



office of the
independent
adjudicator

The OIA and Judicial Review: Ten principles from ten years of challenges

Felicity Mitchell
Deputy Adjudicator

December 2015



Paper 02

Introduction

In 2015 the OIA celebrates its tenth anniversary as the designated operator of the Students Complaints Scheme¹. To date we have reviewed some 15,000 complaints.

OIA decisions are subject to judicial review. In just over ten years of operation (January 2005 to November 2015 inclusive), 61 students brought judicial review challenges against its decisions. One student attempted to bring a claim even before the OIA became the designated operator. In addition, we were named as “Interested Party” in six claims, and received four High or County Court claims for damages (each of which was struck out).

I have been leading the OIA’s response to these legal challenges since late 2006. In this article I attempt to distil some principles from the most significant judicial review claims that have informed the development of the OIA Scheme.

The OIA’s Role and Remit

The leading judicial review case is the case of *R (Siborurma) v OIA*². Mr Siborurema complained to the OIA about the decision of London South Bank University to reject his academic appeal.

Mr Siborurema was a first year nursing student who had failed his fourth and final attempt at his exams, and had been withdrawn from the course. He appealed on the basis of mitigating circumstances which he had not presented to the university at the time of his assessments. His mitigation related to his difficult family circumstances, which included supporting his mother in her asylum application. The university rejected his appeal on the basis that its regulations provided that mitigating circumstances claims had to be submitted within a specified deadline, that Mr Siborurema had not provided a “valid reason” for failing to do so, and in any event, the evidence presented did not support his claim.

Mr Siborurema submitted a complaint to the OIA in June 2005. We concluded that the complaint was not justified.

Mr Siboruma sought the permission of the High Court to bring a claim for judicial review against the OIA’s decision. His main ground was that the OIA ought to have conducted a “full merits review” of his complaint – effectively stepping into the shoes of the university to redetermine his claim for extenuating circumstances.

He was refused permission, and appealed to the Court of Appeal. The case came before Lords Justice Pill, Moore-Bick and Richards in November 2006.

During the early stages of the litigation the OIA maintained the rather optimistic position that its decisions should be exempt from judicial review. The Court of Appeal, unsurprisingly, rejected that position. However, it dismissed Mr Siborurema’s application for judicial review. Lord Justice Pill said:

OIA’s decisions will, it is to be hoped and expected, be based on fairness and a consideration of higher education practices ... but I do not see that impeded by the existence of a limited remedy in the courts if OIA has exceeded its powers or acted in a manner inconsistent with the Statute under which it operates. ... [50]

Parliament has conferred on the designated operator a broad discretion. It is not prescriptive as to how complaints should be considered when making a decision whether they are justified. OIA is able, both in defining its scheme and in deciding whether particular complaints are justified, to exercise a discretion in determining how to approach the particular complaint. OIA is entitled to operate on the basis that different complaints may require different approaches. In assessing whether a complaint has been approached in a lawful manner, the court will have regard to the expertise of OIA, which in turn should have regard to the expertise of the HEI. OIA is entitled in most cases, if it sees fit, to take the HEI’s regulations and procedures as a starting point and to consider, when assessing a complaint, whether they have been complied with. [53]

1 The OIA was designated as the operator of the complaints scheme on 1 January 2005 for England and Wales, pursuant to section 13 of the Higher Education Act 2004.

2 [2008] ELR 209

Initially, the regulations can be assumed to be a reliable bench mark. The provision in the second part of paragraph 7.3, read with paragraph 6.1³, to “consider whether or not a decision by the HEI was reasonable in all the circumstances”, is, however, to be read broadly. It empowers OIA to comment upon the reasonableness of those regulations and procedures. It empowers OIA to conduct its own investigation into the facts underlying the complaint. There may be cases in which OIA will decide that is appropriate course to take but I do not accept that OIA is under a general obligation to rehear the merits of the case made to the HEI. [54]

Lord Justice Moore-Bick agreed with the judgment of Lord Justice Pill:

The nature and seriousness of complaints referred to the OIA is likely to vary widely and is therefore likely to call for a variety of different approaches. I am unable to accept, therefore, the submission that in every case the OIA is bound to examine the underlying merits of the dispute and cannot properly limit itself to a review of the decision which has given rise to the complaint. It is for the OIA in each case to decide the nature and extent of the investigation required having regard to the nature of the particular complaint and on any application for judicial review the court should recognise the expertise of the OIA and is likely to be slow to accept that its choice of procedure was improper. Similarly, I should not expect the court to be easily persuaded that its decision and any consequent recommendation was unsustainable in law. [70]

Lord Justice Richards, who also agreed, added:

The OIA’s concern that the availability of judicial review will impair the efficient operation of the Scheme by introducing undue formality and legalism is misplaced. The number of cases in which an application for judicial review could get past the permission stage is likely to be very small. There is a broad discretion under the Scheme as to how the review of a complaint will be carried out The decision whether a complaint is justified involves an exercise of judgment with which the court will be very slow to interfere. A complainant dissatisfied with the OIA’s decision will often have the option of pursuing a civil claim against the HEI, which may well be an appropriate alternative remedy justifying in itself the refusal of permission to apply for judicial review of the OIA’s decision. In the present case, permission was granted only because certain issues of general principle were raised. In the ordinary course a case of this kind could be expected to have little chance of getting through the permission filter. [75]

The *Siborurema* judgment, therefore, provides us with our first two principles:

Principle 1

The OIA is subject to judicial review, but the courts should have regard to the expertise of the OIA, and few claimants will be granted permission to bring a judicial review claim.

Principle 1 is borne out in the statistics: four out of five Claimants are refused permission to bring their claim.

Principle 2

The OIA has a broad discretion in determining the nature and extent of its review. It may take as its starting point the regulations of the higher education provider, but may also consider whether those regulations are reasonable, and may (but does not have to) investigate the underlying merits of the complaint.

The “full merits review” argument was raised in a number of other cases until it was finally laid to rest by Lord Justice Longmore in *R (Sandhar) v OIA*⁴.

Mr Sandhar was a student doctor who failed his final exams at the second attempt. He submitted a claim for extenuating circumstances which the university accepted (on appeal), and he was offered the opportunity to resit the year. Mr Sandhar appealed on the basis that he ought to be awarded his degree without having to resit the final exams for a third time.

3 OIA Rules 1 January 2005 to 31 August 2006:

6.1 The Reviewer will carry out a review of the complaint to decide whether it is justified in whole or in part.

7.3 In deciding whether a complaint is justified the Reviewer may consider whether or not the HEI properly applied its regulations and followed its procedures, and whether or not a decision made by the HEI was reasonable in all the circumstances.

4 [2011] EWCA Civ 1614

During the course of the OIA's review of Mr Sandhar's complaint, he brought a claim for judicial review on the basis that the OIA was not independent, that it ought to conduct a "full merits review" and that it ought to have held an oral hearing. Permission to bring the judicial review claim was refused in the High Court and Mr Sandhar appealed to the Court of Appeal.

Lord Justice Longmore commented that the "*distinction drawn by Moore-Bick LJ in para 70 of Siborurema between any examination of the underlying merits and a review of the University's decision may be thought to be somewhat elusive in practice.*" [38]. In the context of Mr Sandhar's case, the review of his complaint had not yet been concluded: Mr Sandhar had not provided comments on the university's response to his complaint.

Citing the judgment of Mr C.M.G. Ockelton sitting as a Deputy High Court Judge in *R (Budd) v OIA*⁵ Lord Justice Longmore said:

'It is unnecessary and unrealistic to describe the OIA as having a discretion to enter upon a "merits review" or a "full merits review" as though those phrases marked fixed thresholds in the OIA's investigative process. They do not. The OIA does its task properly if it continues its investigation until it is confident that it has all the material it needs in order to make a decision on the individual complaint, and then makes its decision. The exercise of a discretion in this context is simply the continuous consideration of whether any more information is needed in order to make a decision on the particular complaint.'

Subject, therefore, to any question of an oral hearing, it is for the complainant to produce the evidence and arguments he wishes to the OIA and its case-handler to consider. Provided that such evidence and arguments are considered, there will have been a full merits review. [39]

Mr Justice Longmore went on to conclude:

There is, therefore, no current reason to suppose that any oral hearing is required and certainly no ground on which this court could quash such refusal as there has so far been of an oral hearing. [45]

In *Budd*, Mr Ockelton had also considered the Claimant's assertion that the OIA failed to exercise its discretion to hold an oral hearing:

If a man in a main street in London tells me he is not aware of any cars, I may suspect him of not looking very hard: if he says he is not aware of any carriages I do not have the same suspicion, unless there has been reason to expect some. The fact that there have been no oral hearings can only be evidence of a disinclination to hold them if there is some reason to suppose that otherwise there might have been some. [89]

Sandhar, then, gives us our third and fourth principles:

Principle 3

The OIA does its task properly if it continues its investigation until it is confident that it has all the material it needs in order to make a decision on the individual complaint, and then makes its decision.

Principle 4

There is no general obligation to hold an oral hearing but the OIA may do so in the perhaps unlikely event that one is necessary.

Sandhar also laid to rest arguments about the OIA's independence: Lord Justice Longmore concluded:

In all these circumstances I just do not see how it can be said that any fair-minded and informed observer could say that there was a real possibility that the OIA in general or its Independent Adjudicator or any individual case-handler was biased in favour of the HEI under scrutiny in any particular case or lacked independence in any way. Considerable care has been taken to ensure that the case-handler should be seen to be independent of the HEI whose conduct is under challenge and there is no reason to suppose that such independence is not achieved. [34]

Approach to discrimination complaints

Sandhar was our second visit to the Court of Appeal during 2011. The first was in the case of *R (Maxwell) v OIA*⁶.

Ms Maxwell had a sleeping disorder and complained to the OIA about the University of Salford's provision for her disability. The OIA found Ms Maxwell's complaint to be partly justified and recommended payment of compensation, and changes to the university's internal procedures. The OIA's approach to discrimination cases was articulated as follows:

In considering issues related to disability discrimination the OIA does not act as a court. It does not investigate in the same manner as a court, nor make findings which are based on supposition as to what a court might have done in the same case. However, it is appropriate for the OIA to refer to the law and guidance on disability discrimination to form an opinion as to good practice and to decide whether the University has acted fairly. This Decision does not make findings about disability discrimination.

Ms Maxwell brought a judicial review claim on the basis that the OIA ought to have made a finding that the University had discriminated against her on grounds of disability. She argued that, had it done so, she would have received a higher level of compensation, and greater assistance in any future studies.

Ms Maxwell's claim was dismissed by Mr Justice Foskett and she appealed to the Court of Appeal. The appeal was heard by Lords Justice Hooper and McFarlane, and Mummery, who gave judgment on behalf of the Court. He said:

... 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 [Higher Education] 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 . [32]

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. [33]

... 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. [34]

... 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. [37]

That leads to our next principle:

Principle 5

The OIA's task is not to determine whether a higher education provider has discriminated against a student, but whether the provider's decision was reasonable in the circumstances.

Decisions are not judgments

Lord Justice Mummery's comments on the judicialisation of the OIA are reflected in other judgments. Lord Justice Richards commented, in *Siborurema*:

The OIA's decision letters were not well expressed, but should in my view be read with a degree of benevolence. On that basis I do not think that they reveal any misdirection or misunderstanding of how the University had approached the claimant's representations. Moreover, elaborate reasoning is not required in a decision of this nature. On the facts it was plainly open to the reviewer to find that the complaint was not justified. [79]

In *R (Burger) v OIA*⁷, Lady Justice Hallett gave judgment on behalf of the Court of Appeal⁸ on an appeal by Mr Burger against a decision of Mr Justice Mostyn, dismissing his claim. Mr Justice Mostyn accepted the OIA's argument that, although errors had been made in the OIA's decision, they were not material to the outcome. Refusing the appeal, Lady Justice Hallett said:

The OIA was set up to provide speedy, effective and cost effective resolution of students' complaints. It was not set up as a court or tribunal or other judicial body. Any court asked to review its decisions must, therefore, act with caution. One must look to the nature of the complaint before the OIA and how the OIA responded in far more general terms than might be the case when reviewing a decision of a judge. Here the OIA did its very best with a very far ranging series of complaints made by the appellant. It followed rational and fair procedures and gave adequate reasons for its decisions and recommendations. It addressed the substance of the complaints. Even if no errors had been made the result would have been the same. [50]

So, principle 6 counters the tendency to judicialise the OIA:

Principle 6

The purpose of the OIA scheme is to provide free and informal complaints handling; it is not intended to be a substitute for court proceedings and its decisions should not be analysed in the same way as judicial determinations.

Academic judgment

Academic judgment is the last bastion of professional judgment considered to be exempt from judicial scrutiny. The OIA cannot interfere with matters of academic judgment: the Higher Education Act 2004 specifically excludes complaints relating to matters of academic judgment⁹ and this is reflected in the OIA's Rules¹⁰.

However, the OIA is careful to define academic judgment narrowly. It is not any judgment made by an academic. It is a judgment that is made about a matter where only the opinion of an academic expert is sufficient. We cannot put ourselves in the position of the examiners in order to re-mark work or pass comment on the marks given to the student. However, we can look at whether the higher education provider has correctly followed its own procedures, for example, its assessment, marking and moderation procedures, and whether there was any unfairness or bias in the decision-making process the provider followed.

A decision about assessment, a degree classification, fitness to practise, research methodology, or course content or outcomes will normally involve academic judgment.

The following areas do not involve academic judgment: decisions about the fairness of procedures, whether they have been correctly interpreted, what the facts are, how a provider has communicated with the student, whether an opinion has been expressed outside the area of an academic's competence, the way the evidence has been considered, whether there is evidence of bias or maladministration¹¹.

7 [2013] EWCA Civ 1803

8 The Chancellor of the High Court, Lady Justice Hallett and Lady Justice Sharp

9 S12(2) A complaint which falls within subsection (1) is not a qualifying complaint to the extent that it relates to matters of academic judgment.

10 Rule 3.2

11 <http://www.oiahe.org.uk/glossary.aspx>

Judges have been equally circumspect in defining academic judgment. A comprehensive analysis of the relevant case law was provided by His Honour Judge Curran QC in *R (Gopikrishna) v OIA*¹². The judge considered the leading cases in this area, including *Clark v University of Lincolnshire and Humberside*¹³ and *Moroney v. Anglo-European College of Chiropractic*¹⁴ before considering two cases which involved the OIA.

The first was *R (Cardao-Pito) v OIA*¹⁵ in which the Recorder of Manchester, His Honour Judge Gilbart QC, made comments about the parameters of the academic judgment “immunity” during the course of his judgment (second in length only to the *Gopikrishna* judgment). In the *Cardao-Pito* case the OIA did not argue that any part of the complaint was ineligible because it related to academic judgment, and the Claimant did not challenge the OIA’s decision on that basis, so the judge’s comments are incidental¹⁶. He said:

In my view, [the OIA’s Rule 3.2] is intended to exclude appeals where the central subject matter of the complaint is a dispute about an academic judgement. Typical examples would be those whose substance is to dispute an academic assessment of the quality of a piece of work, or where issues are raised about the performance of a student in tutorials or seminars. But that does not serve to exclude complaints which do not relate to such a dispute, albeit that its subject matter can have an effect on the ability of the student to pursue his or her course of study. It cannot be doubted that misconduct or omissions or failures by an HEI which adversely affect a student are subject to the scheme. It would be extraordinary if it could exclude consideration of misconduct or failures by the HEI simply because their effects showed up in a poor performance of the student in his/her coursework or examinations. [97]

The second case involving the OIA was *R (Mustafa) v OIA and Queen Mary, University of London*¹⁷ in which Mr Justice Males considered a claim challenging the OIA’s decision in relation to a complaint about a finding of plagiarism against the student. Males J rejected the student’s claim on the basis that on the facts of the case the OIA had correctly determined that the University exercised its academic judgment in deciding that what the Claimant had done was plagiarism. He said:

Obviously, the exercise of academic judgement does not encompass everything which academics do, and not all judgments which academics have to make will qualify as academic judgements. 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 [Higher Education Act 2004] 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. [52]

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. [54]

Concluding his analysis of and summarising the case law on academic judgment, HHJ Curran said:

This summary might usefully be compared with the much more concise statement made by the OIA [in its decision] of what it regarded as its function ... where it contrasted its inability to re-mark papers with its ability to scrutinise fairness in decision-making. There is very little, if any difference. [188]

Principle 7 might then be formulated as follows:

12 [2015] EWHC 207, at paragraphs 143 ff

13 [2000] 3 All ER 752

14 [2008] EWHC 2633

15 [2012] EWHC 203 (Admin)

16 Obiter dicta

17 [2013] EWHC 1279 (Admin.)

Principle 7

The OIA cannot interfere with academic judgment but that immunity relates solely to decisions of a purely academic nature. The OIA cannot put itself in the position of examiners in order to re-mark work or pass comment on the marks given, but it will look at whether a higher education provider has correctly followed its own assessment, marking and moderation procedures, and whether there was any unfairness in the decision-making process.

Professional judgment and fitness to practise

The OIA takes a similar approach in cases involving professional judgment, for example, fitness to practise issues. Whether a student's behaviour renders him or her unfit to practise is likely to be a matter of professional judgment. Professional judgment is a decision about professional standards that only an experienced professional can make. The OIA will not generally interfere with professional judgment unless there is evidence of procedural irregularity, unfairness or bias.

That approach was considered by His Honour Judge Milwyn Jarman QC in the case of *R (Thilakawardhana) v OIA*¹⁸. The Claimant was a medical student who was disciplined and subsequently found unfit to practise for posting a threatening meme and sending threatening and offensive messages via social media. The Claimant was excluded from the university and appealed that decision. His appeal was rejected by the university.

The Claimant challenged the OIA's decision that the university reasonably rejected his appeal. He said that the University's Appeal Panel failed to take account of his evidence regarding the context in which his messages had been sent, failed to give reasons for rejecting that evidence, and failed to consider applying a lower sanction.

The Judge rejected the Claimant's claim, concluding:

... in my judgment it has not been shown that the approach of the defendant to the decision of the appeal panel was irrational. In particular, I am satisfied that the defendant was entitled to conclude that the appeal panel had viewed the meme and the message objectively to determine whether together they were likely to undermine the trust of a reasonable member of the public in the profession, regardless of whether members of the public saw the same and regardless of whether [the other student] felt threatened. It was also entitled to conclude that the appeal panel had acted reasonably in regarding the posting of itself as sufficiently serious to lead to the conclusion that the claimant is not fit to practise as a doctor and it was therefore unnecessary for detailed consideration to be given to lesser sanctions. [36]

That may be seen by some as an outcome which is harsh That however is not the test I must apply. The test I must apply is whether the decision is one to which no reasonable decision maker possessed of expertise reasonably to be expected of the defendant could have come. Adopting the cautious approach which I must, I cannot be satisfied that that high hurdle has been reached in this case, particularly as it involves professional judgement as to fitness to practise medicine. [37]

That gives rise to principle 8:

Principle 8

Where a student seeks to challenge a decision relating to a provider's professional judgment about his or her fitness to practise, the hurdle he or she must overcome is a high one: is the OIA's decision one to which no reasonable decision maker possessed of expertise reasonably to be expected of the OIA could have come?

Late Evidence

The *Gopikrishna*¹⁹ case started life as a claim based on the argument that the OIA ought to direct the university to consider new evidence that the claimant was suffering from a learning disability and depression which were not diagnosed until some months after the university's appeal processes had concluded. The OIA concluded that the university's refusal to reopen the appeal on the basis of the new evidence was not a separate decision susceptible to review by the OIA but that, if it were, that refusal was reasonable in the circumstances. The case was one of a series of complaints on similar facts brought by medical students at Leicester University²⁰.

His Honour Judge Curran decided that the university's refusal to reopen the Claimant's appeal based on the new evidence did amount to a decision which was itself susceptible to review by the OIA. However, on the facts of the case, he decided that the OIA reasonably concluded that it was reasonable for the university to refuse to reopen the Claimant's appeal. He commented:

If a case arose in which, unlike the present case, some quite unsuspected and undiagnosed condition was revealed by medical evidence soon after the failure of an examination, when there had been no reasonable possibility that it was diagnosable beforehand, it might very well be appropriate, if not necessary, for the matter to be looked at afresh by the University. [181]

The OIA's Rules were revised with effect from 9 July 2015 and the following new Rule was introduced in relation to any late evidence to reflect the judge's comments:

4.8 The OIA will not normally consider a complaint which arises from information or evidence which the student has obtained

4.8.1 after the date of the Completion of Procedures Letter, or

4.8.2 if no Completion of Procedures Letter has been issued, more than 28 days after the student ceases to be a student

unless the student could not reasonably have obtained that information or evidence at an earlier date.

The "late evidence" principle is:

Principle 9

In considering whether to accept late evidence of mitigating circumstances, the OIA should look at the time which has elapsed since the affected examinations, and whether the student could reasonably have suspected they had the condition, or obtained a diagnosis, at an earlier time.

His Honour Judge Curran upheld the Claimant's claim in the *Gopikrishna* case on the basis that, on the facts of the case, there were procedural irregularities in the university's conduct of the Claimant's appeal which the OIA had not identified as irregularities. In addition there was a material error of fact which may have made a difference to the outcome, although the OIA was not responsible for that error. The Claimant's other grounds failed.

Remedy

The principal finding of His Honour Judge Gilbert QC in the case of *Cardao-Pito*²¹ related to the OIA's reasons for the compensation we recommended. In that case, the OIA concluded that the London Business School failed properly to consider Mr Cardao-Pito's appeal against the decision not to up-grade him to PhD status. His appeal was founded, in part, on allegations of harassment against his supervisor. Those allegations had not been investigated by the School.

The OIA recommended compensation of £5,000 in relation to the "loss of opportunity to have his appeal heard" and for costs associated with Mr Cardao-Pito's transfer to a different university which might have been avoided if his appeal had been properly considered. We also recommended compensation of £1,500 for distress and inconvenience.

¹⁹ Op cit

²⁰ One other claim resulted in a judicial review claim which has been refused permission on the papers but which at the time of writing is subject to a renewed application for permission.

²¹ Op cit

The Judge concluded that the award for distress and inconvenience was “within the OIA’s discretion” and did not require further reasoning.

In relation to the lost opportunity award, the Judge said:

Lest there be any doubt, I entirely accept that the OIA is not to be expected to engage in the depth of assessment appropriate to a personal injury claim- whether of special damages for loss of earnings, future losses or for disadvantage on the labour market. Such an assessment was not required here. The assessment could have been shortly stated, been broad brush, and could have been as simple as saying “ The total lost award was £34,000, but given factors A B and C, I assess the chances of a successful appeal as having been z % and therefore the award is £y. I apply the same proportion to the costs of relocation from the LBS to Strathclyde. ” In some cases it may not be possible to reach any conclusion. If so, then the award may in some cases properly be assessed as nil under this head. But here, it did not take that approach, and actually elected to adopt a position in the middle ground to which I made reference above. Having made that election, it was required to give some reasons for the level of award upon which it fixed. [138]

Given the fact that a large sum had been claimed, based on a case that he had lost his [bursary] award, and that his complaint had not been regarded as frivolous, it was a topic which demanded an explanation, albeit a succinct one. For example one asks - What figures have been taken into account, or brought into account? How has the OIA approached the valuation of the “opportunity” to which it refers? Did it take into account some lesser proportion than the total? Did it apply some discount, and if so what was it? What are the expenses it has included in that figure? [142]

The Judge concluded that in the circumstances of that case, the OIA had not given adequate reasons for recommending the sum of £5,000. There are some difficulties, however, with the mathematical approach which the Judge advocated in that case. Firstly, the assessment of the prospects of a student succeeding in an academic appeal will often require the exercise of academic judgment. Secondly, it would be impossible for the OIA to assess in percentage terms how likely it was for a student to succeed in an appeal based on allegations of harassment without first investigating those allegations. In Mr Cardao-Pito’s case, the Judge concluded that it was reasonable for the OIA **not** to investigate those allegations itself. Thirdly, a successful appeal would not automatically have led to Mr Cardao-Pito completing his PhD at the School – again an assessment of his prospects of success would inevitably require an element of academic judgment.

The issue of compensation was again considered in *R (Wilson) v OIA*²². In that case, the OIA recommended payment of £6,000 for the distress and inconvenience suffered by Mr Wilson as a result of the University’s poor handling of his complaint, in circumstances where Mr Wilson had not been able to re-join the course. We concluded that it was not possible for us to estimate the likelihood of Mr Wilson successfully completing his course and so did not recommend compensation for his loss of opportunity to do so.

The case was considered by Mr Philip Mott QC sitting as a Deputy High Court Judge. He concluded:

In the light of this evidence [of Mr Wilson’s claim for financial losses], it would have been difficult to make any mathematically precise assessment of loss. Given the nature of the OIA’s procedures and function, it was reasonable for it simply to come to a round figure, taking into account the various uncertainties which were set out in the second decision. The award of £6,000 in my judgment is within the bracket of reasonable figures which could be recommended on that evidence. [43]

So, our final principle is:

Principle 10

When assessing compensation for actual financial loss, or lost opportunity, the OIA must provide adequate reasons for the sum it recommends. However, the OIA has discretion in relation to compensation for distress and inconvenience and where it is not possible to reach a precise assessment of loss, it is reasonable to take a broad brush approach.

Concluding comments

Dealing with claims for judicial review is challenging, sometime frustrating, and always educational. Eighty per cent of claimants are refused permission, and around half of claims are refused on the basis that they are “totally without merit”. The OIA has limited resources and we have sometimes felt that too much resource has been focused on defending ourselves against some speculative or even desperate claims.

We must keep this in perspective. For students, the stakes in higher education are often high and the OIA as a consequence receives a relatively high number of challenges. To date two claims have resulted in a judgment against the OIA, and in both of those cases, the Claimant succeeded on only some of their grounds²³.

Many of the judicial review challenges have tested or established significant principles and have provided useful and important clarification on the OIA's role, remit and approach. This has been immensely valuable, if a little painful at times. We are enormously grateful to the judges involved for the care they have taken to understand the ombudsman jurisdiction. The OIA Scheme is the stronger for the erudite and sensible judgments which they have delivered.

23 Cardao-Pito and Gopikrishna. Note that in the former case the OIA was ordered to pay 2/3 of the Claimant's costs and in the latter it was ordered to pay only 1/3 of the Claimant's costs.



office of the
independent
adjudicator

Office of the Independent Adjudicator for Higher Education

Second Floor, Abbey Gate, 57-75 Kings Road, Reading, RG1 3AB

Tel: 0118 959 9813

Email: enquiries@oiahe.org.uk

Website: www.oiahe.org.uk