Case No: CO/11271/2013

Neutral Citation Number: [2015] EWHC 207 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/02/2015

Before:

HIS HONOUR JUDGE CURRAN QC

- -

Between :

THE QUEEN (on the application of DARMEENA GOPIKRISHNA)	**Claimant**
- and -	
THE OFFICE OF THE INDEPENDENT ADJUDICATOR FOR HIGHER EDUCATION	**Defendant**
- and -	
(1) THE UNIVERSITY OF LEICESTER **(2) KAZIRA VON SELMONT** **(3) VANESSA PEAT** **(4) AHMED AL-HADAD**	**Interested Parties**

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- -

Clive Newton QC and David Lawson (instructed by **Sinclairs Law Solicitors**) for the **Claimant**
Aileen McColgan (instructed by **E.J. Winter & Son**) for the **Defendant**
John Hamilton (instructed by **Watson Burton LLP) for the First Interested Party**
Leon Glenister (instructed by **Sinclairs Law Solicitors) for the other Interested Parties**

Hearing date: 24 October 2014

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Judgment

HHJ Curran QC :

1. This judgment is divided into 6 parts and the contents are as follows:

Abbreviations used throughout

2. For ease of reference the main abbreviations or acronyms which have been used in the evidence are as follows:

APC	Academic Progress Committee
AS	Academic Summary
Ch.B	Bachelor of Surgery (university degree)
CSFC	Consultation Skills Foundation Course
ESA	End of Semester Assessment
HB	Hearing Bundle
M.B.	Bachelor of Medicine (university degree)
OIA	Office of the Independent Adjudicator for Higher Education
OSCE	Objective Structured Clinical Examination
QE	Qualifying Examination
SSC	Student-Selected Component
TCRP	Termination of Course Review Panel
UTI	Urinary tract infection

The parties

3. In 2011, the Claimant, then a second-year medical student, failed her end-of-year examination. She asked to be allowed to repeat the year and to re-sit the examination. A committee at the medical school decided that she should not be allowed to repeat the year, and that her course should be terminated. The Claimant appealed to a review panel acting for the whole university, which rejected her appeal. The Claimant then made a complaint to the Office of the Independent Adjudicator for Higher Education ("OIA") the statutory authority for higher education responsible for adjudication in such matters. The OIA over a period of time issued two provisional decisions, and later, following various developments detailed below, its final decision in an 'Amended Complaint Outcome.' The Claimant's complaint was not upheld. She now seeks judicial review of that final decision of the OIA.

The University and the Undergraduate Interested Parties

4. One aspect of this case, involving medical evidence first produced after the course termination decision, but which is said to be relevant to the Claimant's academic performance, is a matter which affects medical student members of the University other than the Claimant. Put shortly, a question arises as to whether a "fresh decision," reviewable by the OIA, was made when the University declined the invitation of the OIA to re-open the Claimant's case in the light of such evidence. The university and those other students involved have been joined in these proceedings as Interested Parties.

The OIA

5. The OIA has a public function to review a "qualifying complaint" made against a university and to determine the extent to which it is justified. The OIA considers whether the relevant internal regulations have been properly applied by the university, whether it has followed its own procedures, and whether its decision was reasonable in all the circumstances. It is not the function of the OIA to determine the legal rights and obligations of the parties involved, nor to conduct a full investigation into the underlying facts. 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. The intention of Parliament was that its operations should be more informal, more expeditious and less costly than legal proceedings in ordinary courts and tribunals.

6. However, in certain circumstances, the decisions of the OIA are open to judicial review and, as is shown by this case, it may become very difficult for considerations of informality, expedition and economy of cost to be maintained. This judgment is unavoidably lengthy. Whilst the hearing occupied no more than the greater part of three days in court, the hearing bundle ("HB") comprised over 1,000 pages of documents. Skeleton arguments were submitted by all parties totalling over 100 pages. In addition, a lever-arch file of authorities was produced, containing many reported cases. Unusually for a case of its kind, there are numerous discrete matters of fact to be considered, as well as issues of law which require resolution. A further complicating factor is that errors and misunderstandings occurred during the many months when the complaint was being considered. The OIA say that those acting for the Claimant repeatedly changed the way in which the case was presented, and it is correct that even at the beginning of the hearing applications were made for re-amendment and further re-amendment of the Claimant's Grounds. It is impossible to resolve the issues without detailed examination of the background and the context within which those issues arose. It is also necessary to be clear about what the OIA was being told, both correctly and incorrectly, at various material stages of its consideration of the case, and the information that it acted upon.

Background

7. In September 2009 the Claimant registered at the University of Leicester ("the University") Medical School to study for the degrees of Bachelor of Medicine

and Bachelor of Surgery (M.B., Ch.B.) having achieved 12 'GCSE' passes at grade A (six of which were graded A*) and three A grades at 'A' level.

8. Teaching at the Medical School is undertaken by lecturers and by a number of different clinical tutors who are practising doctors, such as Dr Michael Nandakumar (HB 391-2), a general practitioner and Undergraduate Clinical Tutor and Clinical Lecturer at Guy's Hospital Medical School, London. Dr Nandakumar taught the Claimant for the six months of her Consultation Skills Foundation Course ("CSFC").

9. In respect of the pastoral and academic care of students the University's arrangements may be illustrated by a document produced at the hearing which had been taken from the University's website, entitled "*Leicester Medical School – Looking after You – 2009 Intake*." This document contains a diagram which under a column headed "*What's my problem?*" appears to show that if the problem is related to general academic progress the student should consult his or her "*Personal Tutor/School Tutor*" whereas if the problem is "*Personal*" a direct arrow points to the 'School Tutor' and a branched-off arrow to the personal tutor. (If the role of the 'School Tutor' is different from that of the clinical tutor, no explanation has been given of the distinction.)

10. The personal tutor has an overall pastoral role. That involves assisting students with making progress in their studies and with matters such as module choices, or with health problems or other circumstances which may affect studies. The personal tutor is also available to discuss examination results and career opportunities, to provide references, and to help students to deal with purely personal problems, such as accommodation or financial difficulties. Particular responsibilities are provided for the personal tutor under the University's regulations in the event that a student fails an examination. These will be dealt with in due time.

11. At the time of the termination of the Claimant's course in September 2011 it was recorded that the Claimant's personal tutor was Dr D. Clarke. It is clear from the unchallenged evidence of the Claimant and of Dr Jonathan Hales, a Senior Lecturer in the Medical School, however, that Dr Clarke had only occupied that position for a relatively short period in the second half of the Claimant's second year, and that the Claimant had had no personal tutor for the majority of her second year. No real explanation for that was given in the papers or at the hearing.

12. At the time of the Claimant's admission the University had appointed Dr Hales, as 'Phase 1 Student Support Co-Coordinator.' The Claimant was a student assigned to Dr Hales for support. In a witness statement dated 21st October 2014 Dr Hales said that the Claimant came to the University with very good 'A' level results, "*a fine reference*," and having performed well at interview. Dr Hales said that she made friends readily and was respected and well liked by her peers. He described her as a self-possessed young woman who listens well, cares about others and has considerable poise and self-control.

The Claimant's academic progress in her first year

13. The Medical School at the University is not organised upon the basis of the conventional three-term academic year. Instead, each academic year is divided into two semesters. At the end of each semester students sit an examination called an "End of Semester Assessment." The first is "ESA 1", the second "ESA 2" and so on. The Claimant received a "borderline satisfactory" pass for her ESA 1 module (HB 142-3). Thereafter the Claimant's case is that personal and family problems, which she had begun to encounter from the beginning of her course, increasingly seriously affected her ability to study (HB 153).

14. During the second semester of the first year, on 17 March 2010 the Claimant received advice from Dr Hales about various difficulties she was then experiencing. Her student loan had been delayed, leaving her financially embarrassed (which she described as "very distressing for me" – HB 153) and she was having to go home every weekend owing to her father's serious health problems and certain consequent behavioural difficulties, and her mother was also in poor health (HB 142-3 and 153). During the first part of the Easter vacation, the Claimant says that she managed to catch up with her notes but during the last part of the vacation the Claimant's father's condition worsened, disrupting the Claimant's ability to concentrate on her revision (HB 153).

15. The Claimant received an "unsatisfactory" grade in her ESA 2 and her Objective Structured Clinical Examination ("OSCE") modules (HB 142-3). She was therefore required to sit the Year 1 Qualifying Examination ("Y1 QE"), which she passed, despite the continuing difficult circumstances at home (HB 153). In his witness statement Dr Hales said this:

> *"The Claimant came to see me in her first year, explaining some of the appalling life events she had experienced and made me aware that she was feeling depressed. At the time the University operated a procedure whereby mitigating circumstances would only be considered if a student were to fail an actual examination. In the Claimant's case she made me aware in her first year of … the way in which her circumstances impacted on her academic performance. However, given that she passed her first year it was not necessary for me to refer her to a mitigating circumstances procedure." (HB 1029)*

Dr Hales also said that from the second semester in the first year onwards the Claimant was diligent in informing the medical school of her problems. He added,

> *"Under the circumstances it was to her credit that she narrowly passed her first year. An interregnum left her without a personal tutor for all but the last few weeks of the second year…"*

It is now accepted by all parties that none of the Claimant's absences, whether in her first or her second year, were unauthorised. The University at one stage suggested in a letter to her MP that her attendance had been "poor" but at the hearing all parties appeared to accept that the Claimant had not missed any academic or clinical sessions without obtaining authorisation for such absences, and for valid reasons. There has been no challenge, at any stage, to the veracity of the Claimant's account of the difficulties she encountered which led to these absences.

<u>The second year</u>

16. During the academic year 2010-2011 the Claimant's mother was absent abroad for most of the year, thereby increasing the Claimant's responsibilities at home (HB 136). On 15 November 2010 the Claimant was notified in the record of attendance for Semester 3 that there was cause for concern over her performance and she was referred to the Professional and Academic Concerns Group (HB 143-3). In December 2010 the Claimant stated that her personal situation became intolerable during the revision period before ESA 3 (HB 136). In addition as a result of frozen and burst pipes during the Christmas holidays the Claimant's student accommodation became barely habitable until about Easter 2011 making study there virtually impossible (HB 137).

17. In her Semester 3 results the Claimant received an "unsatisfactory" grade in her ESA 3 module. Before her ESA 3 examination the Claimant suffered from a UTI (HB 136). On 24 February 2011 the Claimant met Dr Hales and told him she had been very depressed over Christmas and had been unable to stay in the family home for more than 2 hours a day because of the difficult family situation. She had found it hard to focus. (HB 142-3).

18. In March 2011 the Claimant completed a post-ESA action plan, saying that her performance had been affected by family problems. She also said she would sort out the problems with her family and stay with her grandmother over Easter. She had a revision plan in place (HB 142-3).

19. The particular problem involving the Claimant's father's behaviour was that medication prescribed for Parkinson's disease, from which he suffered, had a disinhibiting effect (which Dr Hales at HB 1029 describes as "impulse control disorder secondary to *dopamine agonists*") resulting in his gambling compulsively and squandering the family's assets. In his witness statement Dr Hales said that,

> *"[The father's] GP informed the medical school that his gambling subsequently abated and the family were receiving a great deal more social support. This improvement came too late in the academic year for the damage to the Claimant's studies to be rectified." (HB 1030)*

Dr Hales also said that it was through research performed by the Claimant herself that the problem with the medication was identified. As a result, he said, of the Claimant's request for help for him, during the Easter period in 2011 her father was admitted to hospital for six weeks. However, that in turn

made it necessary for her to make regular visits to him in the revision period for ESA 4 (136). The Claimant also suffered a further UTI.

20. In her Semester 4 results the Claimant received an "unsatisfactory" grade in her ESA 4 and SSC modules. (She had only attended 25 per cent of her SSC module: HB 142-3) On 29 June 2011 the Claimant was flagged as a "red concern" by the Professional and Academic Concerns Group (HB 125).

21. On 30 June 2011, owing to her poor performance in Year 2, the Claimant was required to take the Second Year Qualifying Examination (HB 142-3). During most of the 2 weeks before that examination the Claimant's case is that she was unwell as a result of a problem with her wisdom teeth which gave rise to an infection (137). During the first paper of the examination the Claimant says she was unwell. After about an hour into the examination the Claimant felt nauseous and had to leave the examination room to be sick (137).

<u>The decision of the Second Year Examiners, and the procedure for appealing that decision</u>

22. On 11 August 2011 the Claimant received an "unsatisfactory" grade in respect of her Second Year Qualifying Examination. The examiners made a recommendation for course termination (HB 142-3). On the same day, Mrs. A. Peppitt, the University's assistant registrar, wrote to the Claimant informing her that the examination board had decided her course should be terminated and explaining how she could appeal to the Academic Progress Committee ("APC") providing her with the relevant "Notes of Guidance" (HB 134-135). In the letter Mrs. Peppitt stated:

> *"I regret to inform you that following your failure to satisfy the examiners in the MB ChB second year QE a decision has been made by the examination board that your course should be terminated. If you believe that there are circumstances relevant to your academic performance which you feel might lead to a review of their decision, you can state your case to the Academic Progress Committee. You should submit a letter from yourself setting out all of the matters that you feel are relevant to your performance in the examination…"*

The notes for guidance include the following passages:

> *"If the Examination Board has decided to terminate a student's course, the Committee, after consideration of a student's case, may decide that a student is permitted to repeat a year.*
>
> *"If you have been invited to state your case to the Committee, you should ensure that this is done succinctly and that you concentrate only on the matters strictly relevant to your case.*

"The Committee will examine carefully your past academic history and take careful note of any assessment of capability provided on behalf of the Examiners.

"The Committee will follow set criteria, which you should show evidence of, as follows:

- *Mitigation which may have led to your poor performance*
- *Continuing strong motivation for your chosen course*
- *That there is a good prospect of meeting the requirements of the course in the future.*

"Material that will help the Committee to consider your case effectively will include one or more of the following only:

- *Your statement of the circumstances affecting your academic performance. This should ideally be 1 page of A4 in length, and certainly not more than 2 pages*
- *A medical certificate or doctor's letter, where this is relevant to your case. If your case is dependent on medical circumstances, you will always be asked to provide written corroboration.*
- *If your personal tutor or other member of staff can add extra information that would support your case you may invite him/her to write to the Committee also. General personal references or letters of support are not necessary.*

"You should include in your statement ALL of the circumstances that affected your performance. It may not be possible to accept evidence of mitigation at a later date if it was omitted from your appeal statement." (HB 134)

<u>The Claimant's grounds for appeal to the APC</u>

23. The Claimant submitted her grounds of appeal to the APC, and, as instructed in the first three bullet points above, gave particulars of 'mitigation' and of circumstances which had affected her performance in the second year. She began with the words,

"I know for certain that my poor performance <u>this year</u> was due to an accumulation of issues. The first and most

important issue I faced this academic year was something which I have made the University aware of, via Dr Hales, during the second semester of first year." (Emphasis added.)

24. The Claimant then referred to her father's illness and the behavioural difficulties caused by his medication. Whilst this had begun during the latter part of the first year, she said it had become a real problem during the second year. The Claimant made it clear that the situation became intolerable during the revision period before ESA 3.

25. Once the link between the drug and its effect upon the father's behaviour had been established, the Claimant explained in the APC form, treatment was arranged for him in hospital in London, but the Claimant's mother then departed for Sri Lanka, resulting in the Claimant having to travel away from Leicester to bear greater responsibility at home, and consequently losing much revision time.

26. The first sentence of the concluding paragraph of the grounds of her grounds of appeal to the APC is as follows:

"Although my academic performance has been poor <u>this year</u> due to the reasons I have mentioned above, I can assure you that it is not in my nature to let my studies slip." (Emphasis added.)

Apart from the brief reference to "the second semester of the first year", it is to be noted that the "mitigation" and other circumstances advanced by the Claimant to the APC were confined to the periods before the ESA 3 and ESA 4 assessments and the qualifying examination at the end of Year 2. No reference of substance was made by the Claimant to any reasons for any unsatisfactory assessment in Year 1, as she understood that she should only present "Year 2 mitigation."

<u>Hearing before the APC sub-committee</u>

27. On 31 August 2011 the Claimant presented her case to a sub-committee of the APC, called the APC 'Sub Group', consisting of Dr Morgan ("LM") and Mr Harrup ("KH"). She was assisted by Dr Hales ("JH") – HB 139 – 141. Dr Hales, of course, was not her personal tutor. That was Dr Clarke. Dr Clarke was unable to attend, and no assessment from him was placed before the committee. It seems to be an agreed fact that, whatever the reason for it, no material was placed before the APC, or its Sub Group, from any of the Claimant's tutors, academic or pastoral. Nor is there any evidence of any separate "assessment of capability" from the Examiners. The meeting with the Claimant seems to have occupied some 18 minutes, from 1625 to 1643. The notes of the meeting are at HB 140. They read as follows:

"Darweena Gopikrishna w. Dr J Hales 1625

DG Mum was away from nine months – just me and sister and dad had to deal w. issues had to go home

regularly, was in Sri Lanka when got results – not get flight until the 28th. Antibiotics for wisdom teeth– unable to get doctor's note, but any sessions missed, recorded on [illegible] GP and email details - hope to get it by tomorrow.

LM Yr 1 – what was happening in Yr 1 –

DG Probs facing dad started after ESA 1. Did spk. To Dr Hales. Was confident after QE - + ready to start Yr 2. Family probs - did not realise it wld get worse. Dad got worse Xmas hols - had a bad accommodation problem - cld not go anywhere to revise - Grandma had to go to Sri Lanka over Easter – still there now.

Dad went into hospital over Easter – things less stressful – but had to visit him in hospital as advised.

LM What do differently?

DG Now, problem unaware medication caused dad's behaviour now we know, we have the support – Dad improved, off medication since April.

LM Your insight into your abilities – signals you weren't coping

DG I will stay in Leic[ester] regardless of what is going on– this is more important– going home less often – if I have any problems will seek counselling, even from univ[ersity.] Did not make friends aware of problems.

JH House [in Sri Lanka] occupied by military. House [in Leicester] flooding.

DG For QE [Qualifying Examination 2] had infection – wisdom teeth – Felt nauseous halfway through exam– Put hand up Female [illegible - ? invigilator?] took me to bathroom – Was sick.

Now taking a lot of action to improve self study."

28. The comments of the Sub Group are recorded at HB 139: They are as follows:

"Father's condition improved, therefore will not have to deal with so [illegible: possibly 'much.']

Limited coping strategies.

Signed Mr K Harrup, Dr L Morgan"

The decision of the full APC

29. On 1 September 2011 the full APC met (HB 146). The notes of that meeting are as follows:

> *"DG*
>
> *KH read notes –*
>
> *Mitigation – father's illness and side effects of medication – Situation became very difficult. She stressed in subgroup her mother was away … nine months – so no support for self or father. Has sought help for own health issues. Father's condition has improved. Family have rallied round. Coping strategies – limited?*
>
> *Motivation – yes*
>
> *Mitigation – yes*
>
> *Progress – weak student in past –*
>
> *Didn't cite any adjustments to learning style to help her succeed. –No confidence –*
>
> *Termination upheld.*"

30. The Conclusion reached by the APC is recorded in the form to be found at HB 144 as follows:

> *"University of Leicester*
>
> *School of Medicine*
>
> *Academic Progress Committee – Thursday, 1 September 2011*
>
> *Student: GOPIKRISHNA Darmeena Year: MBChB2 L5*
>
> *On considering the evidence presented for the student's appeal and their [sic] past academic history, the Academic Progress Committee came to the following conclusions:*
>
> *Did the student display continuing strong motivation for their chosen course? YES*
>
> *Did the student present mitigation that led to their poor performance? YES*

Is there a good prospect of the student meeting the requirements of the course in the future? NO

Committee Decision ~~*Repeat Year*~~ *Termination Upheld*

Signed … *Professor S Petersen (Chair)"*

Findings made by the APC

31. Thus the APC concluded that the Claimant displayed motivation, and that she had presented mitigation which either had led to her poor performance, or may have done so, but it did not consider there was a good prospect of her meeting the requirements of the course in the future (HB 144). Counsel for the University raised a point on a potential distinction between the phrases "had led" and "may have led", by reference to a witness statement from Prof Petersen made on 9 April 2014. In that witness statement (HB 858) he asserted that the APC had only found in the case of the Claimant that the mitigation "may have" played a part in her poor performance, despite the unqualified terms of the decision set out immediately above. This point was not the subject of lengthy discussion at the hearing. The difference in wording between the Notes and the printed decision form referred to by Prof Petersen is of no consequence at all in my view. Absent clear contemporaneous evidence of any qualification to the finding made by the whole APC (and none was referred to) there is no room for any suggestion of it. Either the APC considered that mitigation may have played a part, in which case its verdict was 'YES,' or it did *not* think it may have done so, in which case its verdict would have been 'NO.' Any apparent innuendo implying that the APC may have had its doubts about the mitigation, I am confident, was unintentional, as it would neither have been an attractive point, nor one which was justified by the evidence.

The 'weak student' finding

32. In the light of the findings as to mitigation and motivation, the crucial findings made by the APC were (a) that the Claimant had been a '*weak student in the past*' and (b) she had not '*cited any adjustments to her learning style*'. The latter finding implies that the 'adjustments' the APC had in mind could be of a kind which might remedy the weakness referred to.

33. In the context of a review of the Claimant's performance in her second year, the phrase 'in the past' is logically referable only to her first year at the University. Before admission to the university, the evidence of her strength as a student was not, by any process of reasoning, consistent with her being a weak student.

34. The meaning of the phrase 'learning style' was not expressly dealt with in the evidence. In all the circumstances, it seems to refer to the method by which a student approaches the task of learning generally, and, in particular, of absorbing such material as is prescribed in the curriculum. No explanation was given in evidence of how any adjustment in learning style may remedy

poor performance where illness or other causes have prevented a student from proper attendance and participation in the course.

35. The APC did not remark upon the absence of any material from any of her tutors, pastoral or academic; nor did it consider, it seems, whether it should adjourn consideration of the case to obtain and consider such material before reaching its conclusion, in particular, that the Claimant had been a weak student in the past.

The Claimant's appeal to the TCRP

36. Four days after receiving the formal notification, on 5 September 2011, the Claimant applied to appeal the APC's decision to the Termination of Course Review Panel ("TCRP") (HB 73-77). On 6 September 2011 the Claimant received advice from Dr Hales suggesting that she should either ask for further particulars from the APC or submit a more detailed statement to the TCRP (HB 210 para 29).

The Procedural Rules of the TCRP

37. The University had earlier written to the Appellant providing her with a document setting out the procedure which should be followed, entitled "*Termination of Course Review Procedures: Notes of Guidance"*, which included the following provisions:

> *"1. ….The review will be conducted by a panel comprising three members of the academic staff of the University, excluding staff from the department in which the appellant is registered. …. The student may attend the meeting and may be accompanied by a member of the University. Personal attendance provides an opportunity for students to expand upon, and answer questions about his/her submission. The student's companion (if any) will be invited to make a brief statement on the student's behalf, but will take no part in the proceedings unless requested to do so by the Chair. The student's personal tutor and a representative of each department involved will also be invited to attend….*
>
> *Note: It is the responsibility of students to inform their personal tutor or head of department of any matter (whether of an academic, personal, medical or other nature) that may be relevant to their academic performance, and to supply appropriate evidence. Such information should be give[n] as soon as it is available."*
>
> *2. Order of Proceedings*
>
> *(1) The Chair or Secretary of the panel will give a brief resume of the student's academic career.*

(2) The student will be asked if he/she wishes to elaborate on information contained in the appeal.

(3) The student's companion (if any) will be asked to make a brief statement on the student's behalf.

(4) The departmental representative(s) will be invited to make statements.

(5) The panel may ask questions of anyone present.

(6) The student will be asked if he/she has anything further to add to his/her submission.

(7) All parties will withdraw except for the Panel and its Secretary. The Panel will determine the outcome of the appeal in private consultation. It will determine either that the termination of course should be confirmed, or that termination should be overturned.

3. Participants' responsibilities

(1) The student is present in order to elaborate on the content of the appeal form, and to answer questions from the panel about any matter associated with the circumstances of the termination of course, including his/her academic history. It is the student's responsibility to ensure that substantiating evidence such as medical certification is available for inspection by the panel.

(2) The student is allowed to bring one companion to the appeal, who must be a member of the University….

(3) The personal tutor's role is to guide the student through the appeals process and to provide the Panel with any relevant information about the student's personal history.

(4) The Departmental representative is present to provide information about the academic background to the termination of course, including examination results and details of attendance and progress.

(5) The secretary of the panel is required to convene the members and to ensure that the student's appeal form is copied to all participants, ….

> *(6) The panel is required to examine all the evidence before it in order to decide whether new circumstances exist which, had these been known about earlier, would have led the Board of Examiners to recommend a course of action other than termination of course. The Panel will look in particular for evidence that but for the circumstances set out in the appeal form, the student would have satisfied the requirement of his/her course of studies. It will therefore examine carefully the student's past academic history and take careful note of any assessment capability [sic] provided by the departmental representative(s)….."*

38. It is to be noted that under paragraph 1 of the TCRP's Procedures it is a requirement that the student's personal tutor "*… will … be invited to attend*." There is no evidence that Dr Clarke was in fact invited to attend by the TCRP. It seems probable to me that he was not invited. Be that as it may, it is a fact accepted by all parties that he did not attend the meeting of the TCRP. It is not challenged that the Claimant, for her part, had asked him to attend and that he had at least agreed to provide a statement for her. It also seems to be accepted by all parties that no notice was taken by the TCRP of the fact that Dr Clarke was not present. No application was made by the Claimant for an adjournment for him to attend, but nor was any suggestion made by the TCRP that she might make such an application. The attendance of the student's personal tutor is expressly provided for by the TCRP's written procedural rules "*to provide the Panel with any relevant information about the student's personal history.*" No explanation has been given by the University for the decision to proceed in the absence of the personal tutor, or of any material from him.

<u>The Claimant's grounds of appeal to the TCRP</u>

39. It is common ground that the procedure adopted by the Medical School differs slightly from that which applies to the rest of the University. The APC is a committee which exists only in the Medical School. Other students' cases are considered only by the Board of Examiners and, if appealed, by the TCRP. The TCRP appeal form is the same for all students, including medical students, but it makes reference only to "*the Board of Examiners.*" No point was taken by any party as to this: the words are agreed to be apt to describe the APC.

40. The form provided for appealing to the TCRP reads as follows. '*Grounds for appeal*': …

> *"You may only appeal if: (a) you are in a [sic] possession of evidence about the reasons for your examination performance which was not available to the board of examiners [or, in this case, the APC], or which was only partially available …. You should only complete these boxes if you have genuine <u>new</u> evidence. If you submitted*

> *evidence before the meeting of the [APC] but feel that it is it has not been adequately taken into account, this is a potential procedural irregularity, and you should complete box (b) below."*

41. In box (a) (i) the Claimant made extensive reference to the fact that the issues regarding her father had affected her performance in her first year (before ESA 2) and that, in particular, her work was affected during the second semester. She also made reference to problems regarding financial matters.

42. There is a box (a) (iii) which is headed

> *"You should also explain why it was not possible to inform your department about these circumstances before the [APC] met."*

In this box the Claimant entered the following explanation:

> *"I wrote my appeal letter and focused on the meeting based on my second year results, it was only after I got my feedback back I felt the need to highlight how these issues have actually affected the most part of my time in University. I passed my qualifying examination in first year so the issues, although … mentioned, were not highlighted or brought to the University's attention. I was also unable to present some evidence to the APC as I had little time to gather the information and process it."* [HB 75.]

Box (b) was left blank.

43. Thus the Claimant was making it clear to anyone reading the form that she was intending to rely upon evidence as to mitigating circumstances in Year 1 which either had not been available to the APC, or had only been partially available to them, and that the reason for that was that she had thought her pass in the qualifying examination for the first year made it unnecessary to go into detail about problems in the first year. This is a point which, it is important to note, was being made by the Claimant at the very outset, and which is material when considering an issue involving the OIA, as will be seen. (In the light of the fact that mention had been made, albeit fleetingly, of Year 1 matters before the APC, the Claimant might have been wise in hindsight to have suggested a potential procedural irregularity, and also to have made an entry in box (b), but no point was taken on this at the hearing.)

<u>Dr Nandakumar's letter to the TCRP</u>

44. On 5 September 2011, Dr Nandakumar, one of the Claimant's clinical tutors, wrote the following letter to the TCRP:

> *"I am writing regarding Darmeena Gopikrishna, in support of her appeal to re-sit the second year of the MB ChB degree programme.*

"I taught Darmeena in my role as Consultation Skills Foundation Course (CSFC) tutor during the period January to June 2011. This involved three-hour bedside clinical teaching sessions and small group discussions on a weekly basis at Leicester Royal Infirmary.

"I was very surprised to learn that Darmeena has found herself in the unfortunate position of having her course terminated, as she has been consistently excellent during teaching sessions. She attended all of our timetabled clinical teaching, and contributed well to group discussions. She had a friendly yet professional manner with patients, and demonstrated a keen interest and willingness to learn. These are observations I made consistently over the six month period, and I considered her overall performance to be above average when compared to other students in the group.

"I have recently had a lengthy discussion with Darmeena regarding her current position, and it is clearly evident that she is determined to do all that is necessary to be able to re-sit the second year and ultimately complete the MB ChB course. I genuinely believe that Darmeena does have the required ability and attitude to benefit from further year of training if she was given the opportunity to do so.

"I do hope that you will be able to consider the above information in support of Darmeena's appeal.

"Please don't hesitate to contact me if you require any additional information, or if I can be of any further help."

Dr Clarke's letter to the TCRP, and the hearing before the TCRP

45. On 6 September 2011 the Claimant asked Dr Clarke for an academic reference to support her appeal to the TCRP. Dr Clarke confirmed that he would provide one. He did in fact write such a letter, which was supportive of the Claimant, but he sent it to the Claimant too late for it to be placed before the TCRP, when it convened at 11.40 a.m. on the 14 September 2011. The Claimant appeared before the TCRP, accompanied by Dr Hales, and presented her case.

46. The transcript of the Secretary's manuscript notes of the TCRP meeting (HB 129-130 and 161) shows that it was chaired by Prof White of the Law Department, who sat with Dr Bartram of the Sociology Department and Dr Gieve of the Education Department. Prof Petersen who had chaired the APC was also present. At the beginning of the meeting the Claimant is recorded as having agreed that the Academic Summary was accurate. She then asked why the APC had "lacked confidence". Prof Petersen is recorded as saying,

> *"Academic record – 2 years – failed 5 of 7 assessments. Poor attendance and non-attendance in SSC. APC told about family problems etc. Didn't feel it was sufficient to explain it."*

47. The Claimant then made the point that she had not "highlighted" the fact that the family problems had been "ongoing" since Year 1 and had become worse after ESA 1. She made the point that she had passed the Qualifying Examination. She then made reference to a number of matters of mitigation, and said that she had not mentioned the details before the APC. She also made the point that throughout her time at the University her ability to concentrate had been affected, but that "now" the family had help to resolve the problems she had had. The notes show that Dr Hales attempted to support the Claimant and said that she was,

> *"not the sort of student who is [illegible] – her thinking [clear?]" [sic.]*

Dr Gieve is noted to have asked *"[Was this] different [from what APC knew?]"* Dr Hales apparently said.

> *"APC letter doesn't say these problems substantive in Year 1. Being judged on ESAs in Year 1 too."*

Then the Chairman said,

> *"That was remedied in Y1 QE. To put it bluntly, you are asking us to second-guess the medical educationalists and say they are wrong. We need something to base such a decision on."*

The Claimant then said,

> *"A lot of probs for 2 years."*

To which the Chairman's response, according to the notes, was:

> *"But they [APC] knew that."*

The Claimant's response was to say that:

> *"APC didn't appreciate how much these problems have now been resolved. Have performed really well in clinical practice."*

48. The meeting closed, and the Claimant and Dr Hales withdrew to await its decision.

49. That evening, at 9:47 p.m., the Claimant received an email from Dr Clarke to which was attached the letter he intended to submit for consideration by the TCRP. Dr Clarke's letter is undated, but the email evidence shows it was sent to the Claimant that evening of 14th September 2011, and reads as follows:

"....

Re-GOPIKRISHNA Darmeena - 09071

Dear Sir/Madame [sic],

I have been a personal tutor to Darmeena Gopikrishna at the University of Leicester Medical School since March 2011 after her original tutor became unavailable to continue the position.

Since failing the ESA 3 exam, Darmeena contacted both myself and other members of the University faculty with regards to revision skills and examination technique.

Darmeena has the drive and attributes required to complete an MB ChB and go on to be a capable doctor. She has had some significant issues outside of University that will have understandably affected her academic performance.

Given the opportunity I believe Darmeena would progress well through the medical degree.

I was unable to attend the appeal meeting personally due to work commitments.

...."

It may be noted that the fact that Dr Clarke used the past tense in the last sentence shows that he knew that the meeting had already taken place, and the context shows that he had known in advance of the fact that it was due to take place.

50. At 9:04 a.m. the next day, 15 September 2011, the Claimant forwarded the letter from Dr Clarke to the University by email asking that it be placed before the TCRP. At 9:39 she received a response from a member of the administrative staff, acknowledging receipt of the letter, but saying that as the Claimant had been before the TCRP the previous day, it was too late for them "*to view another item*."

51. There is no reason to suppose that Dr Nandakumar's letter was not available to the TCRP, indeed the words "reference from CPC Tutor" appear in the Appeal form as an enclosure (HB 41) but no reference was made to it in the minutes of the TCRP meeting nor in its decision. There is no note of any discussion over the inconsistency between the view of a clinical tutor with six months' experience of teaching the Claimant and the views of those who had considered her case at the sub-group meeting and at the full APC, nor of how such an inconsistency might be explicable.

52. On 15 September 2011 the University wrote to the Claimant informing her that the TCRP had upheld the decision of the APC and the examination board

(page 162). The letter was accompanied by a notice of 'Completion of Procedures' (page 163) in which the University's Director of Administration, and secretary to the TCRP, Mr Nigel Siesage, said,

> *"If you are dissatisfied with the outcome you may be able to apply for a review of your appeal to the [OIA].... On or before 15 December 2011."*

The 'Hales Letter' and the 'Hales Reference'

53. It is clear that although she regarded the way she had been treated as unfair, the Claimant did not decide simply to spend her time complaining about the University's decision. She was evidently making arrangements to apply to other medical schools, and asked Dr Hales for a reference. On 14 October 2011, exactly a month after the TCRP hearing, Dr Hales wrote to the Claimant in the following terms:

> *"Here is the reference which I have submitted online for your UCAS application to study medicine at other medical schools."*

The reference summarises the personal and family difficulties with which the Claimant had to contend whilst pursuing her studies, which have already been referred to above.

It continues as follows.

> *"In making its decision to terminate her course the Medical School's Academic Progress Committee stated that it did not question her motivation for medicine, or the seriousness of her mitigation, but that it could not be confident, based on her performance over her first and second years that her prospects of success were good. [The Claimant] had understood that she should only present mitigation pertaining to the year she had failed (i.e. the second year) and she therefore sought to explain the very real issues she had contended with in the first year when she made her subsequent appeal to the [TCRP]. The Chair of the [TCRP] would not consider any mitigation pertaining to the first year of study, stating that it was outside its remit to do so. [The Claimant's] course was therefore terminated, in part, on the basis of a relatively weak pass in the first year, without any consideration of the substantial extenuating circumstances with which she was contending throughout that period. Since her father's treatment she feels free to devote all her mental energy to her studies and very much hopes she can continue in her chosen career; she received some very good reports for her clinical work on wards."*

The section of the letter up to this point, including the paragraph immediately above, has been referred to in these proceedings as the 'Hales Reference.'

Dr Hales then completed his letter to the Claimant with the following paragraph:

> *"I do recall being very taken aback that Prof Robin White [the Chairman of the TCRP] would not allow you to present the mitigation relating to your very real difficulties in Year 1: these had not been discussed at your meeting with the APC sub-committee. I was disappointed, after the meeting with the TCRP, that I had not challenged this unusual but very definite veto, but at the time it appeared that Prof Robin White and Professor Stuart Petersen [who had chaired the APC and was present at the TCRP hearing] were in complete accord that it was appropriate. I have not seen any university documentation stating that students could only raise mitigation relating to the year which they had just failed, but I took it that Prof White was better appraised [sic] of the rules. My own feeling was that the mitigation you wished to present, which related to your first year, was very relevant to the situation in which the APC was placing no confidence in your future prospects for success, not just on the basis of your failure in year two, but in the apparent academic weakness suggested by your need to sit the Qualifying examination in Year 1. I realised, when subsequently accompanying appellants in the same round of TCRP hearings, that under a different chair, students were permitted to talk about first-year mitigation."*

The whole document is referred to as the 'Hales Letter.'

Part 2: The complaint to the OIA & the Rules of the OIA Scheme

Section 12 of the Higher Education Act 2004

54. The OIA may deal with 'qualifying complaints' as defined by section 12 of the Higher Education Act 2004. The full terms of the section are as follows.

> *"12. Qualifying complaints*
>
> *1) "In this Part "qualifying complaint" means, subject to subsection (2), a complaint about an act or omission of a qualifying institution which is made by a person as a student or former student at that institution, … [omitting irrelevant words] undertaking a course of study, or programme of research, leading to the grant of one of the qualifying institution's awards.*

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

55. The OIA's Scheme is contained in the Rules of the Student Complaints Scheme. These have been subject to several revisions, but the version applicable to this case came into force on 1 May 2008, applying until 31 January 2012. The rules which are in point here, omitting irrelevant words, are as follows.

> *"3. The Scheme does not cover a complaint to the extent that:…*
>
> *3.2 It relates to a matter of academic judgement.*
>
> *4.1 A complainant must first have exhausted the internal complaints procedures of the HEI complained about before bringing a complaint to the OIA. In exceptional circumstances a reviewer may accept a complaint for review even if the internal complaints procedures of the HEI have not been exhausted if he or she considers it appropriate to do so.*
>
> *4.5 The OIA will not normally consider a complaint where it considers that the substantive event(s) complained about occurred more than three years before the Scheme Application Form is received by the OIA.*
>
> *6.1 Once a complaint has been accepted the Reviewer will carry out a review of the complaint to decide whether it is justified, partly justified, or not justified.*
>
> *6.2 The review will normally consist of a review of documentation and other information and the reviewer will not hold an oral hearing unless in all the circumstances he or she considers that it is necessary to do so.*
>
> *6.3 The nature and extent of the review will be at the sole discretion of the reviewer and the review may or may not include matters that a court or tribunal would consider.*
>
> *6.4 The normal review process for dealing with a complaint will be as follows:*
>
> *6.4.1 The Reviewer will decide what further information (if any) he or she needs for his/her review; this may include a requirement that the HEI provides a copy of the information that it considered at the final stage of its internal complaints procedures (and any related records) and at any time the reviewer may require the*

parties to answer specific questions and/or provide additional information.

6.4.2 Prior to issuing a formal decision the Reviewer will (unless the Reviewer considers it unnecessary to do so) issue a draft or preliminary decision (and any draft/preliminary recommendations).

6.4.3 Where a draft decision is issued the parties will be given the opportunity to make limited representations as to any material errors of fact they consider have been made and whether the draft recommendations are practicable.

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."

<u>The Claimant's original grounds of complaint to the OIA</u>

56. On 15 December 2011 the Claimant lodged a completed OIA Complaint Form (330-350) with the OIA, accompanied by "Grounds of Complaint" (351-361) drafted by solicitors acting for her, Messrs Sinclairs.

57. The background is dealt with in the Grounds at paragraphs 1 – 14 (HB 352-357.) Parts of the University's regulations are set out in paragraphs 15 and 16, together with a reference to the lack of reasons from the APC which handicapped the Claimant's ability at the TCRP to challenge the decision of the APC. Paragraphs 17-19 of the Grounds then read as follows:

'17. .... It does seem that the university have based their reasoning on the basis that there [is no] "good prospect of the student meeting the requirements of the course in the future". How the University arrived at this decision is unknown. The appellant seems to feel that this was on the basis that she had to re-sit an examination in her first year of study, which she duly passed. This was down to the problems encountered in the first year of study....

'18. .... [The Claimant] passed her first year examinations also and managed to progress to the second year, therefore it is submitted that the university have failed to take into account a variety of factors in arriving at this most puzzling decision. The only basis for this decision that the appellant understands is that it could have been down to her first year of study whereby she was required to re-sit an examination she duly passed. This point was raised in the second appeal hearing whereby [the Claimant] aimed to explain her

> *circumstances clearly to the Panel. However, she was not given the opportunity to do so as the Panel deemed this information immaterial, yet [it] seems the basis for the decision made by the University to terminate her course of study.*
>
> *'19. It is therefore contended that the appellant has not had a fair and formal appeal procedure adhered to by the University and criteria has [sic] been applied to her case that is [sic] irrational.'*

58. Thus the challenges to the procedural fairness of the hearings, and the rationality of the decision of the University, which the OIA was invited to consider, may be summarised as follows.

    i) The Claimant's future prospects were assessed by the APC on the basis of poor performance in her first year, which was an irrelevant consideration as,

        a) such poor performance was the result of the problems amounting to 'mitigation' for Year 1, and not weakness in terms of ability;

        and

        b) she had in any event passed the qualifying examination for that year, demonstrating that she had been able to overcome such problems.

    ii) When, on appealing the "future prospects" finding to the TCRP, she tried to explain the Year 1 problems, the Panel would not permit her to do so, as they deemed it immaterial.

    The Claimant's case was thus clearly being put on grounds both of irrationality and procedural unfairness. Ms McColgan, for the OIA, observed at paragraph 69 of her skeleton argument that,

> *"... given that the target of these proceedings are <u>the Defendant's</u> alleged shortcomings, in its approach to the complaints made <u>to [the Defendant] by [the Claimant]</u> the focus of this Court needs to be on what [the Claimant] was complaining of <u>at the time of her complaints to [the Defendant.]</u>" (Original emphasis.)*

59. The fact that the points set out at paragraphs 17 – 19 of the Grounds were made in the first complaint made to the OIA on behalf of the Claimant is of some importance, as one of the principal submissions now made on her behalf in these proceedings is that the OIA failed to consider, and to conclude, that,

> *"... in reaching the conclusion that the Claimant did not have a good future prospect, the APC took into account year 1 poor performance but not year 1 mitigation,*

> *thereby failing to take into account matters essential for a fair decision." (Skeleton argument for the Claimant paragraph 39(ii).)*

This point was addressed by counsel for the OIA at paragraph 51 of her skeleton argument as follows:

> *"As to [the Claimant's] paragraph 39(ii), whether or not the APC unreasonably failed to take into account Year 1 mitigation (and it is not accepted that this was the case), [the Claimant's] complaint against the OIA concerns the OIA's alleged unreasonable failure to conclude that the [University] had failed to take into account matters essential for a fair decision in concluding that [the Claimant] did not have a good future prospect. ... this was not a matter clearly raised with the OIA in the many pages of complaint made on [the Claimant's] behalf. The Claimant not having complained to the OIA about the APC's approach in the terms set out in §39(ii), the OIA cannot reasonably be criticised for having failed to reach the conclusion sought by the Claimant." [Emphasis added.]*

60. As can be seen from the quotations from the original grounds of complaint to the OIA, set out above in paragraph 57 of this judgment, the point was certainly "*raised*." In using the phrase "*not a matter clearly raised*" counsel may have had in mind the fact that neither the Hales Letter nor the Hales Reference were included in the documentation supplied to the OIA in December 2011. The Hales Reference, which gave independent confirmation of the Claimant's account of what had occurred before the TCRP was, however, supplied to the OIA in May 2012, long before its final decision, as will be seen below. In any event, in my view the point made in the Claimant's skeleton argument at paragraph 39 (ii) is simply a more sharply defined version of the point made in paragraphs 17 – 19 of the original Grounds of Complaint.

61. As already noted above, and as the OIA would have appreciated, the key to the APC's decision on future prospects was to be found in the phrase "*weak student in the past*". That plainly was an opinion formed taking into account poor performance in Year 1. It is difficult to see how, in context, the phrase can have any other meaning. The question raised on behalf of the OIA is whether it was sufficiently clear that the "weak student" finding was probably the result of the APC taking into account the "barely satisfactory" ESA 1 and the "unsatisfactory" ESA 2 result, without balancing against them (a) the Year 1 mitigation and (b) the pass result for the Qualifying Examination. I shall deal in greater detail below with the issue of whether the complaint was made "sufficiently clearly." If it was, and if the OIA failed to give it proper consideration, that is a material point in this application for judicial review.

'New evidence': (1) the psychiatric report

62. Complications occurred in subsequent events which may well have amounted to a significant distraction for all concerned, and which seem to have drawn the focus away from the primary complaint. On 8 February 2012 a consultant psychiatrist, Dr. Nahla Jamil, instructed by the Claimant's solicitors, examined the Claimant. Following that examination Dr Jamil produced a report dated the 15th February 2012 (HB 86-89). Dr. Jamil's opinion was that the Claimant had disclosed symptoms of depression, worsening in severity in 2011, and that these would have impacted upon her ability to prepare for the qualifying examination in August 2011. Dr. Jamil noted that when asked why the Claimant had not consulted her GP in relation to mental health difficulties, the Claimant had said that she felt scared for fear of being stigmatised and seen as weak (HB 88 para. 6.1). It is to be noted that the Claimant had mentioned to Dr Hales on two occasions that she had been feeling depressed, once in the first year and then in the second year: see paragraphs 15 and 17 in Part 1 above.

63. On 7 March 2012 the solicitors for the Claimant wrote to the OIA (HB 563) enclosing the report of Dr. Jamil and addendum grounds of appeal, and included documentation from the Claimant (at HB 81-82), and reference to procedural unfairness at the TCRP, as described in the Hales Reference. They also sent a letter to the University enclosing the addendum grounds of appeal and included the report of Dr. Jamil. They asked the University to re-open the Claimant's case, and suggested mediation (HB 588, 49-65, 84-89, 563).

64. On 23 March 2012, the University's Director of Administration, Mr Siesage, wrote to the Claimant's representatives (in response to their letter dated 7 March 2012) as follows.

> *"The University takes the view that the [OIA] has been established to provide a free and independent complaints service for students. Only in the most exceptional circumstances (such as the disclosure of significant new evidence not previously available) would the University re-open the case after issuing a Completion of Procedures letter. We are satisfied that … [the Claimant's] case can most appropriately be dealt with by the OIA. If the OIA believes that the issues you have raised recently are relevant to its consideration of the case, it will ask us about them and we will of course respond." (page 169). (Emphasis added.)*

The significance of the way in which the approach to the new evidence was put on behalf of the University in the passages underlined above will be considered at a later stage.

The University's letter of 29 March 2012

65. On 29 March 2012 Mr Siesage wrote to the OIA (HB 131) enclosing a summary (HB 132-133) of all the documents submitted to the OIA by the University which were relevant to the Claimant's case, indicating which documents had

been before the APC and which had been before the TCRP. Erroneously (it is now accepted on all sides) the summary purported to show that item "*B2.3 Letter undated from Dr D Clarke*" had been before the TCRP.

Receipt of the Hales Reference by the OIA

66. In her second witness statement at paragraph 5, Ms Mitchell, deputy Adjudicator at the OIA said that,

> *"On 24 May 2012, we received four emails from the Claimant, …. The second email attached a document ("the Hales Reference") which was not headed, dated or signed, but which had "Dr Jonathan Hales, Senior Lecturer" at its foot…. The Claimant has explained in her second witness statement that the Hales Reference was written to support her application to an alternative university." (HB 791)*

67. It is convenient to continue to refer to this document as the Hales Reference, in order to distinguish it from the full 'Hales Letter' referred to above at paragraph 53. Whilst the document was unsigned and undated, and does indeed read as though it was written in part at least as a letter of support for a UCAS application, it contains the following passage which is of significance in respect of the APC and TCRP hearings. It is identical to one paragraph in the Hales Letter, part of which, for ease of reference, I shall set out again.

> *"…. [The Claimant] had understood that she should only present mitigation pertaining to the year she had failed (i.e. the second year) and she therefore sought to explain the very real issues she had contended with in the first year when she made her subsequent appeal to the [TCRP]. The Chair of the Panel would not consider any mitigation pertaining to the first year of study, stating that it was outside its remit to do so. [The Claimant's] course was therefore terminated, in part, on the basis of a relatively weak pass in the first year, without any consideration of the substantial extenuating circumstances with which she was contending throughout that period."*

68. The Claimant's email of 24 May 2012, which was addressed to Ms Oldfield, the Assistant Adjudicator then handling the case, (HB 822-823) contained the following passage,

> *"The attached letter I sent to you was written confirmation from senior university staff member (Dr Jonathan Hales) who accompanied me to the TCRP meeting. He was a first-hand witness to the injustice that took place in the meeting. The medical school used my weak first-year pass as a shield defending their decision, claiming that I was academically incapable. I was not allowed to speak about mitigation I had in first*

> *year, which was the reason behind my weak pass and them believing I was academically incapable. The TCRP make the final decision based on the information given by the medical school about my weak first year pass, without taking into consideration my first year (valid and accepted) mitigation. Had the TCRP listened to my reasons, and allowed me to speak and give reasons for my weak first year pass, I am confident that they would have accepted my case….The senior staff member who wrote this reference, Dr John Hales, is willing to testify this. Please make an unbiased decision after considering this information."*

It should be noted that in a witness statement made on the first day of the hearing of this application, 21 October 2014, Dr Hales said that he had told the Claimant that he was not able to assist her in any matter involving litigation. In the same witness statement, however, he said that he was aware that the UCAS reference (the Hales Reference) he had provided to the Claimant had been given to the OIA by her. It has not been suggested that it was not open to the OIA to make enquiries of him, if it was in any doubt as to the authenticity or content of the document. On its face the document provided corroboration of the Claimant's complaint in the original grounds, from a reputable source within the University.

69. Also enclosed in the email from the Claimant (headed "*urgent new evidence*") with the Hales Reference was a letter from the Education Officer at the Students' Union, Ms Hancock, who confirmed that the Claimant had contacted the Education Unit asking for advice on presenting her case to the APC and her appeal from it, which included the observation that,

> *"My understanding is that she felt unprepared for the appeal hearing… [she] had not received feedback following her unsuccessful APC although she had asked for this; the Chair was on holiday. She was therefore unclear about why she had failed to persuade the committee of her ability to succeed if given another chance."*

70. On 25 May 2012, Ms Oldfield at the OIA emailed the Claimant saying,

> *"Thank you for the email that you sent to the OIA on 24 May 2012. I note that you have advised the OIA that you have chosen to elect Sinclairs solicitors as your representatives in this matter. As you have chosen to have a representative I will only deal with your representative directly during the course of my review and therefore any further representations should be made through your representative. The OIA does not deal directly with a complainant and their representative in order to prevent any confusion*

71. On the same day, the OIA emailed the Claimant's solicitors, saying:

> *"… The OIA has received an email directly from Miss Gopikrishna on 24 May 2012 providing further evidence. I have advised Miss Gopikrishna that where a complainant engages a representative the OIA will then only deal directly with the representative in order to prevent any confusion."*

72. Despite the request from the Claimant for the OIA to investigate what she described as "*the injustice that took place in the meeting"* of the TCRP, no investigation appears to have been made into the matter, (which the OIA had the power, but not the duty to undertake) and thus no attempt was made to contact Dr Hales to confirm that the Hales Reference did indeed come from him and did represent a true account of what occurred at the TCRP.

'New evidence' (2) The report of Ms Allen, Educational Psychologist

73. On 26 June 2012 a chartered educational psychologist, Ms Elaine Allen, assessed the Claimant's literacy and numeracy skills and subsequently prepared a report dated 8th July 2012 (HB 91-104). Perhaps surprisingly, Ms Allen concluded that the Claimant's "cognitive profile was indicative that she was experiencing difficulties which could be attributed to a diagnosis of dyslexia" (92) which meant that she required learning support and extra time when taking exams (103). Ms Allen noted:

> *"It is likely that throughout her academic career Darmeena's cognitive strengths had masked her weaknesses. However Darmeena has faced considerable personal stress in the last 2 years since leaving school to go to University…Darmeena has been forced to deal with the considerable personal challenges due to her father's illness…this has challenged Darmeena academically and is likely to have affected her concentration which in turn will have impacted upon her significantly weak processing skills" (pp.92-93)*

The provisional decision of the OIA

74. On 20 July 2012 the OIA issued its provisional decision. This found the complaint unjustified (HB 115-119).

75. On 1st August 2012 the Claimant submitted to the OIA a copy of Ms Allen's report (176).

The enquiry by the OIA as to the possibility of the University re-opening the case

76. On 9 August 2012, Ms Nuckley, the Adjudication Manager at the OIA to whom the Claimant's complaint had been passed, e-mailed the University as follows.

> *"… I do not believe we are in a position to issue a Formal Decision at this point, as I have some concerns about the*

> *information which was made available to [the Claimant] after the APC meeting, about its reasons for making its decision, prior to her appeal to the TCRP. At this point I'm not in a position to say with confidence that her preparation for her appeal was not affected by the lack of reasons in the letter of 1 September. I have also noted that her personal tutor was not in attendance at either meeting, and that statements from him and another tutor appeared to express confidence in [the Claimant]'s ability to pass the course."*

Miss Nuckley then drew attention to the "new evidence" asking whether the University wished, exceptionally, to reconsider the Claimant's circumstances in the light of the conclusions of the psychiatrist and the psychologist (399). She said,

> *"… given the seriousness of the decision to [the Claimant's] career, the fact of the new evidence, and in the light of some concerns about the fairness of the University's procedure, I have taken this opportunity to invite the University to exceptionally consider offering to reconsider [the Claimant's] circumstances…." (Emphasis added.)*
>
> *"If the University does not wish to make such an offer at this time, we will then continue with our review." (HB 399)*

The response by the University on 22 August 2012 declining to re-open the case

77. On 22 August 2012 the University's Deputy Academic Registrar (Quality and Standards) wrote to the OIA confirming it did not wish to reconsider the Claimant's case (HB 181-183). The letter included the following passages:

> *"Ms Gopikrishna submitted an appeal which included submissions and evidence in support, focused very much on the third criterion considered by the APC, dealing with the prospect of meeting the requirements of the course in the future (see, for example, the letters from Dr Nandakumar and Dr Clarke.)" (Emphasis added.)*

(The University themselves were therefore still labouring under the misapprehension that Dr Clarke's reference had been before the TCRP. How, or why, they could have been has not been explained.)

> *"At this point she did not complain that a lack of detailed grounds from the APC had hindered her ability to appeal. Further, having considered the detailed submissions made on her behalf by solicitors during the process of the OIA complaint, the University cannot see in what way it is said that her appeal would have been*

different if detailed grounds had been provided by the APC.

"Her appeal focused on the key issue of ability to progress, and provided evidence in support of her contentions. It is worth pointing out that the APC process is not a judicial process: it is ultimately a method by which academic discretion is exercised in relation to student progress in circumstances where the full position is that the default position is that their studies be terminated.

"Ms Gopikrishna's case was fully considered by the TCRP. As stated above, she provided significant evidence in support of her appeal and addressed the key issue. The TCRP considered the submissions and evidence, but, again exercising its judgement, it concluded that the decision of the APC should stand.

"The subsequent material supplied by [the Claimant] is not relevant to the issue of whether the decision of the TCRP should be set aside… The position of the University is that the decisions arrived at here have been entirely subject to academic judgement and in accordance with its regulations and procedures…."

78. On 21 November 2012, the University's solicitor wrote to the Claimant's representatives (in response to their letter dated the 9th November 2012 HB 574) confirming that the University had informed the OIA that it did not wish to undertake a further review and had invited the OIA to proceed to make its determination (HB 191).

<u>The error of fact made by the University and by the OIA</u>

79. To summarise matters referred to above, it is accepted that those involved at the OIA entirely blamelessly considered the matter upon a mistaken basis: they thought that Dr. Clarke's undated letter of September 2011 (HB 159) had been presented by the Claimant to the TCRP in support of her appeal (see paragraph 29 of the Decision at HB 210) relying, no doubt, on the University's letter of the 29th March 2012 (HB 131) and the documents in the bundle that follow (principally 132 and 159, but also the repetition of the error at 181-183.) E-mail evidence showed that Dr. Clarke's letter was not in fact presented to the TCRP on the 14th September 2011, the day of the hearing, and that although Dr. Clarke's letter was sent by the Claimant to the University early on the morning of the day after the hearing, the letter was never considered by the TCRP, as the administrative assistant had decided that it was too late.

80. It is submitted on behalf of the Claimant that to the extent that the OIA's conclusion was based upon that error, it is open to challenge. Moreover, possibly compounding the error, there is a suggestion on the part of those who represent the Claimant at least, that the letter of Dr. Nandakumar dated the 5th September 2011 (157) was either given no weight, or very little weight, or it

was ignored, or dismissed as immaterial by the TCRP. Without any mention of it, or explanation as to the view taken of it, it is impossible to know: a point not dealt with by the OIA in its decision. What should be clear is that the assertion that it was given weight is thrown into doubt in view of the fact that it was mentioned in the same breath, so to speak, as the letter from Dr Clarke, which was not before the TCRP at all: see the passages underlined in the quotation at paragraph 77 above.

81. After the close of the Claimant's case, as I set out in detail below, I gave leave to the University to adduce further evidence including a witness statement from Prof White, which contained an assertion that Dr Nandakumar's letter had been considered by the TCRP, but in that witness statement no comment was made upon the weight which was given to it, and no reason was given for the absence of any concern at its inconsistency with the views of the APC. This in fact led to counsel for the OIA speculating (as she very candidly admitted she was) upon a possible reason in a way which I mention later in this judgment. She submitted that it had been "perfectly reasonable" for the OIA to have made no reference to the letter.

<u>The Complaint Outcome of February 2013</u>

82. On 20 February 2013 the OIA issued a 'Complaint Outcome' finding the complaint "Not Justified." Following this, further submissions were made by the Claimant's representatives to the OIA on 13 March 2013 and 3 May 2013 (HB 249-256 and 239-244).

83. On 13 March 2013 the solicitors for the Claimant sent an eight-page letter to the OIA, giving notice of their instructions to proceed with an application for judicial review. This letter stated that it was being sent pursuant to the pre-action protocol. It rehearsed the facts at great length. The writer expressed his disagreement with the OIA's decision in the most emphatic terms. It also included the following two paragraphs:

> *"In April 2012 [the Claimant] went to see and spoke to Prof Robin White, the chair of the TCRP, During that meeting he did not wish to disclose much, … [but] was concerned that our client was without a personal tutor for most of her time at university, and admitted that this was a mistake on the part of the university.*
>
> *"Further, in the same month our client went to speak to Prof Gurman who had chaired a parallel TCRP [*i.e. involving other students] *He stated that if she had new evidence, such as the doctor's report and psychology report, the previous TCRP decision would be invalid as it did not have the correct information to make an informed decision at the relevant time."*

84. The deputy Adjudicator, Ms Felicity Mitchell, replied to this letter on 28 March 2013. Ms Mitchell deals with judicial review claims against the OIA. In a five-page letter, she said that it was disappointing that the solicitors for the

Claimant had chosen to initiate judicial review proceedings involving the pre-action protocol,

> *"... rather than engaging with our review processes. .... We note that this is the second occasion you have taken this step during the course of our review of [the Claimant's] complaint."*

Ms Mitchell later said,

> *"Your letter does not set out the actions you expect us to take in response to your letter, in accordance with the pre-action protocol. We assume that you are asking us to issue a new Decision upholding your client's complaint, although you have not engaged in the final stage of our procedures. We decline to do so, for the reasons set out in this letter."*

Ms Mitchell then made extensive reference to the procedures which the OIA follows. Turning to the new evidence in the form of the psychiatrist's and psychologist's reports Ms Mitchell pointed out that the University had had no medical evidence or information before it to suggest that the Claimant was suffering from a disability when it made its decision. There was no suggestion that the University ought to have been aware, when it considered her appeal, that the Claimant was suffering from mental health-related disability, or from a specific learning disability. The OIA's conclusion was that the contents of the two reports could not render the University's decision unreasonable, as it had been made before those reports were prepared. However, medical evidence which

> *"... for good reason has become available after a decision has been made ..."*

could be supplied to the University for its consideration. Although no such good reason had been supplied by the solicitors for the Claimant for the evidence not being available at an earlier stage, the OIA had invited the University to consider whether it wished to re-open the Claimant's appeal in the light of that new evidence. It had declined to do so. The OIA therefore said,

> *"Since its internal appeal process was completed before the evidence became available, and the University has declined to re-open that process, we have confined our review to the appeal process which was concluded with the Completion of Procedures letter issued on 15 September 2011."*

Ms Mitchell then made reference to that course of action being in accordance with the OIA's Rules and with two decisions of the Court of Appeal.

The University's refusal to re-consider its decision not to undertake 'an exceptional review'

85. On 7 May 2013 (HB 420) the University's Legal Adviser, Mrs McConnell, a solicitor, wrote to the Claimant's solicitors (in response to a letter from them dated 3 May 2013 apparently enquiring about the fact that no right of appeal had been referred to when it had said that it did not wish to undertake a further review of the Claimant's case) as follows.

> *"… During the course of the OIA's investigations into your client's complaint the University was asked whether it would consider reviewing your client's case on an exceptional basis. It declined to do so. The OIA then proceeded to consider your client's complaint and determined that it was not justified.*
>
> *"The letter confirming that an exceptional review would not be undertaken did not refer to a right of appeal or the right to submit a complaint because all the University was doing was confirming that it would not be undertaking an exceptional review i.e. it would not reconsider the decision about which your client made complaint.*
>
> *"The University's position remains that its original decision, which the OIA has decided not to interfere with, will not be the subject of an exceptional review"* (HB 197-198; 420-421).

86. On 8 May 2013 the OIA wrote to the Claimant, to the effect that if the Claimant was asking the OIA to complete the review of her complaint, then the OIA was happy to do so. It would take into account the submissions made in letters of 13 March and 3 May 2013, and would also invite the University to respond to the submissions. If it did, it would give the Claimant an opportunity to comment on that response before issuing the Formal Decision. The OIA stated that as part of the review the OIA would consider whether the University's refusal to reconsider the Claimant's appeal in August 2012 itself gave rise to a reviewable complaint (HB 237-238).

87. On 14 May 2013 the Claimant's solicitors responded to the OIA's letter of 8 May 2013 and indicated that the Claimant had been advised to submit an 'appeal form' with a request that the appeal against the decision of 22 August 2012 be consolidated with her original complaint (pp. 235-235 and 199- 201.) On 15 May 2013 the OIA wrote to the Claimant to state that the review would be continued, that the OIA would first determine whether the University's letter of 22 August 2012 gave rise to a reviewable complaint and, if it did, the OIA would review it. The OIA told the Claimant that it did not require the Claimant to submit a new Complaint Form at this stage (p. 510).

88. On 31 May 2013 the OIA asked the University for details of any general policy of the University in terms of consideration of new evidence from students

outside the usual appeals process or time-frame and for the reasons for that policy (HB 427).

89. On 11 June 2013 the University responded, confirming that it did not have any formal procedures for re-opening appeals, or for considering new evidence after termination procedures and deregistration:

> *"An appeal is the final process within the University's internal procedures for review of its decision, whether these are decisions concerning academic, discipline or complaints matters. Having provided every opportunity for a student to submit any information they wish to in support of an appeal, the University adopts the general principle that where its internal procedures have been completed through the conduct of an appeal then a matter will not be re-opened. In addition to this, it is relevant that where the academic decision appealed against is a course termination, and the appeal is not successful, then immediately following the appeal the termination of registration is confirmed. The subject of the appeal is therefore no longer a student of the University. Consequently the University's Regulations no longer apply to them and therefore the internal procedures which our Regulations dictate are no longer available to them."*

(The point in the latter paragraph may conveniently be called the "former student point.")

The letter continued as follows.

> *"Almost by definition the University does not have a formal procedure to deal with consideration of evidence after the formal University process has been completed.*
>
> *"In Ms Gopikrishna's case the University was invited to reconsider her position and chose not to do so. The University does not accept that by declining to engage further with this complaint (outside its processes) it was making a decision that the OIA can examine. (Emphasis added.) This is for the following reasons:*
>
> *"The invitation by the OIA to reconsider was made in the context of the OIA's own complaint procedure. In effect the student is seeking to challenge the University's approach to dealing with the OIA. We do not accept that there is any jurisdiction to do so as this is not a complaint of which the OIA was seized; ….*
>
> *"The University believes that its practice in not reopening cases once the final internal procedure is completed is a necessary one. It ensures that the same*

> *rules are applied consistently and with certainty to all students. The University believes that it is perfectly fair and reasonable to be clear that the procedures do ultimately have an end point…"* (HB 428-430; 494-498).

This letter was not sent by the OIA to the Claimant.

Part 3: The OIA's findings in its Final Decision

The decision under challenge

90. On 27 June 2013 the OIA issued an amended Complaint Outcome finding the complaint "not justified." That is the decision which the Claimant seeks to challenge by judicial review (HB 204-215). This document makes it clear that it deals with two main points.

    i) The validity of the University's decision set out in its letter dated 15th of September 2011 that the TCRP had correctly upheld the decision of the APC not to allow the Claimant's appeal against the decision that her course should be terminated.

    ii) The validity of the University's refusal to reconsider its position in August 2012, in the light of the new evidence regarding factors which may have affected the Claimant's performance.

91. At paragraph 10 (HB 205) the OIA helpfully summarises its process follows:

> *"In deciding whether this complaint is justified we have considered whether the University applied its regulations properly and followed its own procedures correctly. We have also considered whether any decision made by the University was reasonable in all the circumstances."*

92. Paragraph 11 contains the statement that:

> *"We include all material which we consider necessary to make a decision about the complaint."*

Academic judgement

93. At paragraph 12 the OIA explains that it cannot interfere with the operation of an institution's academic judgement.

> *"We cannot put ourselves in the position of examiners in order to re-mark work or pass comment on the marks given. However, we can look at whether the University has correctly followed its own assessment, marking and moderation procedures, and whether there was any unfairness … in the decision-making process."* *[Emphasis added.]*

Observations as to tutors

94. At paragraph 19 the OIA noted that the APC procedural document emphasises that the student "should always" contact her personal tutor. The text continues:

> *"We noted that Miss Gopikrishna did email her tutor, Dr Clarke, on 15 August 2011. His reply on 22 August indicated that he would be unable to attend the APC sub-committee meeting as he would not be in the UK. He added that, "I do not think I would be much help either". …. We appreciate that Miss Gopikrishna may have been somewhat disappointed that her tutor did not feel that his presence would be of assistance to her. However, Miss Gopikrishna was able to obtain the assistance of Dr Hales. It is clear that she had spoken to Dr Hales about her personal circumstances as they occurred. In the circumstances we can see no disadvantage caused to Miss Gopikrishna arising from the fact that she obtained support from Dr Hales rather than Dr Clarke."*

The observation that "Miss Gopikrishna may have been somewhat disappointed that her tutor did not feel that his presence would be of assistance to her" is not qualified, as perhaps it might have been, by the reflection that the OIA had been informed (from the time at least of the additional grounds in March 2012) that Dr Clarke had only been her tutor for a very short time – about half the second semester of the second year. Moreover, from the tone of the reference to the Claimant's subjective "disappointment" that "her tutor" did not feel that his presence would be of assistance to her, it might possibly be thought that the OIA was suggesting that that might be consistent with the tutor's perception of the Claimant as a weak student. Whether the OIA intended to make such a suggestion or not (and I do not make any finding on this point, as it was not dealt with in evidence or argument at the hearing) it would have been an incorrect suggestion to have made, as that was not his view.

The OIA's scrutiny of the APC stage

95. At paragraph 20 it is recorded that the notes of the APC sub-committee indicated that the Claimant was specifically asked to explain what was happening in Year 1. The brevity of the exchange (see paragraph 27 of this judgment, above: 'LM' to 'DG') is not remarked upon. It was also noted that the Claimant was asked about her insight into her abilities and coping strategies, and what she might do differently if given a further opportunity.

96. At paragraph 26 there are the following observations:

> *"It is clear that Miss Gopikrishna experienced some very difficult personal circumstances whilst undertaking her studies. We accept that these must have been very distressing for her. With hindsight, it appears unfortunate that Miss Gopikrishna did not consider*

> *suspending her enrolment while she and her family were attempting to resolve some of the difficulties. Although we are sympathetic to the challenges which pursuing her academic studies at this time must have posed, we are unable to conclude that the APC's decision was unreasonable. The APC was entitled to consider Miss Gopikrishna's performance history in making an assessment as to the likelihood of her being successful on the remainder of the course. We are satisfied that the APC did consider the information made available to it. We are unable to interfere with the APC's academic judgement that Miss Gopikrishna would not be likely to complete the course successfully. We note that the University's appeal procedures do not permit students to challenge the University's academic judgement."*

This passage was described in argument by counsel for the OIA as "the nub" of the decision. The question was, she said,

> *'Was that so unreasonable a decision as to be susceptible to correction by judicial review?'*

97. At paragraph 27 the OIA began by stating that the University's letter to the Claimant of 1 September 2011 did not contain any reasons explaining the APC's decision not to alter the decision to terminate her studies.

> *"We are critical of this omission, and suggest that the University should amend its practice to provide students with a statement of the APC's reasons within the letter informing them of its decision. Setting out the reasons for a decision can help students to understand and accept it. In cases where the student wishes to appeal the decision, providing a statement of reasons can assist them on focusing their submissions <u>on matters which they feel may have been overlooked or misunderstood</u> by the decision maker. In this instance it might have been helpful for Miss Gopikrishna to have been explicitly advised that she did not need to further evidence [sic] her mitigating circumstances, and that the APC was concerned that she had limited coping strategies and was unlikely to complete further examinations successfully." (Emphasis added.)*

98. Pausing at that point, it is clear that the OIA took the view that the conclusion reached by the APC was that the members of it were satisfied that the Claimant had shown sufficient mitigating circumstances, but that the Claimant had "limited coping strategies" which would make it unlikely that she could complete further study and examinations successfully. This point is made quite clear in the next paragraph where it is described as "the broad reason" for the decision of the APC. The paragraph concludes as follows:

> *"The grounds of appeal to the TCRP did not allow Miss Gopikrishna to base her appeal on a challenge to the APC's academic judgement on this point. We therefore conclude that it was unlikely that further elaboration of this academic judgement would have assisted Miss Gopikrishna in preparing her appeal."*

99. It will be noted from the comments of the Sub-Group quoted at paragraph 28 of this judgment that the phrase "*limited coping strategies*" is taken from their comments (HB 139): whilst it featured in the reasons given by the full APC it was mentioned at the end of the passage which began *"Mitigation*" and is in any event followed by a question mark. The actual decision is to be found in what follows that.

> *"Motivation – yes. Mitigation – yes. Progress – weak student in past – didn't cite any adjustments to learning style to help her succeed.– No confidence – termination upheld." (Emphasis added.)*

<u>The OIA's treatment of the TCRP stage and the error in respect of Dr Clarke</u>

100. At paragraph 29 of the final decision there is the following passage:

> *"Miss Gopikrishna contacted her personal tutor for assistance in preparing for submission to the TCRP, but says she did not receive a reply. We note however that Dr Clarke did provide a statement in support of Miss Gopikrishna to the TCRP."*

101. This was the error of fact to which reference has already been made. It was no fault of the OIA. Miss Gopikrishna had not received a reply from Dr Clarke until after the TCRP hearing had been completed. It is true that she did not make that expressly clear to the OIA, but it was through no fault of hers that the OIA made this error. (The error is repeated in paragraph 30 of the final decision, where the OIA stated that the Claimant supplied the TCRP with testimonials

> *"… from her personal tutor and another member of academic staff which were positive about her ability."*

The other member of staff referred to can only have been Dr Nandakumar.)

102. The OIA noted at paragraph 29 that the Claimant had been advised that she should submit a statement to the TCRP explaining in more detail why she felt that her performance "*throughout both years of study*" had been affected by events outside her control (which is, in part, what the Claimant was complaining to the OIA she had not been permitted to explain.)

103. The OIA might at this point have reflected upon the information provided by the Claimant and by Dr Hales as to the conduct of the hearing before the TCRP and the refusal to consider Year 1 mitigation: her original complaint to them. The Claimant, when saying that she was prevented from raising

matters in respect of the Year 1 mitigation, had added that she felt she was "*rudely interrupted*" when she had tried to do so. In the Hales Reference Dr Hales had said that the Claimant had,

> *"… sought to explain the very real issues she had contended with in the first year when she made her subsequent appeal to the [TCRP]. The Chair of the Panel would not consider any mitigation pertaining to the first year of study, stating that it was outside its remit to do so. [The Claimant's] course was therefore terminated, in part, on the basis of a relatively weak pass in the first year, without any consideration of the substantial extenuating circumstances with which she was contending throughout that period."*

104. All that is said about that in the final decision at paragraph 34 is this:

> *"[the Claimant] states that the TCRP did not listen to what she had to say and that she was 'rudely interrupted on several occasions'. Since there is no recording of the meeting, it is not possible for the OIA to reach any decision as to whether the conduct of this meeting was inappropriate. We note that the (undated) statement of support from Dr Hales who was in attendance on 14 September, which has been provided to the OIA [the Hales Reference], does not refer to any inappropriate behaviour in the meeting. Nor do the Secretary's notes indicate that Miss Gopikrishna or Dr Hales wished to make additional statements but were prevented from doing so. Nevertheless we take this opportunity to encourage the University to reflect on this feedback."*

In her skeleton for the OIA Ms McColgan, at paragraph 63, made the following point.

> *"Crucially, however, what was missing from the [Hales Reference] was the text on which [the Claimant] now seeks to rely, in which Dr Hales states that he was surprised by the fact that [the Claimant] was not permitted to talk about Year 1 mitigation and that was not his experience of other hearings."*

The point of substance which the Claimant and Dr Hales had both made was not to do with "inappropriate behaviour" in the sense of rudeness or discourtesy. Nor was it to do with Dr Hales's surprise, nor his experience of other hearings. It was the refusal of the Panel, through the Chairman, to hear mitigation relevant to Year 1, on the basis that it was *"… outside their remit*." That point was not commented on by the OIA, not having been raised by it as an enquiry, it seems, with the University. Ms Mitchell in her second witness statement for the OIA simply states that,

> *"We did not find [Dr Hales's account] persuasive when balanced against the contemporaneous documentation."*

As a matter of fact, the secretary's notes are arguably quite consistent with Dr Hales's account in the Hales Reference. It was at the stage when Dr Hales (in the second of the only two contributions from him recorded in the notes) raised the point that the APC had judged the Claimant on Year 1 ESAs that the Chairman said,

> *"… that was remedied by the Year 1 QE. To put it bluntly, you are asking us to second-guess the medical educationalists …."*

At that, discussion of that matter ended. If I were required to make a finding of fact on the point, I would find that Dr Hales's account, first given within a month of the event, was reliable and also consistent with the contemporaneous documentation, in the form of Mr Siesage's notes. Whether my view of the reliability of Dr Hales's account is correct or not, the fact remains that the "Year 1" mitigation point being made by both the Claimant and Dr Hales was simply not addressed by the OIA in its decision. That was the 'crucial' point. The suggestion that that omission may be excused because the Hales Reference did not contain the details about surprise and experience at other hearings is one which I do not accept.

<u>The OIA's decision on the 'new evidence' and the 'fresh decision' point.</u>

105. At paragraph 37 the OIA recorded the fact that,

> *"On 9 August 2012 we invited the University to indicate whether it would be willing, exceptionally, to offer to reconsider [the Claimant's] circumstances based on new information which she has supplied to the OIA, so resolving her complaint to the OIA."*

106. The response of the University is dealt with at paragraph 38 of the decision. By the letter of 22 August 2012 the University declined any further exceptional review of the decision to terminate the Claimant's studies. It "reiterated" the University's position that its decision "involving the operation of its academic judgement" had been taken in line with the University's regulations and procedures.

107. The OIA noted that the solicitors for the Claimant had contended that that response was itself "a separate decision" upon the basis that the refusal of the University to offer "a further reconsideration" of the Claimant's circumstances was unreasonable and amounted to a breach of the University's statutory obligations under the Equality Act 2010 towards the Claimant as a person who was affected by conditions which might be described as disabilities.

108. The OIA dismissed that contention as follows:

> *"We do not consider that the University's letter of 22 August 2012 constitutes a fresh decision which ought to*

be subject to the OIA's review process. In particular we note that [the Claimant] has not engaged in any further formal complaints or appeal procedure at the University giving rise to a new decision. Paragraph 4.1 of the OIA's Rules which apply to [the Claimant's] complaint provides 'A complainant must have first exhausted the internal complaints procedures of the HEI complained about before bringing a complaint to the OIA.' [The Claimant] has not met this requirement in respect of her complaint to the OIA that the University has acted unreasonably in refusing to consider her new evidence. Indeed, there is no process open to her to complete since she is no longer a student at the University."

109. The OIA then referred to an "exceptional circumstances" provision in Rule 4.1:

> *"In exceptional circumstances a reviewer may accept a complaint for review even if the internal complaints procedures of the HEI have not been exhausted, if he or she considers it appropriate to do so."*

110. The OIA said that it had considered whether under that rule it was appropriate to accept the complaint about the University's letter of 22 August 2012 and had decided that it was not. The following reasons, in summary, were given:

i) The letter was not a "fresh engagement" with the issues raised by the Claimant, but simply a re-assertion of "the University's previous position." (paragraph 42)

ii) It would not be "proportionate or appropriate" for the OIA to engage in a further review having invited a University to consider an alternative resolution of a complaint when such an invitation has been declined "*without engaging any further process to consider the merits*" of the student's case. The prospect of "*triggering a new review process may deter Universities from engaging positively with the OIA's early resolution initiatives*." (paragraph 43)

iii) Whilst matters concerning possible breaches of the Equality Act 2010 were not matters for the OIA, the OIA had decided that the University was neither unreasonable nor in breach of its own procedures in refusing to re-consider the Claimant's case in the light of the new evidence. The Claimant had exhausted the relevant procedures. As a former student the Claimant had no right to engage further in the University's procedures. (paragraph 45)

iv) The new evidence was obtained after the expiry of the time limit set by the University's regulations, and the Claimant had given no "*compelling reason*" to explain why it was not obtained in time. (paragraphs 46, 47 & 48)

v) The pre-course Student Agreement signed by the Claimant before beginning her course had provided that she should inform the Medical School promptly of any health concerns (including mental health problems) or of any learning difficulty, including dyslexia. Thus the Claimant should have been "*alerted to the importance of reflecting upon her own state of health*." (paragraph 49)

vi) There was no "*compelling reason*" in the new evidence to explain why the Claimant had not sought support and diagnosis of her conditions whilst a student at the University. "*In the absence of any evidence that the student's disability itself prevented the student from engaging with the correct procedure at the correct time, we are not persuaded that the University has an obligation to consider waiving its time limits for the submission of evidence*." (paragraph 50)

vii) Thus, even if the OIA considered that the University had made a fresh decision in its letter of 22 August 2012, which was reviewable under the OIA scheme, that decision "*was reasonable in the circumstances*." (paragraph 51)

Part 4: The application for permission to apply for judicial review

The original grounds

111. The application for permission to apply for judicial review of the OIA's decision was filed and served on 15th August 2013 (1-229). The grounds submitted with the permission application for the grant of judicial review may be summarised as follows.

i) That the OIA had failed to consider that the University's decision of 22 August 2012 was a 'fresh decision' open to review by the OIA.

ii) That the OIA failed properly to consider the University's failure to take adequate account of the Claimant's disabilities in making its decision of August 2012.

iii) A closely-related point to (2) was that the OIA had also failed to consider the duties of the University under the Equality Act 2010 to make reasonable adjustments for students under a disability, and failed to consider and comply with its own public sector equality duties.

Reference was made to "future academic progress" not being a criterion within the University's regulations (a point not pursued at the substantive hearing), and whilst a reference was made to "first year failings" wrongly being taken into account by the APC, the point made in the Claimant's original grounds of complaint to the OIA was not developed clearly.

Refusal of permission by Stuart-Smith J

112. Permission on the papers was refused by Stuart-Smith J on 28th October 2013 (303). He observed that,

> "There was no basis upon which the OIA could reasonably consider that the new information provided was sufficiently persuasive to have resulted in the original decision of the APC being overturned, because that question was not before the OIA since the relevant information had not been before the TCRP. The University had no obligation to consider the information when it was provided."

Permission granted following an oral hearing on amended grounds

113. Following an oral hearing, on amended grounds, permission was granted by Prof. Andrew Grubb, sitting as a deputy judge of the High Court, on the 26th February 2014: [2014] EWHC 743 (Admin). The transcript of the judgment is at HB 641-651. The order giving effect to it and making consequential directions including permission to the Claimant to amend her grounds for judicial review is at 652-653 and is dated the 10th March 2014.

Grounds in respect of which permission was granted

114. I summarise the grounds upon which permission was granted by the judge as follows. I shall also mention one ground upon which permission was not expressly granted.

i) *The 'fresh decision' and 'former student' point*. The reasoning of the OIA was open to challenge in respect of its conclusion concerning the letter written by the University dated 22 August 2012 by which the university declined to accept an invitation from the OIA to consider whether the University would reconsider the Claimant's circumstances, in the light of (a) the psychiatric report, and (b) the report of a clinical psychologist, which the Claimant had sent to the OIA earlier in 2012. One of the OIA's conclusions was that in declining that invitation the University was not taking a fresh decision which it had jurisdiction to review or overturn, insofar as it was made in a complaint by a former student. The learned deputy judge said that conclusion was "arguably wrong." Section 12 of the Higher Education Act 2012, he said, expressly contemplates the making of a complaint by a former student. The Claimant was at all material times either a student or a former student. Thus, in so far as the OIA's conclusion that as a former student she had no *locus* to make a complaint, the OIA may have been in error. The judge also said that the matter was not straightforward: he made reference to the possibility of "a complaint within a complaint." Nevertheless, he said that it was arguable that "the decision of 22 August" fell within the provisions of section 12 above, as it was at least arguable that the University had a discretion,

> *"… recognised in the letter of 23 March 2012,* [HB 169] *to re-open the case in the most exceptional circumstances…."*

He added that;

> *"If that is the case, then that assists the argument that the decision of 22 August was a decision concerning a student (or former student) and was an act, or perhaps an omission, in relation to a former student that fell within section 12*." [HB 646 paragraph 27-29.]

ii) *The 'fresh decision' and 'exceptional circumstances' points and discretion to re-open*. A second arguable issue, the judge held, arose in respect of the OIA's decision that, despite the reports produced by the Claimant, the university had correctly concluded that there were no exceptional circumstances justifying the exercise of its discretion to re-open the case. The learned judge said that in that respect,

> *"… the grounds raise an arguable issue as to whether the [Defendant] properly considered whether the University …" [in its turn] "… had properly considered whether and how to exercise its discretion to re-open the Claimant's case in the light of the new evidence. I say no more about the substance of that, which will be a matter for the substantive hearing*." [*ibid*. paragraph 30.]

iii) *Academic judgement*. The judge considered the view taken by the OIA of the original decision-making process by the University as 'an academic judgement' with the result that the complaint was not a qualifying complaint, having regard to section 12(2). The judge made reference to the judgment of Males J in the case of *Reg (Mustafa) v OIA* [2013] EWHC 1379 (Admin), and to his observation that,

> *"… not every judgement by an academic necessarily is 'academic' … and that, even if it is, there is at least an argument that a perverse or irrational exercise of judgement may fall within the OIA's jurisdiction."*

Counsel's point, he said, that the university's conclusion, adverse to the Claimant, that she did not have a good prospect as a student of meeting the requirements of the course in the future, was a conclusion which purportedly took into consideration the Claimant's mitigation. If so, that arguably took the matter outside the range of an academic judgement [*ibid*. paragraph 31-37].

iv) *Procedural unfairness*. The last ground upon which the judge expressly gave leave referred to the failure by the OIA to show the Claimant the letter sent to it by the University on 11 June 2013. He held that it was arguable that that failure was procedurally unfair and had deprived the Claimant and her representatives of the opportunity to put forward matters to the OIA,

> "… as to how they should respond to the University's refusal to treat her circumstances as exceptional." [*ibid*. paragraph 37-38]

v) For completeness I should deal with the Equality Act 2010 point. Permission was not expressly given on that point, nor does it seem to me that it was implicitly included in anything said generally by the judge in granting permission. The OIA and the University accept that as public bodies each is bound in the discharge of their respective functions by the relevant provisions of the Equality Act 2010. It is clear, however, from the decision of the Court of Appeal in *Reg. (Maxwell) v OIA* [2011] EWCA Civ 1236 that the OIA is under no obligation to determine complaints that universities have failed to comply with their obligations under those provisions. As Ms McColgan put it: the issue for the OIA (in *Maxwell*) was neither to determine whether the claimant in that case had in fact been the victim of disability discrimination nor whether the relevant university was liable to her for such discrimination. Such matters are for the courts. The OIA's task was to review her complaint, which included a complaint of discrimination, and to see whether the University's decision was reasonable in all the circumstances and was justified, and, if so, what recommendation should be made to the University. The OIA 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. No significant time was spent on the Equality Act 2010 point at the hearing, and in the end all parties understandably seemed to regard it as a distraction from the issues of substance which arise in the case.

Applications in respect of further evidence at the hearing

115. At the hearing applications were made by various parties to rely on witness statements served after the expiration of time limits set by the case management directions at an earlier stage. The reasons for these late applications were mainly to clarify matters by the correction of factual errors or the explanation of ambiguous or otherwise unclear statements either in correspondence or in other documents in the papers. It became obvious, for example, that those acting both for the Claimant and for the OIA had been proceeding upon a mistaken basis in respect of the important issue of whether the undated letter from Dr Clarke had been presented to and considered by the TCRP.

116. The University, as first interested party, made some criticism of the Claimant's late change of stance both in attempting to rely upon late-served evidence and also in her application to re-amend her Grounds. Having said that, the University itself applied to put in some witness statements after the close of the Claimant's case, on the ground that two such statements dealt with points which I had raised in asking questions about the ESA marking system, and about the conduct of proceedings before the TCRP.

117. Although objections were made on all sides to the introduction of evidence so late in the day, very little real prejudice to any party by the late admission of the evidence sought by another was demonstrated, and, to the extent that I consider the late-served evidence to be of significant relevance and importance, it has the merit of finally clearing up matters which were, at

earlier stages, to some extent at least mistaken or confused. In that respect I consider the admission of the evidence to be in accordance with the overriding objective.

Summaries of the additional evidence

Prof Petersen

118. Prof Stewart Petersen is now the Emeritus Professor of Medical Education at the University. He was the Chairman of the APC at the time when the Claimant's case was being considered. In his witness statement, dated the 20th October 2014, he gives his account of matters in respect of the suggestion that the APC failed to take into account the Claimant's Year 1 mitigating circumstances. It reads as follows:

> *"I chaired the APC meeting and it was my standard practice always to review the Academic Summary which appears at pages 142-143 of the hearing bundles. This document was before the APC and contains details of the mitigating circumstances for her Year 1 results. When considering the claimant's prospects of meeting the course requirements the APC would have considered this document."*

119. Prof Petersen also made some comments about the proceedings before the TCRP:

> *"I do not recall the claimant being rudely interrupted. The nature of the TCRP means that there is a degree of dialogue with the student during its course as it is important for students to be able to say what they want. I have attended numerous TCRPs and in my experience students are always permitted to speak and say what they want. The TCRP members listen to what a student has to say, but what weight they attach to their statements is a matter for the TCRP."*

Prof White

120. Two witness statements were put in from Prof White. In the first of these, dated 23 October 2014, he said that the typed notes of the meeting (HB 129-139) accord with his recollection of the hearing. Reading from paragraph 6 onwards he said:

> *"6. The claimant challenged the decision of the APC to terminate her studies on the basis of the grounds … of appeal…The TCRP's job was to decide whether there was sufficient mitigation to set aside the APC's decision. The claimant did not claim there was procedural irregularity or bias….*

7. The TCRP considered the material that was before the APC and also considered the claimant's grounds of appeal in detail, along with supporting documentation. The letter of Dr Nandakumar… was before the TCRP and was considered by it.

8. I have been asked whether the role of the TCRP was simply a rubber stamping exercise in respect of the decisions arrived at by the APC. I did not and do not consider that to be the role of the TCRP. Its role was to scrutinise the grounds advanced by the student and to determine, applying the criteria laid down in the university rules, whether there was a sufficient basis to interfere with the decision of the APC. The TCRP was not to make the decision afresh or to impose its own views and operated essentially an appellate jurisdiction to ensure that if there were any errors in the APC process, or there was additional material of relevance, such matters were considered. It is fair to say that in general the TCRP would have hesitated to disagree with the academic judgement of the APC because the APC was uniquely qualified to reach conclusions in relation to the claimant's prospects. However, it would have done so if it had concluded: (1) that the Claimant's mitigation (and any supporting material) was new and significant or greater weight of the APC had believed it to be; or (2) that the APC's academic judgement was clearly perverse in light of the material supplied by the claimant."

121. Prof White supplied his second witness statement during the hearing to deal with the question of the extent to which the TCRP had considered the issue of the claimant's first-year mitigation. This evidence appears to have been adduced to deal with the matters referred to in the Hales Letter and the Hales Reference, in which some critical observations had been made by Dr Hales (within a month of the event) about the way in which Prof White conducted the hearing. Prof White does not however refer to either of those documents, nor does he refer to the full witness statement from Dr Hales, dated 21st of October 2014, which by then would have been in the possession of the University, and which is set out next. His statement reads as follows:

"I have been asked whether the TCRP considered the issue of the claimant's first year mitigation. I do not have an actual recollection of how the panel dealt with this issue. However, I can say is [sic] that in an appeal of this nature (concerning the assessment of the APC that the student would be highly unlikely to complete the programme), any panel I chaired would consider the whole academic record to date, including any mitigation in relation to an earlier failure, and the explanations for that. This is because we would give the student considerable credit for having passed the first-year

qualifying examination. We would certainly never have refused to admit anything the student wanted to put before us, and we plainly did have the full academic record including explanations for the first year failure before us."

Dr Hales

122. It must be emphasised that when the OIA made its decision, the full witness statement from Dr Hales was not before it. This was provided only at the judicial review hearing itself, as it is dated 21st October 2014. Omitting unnecessary detail and matters already set out or summarised, it reads as follows:

> *"12. I do recall being very taken aback that Prof Robin White, chair of the TCRP, would not allow the claimant to present the mitigation relating to the very real difficulties that she had experienced in Year1. This is because it was made plain to both the claimant and to me that the mitigating circumstances to which she wanted to refer in Year 1 were irrelevant. We were effectively vetoed from arguing that Year 1 was a year during which she encountered significant mitigating circumstances.*
>
> *"13. It was my view that this mitigation was very relevant to the situation and in particular to address the arguments … employed by the APC … that they had no confidence in her future prospects of success. It was not appropriate on the one hand to find against her for the poor performance in Year 1 but on the other to fail to take into account the strong mitigating circumstances that she had over this particular period.*
>
> *"14. When the TCRP hearing concluded I expressed disappointment that I did not challenge this unusual but very definite veto. I have felt for a long time that the approach adopted by the Chair, Prof Robin White, was not appropriate in this instance. It seemed particularly inappropriate, given that Prof Peterson, the APC representative at the TCRP appeal, had cited the Claimant's need to take the first year re-sit examination as one of the factors that led to the APC's decision that her course be terminated.*
>
> *"15. Some months after the claimant's TCRP appeal, and shortly before the next round of appeals in which I was to accompany students, I sought clarification from Mr Nigel Siesage, Secretary to the TCRP, as to whether a veto on hearing mitigation from previous years had become normal practice documented in the TCRP*

regulations. Mr Siesage said that he, like me, recalled being surprised by the refusal to hear mitigation pertaining to the Claimant's first year of study and was unclear as to whether or not this was documented TCRP procedure.

"16. I raised my concerns in relation to the claimant's case with Christine Fyfe, one of the University's Pro-Vice-Chancellors, who advised me not to be involved with the process. …."

The Claimant

123. A further witness statement from the Claimant was admitted dealing with the facts relating to her attempt to obtain Dr Clarke's reference, its receipt by her after the TCRP meeting, its content and the refusal of the University to consider it, together with documentary exhibits showing the email evidence of dates and times.

Shehan Wijesingha

124. Mr Wijesingha is a fourth-year medical student at the University. He failed an examination, and the examiners recommended that his course be terminated in June 201I. His appeals to the APC and TCRP were unsuccessful. He was sent a completion of procedures letter. On 1 September 2011 he obtained a report from a consultant psychiatrist in support of his 'mitigating circumstances.' That report, and a further expert's report were submitted to the University in October 2011. Following a complaint to the OIA later in October 2011, on 30 January 2012 the University decided to convene a second TCRP in his case. On 20 March 2012 that panel decided on the evidence that Mr Wijesingha had been suffering from a specific learning difficulty which would have affected his studies, and that the experts' reports constituted new factual evidence which had not been available to the APC. The TCRP ruled that he should be allowed to re-sit the year.

Ruling on admission and permissible use of the additional evidence

125. All of this material was admitted with the sole purpose of clearing up many past misunderstandings, and to clarify matters which seemed ambiguous or doubtful. I take none of it into account in considering the substance of the challenge to the decision of the OIA, save to the extent that,

    i) it repeats information which was in their possession before the decision was made: plainly, that decision has to be evaluated solely on the information which was before the OIA when it was taken;

    or

    ii) it becomes admissible under the principles enunciated in *E v Secretary of State for the Home Office* [2004] QB 1044, CA, in order to show that the decision was reached on an incorrect basis of fact. I shall deal with the effect of this case in greater detail below.

I cannot make findings of fact where direct contradictions exist. To the extent, however, that I have to evaluate the weight to be given to any matter contained in any of the lately-filed witness statements, there are general considerations to be borne in mind from the most authoritative sources. In *Onassis v Vergottis* [1968] 2 Lloyd's Rep 403, Lord Pearce said at 431:

> *"It is a truism … that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance."*

In the case of *The Ocean Frost* [1985] 1 Lloyd's Rep 1 at 57 Robert Goff LJ (as he then was) made the following well-known observation when dealing with the approach he adopted when considering the credibility of witnesses:

> *"Speaking from my own experience, I have found it essential … when considering the credibility of witnesses, always to test their veracity by reference to the independent facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. … where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.*"

Arnold J in the case of *BRUTT Trade Marks* [2007] RPC 19 at [24], having made reference to Goff LJ's observations in *The Ocean Frost,* said,

> "*Thus before addressing the conflicts of evidence the fact-finding tribunal should first consider what is common ground, what is asserted by one party and not contested by the other, and vice-versa, and what is shown by the documentary evidence. Once these matters have been ascertained and put into chronological order, it is frequently much easier to resolve the remaining conflicts. In resolving such conflicts it is of assistance to consider which version of events is the more likely*."

126. Bearing those matters in mind, in receiving the lately-filed evidence at all I must also direct myself as follows:

    i) Even if it would be desirable or apparently necessary to do so, I cannot resolve any direct conflicts of primary fact between the accounts of these witnesses, if each claims to have a distinct and contradictory recollection, upon the basis of witness statements alone. Where the

difference is more nuanced, however, Blake J held it to be appropriate in the judicial review case of *Reg. (Lunt) & Anor v Liverpool City Council & Anor* [2009] EWHC 2356 (Admin) to make limited findings as to which of different witnesses' versions of events were more or less compelling. He said,

> "*I do not need to resolve all the differences in the witness statements, although I find the witness statements of Mrs Lunt, Mrs Price and Mr Bruce compelling, whereas that of Mr Edwards is far less clear and precise, and his reports have been shown to be inaccurate in a number of ways on one or two other topics*."

That is an approach which I gratefully adopt.

ii) Where the late evidence is (a) not challenged or contradicted, and is credible, and (b) passes the four tests in *E v Secretary of State for the Home Department* [2004] QB 1044, CA, to which I shall refer in detail below, the court may have regard to it in considering whether the decision of the OIA was based on an error of fact.

Adopting the approach of Blake J, on the first point there is a marked contrast between (a) the distinct, detailed, and closely contemporaneous recollections of both Dr Hales and of the Claimant as to what occurred before the APC and the TCRP and (b) the more general accounts of events in the statements, whether based on 'usual practice' or otherwise, made between two and three years after the events, by Prof Petersen and Prof White. With all respect to both professors, for the reasons (a) given in the authorities mentioned in the previous paragraph and (b) mentioned when dealing with particular details of events below, on any conflict of account as to what occurred at either the APC or the TCRP, I should prefer the accounts of the Claimant and Dr Hales where it is necessary to resolve any point of difference. Whether the OIA should adopt this reasoning in any future review, is a matter for them.

On the second point, in deciding whether the OIA's decision was to any extent based on an error of fact, the position is as follows. There is no challenge to or contradiction of the Claimant's credible evidence about Dr Clarke's letter, its delivery to her, and her delivery of it to the University: the (apparently) precisely accurate e-mail evidence as to times and dates speaks for itself. Secondly, it is common ground that the OIA had erroneously considered that the letter had been before the TCRP. Thirdly, the Claimant had not been responsible for the error. Finally, the mistake had played a part (although not necessarily a decisive part) in the reasoning of the OIA: it was expressly stated to have been a matter which had played a part in its reasoning.

<u>Re-amendment and further re-amendment</u>

127. At the hearing, the Claimant, who, as Ms McColgan reminded me, had had the benefit of legal representation throughout the proceedings, and who was represented by leading and junior counsel before the deputy judge at the permission stage, sought leave to re-amend to add a further ground of challenge, not raised at the permission hearing, asserting that the OIA had

erred "in failing to take into account the failure/refusal of the APC and TCRP to take into account Year 1 mitigation". Ms McColgan resisted the grant of permission on this ground on the basis that,

> *"… the Claimant's multiple complaints have been subject to a continual process of change since her Grounds were issued, and indeed since her complaint was first made to the OIA. Particularly where, as here, the complaint against the OIA concerns its handling, in the past, of complaints raised by the Claimant against a third party (the University), the analysis of the complaints against the OIA must focus on what was said to the OIA at the relevant time, and how the OIA handled that. The continual flux in the Claimant's complaints, most of which appear properly to be directed at the University, rather than at the OIA, serve significantly to shift this focus and muddy the actual complaints against the OIA."*

128. It is correct that the proposed re-amendment sought by counsel was a late addition to the ways in which the OIA's decision-making was being challenged. However, Ms McColgan could not point to any significant prejudice to the OIA other than the inconvenience caused in having to deal with another forensic change of tack, or alteration of focus, by those representing the Claimant. The objection was restrained and measured. That, no doubt was the result of reflection on the part of those representing the OIA that the proposed re-amendment would do little more than crystallise in the pleadings the very first written complaint made to the OIA on the 15 December 2011 (at its paragraph 17: see paragraph 57 of this judgment) which was also the central point made on 24 May 2012 in the Hales Reference. In reality there was no dramatic change of case, and those at the OIA must have considered the point many months before the re-amendment was proposed.

<u>The further re-amendment</u>

129. At the hearing there was also an application by counsel for the Claimant to further re-amend her Grounds in the light of the error made by the OIA that Dr Clarke's letter had been presented to and considered by the TCRP. That, it was submitted, was a material error because, by virtue of the TCRP's own rules of procedure, it was required to consider the views of the personal tutor. The content of the letter is not capable of being regarded as in any way adverse to the Claimant. On the contrary, Mr Newton QC submitted that it can only be read as being supportive of her case on the single issue upon which her case failed: academic potential.

130. It cannot be said, counsel continued, that the Claimant was responsible for the error. The University had incorrectly informed the OIA that the TCRP had considered Dr Clarke's letter. The Claimant had not, as a matter of fact, corrected the error, nor had she informed her own solicitors that Dr Clarke's letter had been rejected the day after the TCRP hearing by a member of the administrative staff at the University as being too late. It would have been in her own interest to have made the point at a very much earlier stage, but she

cannot be blamed for not correcting the error, if she had in fact noticed it. I do not think it probable that she had noticed it, nor do I think that she was aware, as the lay client, that the point potentially -- at least -- had procedural importance.

131. On 21 October 2014, at the hearing, when it was first appreciated on all sides that the decision was indeed in part based on an error of fact, time was given in which counsel for the OIA and her instructing solicitors and lay clients had the opportunity to consider the point. After taking that opportunity, the OIA refused to re-consider its decision in the Claimant's case, on the ground that it was a matter which had emerged more than 3 years after the events in question, it would not consider it, in the light of its rule 4.5:

> *"4.5 The OIA will not normally consider a complaint where it considers that the substantive event(s) complained about occurred more than three years before the Scheme Application Form is received by the OIA.*

That rule apart, the OIA said that even if the complaint had included the correct information in respect of Dr Clarke, and thus had been made within 3 years, the OIA would nevertheless have concluded that the complaint was not justified.

132. The Claimant submits that the decision of the OIA to refuse to re-consider the matter is irrational and should itself be quashed by the court on the following grounds.

i) The Claimant's original claim was made perfectly promptly, by December 2011. The fact that the OIA's investigations and subsequent processes have taken as long as they have was not under the control of the Claimant. The period of 3 years, in any event, has only just elapsed.

ii) The University's own procedures specifically provide for the participation of the personal tutor: it is not for the OIA to conclude that his letter would have had no effect.

iii) In any event, the procedure was one which was designed to encourage engagement and co-operation by all parties, and the University had a responsibility, which the OIA should have recognised, to seek and consider Dr Clarke's views.

iv) When the letter came to light, the University (through the agency of administrative staff) operated a blanket policy of not admitting it and had not applied an 'exceptional circumstances' rule.

<u>Ruling on applications to re-amend</u>

133. So far as the proposed re-amendment and further re-amendment of the Claimant's grounds, I grant the applications, and give permission to apply for judicial review on such grounds essentially for the same reasons as I have given permission to all parties to rely upon lately-obtained evidence. Whilst the matter raised by the further re-amendment was simply not known by the

OIA at the time of the making of the decision challenged in these proceedings, there is now no dispute that an error was indeed made in respect of the question of whether or not Dr Clarke's letter had been before the TCRP. I see no reason for not allowing the Claimant to present her case on a basis which is factually accurate, and not factually inaccurate, whilst taking care, nevertheless to be clear about the information which was actually before the OIA at the time of the making of its final decision.

134. The extent to which errors may have arisen as a result of mistakes made by one or more of the parties, and the consequences which may follow, are matters upon which they were able to make all the representations which they wished to make. I invited counsel for the OIA to take time to consider whether, in the light of all the evidence which had so recently become available, the OIA wished to ask for an adjournment. In the event no application for an adjournment was made. There was, it is true, limited opportunity for research into such authorities as exist in respect of the legal issue of the materiality of a mistake of fact as a ground for judicial review.

135. However, counsel were able to provide the court with the leading case of *E v Secretary of State for the Home Department* [2004] QB 1044, CA, in which the previous cases on the point are considered. At paragraph 44 of the judgment of the Court of Appeal (Lord Phillips of Worth Mattravers CJ, Mantell and Carnwath LJJ), handed down by Carnwath LJ, the following observations are to be found:

> "*44. Can a decision reached on an incorrect basis of fact be challenged on an appeal limited to points of law? This apparently paradoxical question has a long history in academic discussion, but it has never received a decisive answer from the courts. The answer is not made easier by the notorious difficulty of drawing a clear distinction between issues of law and fact....*"

Discussion of the problem continues in the judgment until paragraph 66, where it is said that,

> "*66. In our view, the time has now come to accept that mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. .... First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning.*"

It is accepted on all sides that this case is one in which the parties share an interest in co-operating to achieve the correct result.

136. The reasoning in the case of *E* has been endorsed in *Reg. (Iran) v Secretary of State for the Home Department* [2005] EWCA (Civ.) 982, and *Reg.* (*MT, Algeria) v Secretary of State for the Home Department* [2007] EWCA (Civ.) 808. It has also been followed, as already noted, in the case of *Lunt* by Blake J.

Were the terms of the complaint to the OIA sufficiently clear in raising any issue of perversity, irrationality, or unfairness, as to justify intervention by the OIA?

137. Before considering the substantive law which applies to the discharge of the functions of the OIA, and to the issue of academic judgement, I must deal with the question of whether or not the OIA is correct in saying that it cannot be criticised for not considering a complaint which was not clearly made to it. I have already touched on this point, but should deal with the matters raised under this head by counsel for the OIA in argument. In summary these were as follows.

i) The complaint to the OIA did not specify what mitigation applied in relation to Year 1, and did not make any clear complaint such as could found a challenge based on a failure to uphold such a complaint.

ii) Whether or not the APC unreasonably failed to take into account Year 1 mitigation (and it was not accepted that this was the case), the Claimant's complaint against *the OIA* concerned *the OIA's alleged unreasonable failure to conclude* that the University had failed to take into account matters essential for a fair decision in concluding that the Claimant did not have a good future prospect. This was not a matter clearly raised with the OIA in the "many pages of complaint" made on the Claimant's behalf.

iii) The Claimant had made "an unproven assertion" that the APC ignored mitigation pertaining to her Year 1 studies. This assertion was not accepted. The APC had some evidence before it of such mitigation, notwithstanding the Claimant's

> *"… own clear focus then, and until these proceedings were issued, on her Year 2 mitigation, and there is no basis on which it could properly be determined that the APC had not taken this information into account in reaching its conclusions as to the Claimant's future prospects."*

The record of the APC meeting showed, counsel argued, that the Claimant was in fact asked about year 1. The fact was that,

> *"… the Claimant failed many of the examinations she undertook in her two years of study with D. Notwithstanding her personal circumstances, this is not the pattern of a student who is likely to succeed in the longer term."*

Conclusions on the sufficiency of the complaint

138. The suggestion that,

> *"[t]his was not a matter clearly raised with the OIA in the many pages of complaint made on the Claimant's behalf"*

is one I reject. The matter was raised at least four times: in the Claimant's grounds of appeal to the TCRP at (a) (iii) (HB 75); in the original grounds of complaint at paragraph 18 in December 2011 (HB 359); in an exhibit to the "addendum grounds" in February 2012 (HB 81-82); and in the Hales Reference itself on 24 May 2012 (HB 822-823.) It was also clear from the notes of the hearing at the TCRP (HB 129-130) that an attempt was made to raise it there.

139. None of the submissions made by the OIA under this head deals with the basic point made by the Claimant, which is that the APC, having accepted that there was adequate mitigation in respect of Year 2, then considered the overall strength of the Claimant as a candidate by taking into account evidence of her poor performance in Year 1 (a 'barely satisfactory' pass at ESA 1 and an 'unsatisfactory' result at ESA 2) without balancing against that the evidence of mitigating circumstances for the ESA results, and the fact that the Claimant actually passed the Qualifying Examination in Year 1. She had not, when she appeared before the APC, come prepared to argue, and did not argue, 'Year 1 mitigation' before them, because she had understood that it was irrelevant. When, on realising that it had been regarded as relevant by the APC, she tried to argue the point before the TCRP, she was stopped. All that, in terms of complaint, emerges clearly.

140. The argument that the Claimant was a weak student because she "*failed many of the examinations she undertook"* seems to beg the question in much the same way as the Claimant alleges that the APC did in its approach, by ignoring the fact that in (*e.g.)* Prof White's view, first year failures were "remedied by" passing the first year qualifying examination (and thus were irrelevant) and by Dr Hales' additional point that first-year failures were balanced by first-year mitigation, and second-year failures by second-year mitigation.

Part 5 Relevant legal principles concerning (a) Judicial review of decisions of the OIA generally and (b) The concept of 'academic judgement'

Susceptibility of decisions of the OIA to judicial review

141. The leading cases are *Reg. (Siborurema) v OIA* [2008] ELR 209 and *Reg. (Maxwell) v OIA* [2011] EWCA Civ 1236. In *Siborurema,* the claimant was a student who had failed a unit of his course four times. The university withdrew him from the course. The claimant appealed to the university, putting forward evidence of mitigating circumstances, but failed to satisfy the university's requirements for the advancing of such circumstances. His appeal to the university was dismissed largely for that reason. The claimant complained to the OIA, asserting that it was not sufficient for the university

simply to rely on its regulations rather than considering the mitigation. The OIA found that the complaint was not justified, because the university's decision was reasonable in the circumstances and it had followed its procedures. The claimant sought judicial review. The Court of Appeal decided that decisions of the OIA are subject to judicial review, but the scope of any review will be limited and suggested that it was unlikely that many claims (unlike this claim) would pass the permission stage. Where permission was granted the court would be "very slow" to interfere with the exercise of judgment leading to a decision that a complaint was not justified. The Court of Appeal also held that the OIA has a broad discretion to determine the nature and extent of its own reviews.

142. In *Maxwell* the approach taken by the OIA in complaints raising the issue of disability discrimination was challenged. The Court of Appeal held that the OIA's decision on the Claimant's complaint was,

> " … an adequately reasoned decision in accordance with its procedures, in accordance with the law and as a proper exercise of its wide discretion."

Mummery LJ said at paragraph 26 that,

> "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."

Academic judgement "immunity": the authorities at common law

143. Purely academic judgements have a general immunity from judicial scrutiny. In *Clark v. University of Lincolnshire and Humberside* [2000] 3 All ER 752, a contractual case originally pleaded on the basis that in that case the defendant university had misconstrued the meaning of plagiarism and awarded a mark beyond the limits of academic convention (paragraph 6), the Court of Appeal held that the judge had been correct to strike out the case as originally pleaded:

> "This is because there are issues of academic or pastoral judgment which the university is equipped to consider in breadth and in depth, but on which any judgment of the courts would be jejune and inappropriate. This is not a consideration peculiar to academic matters: religious or aesthetic questions, for example, may also fall into this class. It is a class which undoubtedly includes, in my view, such questions as what mark or class a student ought to be awarded or whether an *aegrotat* is justified." (Paragraph 12 per Sedley LJ).

The case proceeded on amendments to the pleadings alleging breach of contractual rules upon which "the courts are well able to adjudicate". (13)

144. There are a number of other cases where the concept of academic judgement immunity has been acknowledged and applied. The cases that follow (considered in chronological order) are all cases where to some extent the nature of the immunity or its limits were discussed.

145. In *Persaud v. Cambridge University* [2001] EWCA Civ 534 Chadwick LJ, with whom the other members of the court agreed, said this at para. 41:

> *"*I would accept that there is no principle of fairness which requires, as a general rule, that a person should be entitled to challenge, or make representations with a view to changing, a purely academic judgement on his or her work or potential. But each case must be examined on its own facts. On a true analysis, this case is not, as it seems to me, a challenge to academic judgement; it is a challenge to the process by which it was determined that she should not be reinstated to the Register of Graduate Students because the course of research for which she had been admitted had ceased to be viable. I am satisfied that that process failed to measure up to the standard of fairness required of the university*"*.

146. In *Van Mellaert v. Oxford University and Others* [2006] EWHC 1565 the Claimant in a contractual claim sought relief upon the basis of complaints relating to criticisms made of his thesis by two examiners, which constituted their reasons for recommending that his thesis be re-submitted. In his judgment Gray J. referred to situations where the exercise of academic judgement may be challenged.

> "24. In the light of … [the] authorities it appears to me that the validity of the reasons which led the examiners to make the recommendation … is a matter of academic judgement with which it would be inappropriate for the court to interfere…
>
> "25. I accept that there may be aspects of the Claimant's examination …into which it would not be inappropriate for the court to intervene. Thus the court would no doubt in a suitable case intervene if it were shown that there had been a material procedural irregularity or if actual bias on the part of one tribunal or another were demonstrated or if it could be shown that there were some procedural unfairness to the claimant."

147. In *Moroney v. Anglo-European College of Chiropractic* [2008] EWHC 2633 the College terminated the Claimant's degree course in chiropractic on the basis of poor academic performance. Underhill J, as he then was, said at para. 26:

> "I do not therefore think that it is even arguable that the mark was perverse or given in bad faith. It may have been harsh, but that is another matter: once it is established that the mark was given in the exercise of a *bona fide* academic judgement, it is incapable of being challenged in this court".

148. Mr Newton QC, for the claimant, submitted that this passage carried the obvious implication that a complaint of perversity or procedural unfairness made in respect of a matter involving academic judgement was open to challenge. *Moroney* was also relied upon by counsel for the OIA, and it will be considered in greater detail presently.

149. In *Hamilton v. Open University* [2011] EWHC 1922 (Admin) at para. 11 Langstaff J. said:

> "The courts administering civil law, and in particular public law, are not well equipped to deal with matters of academic judgement. It is for the examiner and not the court to mark a paper, for instance. It is for the educational professional and not for the court to deal with the way in which education is best advanced. There are limits, as for instance, where a power to mark is on the facts deliberately exercised so as to disadvantage a particular student, but although the claimant here believes, as I have recited, that that is what the Open University were doing in his case, he accepts that there is no evidence – at least no evidence to which he is prepared to refer – which is capable of supporting that conclusion. There being no objective evidence of that there is no proper basis it seems to me for the court here to make an adjudication upon what is a matter of academic judgement".

150. A vivid illustration of what is, and what is not, an academic judgement was given by Burnett J in Abramova v Oxford Institute of Legal Practice [2011] EWHC 613 (QB). The claimant, who had failed her professional law examinations, brought a claim under section 13 of the Supply of Goods and Service Act 1982 alleging a failure of care and skill by the defendant college ("OXILP") in the way it prepared her for the exams, and in failing to give her feedback following the taking of 'mock' papers. The OXLIP argued that these claims were not justiciable because they required the court to evaluate academic judgements, which the court was not equipped to do. Burnett J referred to *Clark* and affirmed the principle that the court was not well placed to engage in questions which go to academic merit, but held at [58] that the claim did not infringe this principle:

> "The statutory mechanisms in place, which enable students to question the results of examinations, have become more elaborate in the intervening 11 years. But the essence of Lord Woolf's point that a Court is not well placed to engage in questions which go to academic merit remains good law. That said, I do not consider that the claimant's attack of OXILP in this claim engages academic judgement in the sense being discussed by Lord Woolf. She is suggesting that the teaching was lacking in reasonable skill and care, rather than basing a claim on a disagreement about the outcome. She is not suggesting

> that OXILP should have awarded her a pass. Albeit perhaps reluctantly, she is constrained to accept that she failed the course because she failed Property Law and Practice three times. The classic example of an argument concerning academic judgement would arise if a student sought to suggest that his papers should have led to the award of a first class degree rather than a 2:1. That is a debate in which a court would be very reluctant to engage. But that is not this case." (Emphasis added.)

Academic judgement immunity and the OIA Scheme: authorities on the statutory test

151. There are then some important cases involving the immunity of academic judgements from the OIA Scheme. In *Reg. (Cardao-Pito) v. OIA* [2012] EWHC 203 (Admin) the Recorder of Manchester, His Hon. Judge Gilbart QC, sitting as a judge of the High Court, said that academic judgement immunity applies where the central subject matter of the complaint is a dispute about academic judgement (paras. 96-97):

> "*96.* When [the claimant] appealed to the OIA …. It is clear to me that some part at least of those complaints was inadmissible. The actual marks awarded, and the choice of examiner, can only relate to matters of academic judgement, and are thus outside the remit of the OIA scheme. But it does not follow that the effect of his supervisor's conduct upon him, which includes the effect upon his performance in his research paper, is excluded from consideration. In the language of the Rules, the scheme 'does not cover a complaint to the extent that (3.2) it relates to a matter of academic judgement.'
>
> "97. In my view, that 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. …."

However, as Ms McColgan pointed out, the judge was considering a case in which an issue of misconduct arose in respect of a supervisor. One of Mr

Cardao-Pito's grounds of complaint was that the university had not properly dealt with his appeal. He argued that his performance in his assessment had been adversely affected by bullying by his supervisor. The OIA concluded that the university had failed to act on Mr Cardao-Pito's allegations of bullying and harassment and concluded that it ought to investigate them. The submission was that,

> *"… whilst it also concluded that the university had not properly considered Mr Cardao-Pito's academic appeal, and that he had lost the opportunity of having that appeal properly considered, the OIA did not decide in Mr Cardao-Pito's case that it could not look at the effect of the bullying on his performance because it was an academic judgement. That was not the point. The references to academic judgement in the decision related to whether the OIA can prefer the view of one academic to another, whether the marker was sufficiently experienced, and whether greater student effort was required for the research element than for the taught element*."

152. The question of what constitutes "academic judgement" within the OIA's scheme was also considered in *Reg. (Mustafa) v. The OIA and Queen Mary, University of London* [2013] EWHC 1379 (Admin). This was a case which the learned Deputy Judge, Prof. Grubb, referred to when granting leave. The case involved a finding of plagiarism against a student. In the course of his judgment, Males J. said:

> "*49*. Just as the courts have identified the existence of issues of academic judgement which are non-justiciable, so the statute contains an exclusion of certain kinds of complaints, which the OIA is prohibited from considering. The cases subsequent to Clark have confirmed the existence of an area of non-justiciability for the courts and have affirmed that a paradigm case of academic judgement is the question of what mark to award. They have also been cautious in determining what constitutes an exercise of academic judgement, lest the area of non-justiciability be spread too wide, with the consequence that there may be no remedy for what are really breaches of contract or other civil wrongs. Otherwise, and not surprisingly, the extent of the area of exclusion remains undefined. It will have to be considered case by case, with the possibility that nice questions may arise, the answers to which will no doubt be affected to some extent by whether the issue raised is one which the court regards itself as competent to determine.
>
> "50. So far as the OIA is concerned, however, the question is one of statutory interpretation, with an absolute prohibition on complaints which are excluded from the

definition of "qualifying complaint" by section 12 (2). Mr. Lawson submitted that the exclusion should be narrowly construed, as it represents an exclusion from what is intended to be a broad and general scheme to deal with complaints, and further that the statutory prohibition should be co-extensive with the area of non-justiciability accepted by the courts, as it would be odd if there are complaints which the courts can consider but the OIA cannot (or vice versa). In my judgment there is force in these submissions, but it is unnecessary to decide in this case how far they should be accepted.

"51. The exclusion of OIA jurisdiction contained in section 12 of the Act and repeated in rule 3 of the OIA's rules applied "to the extent that it [the complaint] relates to matters of academic judgement". This does not exclude in its entirety any complaint which involves a matter of academic judgement, 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 judgement and that complaints where such disputes are peripheral are not intended to be excluded. This is a helpful way of looking at the matter, though it is always preferable to apply the words of the statute rather than to gloss them. Questions may arise, therefore, as to the extent to which the OIA can consider a complaint which does involve a matter of academic judgement, but where the correctness of that judgment is not a central issue. An example may be a complaint that a finding of plagiarism had been reached by a process which was unfair. Indeed the OIA did consider – and rejected – Mr. Mustafa's complaint that the finding of plagiarism against him was unfair because other students had done what he had. (Emphasis added.)

52. 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 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 judgement 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 section 12 (2) of the 2004 Act". (Emphasis added.)

Part 6 Conclusions

The 'former student' point.

153. This was a point which arose from the OIA's comments upon the position adopted by the University in rejecting its invitation to re-open the Claimant's case. The OIA said that it did not consider that the University's letter of 22 August 2012 constituted a fresh decision which might be subject to its review process. In giving its reasons it referred to the fact that the Claimant had not engaged in any further internal formal complaints or appeal procedures at the University: *i.e.* there had been no fresh originating process, consequent decision-making and appeals internally, based on the new evidence, which had led to the response of 22 August 2012. Therefore, the OIA reasoned, the Claimant had not first exhausted the internal complaints procedures of the University before bringing a complaint to the OIA, under its Rule 4.1 (see paragraph 55 above.) It then added the words:

> *"... there is no process open to her to complete since she is no longer a student at the University."*

The OIA had found no exceptional circumstances under its rule 4.1 which justified a departure from the rule. Moreover, the purpose of the provision permitting complaints from former students was

> *"... to allow those students whose relations with the University had been terminated to make complaints about events which took place before the termination."*

154. There is an obvious circularity of argument if the OIA's reasoning is read as saying that it could not investigate a fresh decision because it did not arise from a new originating process, but that the Claimant could not begin such a process because she was no longer a member of the University, so that she could never in any circumstances ask the OIA to review a fresh decision. That may not have been what the OIA was intending to say, however. When the Claimant first made her complaint in December 2011 she was already a former student of the University. It is self-evident from the fact that the OIA accepted and dealt with the original complaint that those dealing with the matter at the OIA did not misunderstand its ability to deal with complaints made by former students. It also accepted, as Ms McColgan made clear at the hearing, that in exceptional circumstances (but only in such circumstances) it could investigate fresh complaints without there having been a new originating process. Thus, if the OIA's "exceptional circumstances" test was passed no procedural bar for the review of such decision as was contained in the letter of 22 August 2012 stood in the way of the Claimant as a 'former student.'

155. Before considering the application of that test however, it may be of assistance to consider a separate "exceptional circumstances" test applied by the University as the only basis for a decision to re-open a case, and also to consider the sequential procedural steps which are involved where such a

decision is made by the University, and a request is made to the OIA to review it.

The University's "exceptional circumstances" test in a termination of course case

156. The circumstances where a case may be re-opened are addressed in the witness statement of Mr Siesage, in which he accepted that the University had discretion to re-open a case in 'exceptional circumstances' and he himself referred to an occasion where a case had been reopened. This could only happen where there were:

> *"... proven circumstances which could impugn the University's original decision to terminate a student's course."*

Whether the case of Mr Wijesingha was an example of the exercise of such discretion by a strict application of that test was a matter of some debate at the hearing, but the importance of his case is that it represents a known example of the exercise of the University's discretion.

Procedural steps involved

157. The effect of a combination of the University's rules and the OIA's rules is that consideration of the re-opening of a case can only be dealt with as follows:

i) The University must follow its own procedures. They permit it to exercise its discretion to re-open a case only in the circumstances referred to by Mr Siesage above.

ii) If no such circumstances exist, there is no power to re-open.

iii) The University's decision as to whether such circumstances exist, except to the extent that it relates to matters of academic judgement, is, *prima facie,* an act or omission reviewable by the OIA under s. 12 of the Act.

iv) The OIA's rule 4.1 however, prevents it from reviewing the decision if the complainant has not first exhausted the internal complaints procedures of the University, unless there are exceptional circumstances in which case the OIA may, if it considers it appropriate, do so.

Exceptional circumstances under the University's rules, and the OIA's decision on whether the University's refusal to re-open was a 'fresh decision'.

158. At paragraph 37 of the Decision the OIA had recorded the fact that,

> *"On 9 August 2012 we invited the University to indicate whether it would be willing, exceptionally, to offer to reconsider [the Claimant's] circumstances based on new information which she has supplied to the OIA, so resolving her complaint to the OIA."*

159. The existence of its discretion, exceptionally, to re-consider a case had been acknowledged by the University in its letter of the 23rd March 2012 (see paragraph 64 above.) As a matter of unquestionable fact it can, and occasionally does, as it did in the case of Mr Wijesingha. In the Claimant's case, by the letter of 22 August 2012, the University declined the invitation to make any further exceptional review of the decision to terminate her studies.

160. The OIA said that it had considered whether under its Rule 4.1 there were exceptional circumstances which made it appropriate to accept the complaint about the University's letter of 22 August 2012 and had decided that such circumstances did not exist. In dealing with this in the Decision and elsewhere in the papers the OIA, and Ms McColgan, made a variety of points, in addition to the 'former student' point, which I summarise as follows.

i) The letter contained no decision for them to review at all. It was merely a re-assertion or re-iteration of its original decision to terminate the course

ii) Alternatively, the letter was no more than a response to suggested mediation by the OIA. The implication of that seemed to be to the effect that it amounted to no more than a party to a dispute declining to enter into 'without prejudice' discussions.

iii) The new evidence was obtained after the expiry of the time limit set by the University's regulations, and the Claimant had given no "*compelling reason*" to explain why it was not obtained in time.

iv) The Claimant's case had reasonably and rightly been regarded by the University as one in which there were no "*exceptional circumstances*."

v) The University had not been regarded as having applied a blanket policy. Such policy statements as the University had disclosed on enquiry by the OIA had catered for exceptional circumstances.

vi) The pre-course Student Agreement point mentioned at paragraph 110 (5) above.

vii) There was no "*compelling reason*" in the new evidence to explain why the Claimant had not sought support and diagnosis of her conditions whilst a student at the University. "*In the absence of any evidence that the student's disability itself prevented the student from engaging with the correct procedure at the correct time, we are not persuaded that the University has an obligation to consider waiving its time limits for the submission of evidence*."

viii) A further point which demonstrated that the Claimant's case was not exceptional was the joinder of "*... the additional Interested Parties ... all of whom are students in similar situations, as are an additional four students represented by the Claimant's solicitors in complaints to [the OIA.] All of these students are former students of the [University's] medical school*."

I shall deal with these points in turn.

The 'no decision' or 'no fresh decision' point

161. On one reading of the papers, at least, the University did indeed seem to be saying that its mind had been made up, and that it had refused to re-consider an 'academic judgement' given in accordance with the University's regulations. That reading of the response might be thought to raise the question of whether a refusal to re-consider on presentation of fresh evidence can itself amount to a 'fresh decision' or whether it merely states "what's done is done" or, in the words of Pilate, "What I have written I have written."

162. Attention was drawn by counsel for the OIA to the case of *R v Commissioner for Local Administration ex p Field* [2000] COD 58 (CO/880/99), where the claimant had sought in 1998 to challenge a decision originally made by the Local Government Ombudsman in 1996. The Ombudsman had based his decision, that he had no discretion to investigate the claimant's complaint, on the specific advice of leading counsel instructed to advise him on the point. In correspondence in 1997 the decision had been repeated. The claimant in 1998 obtained his own junior counsel's opinion, and wrote to the Ombudsman with a copy of a paragraph from that opinion suggesting that, in junior counsel's view, the Ombudsman had discretion to investigate his complaint. The Ombudsman replied that he was following the advice originally given to him by leading counsel, and could not help the claimant. On the claimant's application for judicial review, in order to avoid the three month time-bar then embodied in RSC Order 53 rule 4 (now CPR Part 54.5.1) he sought to rely upon the Ombudsman's letter of 1998, which was characterised as a fresh decision. Keene J said:

> "I have already read the full text of the letter of 3 December 1998. The letter does not read as a fresh decision. It is in very similar terms indeed to that of 6 May 1997, but it is considerably shorter. It adds nothing of any substance whatsoever to the earlier letter. The correspondence between the parties in … 1998 was not truly a new decision by the … Ombudsman. It was of the nature of a reiteration of the decision which had certainly been made and communicated by [a letter of] … 15 May 1997 – if not on 6 December 1996.
>
> "One does not overcome the problems created by Order 53 rule 4 (1) by writing a fresh letter to the decision maker and thereby obtaining a reply which one then seeks to characterise as a fresh decision. That would render that provision in the rules wholly ineffective.
>
> "Here the grounds for … judicial review… undoubtedly first arose when the Ombudsman declined jurisdiction … on 6 December 1996. It may be that [the claimant] hoped by his later correspondence to persuade the Ombudsman to change his mind … but that is not enough."

(At the ninth page of the unpaginated transcript.)

163. That is clearly a distinguishable case, as in *Field* there was no question in the mind of the learned judge that the 1998 response amounted to no more than a simple repetition of the original answer. As Mr Newton QC pointed out in argument, no separate decision-making process had taken place. There was no fresh evidence offered there, simply an extract from junior counsel's opinion, differing from that of leading counsel for the Ombudsman. But the latter had formed the basis for the decision, and the Ombudsman rested upon it.

164. In the instant case, by contrast, substantive evidence in the form of professional reports not previously available had been submitted and had evidently been considered by the University. Whilst the outcome was the same, a decision had been taken upon the basis of the new material and a reason given for rejecting the request to re-open upon the basis of it: that reason was that the new evidence was not regarded as relevant to the issue.

165. To summarise the submission for the Claimant: the University's letter of the 23rd March 2012 acknowledged that the University had a discretion in exceptional circumstances to re-open a case, if presented with new evidence, even after a Completion of Procedures letter has been issued. The Claimant had presented new evidence to it. Having the discretion to do so, the University was under a public law duty to consider whether that discretion should be exercised in the light of new evidence presented to it on behalf of the Claimant. Thus the University's refusal to reconsider was a new decision quite separate from its earlier decision of September 2011.

166. For the second, third and fourth Interested Parties, Mr Glenister pointed out that their complaints have all been suspended by the OIA which is awaiting the decision in this case on the 'fresh decision' issue. In each case further medical evidence has supported a contention that the particular Interested Party complainant suffered a disability at the relevant time, but that evidence was obtained after each respective Completion of Procedures Letter. In this regard, counsel submitted that a decision by the University not to re-open an appeal where there is fresh medical evidence must constitute a fresh decision for the purposes of review by the OIA, for the reasons given on behalf of the Claimant and summarised above.

167. Making reference to the circumstances where a case may be re-opened as described by Mr Siesage, Mr Glenister contended that the fact that it is admitted that there is such a discretion to re-open is itself a strong indication that the refusal to re-open in the case of the Claimant should be deemed a fresh decision by the University. There was, counsel submitted, a lack of consistent explanation of what amounted to 'exceptional circumstances' by Mr Siesage. The attempted definition was of little assistance: *"… proven circumstances which could impugn the University's original decision …"*

168. Reference was then made to the case of Mr Wijesingha, where the University was prepared to, and did, re-open the case and admit medical evidence after the completion of procedures letter had been sent. To all appearances, Mr Glenister submitted, the University had treated both the Claimant's and the

Interested Parties' cases inconsistently with the case of Mr Wijesingha when dealing with the discretion to re-open, and its acts or omissions in doing so should be amenable for review by the OIA.

Conclusion on the fresh decision point

169. I accept that the University's letter can in part be regarded as being consistent with a stance that its decision simply stands. However, the University included the sentence:

> *"The subsequent material supplied by [the Claimant] is not relevant to the issue of whether the decision of the TCRP should be set aside."*

Although no more detailed explanation or reasons are given, it is clear from the context that the mind of the responsible individual at the University had been applied to the question of whether or not the psychiatric and psychological reports would be likely to alter a decision that the Claimant was "a weak student." The words used "*not relevant to the issue"* are in themselves a clear indication that the material has been examined and that someone, having given thought to it, has made the decision that it is not relevant. The Claimant's side strongly disputes the proposition that the material is "not relevant," of course. The question is obviously one which is open to debate.

170. The University's determination of the point seems little different from a ruling by a court that evidence is inadmissible if it is irrelevant. In order to make the ruling, thought has to be given to the material, and a conclusion reached. By any normal use of English that is a "decision." The University was not simply giving the same answer to the same question, as in the case of *Field*. It applied its collective mind to new considerations placed before it and reached a conclusion. Thus in my judgment the response of the 22nd August 2012 was an "act" of a qualifying institution within the meaning of Section 12 of the HEA, which was reviewable by the OIA.

171. If I am wrong as to that, however, and the response was either to ignore the new evidence or to refuse to consider it, such conduct was at least arguably "an omission" within the terms of the statute. In this case it cannot be said, and it has not been suggested, that the University ignored the new evidence. The possibility of an omission is another matter. Mr Newton QC drew my attention to some *dicta* of Lord Hoffmann in the case of *Stovin v Wise* [1996] AC 923, at 950B, where he said,

> "A public body almost always has a duty in public law to consider whether it should exercise its powers …."

Universities are public bodies whose powers in respect of their graduate and undergraduate members are of profound and far-reaching significance. To refuse to exercise those powers in circumstances such as these without giving clear and cogent reasons would in my view constitute an omission which should be capable of review by the OIA.

The 'response to suggested mediation' point

172. The OIA said that it would not be "proportionate or appropriate" for it to engage in a further review having invited the University to consider an alternative resolution of a complaint when such an invitation has been declined "*without engaging any further process to consider the merits*" of the student's case. The prospect of "*triggering a new review process may deter universities from engaging positively with the OIA's early resolution initiatives.*"

173. No explanation was given as to how this would prevent the response of the University from being a reviewable act or omission under the relevant statutory provisions. No 'without prejudice' shield can arise, nor, in fairness, was it suggested by counsel that it might. I reject the submission that it would not have been proportionate or appropriate to engage in a further review, if the circumstances were in the judgment of the OIA otherwise exceptional.

The point that similar applications by other students showed that the Claimant's case was not exceptional.

174. Whilst this point was made in her written submissions by Ms McColgan it was not developed at length by her in argument. It is of course possible to conjecture that many students in circumstances such as these, threatened with the same disastrous consequences for their careers, may assert that their individual claims are exceptional. Every individual's case nevertheless demands individual and scrupulous attention. The fact that some or many such assertions may be found, on examination, to be unmeritorious cannot be regarded as a logical means of determining whether any particular individual's claim within the cohort is in fact exceptional.

The other points: time limit; the Student Agreement; failure by the Claimant to obtain contemporaneous medical evidence and failure to explain any reason for not doing so.

175. These points may in my view be dealt with together as they are all features which may be considered in the light of the University's exceptional circumstances test, the review of that by the OIA, and when considering the application of the OIA's own exceptional circumstances test.

176. The OIA's own exceptional circumstances test was not one which was qualified by any particular words in the way in which the University's test is. It is for the OIA to take account of all the circumstances, and drawing on its own experience of higher education to come to a considered decision as to whether (in this case) it is "appropriate" to accept a complaint about a fresh decision. Here, the OIA took the view that there was no fresh decision to review, but if there were, the circumstances were not exceptional. As I have made clear I do not agree with all the reasons which were given for that view. However, I am not persuaded that the OIA reached an unreasonable final conclusion on the University's refusal to re-open the Claimant's case, for two main reasons. Both relate to the question of "exceptional circumstances."

i) First, the OIA took great care to examine the history given by the Claimant herself when it considered the question of the submission of the medical evidence to the University after expiry of the time-limit, and in particular whether or not the case was exceptional in the sense that the first inkling of a depressive illness had emerged after the expiry of the time limit. The Claimant was at all material times aware of the requirements of the University, and of her responsibilities as a medical student, to take appropriate action in relation to any concern as to her own health, physical or mental. That she was a perceptive and resourceful medical student was demonstrated by her discovery and pursuit of the pharmacological explanation for her father's aberrant behaviour. The Claimant had not told her GP, but had twice spoken to Dr Hales about being depressed. In dealing with the issue of her failure to report her concerns for her own mental health to her GP, the OIA noted that the Claimant said she did not wish to mention her depression because of a perception that she might be considered weak. That was her decision. The OIA, in considering the question of exceptional circumstances, in my view rightly took the view that she had to accept the consequences of having taken that decision. The case was not analogous to the truly exceptional case where a student's poor performance can be shown to have been caused by some serious but unsuspected and undiagnosed condition which is first discovered after failure in examinations.

ii) The second significant finding of the OIA with which I agree is as follows. In the absence of compelling evidence showing that the Claimant's undiagnosed disability might itself have prevented her from engaging with the relevant procedures at the correct time, the University had no obligation to consider waiving its time-limits for the submission of evidence. The first report from Dr Jamil, produced months after the Claimant had ceased to be a student, did not contain the suggested explanation for her failure to bring her depression to the attention of the University. That appeared for the first time in the second report which was not made available even to the OIA until long after its final decision, notwithstanding the fact that the Claimant had been alerted as early as February 2013, on receipt of a second (provisional) 'Complaint Outcome,' that the OIA then took the view (rightly or wrongly) that the University was entitled not to have treated her as disabled at the time its decisions in her case.

177. I should mention that it seemed to me from some of its phraseology that the OIA had reservations as to the soundness of the report on dyslexia. Such reservations were not clearly explained. The same points could not be made about the dyslexia report as were made about the psychiatric evidence. However, the dyslexia report was produced at a very late stage indeed: over a year after the Claimant had failed the Year 2 QE. The University made the point that finality is an important consideration, and the OIA agreed. It does not seem to me that the OIA could be said to have been unreasonable, irrational or unfair in taking the view that the University were thus entitled to find there were no exceptional circumstances, and to decline to exercise its discretion. As a matter of objective fact, (although I should emphasise that

this was not a point made or relied upon by the OIA) the most emphasised reasons given, time and again, for the Claimant's poor performance were her *absences* from academic sessions, and not any difficulties in studying when present.

178. In the result, I have concluded that the OIA's decision in these respects discloses no error of law.

The floodgates

179. At one stage a tentative, almost unspoken suggestion was made that were judicial review to be granted in this case on the 'fresh decision' point, that might open the floodgates to spurious claims by failed students who might then obtain psychiatric reports, with the effect that the University should have to make a fresh decision when faced with any case of alleged lately-acquired evidence. That is wholly unlikely, in my view.

180. Such a fear makes the questionable assumptions, first, that unusual numbers of students will fail their examinations, a significant number of whom would then, secondly, be able to persuade consultant psychiatrists to provide reports explaining their failure.

181. 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. Whether the case of any one of the Undergraduate Interested Parties falls into that category is not an issue which is before the court.

182. In the instant case, without explaining its reasons, the University said that such evidence as the Claimant produced was not relevant. For the reasons given above, I have concluded that the OIA correctly found that the Claimant's application based on the new evidence did not pass the University's exceptional circumstances test, and therefore judicial review will not be granted to her upon this ground.

Academic judgement: the Claimant's submissions

183. On behalf of the Claimant the following submissions are made.

i) The statutory prohibition applicable in this case should be co-extensive with the area of non-justiciability accepted by the courts (a point which was made as a submission by counsel to Males J and noted by him at paragraph 50 of *Mustafa*. Males J said that while the submission had force, it was not necessary for him to decide the point.)

ii) The immunity (or exclusion) applies to a purely academic judgement (*Persaud* per Chadwick LJ at para. 41) where the central subject of the complaint is a dispute about an academic judgement (Judge Gilbart QC in paras. 96-97 of *Cardao-Pito* and Males J. in *Mustafa* para. 51). The basis of the immunity as explained in *Clark* and elsewhere is that the

courts are not well equipped to deal with matters of academic judgement. As Langstaff J. said in *Hamilton* para. 11 "it is for the examiner and not the court to mark a paper, for instance."

iii) It is the nature of the judgment which determines whether the judgment qualifies for the label "academic" (per Males J. at para. 52 in *Mustafa*).

iv) It is the nature of the complaint that must be "focused on" by which the court should determine whether or not its central subject is a dispute about an academic judgement. The statutory exclusion of OIA jurisdiction applies "to the extent" that the complaint relates to matters of academic judgement. The key to answering this question is whether the issue raised is one which the court regards itself as competent to determine (see the comment of Males J. at para. 49 of *Mustafa*). If the court does regard itself as competent to determine the issue raised, the basis for the immunity, that "any judgment of the courts would be jejune and inappropriate" (Sedley LJ in *Clark*), falls away.

v) Thus the purported exercise of academic judgement cannot be challenged simply by a complaint that it was wrong. What is required is a complaint supported by objective evidence (see Langstaff J. in *Hamilton* at para. 11) that the decision maker made his decision:

a) As a result of bias (see Gray J. in *Van Mellaert* para. 25) or as a result of any other motive or prejudice that renders a decision unfair (per Langstaff J. in *Hamilton* para. 11; per Males J. in *Mustafa* para. 52; per Underhill J. in *Moroney* para. 26); or

b) Where there has been unfair process (see Males J. in *Mustafa,* para. 51; Chadwick LJ in *Persaud* para. 41) or procedural unfairness (see Gray J. in *Van Mellaert* para. 25); or

c) Where a matter has not been taken into account which was essential for a fair and proper decision, as where an examiner gives an essay a mark without reading it all;

d) Where any reasons given by the decision maker show the decision to be unreasonable or irrational or perverse (see Judge Gilbart QC in paras. 96-97 of *Cardao-Pito*; and Males J. in *Mustafa,* para. 52).

On behalf of the interested parties, Mr Hamilton for the University did not dissent from these propositions, and Mr Glenister for the other interested parties expressly adopted them as correctly stating the law.

Academic judgement: the submissions for the OIA

184. Ms McColgan for the OIA accepted that these propositions of law were sound, except, I understood her to say, insofar as the matters set out in sub-paragraph (5) (d) immediately above suggested the possibility of broader

grounds for review of an academic judgement than that contemplated in *Moroney*.

185. Ms McColgan drew attention to the point that Underhill J, as he then was, "upheld a strike-out decision" which depended in part on a challenge to the award of zero to one of the claimant's papers. The claimant in that case is recorded as having claimed that "such a mark is perverse and cannot represent a bona fide exercise of academic judgement". Underhill J, having decided that it was not "even arguable that the mark was perverse or given in bad faith", went on to say that it may have been harsh, but once it had been established that the mark was given in the exercise of a *bona fide* academic judgement, it is incapable of being challenged by review either by the OIA or by the court. Ms McColgan emphasised that the concept of 'academic judgement' demanded a narrow definition.

186. It may be helpful to set out in fuller terms the paragraph in the judgment of Underhill J from which these observations are taken (emphasis in italics added) :

> "26. … the Claimant complains of being given a mark of '0' on one of the components in his coursework on Research in Clinical Practice: the recorded mark of 33 is the product of marks of 0 and 65 on the two papers which he submitted. He says that such a mark is perverse and cannot represent a *bona fide* exercise of academic judgement. *I have been shown the paper and the comments of the tutor marking it. These show quite clearly that the tutor reached a reasoned conclusion that the paper submitted, which was supposed to be the write-up of an experiment using statistical analysis, simply failed "to communicate your findings to others in a form that they can understand": looking at the paper, it is not necessary to have an understanding of statistical method to see that this was a conclusion which was open to him.* I do not therefore think that it is even arguable that the mark was perverse or given in bad faith. It may have been harsh, but that is another matter: once it is established that the mark was given in the exercise of a *bona fide* academic judgement, it is incapable of being challenged in this Court (and also, under the appeal regulations, by way of internal appeal). I note that a challenge to a mark of zero was held to be non-justiciable on essentially these grounds in *Clark* (see *per* Sedley LJ at pp. 1992G - 1993A)."

<u>Conclusion on co-extensivity of areas of non-justiciability</u>

187. On the first issue: whether the area of statutory academic decision immunity should be co-extensive with the area of non-justiciability accepted by the courts, I respectfully agree with Males J that there is force in the submission to that effect. It would be a surprising anomaly if there were complaints which

the courts could consider but the OIA could not, or *vice versa*. No argument to the contrary was advanced, nor any reason why, in this case, the various principles to be derived from the authorities should not be applied by the OIA when considering whether or not a decision was open to its scrutiny and review.

188. Those principles may in my view be summarised for the purposes of this case as follows:

i) The immunity (or exclusion) applies where the central subject of the complaint is a dispute about an academic judgement. Although the OIA is, by definition, an independent adjudicator in higher education matters which is entitled to consider acts or omissions of institutions such as universities on the basis of the materials before it, drawing on its own experience of higher education, questions of what class of degree, or whether a student has passed or failed an examination, for example, are matters solely for the judgment of examiners within the relevant discipline. As Langstaff J. said in *Hamilton* "it is for the examiner and not the court to mark a paper".

ii) Not all judgements which academics have to make qualify for the immunity. Nor can an academic institution expect that any claim for academic judgement immunity will be accepted uncritically. The nature and extent of the judgement determines the point. In its scrutiny of the relevant decision, the court (or the OIA) should consider whether the decision is of a purely academic nature -- such as a dispute over a mark, or the class of degree awarded -- or whether the academic extent of the decision is only one element of it: as where, for example, the complaint relates to procedural unfairness in reaching the decision, or to an allegation that extraneous or irrelevant matters were taken into account by the decision-maker. A gross example would be where there is evidence that impropriety has occurred, such as an examiner purporting to mark a paper without reading it all.

iii) On the assumption that the complaint is one made not to a court but to the OIA, as here, if there is objective evidence of matters which suggest procedural unfairness, bias, impropriety, or the kind of administrative irrationality or perversity which the court can and does consider in many other fields, then the OIA may properly regard a complaint to it against a university's decision as one which it is competent to determine, notwithstanding the academic context within which, *ex hypothesi,* it arises.

This summary might usefully be compared with the much more concise statement made by the OIA of what it regarded as its function at paragraph 93 above, 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.

Application of the relevant principles of law

189. In order to apply the principles set out above, in my view the decisions successively of (1) the APC, and (2) the TCRP, demanded separate and

consecutive consideration by the OIA. The TCRP had effectively said that it should not interfere with the academic judgement of the APC, although Prof White made it clear that if there had been some basis for interfering the TCRP *could* do so, and he asserted that the Panel *had* critically considered whether there was any such basis, but had concluded that there was not.

190. The first matter open to scrutiny by the OIA was the nature of the decision of the APC: it was not sufficient for a claim to be made by the institution that its decision is an academic judgement. The point had to be evaluated critically. The question for the OIA was whether the Claimant's complaint in respect of the decision of the APC, that the Claimant's prospects of successful completion of the course were poor was not a qualifying complaint *"to the extent that it relates to matters of academic judgement."*

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 judgement 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 per cent 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.

192. To adopt the words of Chadwick LJ, in *Persaud* (at paragraph 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 judgement 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 judgement, 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.

(1) The OIA's consideration of the APC stage

194. What, therefore, *was* the process by which the APC undertook its determination?

i) It considered the Claimant's Academic Record which showed the results of the assessments and some notes of mitigating circumstances.

ii) It had no material before it from any tutor, personal or academic, and therefore did not consider any. Ms McColgan confirmed at the hearing that at the time when the OIA made its final decision, it was aware of this fact.

iii) It had the Claimant's presentation of her mitigation in respect of Year 2. She did not present any mitigation in respect of Year 1.

Moving on to consider the three criteria for permission to re-sit the year,

iv) The members of the APC were satisfied that the Year 2 mitigation was established.

v) They were also satisfied as to the Claimant's motivation.

vi) On the "progress" criterion they found the Claimant had been a "weak student in the past" and that she had not cited "any adjustments in learning style to help her succeed."

On the basis of point (vi) termination was upheld.

195. The observations of Underhill J (as he then was) make it clear that it is appropriate to consider whether, on the whole of the evidence, a *bona fide* academic judgement has been made. *Bona fide* in this context must in my judgment mean more than simply made in good faith, in the sense of someone honestly doing his or her best. The authorities suggest that the expression must be taken to distinguish a proper decision not merely from a deliberately perverse or malicious *mala fide* judgment, but also from one which is not the product of fair process, or, put another way, one which is made following procedural unfairness. The same may be said of a decision which has not been made with a properly reasoned approach, taking account of relevant matters and ignoring the irrelevant.

196. Dr Hales in my view made a valid point in respect of what he himself, a senior member of staff at the University, regarded as the illogical and unfair step taken by the APC in making the "*weak student in the past*" finding by taking into account performance in the first year without balancing against them the first year mitigation. In his view, the APC should have disregarded poor performance, and instead found, as Prof White put it at the TCRP that *"that was remedied in Y1 QE"*

197. It is clear from paragraph 26 of the Decision (set out at paragraph 96 above) that the decision-makers at the OIA did not grasp this point, which was being made to them by both the Claimant and Dr Hales. They therefore did not

consider it applying Chadwick LJ's test, by asking themselves, 'has the process by which it was determined that the Claimant should not be allowed to repeat Year 2 failed to measure up to the standard of fairness required of the University?' This has an obvious bearing on the extent to which the University's decision was to be regarded as an 'academic judgement.'

198. Moreover, a properly reasoned or 'rational' approach, in conventional administrative law terms, is one which takes care to ensure that all relevant matters are considered, and that no irrelevant matter is taken into account, and that the decision is adequately explained. The principles to be found in authorities such as *Clark, Persaud, Cardao-Pito* and *Mustafa* lead to the conclusion that if, on the evidence, an 'academic judgement' was, or may have been, partly based on irrelevant considerations, it would be nevertheless be open to review. It would be a surprising exercise in irony if a respectable academic institution attempted to defend a decision made by it which took account of irrelevant considerations, or failed to take into account relevant considerations, by saying that, as an 'academic judgement,' it needed no further explanation, and was immune from review.

199. In the result, it seems to me that there was evidence before the OIA in the form of the Claimant's accounts and the Hales Reference which suggested that the decision of the APC was at least arguably irrational, or procedurally unfair, or both, and was therefore open to review by the OIA, and that no academic judgement immunity applied to the decision.

(2) Consideration of the decision of the TCRP by the OIA

200. Moving on to the second stage of the University's decision-making which the OIA had to consider, it should have been clear to the OIA that the TCRP relied heavily upon the APC's assessment of future prospects and made no critical evaluation of its reasoning. The contemporaneous notes of what the Chairman, Prof White, said at the time are the clearest evidence of this:

> "*You're asking us to second-guess the medical educationalists and say they are wrong*.
>
> *We need something to base such a decision on.*" [HB 130]

Prof White in his witness statement, obtained on the last day of the hearing, denied that they had simply "*rubber stamped*" the decision of the APC, yet stated that the assessment of the Claimant's academic ability and prospects of completing her course were "*uniquely a matter for the APC.*" He did not satisfactorily explain how this distinction made any real difference.

201. There was no evidence of substance before the OIA that the TCRP had actually made any independent attempt to make an assessment of the matter. The fact that the TCRP had an agreed summary of the Claimant's academic history cannot alter the fact that the Claimant made it quite clear, when she was before the TCRP, and to the OIA, that she was disputing the validity of the reasoning leading to the conclusion of the APC as to her ability to complete the course. That issue was raised fairly and squarely. The fair and objective

resolution of it by the OIA demanded an analytical approach, which in my view was not demonstrated in the decision under challenge.

202. Reasoning apart, fairness of the procedure adopted was a point to be considered. The OIA were well aware of the ground rules under which the TCRP had purported to proceed, including those which stated that:

> *"1. ....The student's personal tutor ... will be invited to attend..."*
>
> *"3.3 The personal tutor's role is to guide the student through the appeals process and to provide the Panel with any relevant information about the student's personal history." (HB 149)*

The personal tutor was not invited to attend by the TCRP. There was no evidence before the OIA to suggest that he had been. On the face of it there was therefore a breach of the Panel's own rules. There was no evidence before the OIA that the Panel considered what reason there may have been for the non-attendance, nor what procedural step to take in light of his absence, nor of any enquiry of the Claimant as to what she wished to happen in view of the breach of procedure.

203. That those at the OIA were aware of the basic point before embarking on the making of the decision, and were also aware of its importance and significance, is clear. At one stage concern was expressed by the OIA about the matter, when it said that in the circumstances it did not feel able to make a Formal Decision: see paragraph 76 above. Ms Nuckley at the OIA had mentioned, amongst other points that,

> *"I have also noted that her personal tutor was not in attendance at either meeting, and that statements from him and another tutor appeared to express confidence in [the Claimant]'s ability to pass the course."*

What is not clear from its decision, however, is how that concern of the OIA was resolved, if indeed it ever was resolved.

<u>The significance of Dr Nandakumar's letter</u>

204. The letter Dr Clarke had written about the Claimant may have been in fairly general terms, and it was a fact that he had been the Claimant's personal tutor for a short period. The same could not be said, however, of Dr Nandakumar. Dr Nandakumar had lengthy experience of the Claimant, and was in a position both to judge the Claimant's academic ability, her aptitude for medicine, and her ability to complete the course, as a result of direct personal observations he had made whilst teaching her. His letter to the Panel was placed before them. It was inconsistent, and obviously inconsistent, with the view of the APC. A fair-minded person looking at that letter might have found the inconsistency, at the very least, a matter for comment, especially if (as the OIA believed) it was suggested that both letters had been considered by the TCRP and dismissed without comment.

205. Quasi-judicial bodies like the TCRP, taking decisions of crucial and far-reaching significance in the lives of those affected by them, are undoubtedly aware of the desirability of mentioning obvious inconsistencies and of making clear the reasons for discounting them, or for otherwise finding them explicable, or of no importance. The Chairman of the TCRP implicitly at least acknowledges in his witness statement that it was aware that the letter of Dr Nandakumar had not been before the APC, but Prof White does not say in the witness statement that the TCRP gave any reason at the time for dismissing Dr Nandakumar's clear views, and he gives in it no explanation now:

> *"The letter of Dr Nandakumar… was before the TCRP and was considered by it." (paragraph 7)*
>
> *"In summary, the TCRP weighed the mitigation evidence against the academic evidence and concluded that even allowing for the mitigation, the academic prognosis was unsatisfactory; that the APC's decision should not be overturned; and that accordingly the decision to terminate should stand." (paragraph 9)*

As I mentioned at an earlier stage, in the absence of any such explanation, counsel for the OIA speculated, (and candidly accepted that it was a personal speculation) that a reason for the TCRP's failure to take notice of the letter might be that Dr Nandakumar had on other occasions written supportive letters for weak students in order to assist them, out of the kindness of his heart. I decline to engage in such speculation. There is no evidence to support the suggestion, and the very idea is in conflict with the terms of his letter, and with his standing as a member of the professional medical teaching staff at the University, and at Guy's.

206. As an illustration of the potential significance of the University's breach of procedure in not inviting Dr Clarke to the meeting, it is much less speculative to ponder what the effect of Dr Clarke's letter would have been if it had been made available to the TCRP (as it was to the OIA). This may be of significance in any assessment of whether the presence of Dr Clarke, or even sight of his letter, would have made any difference to the decision. It is certainly conceivable that if read in combination with Dr Nandakumar's letter, the document from Dr Clarke might have been regarded by the TCRP, in Prof White's words, as "*something to base such a decision on.*" The TCRP would have had evidence in the form of letters from two members of the Medical School's teaching staff (themselves therefore "medical educationalists") which contradicted the view of the APC on the single essential issue, that the Claimant's future prospects were poor. The reasons for the letter not being made available were that (a) Dr Clarke, himself a senior member of the University, had sent it in too late; and (b) the University's administrative officer refused to pass it on.

207. No explanation was given in evidence for the University of the failure to consider Dr Clarke's absence, despite two witness statements having been taken from Prof White after the case for the Claimant had closed. The OIA were aware of the absence of Dr Clarke from the hearing. They were not

aware of the circumstances regarding the letter, nor of the error generally, which are points which now require consideration.

Error of fact

208. It is beyond doubt that the OIA reached its decision on the factually erroneous basis that Dr Clarke's letter was before the TCRP, an assertion made by the University. The OIA was not merely unaware that that assertion was false, they also did not know (because neither the Claimant nor the University had informed them) that as a result of an administrative decision by a member of the University staff, the letter had been received by the University but not sent on to the TCRP so that it might have considered it before making its decision final. In my view the evidence of material errors is admissible under the requirements of the case of *E,* and the recent case of *Reg.* (*Burger) v OIA & anor* [2013] EWCA (Civ.) 1803.

209. It is therefore necessary to consider whether knowledge of those errors might have affected the decision of the OIA. Approaching the matter with the caution and circumspection demanded by the Court of Appeal in the cases of *Siborurema* and *Maxwell,* I have come to the conclusion that, taking account of all the circumstances, it is not possible to be satisfied, particularly in view of Ms Nuckley's remarks quoted above, that the OIA necessarily would have come to the same conclusion if it had known the true situation. Whilst it was aware of, and concerned about the absence of the personal tutor in particular, it thought that the letter from him was before the TCRP. It is not necessary for the Claimant to show that the decision would inevitably have been different: see, for example, the observation of Elias J, as he then was, in the case of *Reg. v Chelsea College of Art & Design, ex p. Nash* [2000] ELR 686, when, after making reference to *Lake District Special Planning Board v Secretary of State for the Environment* [1975] JPL 220, and *Reg. v Secretary of State for the Environment, ex p. Slot* [1998] JPL 693 he said, at p. 698, paragraph 50, that,

> "*I cannot say in this case that all risk of unfairness was eliminated. Accordingly, I consider that there was a breach of the principles of fairness …. It has been urged on me that even if there were defects in the procedure they would have made no difference to the outcome. This is an argument that is very rarely accepted by the courts, for obvious reasons. It must be in the very plainest of cases, and only in such cases, where one can say that the breach could have made no difference. In my opinion it is not possible in this case to say that the committee's decision would inevitably have been the same even if the committee had acted in accordance with its legal obligations.*"

Refusal to re-consider at the hearing

210. When asked at the hearing to re-consider on the basis of the true position, when the confusion was finally explained, and in far from ideal circumstances,

the OIA said that it did not intend to do so. I do not think it appropriate to regard that as a further formal decision which should be subject to judicial review, despite the invitation to do so by the Claimant. In the light of my overall conclusion it is unnecessary to do so. The three-year period outside which the OIA will not normally consider a complaint under its Rule 4.5, should not in my view prevent it from taking any point into account, however late in the day it emerged. Given the extraordinary efforts which have now been made on all sides to un-knit the knots and unravel the tangled threads of this unusual case, it would seem entirely appropriate for the matter to be re-considered afresh on the basis of the correct facts.

Overall conclusion on the Decision of the OIA

211. The first complaint against the OIA is that it failed to deal with the alleged invalidity of the 'weak student' finding, despite the fact that the issue of such invalidity was raised, clearly and unequivocally in the original Grounds of Complaint, in the exhibit to the Addendum Grounds and in the Hales Reference. It was not possible therefore to confirm that the decision-maker had demonstrated any application of his or her mind to that point: instead it was by-passed. The OIA purported to deal with it by finding no basis for the complaint that the Claimant was "rudely interrupted." There was internal University documentation, in the combined notes of the APC and the TCRP which were available to the OIA, which could be said to be evidence that the Claimant's complaint was a point of substance. Moreover there was evidence that procedural errors were made at both University hearings which may have led to unfairness, quite apart from those errors only revealed after the Decision was given.

212. Dr Hales was trying to make the point both at the APC and the TCRP that it was irrational and unfair to count a point in twice, so to speak. If the Year 1 poor performance was remedied by the pass in the qualifying examination it should not have been counted back in by the APC to reach the conclusion that her future prospects were poor. Dr Hales said that he was cut off when trying to explain, so that the Claimant was not allowed to make the point, and that is credibly reflected in the secretary's notes. That, at least, may have been procedurally unfair.

213. Dr Hales' evidence in the Hales Reference certainly made it quite clear that he regarded what happened at the TCRP as irregular, improper, and procedurally unfair. He is himself a senior lecturer in the Medical School and a senior member of the University. He had no reason to say what he said if there had not been any such irregularity. In my judgment the OIA should have addressed these concerns in the decision. It did not do so. Had the OIA addressed them, it may very well have come to the conclusion that "*there was … unfairness … in the decision-making process*" at both the APC and the TCRP.

214. The same conclusion may also have been reached had the OIA been aware of the fact that Dr Clarke's letter was not before the TCRP, and that a unilateral decision had been made by the University that it had arrived too late to be placed before it.

Procedural unfairness in respect of the letter of 11 June 2013

215. Finally, the Claimant's submission was that the OIA had told the Claimant in its letter of 8th May 2013 that she would have an opportunity to read and comment on any submissions that the University made, before the OIA made its final decision. In fact the OIA did not send the 11th June 2013 letter to the Claimant and did not give the Claimant an opportunity to comment on the submissions made as to the availability of a formal appeal procedure. This, it was submitted, gave rise to significant procedural unfairness in that the Claimant was prevented from adducing further submissions and evidence to show that the University had in other cases re-opened its internal procedures after the Completion of Procedures, and to explain the reasons for failing to produce the new evidence during the University's appeal procedures. Had the Claimant been made aware that the OIA intended to proceed to making a final decision in June 2013, she would have ensured that any further evidence and submissions were supplied before it embarked on taking that decision.

216. The riposte of the OIA is that the Claimant was already aware of the University's general policy as set out in the letter of 11 June 2013 from numerous letters to her from the University itself before that date. As to the suggestion that the University's occasional willingness to reconsider matters post-termination of registration is inconsistent with its general policy as set out in the letter of 23 June 2013, it is on the contrary of the essence of a review which may be conducted in exceptional circumstances that such a review may be conducted. There was, accordingly, no inconsistency between the "general policy" articulated by the University in its letter of 11 June 2013 and the existence of cases in which it had, or would, re-open its decision-making on receipt of fresh evidence. All this being the case, there was no basis for the assertion that the Claimant would have adduced evidence of the University's allegedly inconsistent practice with other students in advance of the OIA's Formal Decision had she been made aware of the letter of 13 June 2013. She was already aware, and had been so from at least March 2012, that the University's general policy was not to re-open matters post-termination, but that in exceptional cases, such as the disclosure of significant new evidence not previously available, it could so re-open.

217. In my view, in this case, as in *Siborurema*, any procedural failure on the part of the OIA in failing to send the letter of 11 June 2013 does not require the OIA's Formal Decision to be quashed. There is here, as there was there, "no real possibility" that, had it been sent and had the response suggested by those acting for the Claimant followed, any truly significant point would have been raised which would materially have affected the OIA's decision. There is in my view no substance in the Claimant's submissions on this ground.

Comment on the difficulties faced by the OIA

218. Having made such criticisms of the decision-making process as I have, I must temper them with an expression both of sympathy for the OIA in its difficulties in considering this case and admiration for its pertinacity in attempting to achieve a settlement. It must be obvious that the developments in the case were taxing and time-consuming, but all the correspondence shows

a genuine concern, patience, and a great expense of energy at the OIA in attempts to bring about an amicable conclusion by those who dealt with the matter. Had the matter remained as clearly stated in the original grounds of complaint, and had the University supplied it with completely accurate information from the beginning, the focus would have remained clearer. Instead, complications were introduced including the new evidence, complaints about alleged breaches of the Equality Act 2010, and other matters, which understandably shifted that focus. The OIA did its best to cope with a case which, in hindsight at least, may have expanded unnecessarily in certain respects over many months.

Ruling

219. In my judgment it was open to the OIA to look critically at the assertion that the decision was immune from review as an academic judgement. It was open to the OIA to consider "the extent to which" the decision was *not* made on purely academic grounds. In doing so, it should have considered such failure by the University to take relevant matters into account as it may have found had occurred. That would have involved scrutiny of the fairness of the process in the different respects referred to above and also of the reasoning which underlay the decision of the University. It remains open for them on a further review of the case.

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. The case is not made out, in my view for a mandatory order, as sought in the prayer for relief. I quash the Amended Complaint Outcome and remit the matter to the OIA for it to re-consider the complaint, both as it was originally made, and in the light of the conclusions in this judgment on the issue of 'academic judgement' and of the true facts as they are now accepted on all sides. To that extent this application for judicial review succeeds.

19th December 2014