? Eve leaving out of account for this purpose the wide discretion conferred on the OIA by the statute and the rules that govern its procedures…I do not think it can be said that there is any such necessity. Matters of discrimination are sensitive both from the point of view of the person who believes that he or she has been the victim of discrimination and from the point of view of the institution concerned. No reputable institution will want to gain the reputation for not taking reasonable steps to accommodate the needs of the genuinely disabled. A process such as that afforded by the OIA provides the opportunity for a resolution of a complaint without the need to reach a concluded view on whether discrimination has taken place. It is quite possible to see that the OIA may simply prefer not to express any such view in many situations bearing in mind that its task is not to make any "finding" and to try and achieve an informal resolution. It will know that the County Court exists to do this if it is necessary in any particular case. However, and this seems to me to be the answer to the judicial review claim advanced in this case as indeed it may well be in many others if the point is taken, it must be a matter for the discretion of the OIA to decide in any case whether to express any such view or not. If the decision is taken not to express any view that does not mean that a view may not have been formed:

> as I have indicated, it would be difficult to see how the fairness of the HEI's response to a disabled student's complaint could be judges without forming some, albeit provisional, view on the strength or otherwise of the case advanced. However, whether to articulate the view expressly or not must almost invariably a matter for the judgment of the OIA reviewer. .."

20. The judge referred to the error on the disability discrimination point in paragraph 37 of the draft Final Decision, but concluded that the gist of the OIA's position was consistent throughout, namely that it did take the question of discrimination into account in considering whether the University had followed its procedures and whether its decision was reasonable.

Role of the OIA

21. This is not the first time that the role of the OIA has been considered by the Court of Appeal. The three judgments in *R (Siborurema) v. Office of the Independent Adjudicator* [2007] EWCA Civ 1365 make it unnecessary to set out again the detailed legislative background to, and structure of, the scheme established in accordance with the Higher Education Act 2004.

22. The scheme is operated by the OIA as a company limited by guarantee and a registered charity designated by the Secretary of State for the review of "qualifying complaints" by students against qualifying HEIs. Matters of academic judgment, admissions and employment matters, none of which feature in this case, are excluded from the scheme.

23. The following general points can be collected from the judgments in *Siborurema*, in which an application for judicial review against the OIA was dismissed, and from the relevant legal materials.

> (1) The OIA is amenable to judicial review for the correction of legal errors in its decision-making process.
>
> (2) That process involves conducting, in accordance with a broad discretion, a fair and impartial review of a student's unresolved complaint about the acts or omissions of an HEI and to do so on the basis of the materials before it, also drawing on its own experience of higher education, all with a view to making recommendations.
>
> (3) The function of the OIA is a public one of reviewing a "qualifying complaint" made against an HEI and of determining "the extent to which it was justified."
>
> (4) For that purpose the OIA considers whether the relevant regulations have been properly applied by the HEI in question, whether it has followed its procedures and whether its decision was reasonable in all the circumstances.
>
> (5) It is not the function of the OIA to determine the legal rights and obligations of the parties involved, or to conduct a full investigation into

the underlying facts. Those are matters for judicial processes in the ordinary courts and tribunals. Access to their jurisdiction is not affected by the operations of the OIA.

(6) The review by the OIA does not have to follow any particular approach or to be in any particular form. The OIA has a broad discretion to be flexible in how it reviews the complaint and in deciding on the form, nature and extent of its investigation in the particular case.

(7) The courts will be slow to interfere with review decisions and recommendations of the OIA when they are adequately reasoned. They are not required to be elaborately reasoned, the intention being that its operations should be more informal, more expeditious and less costly than legal proceedings in ordinary courts and tribunals.

Appellant's submissions

24. Mr Gregory Jones QC submits that there are 3 good grounds for overturning the judgment of Foskett J. He summarised the position of Ms Maxwell as follows:-

> "Put shortly, the Appellant's case is very simple and very strong. The OIA states that it will investigate complaints relating to disability discrimination. The Appellant made a complaint of disability discrimination. In its decision the OIA purported to take into account the DDA [the 1995 Act], all relevant case law and DDA policy (although none was expressly mentioned or cited in the decision letter) but it maintained that it could express no finding about disability discrimination (and in the court the OIA maintained that it would express no view). It is simply irrational to purport to take something into account as the OIA has done but then maintain it has expressed no view or made no finding in respect thereof. In any event the OIA was obliged to give reasons as to how it had taken the DDA, case law etc on discrimination into account and what if any weight he had given to it. The judge below failed properly to grapple with this issue as illustrated by his ruling on costs (attached hereto) where he accepts that the OIA was wrong to assert that it has no power to express a view about disability discrimination, since the OIA remained steadfast in its position that it could express no view or make a finding, the judge thus should have upheld the claim. Furthermore in other decisions published by the OIA it has previously expressed views and findings on matters of disability discrimination."

25. Ms Maxwell's case on appeal was powerfully argued by Mr Jones under the three headings below. In the course of submissions Case Studies taken from the OIA website were cited to show that the OIA had actually expressed views that there had been or may have been disability discrimination in particular cases by not making all necessary reasonable adjustments. For instance, Case example 4 appearing on page 8 of the OIA's Guide to the Student Complaints Scheme (Second Edition) was cited:-

> "*We received a complaint from a student alleging disability discrimination by a university. The student could have taken his*

complaint to the county court but chose to come to the OIA. The student demanded that the OIA should hold a hearing with an examination of witnesses, like a court. We explained that we were a review body and our prime role was to review how the university had dealt with the alleged discrimination. It would seldom be necessary for us to have a full hearing of the case. In fact, the complaint was upheld by us and compensation recommended."

A. Findings

26. The first ground is that the OIA was bound in law to disclose its view as to whether or not there has been disability discrimination in this case. In declining to express a view or to make a finding it has not discharged its functions. It is submitted that Foskett J erred in concluding that the OIA may form a view on that issue without having to disclose it to the complainant. If the OIA purports to take discrimination into account in its discretion, then it must articulate the view it has formed, or the finding it has made and the weight that it has given to it. It is submitted that it is logically impossible to make no findings on the complaint of disability discrimination and at the same time say that it has taken the matter of disability discrimination into account.

B. Reasons

27. The second ground is that there is no reasoned basis for the OIA's recommendations and that the decision is on its face irrational. The OIA is under a statutory duty and a common law duty to give adequate reasons for its decision and recommendations. Without being supplied with reasons Ms Maxwell cannot assess the adequacy of the compensation offered to her and decide whether or not to accept it. Further, the University will not know the basis for the recommended review of its procedures or what it should do to be compliant. It is submitted that Foskett J erred: he should have found that there was no reasoned basis for the OIA's recommendations.

C. Discretion

28. The third ground is that the OIA had not exercised its discretion to take account of disability discrimination. Its decision was not evidentially correct. It is submitted that Foskett J erred in accepting the OIA's argument that it had exercised its discretion to take account of disability discrimination.

Discussion and conclusions

29. I start from a position on which I think that most people would be in agreement: that a complaint of disability discrimination by a student against an institution that exists to provide courses in Higher Education is a serious matter. It is serious both from the point of view of the student claiming to be a victim and from the point of view of the institution as the alleged perpetrator. The outcome of the complaint and the proper procedure for achieving it are significant and sensitive for both sides.

30. Ms Maxwell's essential complaint under all three of Mr Jones's headings is that the OIA should have made a positive statement of a finding of disability discrimination in its Final Decision on her complaint against the University. It is common ground that, under the Higher Education Act 2004, complaints of disability discrimination are

eligible complaints that may be made to the OIA and reviewed by it. However, the operation of the Student Complaints Scheme by the OIA in disability discrimination cases can only be properly understood when read against the legal background of Part 4 of the 1995 Act, which was in force at the relevant time and provided for the bringing of legal proceedings against Further and Higher Education Institutions for unlawful disability discrimination. (The discrimination legislation is now contained in the Equality Act 2010). Although Part 4 did not prevent the making of an application for judicial review, or the making of a complaint under the complaints scheme, the essence of the disability discrimination legislation is that proceedings for unlawful discrimination are for breach of statutory duty and are brought as civil proceedings in the county court subject to the provisions of the legislation.

31. That legislation contained the customary provisions about enforcement, such as time limits and remedies, and also special procedural provisions, such as the requirement for the appointment of assessors, unless the judge considers that there is no good reason for exercising that power. In addition the Civil Procedure Rules apply to the conduct of the proceedings: the machinery of pleadings, disclosure of documents, the giving of oral evidence tested by cross examination, public hearings and reporting and reasoned public judgments subject to rights of appeal to the higher courts, and the making of costs orders.

32. As explained above, the practice and procedures for the review and resolution of a wide range of student complaints under the independent scheme operated free of charge and largely as an inquisitorial on a confidential basis by the OIA under the 2004 Act, is quite different from civil proceedings. Its informal inquisitorial methods, which are normally conducted on paper without cross examination and possibly leading to the making of recommendations in its Final Decision, mean that the outcome is not the product of a rigorous adversarial judicial process dealing with the proof of contested facts, with the application of the legislation to proven facts, with establishing legal rights and obligations and with awarding legal remedies, such as damages and declarations. The issue for the OIA in this matter was not to decide whether Ms Maxwell was in fact the victim of disability discrimination or whether the University is liable to her for such discrimination. The OIA's task was to *review* Ms Maxwell's complaint, which included a complaint of discrimination, to see whether the University's decision was *reasonable* in all the circumstances and was justified and, if so, to what extent, and what recommendations should be made to the University.

33. In my judgment, the courts are not entitled to impose on the informal complaints review procedure of the OIA a requirement that it should have to adjudicate on issues, such as whether or not there has been disability discrimination. Adjudication of that issue usually involves making decisions on contested questions of fact and law, which require the more stringent and structured procedures of civil litigation for their proper determination.

34. Ms Maxwell had a number of options. She chose to use the OIA as the primary route for her complaint. She has secured a favourable response in the form of the recommendations in the OIA's Final Decision. If she is dissatisfied with that outcome, because there has been no positive adjudication on whether or not there has been disability discrimination against her by the University, her remedy is to resurrect the county court proceedings, which have been stayed by consent for the last 5 years.

Her remedy is not in judicial review proceedings mounted on the basis that the OIA has erred in law in not making such an adjudication which it was not obliged to make. It is contrary to the whole spirit of a scheme established for the free and informal handling of students' complaints that the outcomes under it should replicate judicial determinations, which continue to be available in civil proceedings in the ordinary courts, for which the OIA is not and was never intended to be a substitute.

35. The matter can be tested in this way. Suppose that, following the informal procedure of the scheme as it has, the OIA had in fact made a positive adjudication that there had been no disability discrimination by the University against Ms Maxwell. I doubt whether Ms Maxwell would have found that an acceptable result, if it had been reached by the OIA without hearing any evidence from her or without hearing and having an opportunity to challenge the evidence given on behalf of the University and having had disclosure of documents from them and without the benefit of an elaborately reasoned judgment from the OIA setting out their findings of facts and their conclusions of law.

36. In a sentence what Ms Maxwell is seeking to do by these proceedings is for the courts to turn the OIA into something that it is not i.e. a court of law. As Mr Grodzinski pithily put it on behalf of the OIA, the heart of Ms Maxwell's case is that the OIA "should, in effect, act as a surrogate of the county court." The various ground of appeal are all variants of the same theme.

37. If the approach advocated by Mr Jones were correct, it is difficult to see what point there would be in having a scheme, which was established under the 2004 Act not as another court of law or tribunal, but as a more user friendly and affordable alternative procedure for airing students' complaints and grievances. The judicialisation of the OIA so that it has to perform the same fact-finding functions and to make the same decisions on liability as the ordinary courts and tribunals would not be in the interests of students generally.

38. Recent years have seen the growth of alternative processes of inexpensive dispute resolution: they are not intended to be fully judicial, or to be operated in accordance with civil law trial procedures, or to be dependent on what is fast becoming a luxury of legal advice and representation. The new processes have the advantage of being able to produce outcomes that are more flexible, constructive and acceptable to both sides than the all-or-nothing results of unaffordable contests in courts of law.

Result

39. I would dismiss the appeal. Foskett J did not err. I agree with him that no grounds have been established for quashing the Final Decision of the OIA. The OIA made an adequately reasoned decision in accordance with its procedures, in accordance with the law and as a proper exercise of its wide discretion. The decision was on the issue before it: was Ms Maxwell's complaint against the University justified? It said that it was. The OIA cannot be judicially reviewed for declining, in its discretion, to give a decision on a different issue: did the University commit acts of disability discrimination in breach of the 1995 Act? That was not a question that the OIA was obliged to answer in the conduct of its review or in exercising its discretion in the form of recommendations.

Lord Justice Hooper:

40. I agree.

Lord Justice McFarlane:

41. I also agree.