

Recent issues in OIA complaints and claims

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**Can you get a refund if you're unhappy
with a university course?**

**Student complaints about UK
universities growing, says watchdog**

**City University students demand tuition
fee refund while lecturers strike**

The context

- Complaints are on the rise – the OIA’s report for 2017 (the latest available) recorded 1635 complaints received, up 8% in comparison to the 2016 figure of 1,517.
- More students from law students (a surprise?!) and students on business & administrative students.
- 53% not justified; 15% justified or partly justified; 9% settled (others were ineligible or withdrawn).

What is the OIA?

- The scheme designed to independently deal with student complaints, whose jurisdiction is set out in the Higher Education Act 2004.
- The “OIA Scheme Rules” – OIA determines if the complaint is justified, not justified or partly justified by considering whether (1) HEI properly applied regulations and followed its procedures, and (2) HEI’s decision was reasonable
- The OIA is not a Court, e.g. does not need to determine whether there has been discrimination: R (Maxwell) v OIA [2011] EWCA Civ 1236

What is the OIA?

- The OIA has a broad discretion in how it conducts the review process, drawing on its own experience of higher education.
- Its remedies are flexible and can be tailored to a case.

Three recent issues

- Whether to bring a judicial review against the university or complain to the OIA?
- The jurisdiction of the OIA
- Fresh evidence obtained after the university's decision

Judicial review of HEI vs complaint to OIA

- If a student disagrees with HEI decision, they could judicially review HEI or complain to the OIA. BUT if complain to OIA, by the time the complaint is dealt with, likely to be out of time for JR.
- R (Zahid) v University of Manchester [2017] EWHC 188 (Admin)
 - Brought ‘protective JR’ and sought to stay it
 - Hickinbottom J: do not need to issue protective proceedings as long as student issues JR within reasonable time of OIA determination.
 - However as OIA could only look at complaint when matter stayed, the judge stayed the claims.
 - Universities appealed

Judicial review of HEI vs complaint to OIA

St George's University of London v Rafique-Aldawery [2018] EWCA Civ 2520

- Appeal of Zahid v University of Manchester
- Court concerned by:
 - Not encouraging students to issue JRs protectively, which may lead to unnecessary instruction of lawyers
 - Depriving HEIs of the usual 3 month time limit for JRs
 - Risk of undermining statutory complaints process

Judicial review of HEI vs complaint to OIA

St George's University of London v Rafique-Aldawery [2018] EWCA Civ 2520

- Court said:
 - After HEI's decision, student should be in a position to elect whether they will JR HEI or complain to HEI
 - If uncertain, then write to HEI putting them on notice of complaint and potential for JR
- Although reversed Hickinbottom J's judgment, reasoning is similar.

Judicial review of HEI vs complaint to OIA

- Unanswered question: is the OIA an alternative remedy so that a HEI is, in practice, immune from a judicial review a matter that is within the OIA's remit?
- It may be argued where a student unsuccessfully complains to the OIA, and then elects to JR the HEI. Could the HEI argue the complaint to OIA and potential OIA JR is an alternative remedy?

Judicial review of HEI vs complaint to OIA

- Courts are willing to investigate university processes even where the JR is of the OIA, see R (Gopikrishna) v OIA [2015] EWHC 207 (Admin):

“220. It is not for the court to find that material procedural unfairness at the two hearings or irrationality in the decision-making at the university have been established: but it is for the court to make a finding that there are grounds for taking the view that there may have been such unfairness or irrationality and that, on the material before it, the OIA should have taken that into account in reaching its decision (whether that decision was to dismiss the complaint or to uphold it) but did not do so...”

Judicial review of HEI vs complaint to OIA

- Appears to increase the workload for HEIs. They now potentially need to:
 - Engage in correspondence prior to an OIA complaint
 - Respond to the OIA complaint
 - Defend a judicial review brought against it, prima facie out of time

The jurisdiction of the OIA

- The OIA can find a complaint “ineligible” i.e. outside of its jurisdiction, e.g.
 - Matter of “academic judgment”
 - The subject matter of the complaint has been dealt with already by a Court
- What the OIA is saying that, pursuant to its rules, it does not have “jurisdiction” to hear the complaint.
- Related question whether the finding puts the scheme ultra vires the 2004 Act.

The jurisdiction of the OIA: who decides?

R (B) v OIA [2018] EWHC 1971

- Question of whether a contract claim issued prior to the OIA complaint constituted “proceedings relating to the subject matter of the qualifying complaint”.
- This question only has one answer, and it is for the Court to determine.
- Likely to apply to all “jurisdictional” questions, potentially more generally in other Ombudsman schemes as well.

The jurisdiction of the OIA: academic judgment

- Section 12(2) of the 2014 Act states a complaint is not a qualifying complaint (and therefore outside the OIA scheme) “to the extent that it relates to matters of academic judgment”.
- Whether there is academic judgment is a matter of statutory interpretation for the Court: R (Mustafa) v OIA [2013] EWHC 1379.

The jurisdiction of the OIA: academic judgment

Plagiarism

R (Mustafa) v OIA [2013] EWHC 137

- Where academic judgment is peripheral, complaint may not be excluded
- There must be some “judgment” for there to be “academic judgment”. Plagiarism would usually constitute academic judgment.
- What constitutes plagiarism will depend on the university’s definition.

The jurisdiction of the OIA: academic judgment

Prospect of a student finishing a course / relevant considerations

R (Gopikrishna) v OIA [2015] EWHC 207 (Admin)

- Academic judgment does not prevent a complaint about the process by which a decision, which does involve academic judgment, has been reached – including a failure to take into account relevant considerations.

The jurisdiction of the OIA: academic judgment

Sanction

R (Thilalawardhana) v OIA [2018] EWCA Civ 13

- Academic and professional judgment are different
- Whilst OIA should give great weight to a fitness to practise panel, sanction is not “completely beyond its power of review”

Fresh evidence

- When does a university have to reopen a decision where a student has obtained new evidence?
- Underlying complaint in St George's and B
- A university's refusal to reconsider a decision based on new evidence is a fresh decision, amenable to complaint to the OIA: Gopikrishna

Fresh evidence

- Starting point: does HEI have a policy or test for re-opening the specific decision (those acting for universities may consider whether it is advisable to have a policy on this point). If so, it should be submitted to the university for consideration pursuant to that policy.
- Many HEIs will not have a policy. In that event, the material should still be submitted to the HEI and their decision on whether to re-open the decision would appear to be a “fresh decision”.
- Should the HEI refuse to reopen the decision, then the student can look at either complaining to the OIA or bringing judicial review.