FITNESS TO PRACTICE AND DISCIPLINARY PROCEEDINGS IN UNIVERSITIES

Notes for discussion group

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A. The relationship between students and universities

1. This is a "hybrid" relationship "governed partly by contract and partly by the principles of public law enforceable by way of judicial review" (McManus, Education and the Courts, 3rd Edition, 2012, para 8.7).

2. It was held in *Clark v. University of Lincolnshire and Humberside* [2001] 1 WLR 1988 that universities are public bodies whose decisions are amenable to judicial review (albeit by concession).

3. The rapid transformation of higher education provision in (particularly) England raises some issues about this. Consider, for example:
    a. The former division between universities established by Royal Charter and "new" universities now seems to have little meaning. However, in what way are universities "public" if almost all of their fee income is paid privately, even if the students are in fact using publicly funded loans to do so. Their public status might derive from their origin, their regulation, other funding or their governance, but is no longer as obvious as it was.
    b. There are increasing numbers of private providers. The University of Buckingham was granted university status by Royal Charter in 1983. There are three other private universities, including the University of law (the former College of Law) and BPP University (owned by an American for-profit provider).

4. There is clearly a contractual relationship between students and universities. Students now pay fees of £9,250 pa for home students and significantly more for overseas students (for example up to £30,540 pa at Oxford). Contractual terms may be hard to identify but will include the college's/university's statutes and regulations and perhaps the prospectus/ handbook. There are also implied terms, such as the duty implied by s.49 Consumer Rights Act 2015 that a trader

must supply a service to a consumer with reasonable care and skill. The difficulty of identifying contractual terms in these cases was demonstrated in *Chilab v. King's College London* [2013] ELR 339, para 11.

B. Types of claims against universities

5. These include:
    a. Claims for breach of contract, including failing to provide the course as set out in the prospectus will breach of implied terms.
    b. Claims for the negligent provision of education, either in tort or contract.
    c. Claims under the Equality Act 2010.
    d. A wide range of public law claims, listed below.

Contract claims

6. In *Siddiqui v. University of Oxford* [2016] EWHC 3150 Kerr J categorised claims for negligent educational provision, brought in contract or tort, into 3 categories: academic judgment, negligent teaching and "simple operational negligence" (paras 41-46). The first was not justiciable[1], the second would require expert evidence and the third dealt with errors such as not teaching the syllabus, cancelling classes or a teacher being drunk or asleep (see also *Abramova v. Oxford Institute*).

7. That last category is often used as the classic example of the sort of claim which could be brought against an independent school. Indeed, every few years there is a story in the newspapers in June where an independent school is said to have taught the wrong syllabus to a GCSE class.

8. Disciplinary procedures have express procedural requirements and will be subject to an implied requirement to conduct the proceedings fairly. It is possible for a student to seek damages for breach of these provisions.

9. There is a boundary between contractual and public law claims. The latter are subject to a strict time-limit and the permission filter. It can be an abuse of process to bring what is really a public law challenge by way of breaches of implied contractual terms:

[1] See *Clarke v. Lincolnshire and Humberside* and *Mustafa v. OIA*

> *… This focuses attention on what in my view is the single important difference between judicial review and civil suit, the differing time limits. To permit what is in substance a public law challenge to be brought as of right up to six years later if the relationship happens also to be contractual will in many cases circumvent the valuable provision … that applications for leave must be made promptly and in any event within three months of when the grounds arose, unless time is enlarged by agreement or by the court...*
>
> *Clark v. University of Lincolnshire and Humberside* [2001] 1 WLR 1988 para 17

Equality Act claims

10. Higher education institutions are covered by a broad proscription of discrimination, EA 2010, s.91 (other than in respect of marriage and civil partnership, s.90 EA 2010).

11. Claims relying on EA 2010 are brought either as part of a challenge in judicial review or to the County Court. The time limit for bringing a claim to the County Court is extended from 6 to 9 months if a complaint is referred to the OIA within 6 months of the act complained of (s.118 (2) EA 2010). Time can also be extended to 8 weeks after the conclusion of ADR proceedings (s.140AA EA 2010).

12. That time extension derives from directive 2013/11/EU, the ADR directive. The OIA has been approved as the consumer Alternative Dispute Resolution body for higher education pursuant to the ADR directive. That directive requires that member states must ensure that recourse to non-binding ADR does not prevent a party from "initiating judicial proceedings in relation to that dispute as a result of the expiry of limitation or prescription periods during the ADR procedure" (article 12).

13. The ADR directive does not apply to public providers of further or higher education (article 2(2)(i) – but what are they?). However, the implementing regulations deal with all providers of higher education together and involve at least two amendments to primary legislation[2]:
    a. Section 140AA (3) EA 2010 extends the time limit in county court claims under EA s.118 (which includes education claims) to 8 weeks after non-binding ADR ends.
    b. Section 33B Limitation Act 1980 extends the time limit for certain claims to 8 weeks after non-binding arbitration ends.

[2] See Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015, SI 2015/1392

14. The purpose of the ADR directive is set out at para 45:

> *… Therefore, ADR procedures should not be designed to replace court procedures and should not deprive consumers or traders of their rights to seek redress before the courts. This Directive should not prevent parties from exercising their right of access to the judicial system…*

15. There are remarkably few (if any?) reported decisions in Equality Act claims against universities. However, they are commonly brought and are some of the easier claims to pursue. It is also common that Equality Act issues arise as part of the defence to disciplinary/FTP proceedings or as a subsequent claim. Examples of issues currently before the courts include:
    a. Whether a student with a disability required representation.
    b. Whether admitting evidence of disability beyond the period allowed in University procedures was a reasonable adjustment.
    c. Whether a maximum period for completing a degree had to be adjusted.

Public law claims

16. "The types of decisions taken by university bodies vary enormously and a great many may be subject to judicial review" (McManus, op cit, 8.19). In terms of disciplinary proceedings and FTP they include:
    a. Removing a social work student from a course because she could not obtain a work placement due to safeguarding concerns, *R v. University of West of England ex p M* [2001] ELR 77 and, CA [2001] ELR 458.
    b. Considering the expulsion of a student from a medical course on grounds of unfitness to practice, *Higham v. the University of Plymouth* [2005] ELR 547.
    c. Expelling a student for poor academic performance where "prior warning and advice" had not been given, as required by the rules, *R v. Sheffield Hallam University ex p R* [1995] ELR 267.
    d. A failure of a disciplinary panel to follow a fair procedure, *R v. Chelsea College of Art and Design ex p Nash* [2000] ELR 686.

17. Judicial review remains the most common way of challenging FTP on disciplinary decisions of universities. The case of *Crawford* (below) shows how this can be combined with a contract claim.

18. Examples of the wide range of other potential claims includes:

    a. A decision to refuse permission to hold an academic conference unless the organisers would cover the security costs, *R (Ben-Dor and others) v. University of Southampton* [2016] ELR 279.
    b. Withdrawing a CAS form, required for an overseas student to reside in the UK while studying, *R (Hassan) v. Coventry University* [2016] EWHC 654. (Private colleges – such as language schools – and universities have been common litigants against the Secretary of State in respect of their own right to grant tier 4 visas).
    c. The level of fees, for example classification as a home or overseas student, *R (Mitchell) v. Coventry University and SoS for Education and Employment* [2001] ELR 594.
    d. The decision of a university to annul the results of a student election, *R (Odusami) v. University of East London* [2011] EWHC 1256.

C. FTP and disciplinary procedures

19. All universities will have a written disciplinary procedure. This will almost certainly have contractual force. Although there is increasing acceptance of the need for formal systems there is also residual reluctance.

20. Issues common in any disciplinary procedure include:

    a. Notice of the "charge" and the evidence on which it is based.
    b. Amendment of the charge and the provision of additional evidence.
    c. Testing the evidence, including disclosure and calling witnesses.
    d. Whether representation is allowed.
    e. The standard of proof.
    f. The remit of any appellate body.

21. The position is much more complicated for students on vocational and professional courses. They are subject to fitness to practice procedures in a broad range of areas including for disciplinary offences, but also from matters which would not lead to any difficulties for students on other courses. Further, it is much more common for FTP proceedings to be based on the accumulation of small incidents over a long period of time. This raises further questions about the collection and provision of evidence.

22. Students on medical courses come into contact with patients “within a few weeks” (as the website of one medical school says). It goes on, there is a “significant increase” in that contact in years 3 and 4 and they have “supervised responsibility for patient care” in year 5.

23. The GMC has issued guidance about students and fitness to practice, “*Professional behaviour and fitness to practice*”. This includes provision that:
    a. When a student graduates with a medical qualification that amounts to a declaration by the university that the student is fit to practice as a doctor (para 17).
    b. Students with mental health conditions are often identified as they display unprofessional behaviour that is out of character. Staff should be trained to identify them at an early stage (para 37). Students should be referred to occupational health and reasonable adjustments made (paras 40 and 46).
    c. The possible reasons for fitness being impaired for students are listed by reference to those for fully qualified members of the profession (table 1 page 41 referring to s.35C(2) Medical Act 1983). Fitness should be considered when there is a risk to patients or the profession may be brought into disrepute (para 86).
    d. Medical schools should consider including on Fitness to Practice panels someone from outside the school, someone with legal knowledge and a student representative (para 116).
    e. There is guidance on fair procedure including (1) that “all parties have an equal opportunity to present evidence” (para 118); (2) that students are encouraged to have a supporter or legal representative at the hearing (para 119); and (3) student representatives should have the opportunity to ask questions of witnesses (para 121).
    f. Sanctions are not intended to punish (para 125) and panels should start with the least serious sanction and consider each sanction giving reasons for rejecting it (para 126-127). Students should only be expelled if that is the only way to protect the public and any such students should be added to the “excluded student database” (para 145).

24. Hence for students on these courses the factual situations are more complex (involving patient treatment etc) and the consequences greater.

D. Article 6

25. It can be necessary in order to conduct a hearing seen as fair in common law to allow legal representation and questioning of witnesses (*R (S) v. Knowsley NHS PCT* [2006] EWHC 26).

26. The starting point for article 6 and article 2 protocol 1 is:
    a. It is well-established that the right to practice a profession is a civil right engaging A6 (*Le Compte, Van Leuven and De Meyere v. Belgium* (1981) 4 EHRR 1). We are not aware of a case directly on the status of student doctors. However, the principle that the right to practice a profession is a civil right applies more broadly than access to the traditional professions. The Supreme Court has recognised a civil right "to practice his profession as a teaching assistant and to work with children generally" (*R (ota G) v. Governors of X School* [2012] 1 AC 167 para 33).
    b. It has been held that dismissal of a doctor does not involve a determination of civil rights and obligations because the procedures of the GMC, eg hearing oral evidence (*Mattu v. University Hospitals of Coventry* 128 BMLR 93 para 66). Those further rights do not apply for medical students at university but it could be argued that "dismissal" from a course is also not determinative of the right to practice.
    c. A system has been established to make available to all medical schools a list of excluded students. This implies that exclusion from one course is effectively exclusion from the chance to enter the profession and from all medical higher education.
    d. Exclusion from the higher education sector would engage A2P1 (*A v. Head teacher and governors of the Lord Grey School* [2006] 2 AC 363).

27. The approach at the ECtHR suggests that domestic authorities need revisiting. In *Eren v. Turkey* [2006] ELR 155 a student was not allowed to register at university despite his excellent results on the basis that these were out of line with earlier results. The ECtHR found that a broad discretion to annul results would be contrary to the rule of law and in any event did not exist in the Turkish system. The treatment of the claimant was found to be a breach of A2P1. In *Orsus v. Croatia* [2008] ELR 619 the ECtHR found that effective segregation of Roma children at school was a breach of A2P1 taken with A14 (ie the prohibition on discrimination in respect of any right in the Convention).

28. In *Temel v. Turkey* [2009] ELR 301 the ECtHR considered the suspension from university for 2 terms of 18 students who petitioned to have optional Kurdish classes introduced at the university. This sanction was over-turned on appeal but not before it had taken effect:

(7) The right to education did not in principle exclude recourse to disciplinary measures, including suspension or expulsion from an educational institution in order to ensure compliance with its internal rules. However, such regulations must not injure the substance of the right nor conflict with other rights enshrined in the Convention or its Protocols. In this case the applicants were suspended from the university for either one or two terms as a result of the exercise of their freedom of expression (see para [46]).

(8) The imposition of such a disciplinary sanction could not be considered as reasonable or proportionate. Although these sanctions had been subsequently annulled by the administrative courts on grounds of unlawfulness, it was regrettable that by that time the applicants had already missed one or two terms of their studies. There had been a violation of Article 2 of Protocol 1 to the Convention on account of the suspension of the applicants from university having been a disproportionate disciplinary measure in reaction to their request to introduce optional Kurdish language classes (see para [46]).

E. Nature and role of the OIA

29. The first port of call for a student disappointed in disciplinary or FTP proceedings is usually a complaint to The Office of the Independent Adjudicator for Higher Education (OIA).

30. The OIA is an "ombudsman-type" scheme now operating under Higher Education Act 2004 (HEA 2004). It covers about 700 institutions including those which are within the HEA 2004 and those which have voluntarily opted into its jurisdiction. It considers about 2,000 complaints each year.

31. Its processes are approximately as follows:
    a. When a complaint is first made a reviewer considers its admissibility. In broad terms the OIA does not consider complaints about admission, complaints about academic judgement, frivolous or vexatious complaints or complaints which are already subject to proceedings which have not been stayed.
    b. All other complaints are admissible but the OIA has a broad discretion in how it handles the complaint. It does not hold oral hearings.

c. The university is asked to provide evidence and a written response. This is put to the student giving them the opportunity for further submissions.
d. The decision is either that a complaint is justified, not justified or partly justified. Where breaches are found, they tend to be minor and procedural and it is relatively rare for a university's approach to be found wrong in substance.

32. About 75% of complaints are determined within 6 months and the average period to decide a complaint is 99 days.

33. The courts have given the OIA considerable discretion over how it carries out an investigation, *Siborurema v. OIA* [2007] EWCA Civ 1365:

> *The decision whether a complaint is justified involves an exercise of judgment with which the court will be very slow to interfere. A complainant dissatisfied with the OIA's decision will often have the option of pursuing a civil claim against the HEI, which may well be an appropriate alternative remedy justifying in itself the refusal of permission to apply for judicial review of the OIA's decision.*

34. The Court of Appeal then held that the OIA was not under "a general obligation to rehear the merits of the case made to the HEI" (para 54).

35. In *Siborurema* the then chief adjudicator (Baroness Deech) gave evidence that:

> *'Many of those complaints could be taken to the courts, but students choose to come to us because we offer a speedy, user-friendly and free service and because our decisions are based on fairness and a consideration of higher education practices rather than legal rights. If a student does not accept the determination of a complaint under the Scheme, then he or she is free to seek a remedy by going to the courts.'*

36. The courts have also held that the OIA does not make "findings", for example about disability discrimination (*R (Maxwell) v. The OIA* [2012] ELR 538). It is not a 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"* (para 23(5)). The OIA was *"operated free of charge and largely as an inquisitorial on a confidential basis"* and used "*informal inquisitorial methods, which are normally conducted on paper without cross–examination"* (para 32). The OIA did not therefore deal with *"… proof of contested facts, with the application of the legislation to proven*

facts, with establishing legal rights and obligations and with awarding legal remedies, such as damages and declarations" (para 32).

37. In *R (Burger) v Office of the Independent Adjudicator* [2013] EWCA Civ 1803 (para 50), Hallett LJ held:

> *"The OIA was set up to provide speedy, effective and cost effective resolution of student's complaints. It was not set up as a court or a tribunal or other judicial body. Any court asked to review its decisions, must, therefore, act with caution. … Here the OIA did its very best with a very far ranging series of complaints made by the appellant. It followed rational and fair procedures and gave adequate reasons for its decisions and recommendations. It addressed the substance of the complaints. Even if no errors had been made the result would have been the same."*

F. Role of the courts in the context of the OIA

38. In *Zahid v. Manchester University* [2017] the court considered whether and how a student could bring a claim against the University whilst also complaining to the OIA. In several early cases the courts held that a student who had not complained to the OIA could not bring a claim against the University (*R (Shi) v. King's College* [2008] ELR 414 para 45 and *R (Carnell) v. Regent's Park College* [2008] EWHC 739 paras 24-25). Because of time limits it would not generally be possible to claim against the University after complaining to the OIA.

39. However, when concluding that the OIA did not make "findings" about discrimination, the Court of Appeal relied on the availability of access to the court system:

> *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.*

40. In several subsequent cases the courts stayed claims against the University during the complaint to the OIA: *Matin v. University College London* [2012] ELR 487 68) and *R (Crawford) v. University of Newcastle Upon Tyne* [2014] ELR 110. The latter case was a joint contract law and judicial review claim. The court considered that compliance with the University handbook and procedural fairness could not be excluded from the jurisdiction of the court once the student had pursued a complaint to the OIA. In Zahid the Court upheld this line of authorities and (1)

relied on Cowl [2002] 1 WLR 803 to find that ADR should be pursued in advance of judicial review (in many but obviously not all circumstances) and (2) set out a procedure for dealing with the limitation issues that would otherwise arise.

G. Challenges on penalty

41. The issue in FTP claims is often what penalty is appropriate for the degree of impairment of fitness to practice which is found by the committee. GMC guidance requires a methodical approach to this working through the full range of penalty options.

42. The applicability of this guidance to university decision-making is currently before the Court of Appeal. In *Thilakawardhana v. OIA* [2015] EWHC 3285 a student was excluded from a medical course for threatening a fellow student who had distributed explicit pictures of a female friend. The court recognised that some might see the exclusion as harsh but did not intervene in part because of the high hurdle to overturn decisions on penalty, in particular where the challenge was not directly to the decision of the University:

> *37 … The test I must apply is whether the decision is one to which no reasonable decision maker possessed of expertise reasonably to be expected of the defendant could have come. Adopting the cautious approach which I must, I cannot be satisfied that that high hurdle has been reached in this case, particularly as it involves professional judgement as to fitness to practise medicine.*

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SERJEANTS' INN

ELAS Discussion Group

FTP and disciplinary procedures in higher education

Scenario one: advising a medical student

1. John is in his fifth year of a five-year MBChB. However, it has taken him seven years to get there. He failed examinations in year two (but only by 1%) and took a year out due to stress when he should have been taking year four.

2. He has been sent papers for a preliminary committee investigating whether to call an FTP hearing in respect of repeated concerns about his progress through the course. There are 75 concern slips on his file. In years 1 and 2 he was repeatedly late and lecturers complained that he was casual and sarcastic. Things then settled down, but in years 4 and 5 he has started being late to the ward. His handwriting in notes is said to be illegible and other clinical staff complain both that he is irritable towards them and that they do not trust his judgement. They explain that they were having to work around him. There are 5 witness statements to this effect, 2 from junior doctors, 2 from nurses and 1 from a senior doctor. It is said that things came to a head when he swore at a healthcare assistant. She is the only witness to this end and he denies this allegation.

3. John has now received a letter calling him to a hearing in 5 days' time. He has several lever arch files and documents. The University indicates it will ask that he is not allowed to continue seeing patients while a decision is made on an expedited basis about whether he can continue on the course. The University rules provide that John is entitled to be accompanied by a friend or a representative from a medical organisation, but not a lawyer.

4. Questions:
    a. What further instructions do you need from John?
    b. How should you deal with the nearness of the forthcoming hearing and the application for an interim suspension?
    c. What further evidence do you need, expert and factual?
    d. How should you deal with the one-off incident with the health care assistant? Is it a one-off incident?
    e. What can you do about the prohibition on lawyers?
    f. The university proceeds with the investigatory hearing and lists the final hearing 2 months before finals. How should you proceed?

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Scenario 2: committee under pressure

1. You are appointed as the legal adviser of a disciplinary committee hearing a harassment allegation. The University rules permit legal representation and the accused student's representative has just handed in a 25 page skeleton argument one hour before the hearing. Unfortunately, it is quite good.

2. Peter has been accused of harassment, in particular by unwanted touching of a girl (Jane) in a party at the student union. Peter's defence is that he was not at the party and Jane is an attention seeker. The university has carried out little investigation and the only supporting evidence is from Jane's best friend. Somehow it became known that this complaint had been brought and Jane has been teased about it. She has complained to the University that Peter must have leaked her name and the University is asking to have that added as a charge to be determined by the panel (Peter has notice of this, but the decision whether to add the charge has not been made).

3. In the meantime, perhaps because a complaint against him became known, the University has received an anonymous tipoff that Peter (who is studying law) takes drugs at parties and has given them to friends of his. At present, only you are aware of this allegation.

4. Questions:
    a. What are the issues for the decision whether to amend the charge?
    b. Must Jane give evidence? To what extent can Peter's lawyer be allowed to cross examine her? What limit should be applied to questions about her behaviour?
    c. Peter has provided two witness statements critical of Jane. Should the panel hear evidence from those people? Should Jane have notice of their statements before she gives evidence? Should she be given the chance to get representation?
    d. What standard of identification should the university apply? The university did not apply any identification procedures (id parades, etc). What should it have done? If the university had considered the identification weak (dark room, drink consumed etc) was it required to put the charge before a panel in any event?
    e. What should you do about the drugs allegation?
    f. What penalty is appropriate if Peter is found guilty? Is his aggressive defence relevant to sanction?