Recent issues in OIA complaints and claims

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1. This paper considers recent themes in cases relating to student complaints to the Office of the Independent Adjudicator ("**the OIA**"). In particular, it looks at three important decisions of 2018: R (Thilalawardhana) v OIA [2018] EWCA Civ 13, R (B) v OIA [2018] EWHC 1971 and St George's University of London v Mazz Rafique-Aldawery [2018] EWCA Civ 2520.

A (brief) introduction to the OIA

2. The Higher Education Act 2004 permitted the Secretary of State to designate a body to operate an independent student complaints scheme. The OIA is that designated body. Prior to the OIA student complaints were often dealt with by a "Visitor". However some institutions, particularly newer institutions, did not have such a Visitor. The premise of the OIA system was to ensure there was an overarching student complaints system which would determine student complaints instead of students having need to resort to the Court.

3. The OIA publishes the "OIA Scheme Rules" ("**the Rules**"). A complaint must be brought within 12 months of the final decision. The possible outcomes are set out in the Rules:

> "13.3. The Complaint Outcome will set out our decision that the complaint is Justified or Partly Justified, or Not Justified, and the reasons for the decision.
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> 13.4. In making our decision about the complaint we may consider whether or not the higher education provider properly applied its regulations and followed its procedures, and whether or not the higher education provider's decision was reasonable."

4. The Court has repeatedly emphasised that the OIA is not a Court. For example, it need not adjudicate on whether there has been disability discrimination, rather it needs to consider whether the decision by the university is fair and reasonable: R (Maxwell) v OIA [2011] EWCA Civ 1236.

5. In Maxwell, the Court of Appeal helpfully set out the role of the OIA:

> "(1) The OIA is amenable to judicial review for the correction of legal errors in its decision-making process.
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> (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.
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> (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.'
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> (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.
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> (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.
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> (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.
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> (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."

6. In R (Zahid) v University of Manchester [2017] EWHC 188 (Admin), Hickinbottom further considered the scope and purpose of the OIA. Whilst his conclusion was overturned on appeal, his observations on the OIA are unaffected. He noted the flexibility of the OIA Scheme:

> "33. …Compared with the restricted remedies available to the court, it is clear that the OIA is able to make wide ranging recommendations that are particularly tailored to the case before it, including a flexible response to any unreasonableness or unfairness it concludes has occurred."

7. He also noted the "expertise and experience of higher education" that the OIA has, and the breadth of discretion to determine whether the higher education institution has acted reasonably, which "means broadly reasonable in the non-technical sense, and is not restricted to the antithesis of legally perverse or Wednesbury unreasonable".

Judicially review the Higher Education Institution, or complain to the OIA?

8. Where a higher education institution ("**HEI**") makes a decision a student disagrees with, that student has two potential routes of redress. The first is to complain to the OIA, and the second is to bring judicial review proceedings against the HEI. The difficulty for the student is, if they complain to the OIA, then they will likely be out of time to issue a judicial review claim against the HEI.

9. Last year, an interesting judgment was handed down in R (Zahid) v University of Manchester [2017] EWHC 188 (Admin), which was important in respect of the OIA, but also more generally on the question of alternative remedy in judicial review. The three claimants had issued judicial review claims but immediately sought a stay of their claim pending a complaint to the OIA. Hickinbottom J was of the opinion:

> "79. …I do not see the need for the routine issue of protective proceedings in cases in which an OIA reference has been made, so long as the student issues any judicial review claim that he or she wishes to pursue within a reasonable period from the OIA's determination of the complaint. In the ordinary course, the student should be able to issue proceedings within one month of that determination; and it seems to me that the court would need compelling reasons to be persuaded that longer was reasonably required."

10. However, given proceedings had been issued, according to the Rules the complaint could only be considered if the judicial review was stayed. In effect the claimants had to choose between the OIA complaint and judicial review. In those circumstances, the judge granted the stay.

11. This decision was the subject of a successful appeal in St George's. The HEIs argued that the judge did not give sufficient weight to judicial review being a remedy of last resort. Three concerns were raised in particular, which the Court of Appeal sympathised with:

    a. The judge's ruling would encourage students to issue judicial review proceedings for fear of losing a legitimate means of protecting themselves and their rights – which in turn would lead to the instruction of lawyers, a step they would be unlikely to take if only complaining to the OIA;

    b. The ruling would deprive the HEI of its normal protection in the three-month time limit. The timings in the OIA rules are longer (12 months) and incompatible with judicial review.

    c. There is a risk the statutory complaints procedure would be undermined if students issued protectively to issue applications for judicial review simultaneously with complaints to the OIA.

12. The Court of Appeal considered that a student should, after receiving an adverse decision from an HEI, be in a position to elect whether to complaint to the OIA or issue proceedings. If uncertain then the student should write to the HEI putting it on notice of the detail of the complaint and the potential recourse to judicial review:

> "20. By the time the student makes the decision to raise a complaint against an HEI he/she will be in receipt of the reasons for the decision and the sanction complained of. It is likely that such reasoning will provide a good indication of whether the OIA will provide an effective means of review and resolution of the particular problem. The ambit and powers of the OIA are a matter of public record of which anyone embarking upon a complaint would or should be aware. This would provide guidance as to whether the OIA could provide appropriate review and resolution.

> 21. In the event that a student is uncertain as to the course to be taken, it would be open to the student to write to the HEI stating that they do not, at that time, wish to institute proceedings for judicial review but putting the HEI on notice of the detail of the complaint and indicating that it may be necessary to apply for judicial review in the event that the OIA procedure does not provide a suitable remedy. If in those circumstances the HEI later sought to take a time bar point in any subsequent judicial review proceedings the student's letter could be filed in the proceedings. The fact that the HEI were on notice of the detail of the complaint from the outset would be a significant factor of which the court could take account in exercising its discretion to extend time. This course would likely serve to protect the legal position of the student without recourse to separate legal proceedings when the complaint to the OIA is made. It would address the concerns raised by the appellants summarised at paragraph 17 above and those of the interested party."

13. The reasoning of the Court of Appeal is not significantly different to that of Hickinbottom J. Both thought it was unnecessary to issue protectively; and the answer lay in correspondence with the HEI.

14. If the OIA dismisses a student complaint, the student will have two options to take the matter further. It could bring a claim against the OIA, or against the HEI. If a claim is brought against the HEI, it will be interesting to see whether the HEI argues that a complaint to the OIA, and potential judicial review of the OIA decision, is an alternative remedy. It seems possible that an HEI could argue that the OIA means, in practice, it cannot be judicially reviewed in respect of a decision which is amenable to an OIA complaint.

15. Hickinbottom J appears to suggest the OIA did not provide a "coextensive remedy" to a challenge by judicial review, in dicta that was approved by the Court of Appeal in R (Thilalawardhana) v OIA [2018] EWCA Civ 13:

> "45. The OIA scheme and court proceedings thus respectively offer advantages and disadvantages to a student who is dissatisfied with his or her treatment by an HEI. As Parliament specifically intended…..the former offers an attractive alternative to formal legal proceedings; but, although its findings and decision may give pointers to its view on the formal legal position, it does not and cannot determine legal rights and obligations. The latter offers a forum for the resolution of issues

> in relation to formal legal rights and obligations, but at some considerable cost, not only in terms of money but also publicity and lack of flexibility in terms of both process and remedies…
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> 46. Because of the advantages of the OIA scheme, most students who have unsatisfied complaints against an HEI at which they have been studying refer the matter to the OIA, and do not wish to pursue legal proceedings. The OIA receives about 2,000 complaints per year.
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> 47. However, some students do wish to pursue a legal claim… Such students issue proceedings instead of, or as well as, referring the matter to the OIA; or at least wish to preserve and protect their position on proceeding in the court, dependent upon the result of the OIA reference."

16. Even where a judicial review is brought against the OIA, the Court has shown a willingness to delve into events which occurred before the HEI. In R (Gopikrishna) v OIA [2015] EWHC 207 (Admin), the argument was effectively that the OIA should have found the HEI's termination of the claimant's course was unlawful, either as a matter of procedure or substance. The Court spent significant time reviewing the process of the University of Leicester and found it to be procedurally unfair. This was the basis for the finding against the OIA that it should have taken this into account in its decision. See in particular:

> "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. It is also for the court to make a finding that a material error occurred which may have made a difference to the outcome. Those are the findings I make, for the reasons which I have attempted to explain at such length."

In that case the University of Leicester was represented as an Interested Party. Could the Court have undertaken such an exercise if the HEI declined to play an active part in the judicial review?

17. The outcome of the St George's also appears to increase the workload for HEIs. Where a complaint is made to the OIA, the HEI usually only needs to respond to the OIA and then will

not take an active role in judicial review proceedings of the OIA.

Should students judicially review the HEI, the HEI will have to (1) engage in correspondence on a judicial review before the OIA complaint is made, (2) respond to the OIA complaint, and (3) defend a potential judicial review.

The jurisdiction of the OIA

18. Whilst the complaints scheme is set up by the OIA, the 2004 Act prescribes the requirements for what the scheme must do. What this means is that where the OIA finds it does not have jurisdiction to hear a complaint, this potentially puts the scheme ultra vires the 2004 Act.

19. To use examples from the case law, "jurisdictional" questions include whether a complaint involves academic judgment, and whether a complaint has already been the subject matter of court proceedings. If the answer is yes to either, the OIA may not have jurisdiction to hear the complaint. Some legal issues arise if the OIA makes such a finding and a challenge is brought to that decision.

Who decides whether the OIA has jurisdiction – the OIA or the Court?

20. In B, the question arose as to whether jurisdictional questions are ones for the OIA to determine, subject to review by the Court on a Wednesbury basis, or whether these questions had only one right answer which the Court was entitled to decide upon.

21. In the case, B had issued a contract claim against the University of Leicester in relation to the process a Fitness to Practice Panel took in coming to a decision adverse to him. For various reasons, the parties agreed to strike the claim out. B then obtained further information and attempted to reopen the substance of the complaint. The HEI refused and the OIA found it did not have jurisdiction to hear the complaint. This was because the OIA Rules state the scheme does not cover a complaint where "the matter complained about was the subject of court or tribunal proceedings and those proceedings have been concluded"; which is a

derivation of wording in Schedule 2 of the 2004 Act which states "proceedings relating to the subject matter of the qualifying complaint" do not need to be considered under the scheme.

22. On this question, the Court found this had a right or wrong answer which was for the Court to determine:

> "48. …I have to decide whether Parliament intended the court itself to decide this question or to allow the Defendant to do so subject only to review on *Wednesbury* principles.
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> 49. As a matter of statutory construction (as stated in *R (A) v Croydon LBC [2009] 1 WLR 2557* para 52) I believe that the criterion to be applied (i.e. "relating to the subject matter") is objective, admitting of a right or wrong answer, rather than evaluative. Further, it is appropriate that the court should so construe the provision as it is in a better position to decide this than the OIA. It is the sort of issue which the courts deal with every day.
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> 50. Whilst "relating to" is not a straightforward concept it is not a spectrum on which the judgement of the OIA will be of particular assistance. I conclude that Parliament intended this issue to be decided by the court and I will go on to do so."

23. This has wider implications than just in relation to the OIA. The judge heard argument that in other ombudsman schemes, such as the Pensions Ombudsman (R (Parish) v Pensions Ombudsman [2009] EWHC 32 (Admin) and [2009] EWHC 969 (Admin)), there appeared to be a principle that an ombudsman's jurisdiction was a matter for the Court rather than the ombudsman. It seems likely the principle can be applied to other ombudsman schemes.

Academic judgment

24. An example of a jurisdictional issue that often arises is in relation to academic judgment. Section 12 of the 2004 Act sets out what constitutes a "qualifying complaint" (for which the OIA scheme must cater) but:

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

25. This provision was considered by the Court in R (Mustafa) v OIA [2013] EWHC 1379 (Admin). The Court considered that where academic was peripheral to a complaint, it may still be in the jurisdiction of the scheme:

> "51 The exclusion of OIA jurisdiction contained in s 12 of the Act and repeated in r 3 of the OIA's rules applies 'to the extent that it [the complaint] relates to matters of academic judgment'. This does not exclude in its entirety any complaint which involves a matter of academic judgment, but does so only 'to the extent' that the complaint 'relates to' such a matter. I respectfully agree with Judge Gilbart that the exclusion applies where the central subject of the complaint is a dispute about an academic judgment and that complaints where such disputes are peripheral are not intended to be excluded."

26. As to what "academic judgment" means:

> "52. Obviously, the exercise of academic judgment does not encompass everything which academics do, and not all judgments which academics have to make will qualify as academic judgments. The exclusion applies only to those matters which involve the exercise of a certain kind of judgment which, beyond saying that it is 'academic', the statute does not define. It is, however, the nature of the judgment which determines whether the judgment qualifies for the label 'academic', and not whether the decision is easy or difficult. But there must still be an exercise of judgment. That said, the courts have at least been willing to consider whether an academic judgment was made bona fide or whether it was perverse (see the passage from *Moroney* cited above), and it may be that these qualifications are also implicit in the exclusion in s 12(2) of the 2004 Act."

27. **Plagiarism** will often, but not always, involve academic judgment:

> "54. To my mind, it is reasonably clear that the question whether plagiarism has been committed often (and perhaps usually) will require an exercise of academic judgment, but that it need not necessarily do so. Take the case, for example, where a student lifts wholesale an article from the internet which he presents as his own work without attribution or other acknowledgement. The computer programme will demonstrate 100% copying and no judgment is required, academic or otherwise, in order to determine that there has been plagiarism. It may be that such a case will be referred to an academic to decide what to do, but that will be a decision on what to do about the

plagiarism and not a determination whether plagiarism has taken place – or even if it is, it is not a determination which requires any exercise of judgment."

28. The question may also turn on how a particular HEI defines plagiarism. In the case of Mr Mustafa, the Court noted specifically that the finding was not one of "moral turpitude" as the university's definition of plagiarism do not depend on any finding a student intended to mislead or claim the work of others as his own.

29. In Gopikrishna, HHJ Curran suggested that the exception for academic judgment was fairly narrow, and in particular did not encompass the procedure by which an HEI came to a particular decision. In that case the Court was considering the finding on the **prospects of a particular student finishing the course**, which was the basis upon which the university terminated Ms Gopikrishna's course. That question was not necessarily a matter of academic judgment:

> "191. This was not a complaint about how a paper had been marked, or a decision upon the class of degree which the candidate's scripts merited, nor was it an assessment, for example, of performance in practical tests. It was not comparable to the kind of decision where a mark of zero is given as the result of an academic judgment that there had been a total failure to communicate a comprehensible answer. Instead, it demanded an assessment of future prospects after taking into account, and only taking into account, relevant material. Some of that material involved the 'mitigation' such as repeated authorised absences from lectures and coursework. As there was no suggestion of any lack of veracity, the point which the claimant was seeking to make was that there had been a particular reason for the absences, which had since ceased. She was asking to repeat the year and demonstrate that without such circumstances she could pass. Plainly the decision on that issue required consideration of academic matters such as the academic history, but it also involved taking into account the bald incontrovertible fact, for example, that she had only completed 25% of the SSC in Semester 4 for reasons which had been found to be acceptable. The question was whether that could rationally be regarded as demonstrating poor prospects for the future.
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> 192. To adopt the words of Chadwick LJ, in Persaud (at para [41] of his judgment), whilst there is no principle of fairness which requires, as a general rule, that a person should be entitled to challenge a purely academic judgment on his or her work or potential, each case must be

examined on its own facts. If on a true analysis of those facts,
applying the words of the statute, the case is not a challenge to the decision to the extent that it relates to academic judgment, but a challenge to the process by which it was determined that the claimant should not be allowed to repeat Year 2, then, if that process failed to measure up to the standard of fairness required of the university, the OIA should have found the complaint made to it justified.

193. Males J gave the example, close to the facts of Mustafa, of a complaint that a finding of plagiarism had been reached by a process which was unfair. Here it is necessary to consider the complaint that the 'weak student' finding was reached by a process which was unfair."

30. In Mustafa, Males J left open the question of whether a **sanction** involved academic judgment and therefore was outside the jurisdiction of the OIA. The Court revisited this point in Thilakawardhana. Gross LJ (with whom the other judges agreed) differentiated professional, and academic, judgment. In this case, the Court was considering the penalty imposed by a fitness to practice committee, and the Court suggested it was something the OIA could look at:

"82. …I would not wish to be taken as endorsing counsel's submission defending the reticence of the OIA to intervene simply because a university panel's decision involves professional judgment. That submission appears to overlook the power, contained in rule 6.2 of the OIA Scheme, to consider whether a decision made by a HEI was "reasonable in all the circumstances" – and as observed in *Zahid* (*supra*), at [41], when doing so the OIA is not confined "to the antithesis of legally perverse or *Wednesbury* unreasonable". It will be appropriate for the OIA to give great weight to the decision of a university panel involving an assessment based on professional judgment but it should not treat such a decision as completely beyond its power of review. Still further, were that submission well-founded in the terms advanced, the purpose and utility of the OIA might well be undermined – necessitating applications for Judicial Review which could otherwise be avoided. The position of the OIA as a non-judicial body, offering a form of ADR is well understood (as I hope to have shown) but that is not a justification for an unduly self-denying ordinance which would have the unattractive consequence of pushing parties into litigation or, at the least, preserving time limits for litigation."

Fresh evidence

31. A series of claims have been brought in relation to whether an HEI has a duty to re-open a decision taken following the receipt of fresh evidence. This was the subject of the underlying complaints in B and St George's, discussed above.

32. This possibility arises from Gopikrishna, where the claimant had her course terminated by the University of Leicester due to poor grades in her first two years of study, in respect of which Ms Gopkrishna submitted there were mitigating factors. The OIA did not uphold her complaint. Ms Gopikrishna subsequently submitted medical evidence to the effect she had been suffering depression at the relevant time. In response, the university declined to undertake an "exceptional review" and the OIA did not class this as a "fresh decision" (although, the OIA also found that even it was a fresh decision, the university had reasonably concluded the "exceptional circumstances" test was not met).

33. The University acknowledged it had a discretion in exceptional circumstances to reopen a case, and the Court found that the exercise of such discretion was a fresh decision amenable to a fresh complaint to the OIA. However, on the facts of the case the OIA had reasonably found the "exceptional circumstances" test was not met.

34. In coming to the conclusion that a decision not to reopen was a fresh decision, the Court considered the potential that this would "open the floodgates". It was unpersuaded by such a consequence. This conclusion may be subject to some criticism by universities.

35. This really comes down to balancing getting the right result for the student, and the finality in a university decision. In the circumstance that a student is in receipt of a final decision of an HEI which they want to challenge with evidence obtained after the HEI's decision, the appropriate considerations are as follows:

    a. The starting point is to determine whether the HEI has 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.

b. 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".

c. Should the HEI refuse to reopen the decision, then the student can look at either complaining to the OIA or bringing judicial review.

36. Given the approach of the Court in Gopikrishna, the indication is that it will take some quite significant facts in order to challenge a university's refusal to re-open a final decision.

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