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The Joint Committee of England and Wales
for the civil enforcement of
Parking and Traffic Regulations Outside London

16th April 2012

Norman Baker MP
Parliamentary Under-Secretary of State for Transport
Department for Transport
Great Minster House
76 Marsham Street
London
SW1P 4DR

PATROL

Dear Minister

PRIVATE PARKING ENFORCEMENT – APPEAL AND REDRESS SCHEME

Further to my letter of 1st February, where I gave assurance that the Traffic Penalty Tribunal would try to assist in the development of the appeals and redress scheme, we thought it would be helpful to update you.

We have advised the British Parking Association that in our view the issue of the Invitation to Tender for the Independent Appeals Service issued by the BPA was premature and misconceived. With hindsight, a more productive approach would have been to encourage the two parking tribunals to work collaboratively with the BPA to establish an appropriate governance structure that would give confidence to the motoring public.

Consequently, we have refrained from bidding as such but have made some suggestions for a positive way forward having established robust governance arrangements for the scheme.

We have given assurances that we remain interested in delivering or contributing to the delivery of this service and believe that our experience in parking adjudication in England and Wales and our cost effective approach and innovative service delivery mean that we are well placed to contribute to the success of the independent appeals service.

To support the development of the service, we have provided (see attached) a road map solution with supporting documentation which places this scheme in the wider administrative justice context. We believe that the establishment of a truly independent service is still achievable within the time frame envisaged by the BPA and yourself.

We remain committed to supporting the development of this service and sincerely hope that however it is finally delivered, the scheme does not undermine the integrity of the successful civil tribunals and, most importantly, gives confidence to the motoring public that their appeal and complaints will be determined independently, impartially and fairly.

Yours sincerely

Councillor Ken Gregory
(Thanet District Council)
Chair

Caroline Sheppard
Chief Adjudicator
England and Wales

Cc **Patrick Troy, Chief Executive, British Parking Association**
Alan Irving, Department for Transport
Colin Eaketts, Welsh Government

PROVISION OF AN INDEPENDENT APPEALS SERVICE FOR PARKING ON UNREGULATED PRIVATE LAND IN ENGLAND AND WALES

1. Introduction

1.1 The PATROL Adjudication Joint Committee has considered the tender documentation and subsequent correspondence and in accordance with the observations made at the 13th March meeting with the British Parking Association (BPA) has decided that it is not able to bid. The reasons for this are set out below.

- The use of a private sector style tender does not sit comfortably with a public sector organisation.
- The governance arrangements which are integral to the perceived independence and integrity of the scheme are not developed significantly enough to provide confidence to ourselves or the motorist.
- Any perceived lack of independence or integrity on the part of a private sector parking appeals service will have ramifications for both public sector parking tribunals.
- The detail of the Invitation to Tender (ITT) points to an anticipated degree of control by the BPA or the yet to be defined Independent Appeals Service (IAS) that would be contrary to the principles of governance and complaint handling advocated by the British and Irish Ombudsman Association (BIOA).
- It is for the above reasons that the only sensible way forward must be to return to basics and develop the governance arrangements appropriately in advance of securing the service provision.

1.2 The PATROL (Parking and Traffic Regulations Outside London) Joint Committee (PATROL) and Traffic Penalty Tribunal (Tribunal) recognise the importance of having an appeals and dispute resolution service for private parking enforcement. Both the Tribunal and Members in councils receive numerous requests for advice and complaints from drivers and vehicle owners about the activities of private operators and see the very real need for a body similar to the Tribunal to be able to determine liability for a parking charge notice and consider complaints against operators.

1.3 Clearly the operators want the owner liability powers in Schedule 4 as soon as the Act comes into force. However the objective of meeting that deadline should not override the importance of ensuring that the organisation is independent and fit for purpose and failure to achieve this will undermine all current efforts and those into the future.

1.4 Whilst there have been numerous meetings and discussions about what is required from the IAS, with hindsight, and while this course was pursued with the best possible intentions, the form of these discussions has proved detrimental to having a sufficiently wide and penetrating discourse on the fundamental values and principles of the service as the BPA indicated some time ago that the intention was to get the two parking tribunals to bid against each other to run this service without further discussion between parties prior to the award of contract.

1.5 PATROL made a commitment to the Minister to assist the development of an IAS and in the spirit of this presents the following road map to a solution. The immediate focus for which should therefore be to bring together an independent Working Party/Shadow Board to draw up the arrangements for the governance and operation of the IAS.

2. Government Requirements

2.1 The Government has asked the private parking sector to establish an independent appeals body covering tickets issued on private land by companies with accredited access to DVLA data. As Ministers have made clear in Parliament this will need to meet specific criteria and be in place before the Government will agree to commence the keeper liability provisions in the Bill.

2.2 The Minister has made it clear that the IAS will be an essential element of the new keeper liability provisions that Schedule 4 of the Protection of Freedoms Bill will bring to the enforcement of parking on private land – so much so that the Government will not commence the keeper liability provisions in Schedule 4 until such a body is established.

2.3 The Minister has asked the BPA to work towards the establishment of an IAS that will provide reassurance to motorists by helping to drive out unfair and unreasonable practices in the sector. Key to providing that reassurance to motorists is that the independent appeals service **must:**

- be, and be seen to be, completely independent;
- cover all tickets issued on relevant land by Approved Operator Scheme members with access to DVLA data;
- be provided as a free service to motorists;
- provide decisions that are binding on the industry; and
- be funded by the parking sector.

2.4 In terms of its remit, the Minister has made it clear that as well as ruling on whether or not a parking contravention has taken place, it is important that the body should also be able to rule, on a case-by-case basis, whether the parking company has behaved unreasonably. If not it should be able to uphold an appeal, in part or in whole. This should include circumstances where a company has refused to consider what the appeals body considers to be evidence of reasonable mitigation from an appellant. These are clearly matters which the Minister will wish to satisfy himself with prior to agreeing to implement Schedule 4 of the Protection of Freedoms Act.

3. The Law

3.1 The law that underpins the scheme is that of contract and trespass. Schedule 4 imposes a process and conditions that must be met if the operator wishes to pursue the owner of a vehicle.

3.2 In exhorting the Approved Operator Scheme (AOS) scheme to limit the sums claimed as 'charges' in 'tickets' the Minister was clearly mindful of the legal basis for determining contractual damages. Concerning trespass on private land the concept that 'damages are agreed in advance' is novel to English law, and it will be necessary for the operators to understand the principles, and that they are clearly explained to the public so they understand the proper basis for the issue of a 'ticket'.

3.3 The examples of decisions included in the ITT did not address the legal issues, focussing on the facts. While this may be a practical approach when the scope of the issues have been identified and considered within the framework of the law, in the early stages it will be of most benefit to the stakeholders that the relevant matters that underpin any liability for payment are set out. We include a sample decision (at Appendix 3) that was also provided for the BPA pilot scheme where a different approach was taken from that of the adjudicator whose decision was included in the ITT.

3.4 The AOS Code of Practice will need to be updated and brought into line with the current application of the law, together with good practice in complaint handling.

3.5 The proper approach to the law will be a necessary prerequisite, not simply to assure government that the IAS complies with the requirements when Schedule 4 is implemented, but to command the respect of the County Courts when and if cases then are taken to Court. If the IAS decision makers are not demonstrably applying the correct law, they will cease to command public respect if their decisions are regularly set aside in the Courts.

3.6 It will be for the Principal Adjudicator/Ombudsman to reassure the Board and Ministers that appropriate guidance and training is provided, and that decisions are published in accordance with BIOA recommendations.

3.7 Being a civil alternative dispute resolution (ADR) scheme, it will be open to the parties to settle, and it will be important that the process allows for the parties to consider this as an alternative to a decision.

4. Principles of alternative dispute resolution (ADR).

4.1 Because the focus until now has been on adopting the approach and principles of the public civil enforcement tribunals, it has not been acknowledged that because the IAS is an alternative dispute resolution scheme it comes under the now familiar umbrella of Ombudsmen, Commissioners, Examiners, Adjudicators, Complaints Reviewers and Handlers. These have become a more common feature over the years of the landscape of administrative justice, dispute resolution and redress.

4.2 The Minister's speech indicates his recognition of the Cabinet Office's helpful paper on ADR (Appendix 2) Membership of the BIOA (http://www.bioa.org.uk/) is advocated by the Cabinet Office and the BIOA publications clearly set out the way organisations should be set up and operated to ensure that they are effective in achieving their objectives.

Principles of good governance:

- Independence
- Openness and transparency
- Accountability
- Integrity
- Clarity of purpose
- Effectiveness

4.3 The structure envisaged in the ITT would not comply with these principles. In our view the IAS must be established with strict regard to these principles, with a view to membership of the BIOA... That membership would provide reassurance to Government that their conditions for bringing Schedule 4 into force had, and continued to be met.

5. Governance

5.1 If a scheme is to be credible, all stakeholders must have confidence in it and in the independence and effectiveness of the IAS in the role of investigating and resolving cases brought to it.

5.2 The governance arrangements are central to the integrity and therefore proper functioning of the service and in our view must be established ahead of making practical arrangements for the service delivery.

5.3 To achieve the objectives of the scheme we suggest a not for profit company with the following shareholders:

- BPA
- The Lead Authority of each tribunal joint committee
- A Welsh Authority

5.4 They would each have a seat on the Board and should each put forward an independent Member of the Board, one of whom will be Chair. Stakeholders will also be represented on the Board – one member from the AOS and a Motoring Organisation (we suggest the AA, since the RAC is on the AOS board).

5.5 The Board will require a secretariat (not necessarily full-time) who should be independent of the stakeholders, and therefore not be staffed by BPA personnel. The experience required is in the administrative justice field, not the parking world. A short-term project manager with relevant experience could be appointed to move the project forward. The Board would decide upon the structure of the secretariat

5.6 The Board should also appoint an Ombudsman or Chief Adjudicator who will be responsible for the quality and independence of the decision making. This is an important role to establish independence of decision making and to ensure that neither the Board nor the parties can undermine the integrity of the service.

5.7 As with other public appointments, the time commitment of the Ombudsman/Chief Adjudicator can be determined at so many days per year depending on need but there would need to be significant amount of time during the set up period and early implementation to advise the Board on establishing and communicating the principles of the scheme.

5.8 The Board would then determine the manner in which they wish to commission the provision of the service. This could either be contracted from a separate organisation or delivered in-house.

5.9 The BPA needs to determine how the service will be funded in terms of start up and running costs. Public sector bodies such as the civil parking tribunals cannot be called upon to subsidise the private sector. If the intent remains to engage public bodies as potential suppliers this aspect requires a careful holistic approach with regard to treatment of both cost and risk transfer within any specification of the service and procurement, including contract term. It also remains the case that the Operators will need to give credence to their intent for an independent appeals service with an upfront contribution and robust arrangements for the ongoing running costs. An effective and sustainable service will require adequate resourcing within the governance structure prior to, during, and after implementation and the funding of this will need to be considered early to ensure a robust

and fully costed business case for the service. The BPA is well placed to obtain such funds from contributions from its members through its existing membership arrangements. A single source of income from the BPA would be required for the cost effective running and security of an independent appeals service.

5.10 A recent Court of Appeal Judgment in a case dealing with the independence of the Higher Education Institutes' Appeals Service is provided at Appendix 4.

5.11 Whatever arrangements are in place, it is regarded as good practice to publish details of internal governance policy and procedures. It is our view that the Independent Appeals Service should be established with a view to becoming a member of the BIOA.

6. Road Map

6.1 We are proposing a Road Map that will achieve the objectives of the Minster, the BPA and stakeholders, but following a different route than the one set out by the BPA in its Invitation to Tender.

6.2 Despite the work undertaken so far, and the urgency on the part of the industry to have the Schedule 4 powers as soon as the Act is passed, it is not too late to put this project on a sound footing and achieve the mutual objectives of the BPA, the Minister, the stakeholders and the two tribunals.

6.3 We recognise that other parties may have submitted well prepared proposals – these need not necessarily be abandoned in following this Road Map (the commercial nature of their proposal can remain confidential) – it can be revisited by the Board once the governance arrangements in the Road Map have been set up.

6.4 Indeed, should a revised approach to commissioning the service be adopted, TPT would still like the opportunity to offer this service, which, notwithstanding that we are not prepared to meet the demands of the current ITT, we nonetheless believe that we can deliver effectively, efficiently and at outstanding value and the following added value:

- Demonstrable independence, well established in the public eye through many years practice
- Experience in providing an appeals service across England and Wales
- Providing access to adjudication for a diverse jurisdiction including large and small local authorities.
- Web based appeals process for both parties facilitated by the development of a new case management portal
- Well established telephone hearing service
- Adjudicators with diverse legal expertise and experience
- Adjudicator Training and Outreach which has been commended by the Judicial Studies Board
- Experience of providing information to the public via helpline, leaflets and web site.
- Experience of providing induction training to councils requiring access to adjudication

6.5 It may seem late in the day to embark on this Road Map, but with hindsight, the BPA's decision some time ago to ask each of the existing tribunals to bid against one another, exacerbated by the over-commercial approach and insistence in the ITT that there must be no discussion between the 'rival' bidders, has produced the unintended consequence of a regrettable failure to discuss the fundamental principles of the scheme.

6.6 We are sure that it was not intended to convey the approach it does, but the detail of the ITT undermines the whole principle of independence, for example, by:

- the BPA being the "Client"
- a short term contract without any recognition that an inference could be drawn that the contact would not be renewed if the "Client" found the decisions to be unpalatable
- the "Client" wishing to control the branding (and by implication the content) of communications and exerting control over the staff of the IAS

6.7 It is curious that although there are numerous conditions that the "Client" wishes to impose on the Service provider, nowhere is the service described – it is simply implied.

6.8 In our view the ITT has prematurely been issued by the BPA, when it should be agreed and issued by the 'Board (see governance below) and should be withdrawn and the proposed meetings on 16 April be used for a round-table discussion with both tribunals to establish the appropriate way forward, including how to set up a Board quickly and efficiently.

6.9 The order of events in establishing the service can be the subject of further discussion, however by way of example, two options are set out below.

i) set up Board
   a. agree shape, remit and funding model of service – company?
   b. issue ITT (less commercial) for:
      i. complete package headed up by suitable "Chief/ombudsman" (asked for in ITT)
      ii. sensible length of contract
      iii. joint working with board on rules, publications etc

or

ii) set up Board
   a. appoint Chief/ombudsman
   b. agree rules etc
   c. ask the two tribunals to process the cases and choose the fittest for purpose

6.10 The following dates are suggested to facilitate further discussion on the development of the governance arrangement of this service.

16th April – meet with BPA and London to discuss the governance arrangements and establishment of a working group to oversee this.

16th May - meeting in London with DfT, Wales, AA and potential Board Members (a meeting of the TPT Advisory Board is scheduled for that day, when key stakeholders for the IAS are committed to be in London)

7.0 Appendices

Finally, the following appendices are provided for reference.

1. Speech to the British Parking Association Independent Appeals Service Working Group, 1 February 2012 Norman Baker, Parliamentary Under-Secretary of State for Transport

2. Cabinet Office: Ombudsmen Schemes – Guidance for Departments

3. Alternative Decision from the BPA pilot scheme.

4. Court of Appeal Judgment in (R) Sandhar v Office of the Independent Adjudicator for Higher Education and ANR

Speech to the British Parking Association Independent Appeals Service Working Group , 1 February 2012

Norman Baker, Parliamentary Under-Secretary of State for Transport

Hello, and thank you for inviting me to speak to you today.

I'd like to start by apologising for not being able to talk to you in person. A three line whip in parliament keeps me away, but I am glad to say that – through the wonders of modern technology – I can at least be here virtually.

I want to talk to you today about the independent appeals body that we have asked private parking sector companies accredited through the BPA's Approved Operator Scheme to establish.

Let me be clear. The IAB will be an essential element of the new keeper liability provisions that Schedule 4 of the Protection of Freedoms Bill will bring to the enforcement of parking on private land – so much so that the Government will not commence the keeper liability provisions in schedule 4 until such a body is established. I very much hope that we can bring these provisions into force co-terminus with the launch of the appeals body.

I know that Patrick and his colleagues at the BPA are already actively working on the appeals body, and I trust that most of the parking sector can see the need for it. We need to work together to establish an effective, legitimate appeals body, and today's meeting is an important part of that process.

So how do we want the appeals body to operate?

We want it to operate in a way which both safeguards and drives up fair, reasonable and equitable standards in the private parking sector. We cannot deny that parking can be a very contentious issue, and there are problems that need to be addressed – for example most of the complaints about parking in my postbag are either about

extortionate charges or unreasonable and inflexible behaviour by private parking companies.

So, the need for an independent appeals body is clear, and the challenge we are presenting to you today is to work towards the establishment of such a body that will provide reassurance to motorists by helping to drive out unfair and unreasonable practices in the sector.

First some fundamentals. The appeals body:

- must be, and be seen to be, completely independent;
- It must cover all tickets issued on relevant land by Approved Operator Scheme members with access to DVLA data;
- It must be provided as a free service to motorists;
- Its decisions must be binding on the industry; and
- It must be funded by the parking sector.

In terms of its remit, as well as ruling on whether or not a parking contravention has taken place, I believe it is important that the body should also be able to rule, on a case-by-case basis, whether the parking company has behaved reasonably.

If not it should be able to uphold an appeal, in part or in whole. This should include circumstances where a company has refused to consider what the appeals body considers to be evidence of reasonable mitigation from an appellant.

I emphasise that what I am seeking here is simply the extension of the reasonable behaviour that the great majority of BPA members already practice most of the time, and would normally be dealt with by their own internal appeal mechanisms.

I do not believe there should be any fears for responsible companies that the appeals body is going to impose decisions on anything less than reasonable grounds.

Whilst it is of course up to you to satisfy these conditions in the way you see fit, I welcome your consideration of existing structures – the local authority and London models – in informing the working of your own appeals body.

I also want to take this opportunity to say a few words about excess parking charges. As you know, unlike on-road penalty charges, excess parking charges in private car parks are currently not limited by regulation.

Ideally the Government would want to keep it that way, and we understand that charges need to be appropriate to the parking contravention in question. However there is real public concern, as well as in the media about some organisations setting unreasonably high parking charges - this cannot be ignored.

As you know the BPA's Code of Practice currently contains a recommendation that an excess parking charge should not exceed £150. However I understand from Patrick that in fact the average charge sought by BPA members is around £84.

I think there is real scope here for BPA members to consider the feasibility of committing themselves to a mandatory maximum charge and sign up to it in a revised Code of Practice.

Together with establishment of the appeals body I believe such a move would clearly demonstrate how the industry was able to effectively regulate itself.

Progressive action in this area would, I believe, provide much needed reassurance to the motorist, and reduce the likelihood of the Government having to step in and impose a statutory, and no doubt long-lasting cap on excess charges.

I ask you to consider these issues seriously. I believe this presents a great opportunity for the major players in the parking sector to set the template for good practice in private car parks, and demonstrate that the industry is able to effectively regulate itself.

I wish you well with your deliberations, and look forward to seeing how these important issues can be addressed, so the Government can introduce the keeper liability provisions in the Protection of Freedoms Bill with confidence as soon as possible.

Thank you

CABINET OFFICE

OMBUDSMAN SCHEMES - GUIDANCE FOR DEPARTMENTS

Scope

1. This guidance does not extend to matters that are the responsibility of the Devolved Administrations, although they may wish to follow the principles set out below.

Introduction

2. Ombudsman schemes (or similar complaint-handling schemes, even if they do not use the title 'Ombudsman') are proving increasingly popular as a free and accessible means of gaining redress for the citizen or consumer, as recipients of public and private sector goods or services.

3. The British and Irish Ombudsman Association (BIOA) (www.bioa.org.uk) is a voluntary organisation to which all of the Ombudsmen in the United Kingdom and the Republic of Ireland belong. It has considerable experience and expertise, gained since its inception in 1993, in the establishment and running of Ombudsman schemes.

4. An effective (and BIOA compliant) Ombudsman scheme can be the hallmark of fair redress. It is important therefore that anyone establishing such a scheme should consult with the Cabinet Office which acts as the Government liaison point on Ombudsman matters, and also provides the channel of communication with BIOA.

5. In considering setting up such a scheme, departments should have regard to BIOA's Criteria for use of the term Ombudsman: independence from those who the Ombudsman has the power to investigate; accessibility; effectiveness; fairness; and public accountability. If these criteria are not met, use of the term Ombudsman must be avoided and an alternative (Commissioner, Adjudicator, Complaints Examiner, for instance) used.

6. It is also important to have regard to the governance arrangements of new schemes (especially those in the private sector), as this is fundamental to their independence and effectiveness (see BIOA's Guide to Principles of Good Governance at www.bioa.org.uk/docs/BIOAGovernanceGuideOct09.pdf) Certain issues, such as those where a principle of law is involved, may best be resolved through the courts.

7. The Ministry of Justice is able to provide advice on redress policy generally across government.

Context

8. The context within which Ombudsman schemes are developing is one of considerable change and innovation, especially within the private sector. The Government is committed to delivering a world-best consumer protection scheme which is good both for consumers and business. It is also committed to fair redress schemes for public services. Additionally, it has established the Administrative Justice and Tribunals Council which has strategic oversight over the administrative justice landscape, including Ombudsmen.

9. It is important to maintain a proper balance between the development of new Ombudsman schemes (where they are needed), and extending the remit of existing schemes where that is both appropriate and possible. In choosing the best option, Departments will therefore need to:

In the public sector

- consider the reason for additional adjudication and dispute resolution, and how it will add value to existing schemes (eg Parliamentary & Health Service Ombudsman and Local Government Ombudsman), and to the Department's own internal complaints procedures, whilst noting that an independent complaints examiner, internal to the Department, is unlikely to be considered wholly independent.

In the private sector

- avoid multiple redress schemes within individual industry sectors, which may confuse consumers and may introduce uneven practices in investigation and redress, by utilising existing Ombudsman schemes (even existing voluntary ones), or by introducing single new schemes.

Generally

- unless there are overriding reasons to the contrary, use the term 'Ombudsman' for genuinely independent redress schemes, as it has wide and increasing national and international public use and understanding, rather than other names such as 'Commissioner' or 'Adjudicator.'

General characteristics of Ombudsman schemes

10. There is a wide range of Ombudsman schemes in the United Kingdom operating in the public and private sectors. Some of the latter are entirely voluntary, some are statutory and some are 'approved' by Departments or regulators for the statutory compliance of suppliers/providers.

11. Ombudsman schemes are designed to be free to the complainant and user-friendly. Complainants do not need normally legal representation or other assistance to access Ombudsman schemes. Ombudsmen proceed by way of investigation and not by way of adversarial hearings. They provide a level playing field between the individual complainant and organisations. They often use a number of Alternative Dispute Resolution (ADR) mechanisms and offer advantages over, and sometimes alternatives to, potentially expensive litigation.

12. The term 'Ombudsman' is occasionally used to describe bodies which are internal to those complained about and therefore not wholly independent of them. The term 'Ombudsman' is not legally protected so its use cannot be prevented, but it is essential that Departments assess carefully the relationship between any newly created redress scheme and the Department/organisation over which it has jurisdiction to consider complaints. They should not describe as an 'Ombudsman' scheme any scheme that is not truly independent from the body to be investigated.

13. For the bodies complained against, the advantages of Ombudsman schemes are that they avoid the cost and publicity of litigation while offering effective redress to their users and customers. For private sector schemes, the costs are shared among their members. For public sector schemes, the costs are borne by the taxpayer.

14. Ombudsmen have the further advantage over litigation in that they can and do often advise on systemic change. They can consider all the circumstances which gave rise to the complaint and make recommendations for a change of practice or procedure in a particular institution, Department or across a whole sector of the economy, for the benefit of all future users. Ombudsmen acquire knowledge and experience of good practice and this further informs their recommendations.

15. Ombudsmen investigations are conducted in private. Ombudsmen can examine records, interview witnesses and use professional experts where appropriate. The procedure for investigations can be tailored to the circumstances of the case. Ombudsmen do not normally name complainants but may publish digests of their decided cases. Most publish reports in which they name organisations which are the subject of the complaint.

16. Ombudsmen provide remedies which are fair and reasonable in all the circumstances, and are not necessarily bound by a strict interpretation of the law or precedent. In the public sector and in some private schemes their recommendations are not binding but meet with nearly total compliance. This is secured by a variety of means – by law, by contract, by publicity, by a regulator or by the moral force and the standing of the Ombudsman. There is no appeal against Ombudsman decisions, other than Judicial Review (where applicable) or where schemes (like the Pensions Ombudsman) have an appeal procedure in place.

17. There will be other complaint-handling schemes with Ombudsman characteristics, but they will not be fully-fledged Ombudsman schemes.

Steps to establishing an Ombudsman scheme

18. In considering whether to establish a new Ombudsman scheme, and if so how, you may find it useful to consider the following:

- **Is an Ombudsman scheme appropriate for the service concerned?**

  If you are seeking to provide a means of truly independent investigation of complaints about a service, whether in the public or private sector, with the objective of providing a remedy for the complainant for any failure and recommendations for improving the service, an Ombudsman scheme is likely to be appropriate. It will have greater recognition and acceptance if it is set up as 'BIOA compliant'.

If you are seeking to provide a means of appeal against a decision by a body such as a Government department, a tribunal may be in some circumstances more appropriate (contact the Ministry of Justice).

If you are seeking to create a body which will supplement the Department's own internal complaint-handling procedures, but which will carry out its functions internally reporting to the Department, then an independent complaints examiner may be more appropriate.

If you are seeking to create a service whose primary aim is advocacy, such as the Children's Commissioner for England, the title 'Ombudsman' is not appropriate.

- **Have you considered existing Ombudsman schemes?**

  Before creating a new Ombudsman scheme, you should consider the role and remit of existing schemes and decide whether a new scheme is necessary. It may, for example, be more appropriate, and more cost effective, to extend the remit of an existing scheme.

- **Has Article 6(1) of the ECHR been taken into account?**

  Ombudsmen may need to comply with the requirements of Article 6(1) of the European Convention on Human Rights. Whether a scheme needs to comply and, if so, how it needs to comply, will depend upon the nature of the individual scheme. The following issues will need to be considered:

  - is the Ombudsman scheme a 'public authority'?
  - if so, is the Ombudsman determining 'civil rights and obligations'?

  If the Ombudsman scheme is a public authority determining civil rights and obligations, the following issues will need to be considered:

  - fair proceedings
  - a reasonable timescale for the process
  - whether an oral hearing is necessary
  - whether the hearing should be held in public
  - whether the judgement should be made public.

- **Do you need to develop a mechanism for dealing with cases that have wider regulatory implications?**

  When creating statutory Ombudsmen to work in an area which coincides with that of a regulator, you might need to consider whether cases that have wider regulatory implications will arise, and if so how you will deal with them.

- **Has there been consultation with the Cabinet Office, and if necessary with BIOA?**

  The Cabinet Office provides central advice on Ombudsman matters and establishing Ombudsman schemes. BIOA is in a position to advise on the key requirements for an Ombudsman scheme to be granted full membership and voting status.

- **Has there been consultation with the Treasury?**

  It is usual for departments to consult the Treasury about proposals to set up any new body. Departments should approach their usual Treasury contact in the first instance.

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Further details

The 'Criteria' of the British and Irish Ombudsman Association (BIOA) sets out in detail the criteria the Association uses for recognition of Ombudsman schemes (full membership), and can serve as a useful guide. http://www.bioa.org.uk/criteria.php

The BIOA 'Guide to principles of good complaint handling' and 'Guide to principles of good governance' are both available in hard-copy, free on request from the BIOA Secretary.

November 2009

INDEPENDENT ASSESSMENT

1. The complaint by Miss H has been referred to me for assessment.
2. The contractor, Company X, alleges that Miss H's vehicle was parked in a private car park in a retail park in ..., in a section of the car park where vehicles were not authorised to park. The date of the incident is not given by either party. The contractor has provided two photographs of the vehicle but has not provided either a copy of the demand note (described as a 'parking charge notice'). The photographs of the vehicle show diagonal yellow lines across the bay in which she parked and in several bays alongside. A photograph is provided of a sign exhibited in this car park but no map or plan to show where this sign is placed. The sign sets out a condition that there will be a £90 "parking charge notice" for "failure to park correctly within an authorised bay marked P&D". The parking charge notice amount is stated to be £90, reduced to £50 if paid within 14 days.
3. In response to this allegation Miss H says that several other vehicles were also parked in these bays, that there were no signs to specify the restriction and that the company's own attendant commented on the paucity of signs. She has submitted a photograph showing an unbroken line of vehicle in these yellow marked bays.
4. I shall begin by summarising the nature of the legal relationship in matters of this kind. Unlike the regulations under the Traffic Management Act 2004 which control the provision of on and off street parking provided by local authorities, the provision of off-street parking by private car park operators creates a legal contract or licence between the land owner, probably acting through a parking contractor as an agent, and the driver of the motor vehicle - see *Thornton v Shoe Lane Parking Ltd [1970] EWCA Civ, [1971] 1 All ER 686* and *Fred Chappel Ltd v National Car Parks Ltd (1987) The Times 22 May*. The terms of the contract must be clearly displayed at the time that the contract is entered into by the driver so that they may be understood and agreed. The landowner or the agent may impose such terms and conditions as they wish provided that they do not amount to unfair contract terms. Those terms may include an agreed payment for a breach of the terms and conditions, subject to certain legal requirements.
5. It is not permitted, however, for a contract to impose a penalty for the non-observance of the conditions - see *Bridge v Campbell Discount Co Ltd [1962] AC 600 (House of Lords)*. Any payment due for a breach of the conditions must be regarded as damages and calculated to reflect the loss or actual costs incurred by the other party as a consequence of the breach. A payment which constitutes a penalty is unenforceable in law and cannot be a valid term of the contract.

6. Similarly, because the legal relationship is based on contract which must have terms which are agreed by both parties, it is not permitted for one party to act in such a way that it may be 'passing itself off' as some other regulated body and thereby be misleading the other party. In connection with private parking, it is not permissible in law for names and documents issued by private parking contractors to copy or imitate the format and styles used by the local authorities regulated by the Traffic Management Act 2004, for instance in the use of the terms similar to "enforcement authority", "penalty charge", "penalty charge notice", etc.

7. Turning to the circumstances of this matter, I must look at the issues from the contract perspective and not in terms of the adversarial approach adopted under the Traffic Management Act appeal provisions. It is not appropriate to simply impose the burden of proof on the contractor but to look at the evidence overall to ascertain whether an enforceable breach of contract has occurred. If it has and the amount sought is not an unlawful penalty, the complaint will not be upheld. However, if the balance of the evidence means that the liability of the complainant is not established or that a breach of the contract has not occurred, the complaint will be upheld.

8. The breach of the conditions is, apparently, that Miss H parked her vehicle in a bay which was not authorised for parking. The *Shoe Lane* case from the Court of Appeal specified that the terms and conditions for parking on private land must be placed in such a position that a motorist entering the private land can see and understand the conditions before entering into the contract or committing what will otherwise be an unlawful trespass. The statement of terms and conditions must be clear, legible and readily understandable. The company says in this complaint that a breach of contract occurred and it must, therefore, provide evidence both of the terms and conditions and the provisions of signs which will satisfy the test in *Shoe Lane*. There is no evidence provided of the location of the boards setting out the terms and conditions for the use of this car park which Miss H could have consulted before she decided to enter into the contract.

9. In addition, I do not consider that the condition prohibiting parking in an unauthorised bay is sufficiently clearly stated. The wording does not impose a positive obligation to, for instance, 'park only within marked bays' but warns of a parking charge notice by not parking in an authorised bay. In addition, the conditions refer to "an authorised bay marked P&D". I very much doubt whether the average motorist will understand the phrase "P&D" which, whilst common in the parking industry, is not a term in general use. Thus, even if there was a sign clearly displayed on entry to the car park, I am not satisfied that photographed sign meets the requirements for clarity and understanding in respect of this intended obligation. I am satisfied, therefore, that the evidence provided does not show a valid term of the contract prohibiting a vehicle parking where Miss H did

and does not show that Miss H was in breach of a contract. There is no situation where any damages for breach of contract could be payable.

10. I also record that I do not consider that a 'parking charge notice' imposing a charge for "Contravention of the parking regulations" is enforceable because of its striking similarity with the penalty charge notice issued by local authorities under the provisions of the Traffic Management Act 2004 and because it purports to impose an unlawful penalty. However, in view of my principal conclusion I do not propose to set those issues out at any length.

11. Taking all those factors into account I conclude that I agree with the complaint made by Miss H that a breach of contract did not occur. This complaint is upheld.

Neutral Citation Number: [2011] EWCA Civ 1614

Case No: C1/2011/0511

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR DAVID HOLGATE QC (Sitting as a Deputy High Court Judge)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

Before :

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LADY JUSTICE BLACK
and
THE RIGHT HONOURABLE SIR DAVID KEENE

- -

Between :

THE QUEEN ON THE APPLICATION OF SANDHAR	**Appellant**
- and -	
OFFICE OF THE INDEPENDENT ADJUDICATOR FOR HIGHER EDUCATION & ANR	**Respondents**

- -
- -

Mr Michael Beloff QC & Ms G White (instructed by **Balsara & Co Solicitors**) for the **Appellant**
Mr Sam Grodzinski QC (instructed by **E J Winter & Son LLP & Mills & Reeve LLP**) for the **Respondents**

Hearing dates: 22nd November 2011

- -

Approved Judgment

Lord Justice Longmore:

Introduction

1. This appeal (pursued with the permission of Arden LJ) from previous refusals of permission to apply for judicial review raises the question whether the Office of the Independent Adjudicator for Higher Education ("OIA") is appropriately independent for the purpose of dealing with students' complaints in relation to their examination results. It also raises the question whether, if it is independent, the OIA should in the present case have adopted an emergency procedure and thus enabled Mr Sandhar, a final year medical student, to take up junior doctor positions which he had been offered or should now be required to proceed to a "full merits" oral hearing.

2. The question of OIA's independence is a question which is logically prior to any question relating to the procedures adopted (or not adopted) by the OIA. It is difficult to see how Mr Sandhar could benefit from any decision in his favour since, if this court decides that the OIA is not an independent body, any decision made to date will have to be set aside and Mr Sandhar will have no redress save for a singularly unpromising application (now in any event well out of time) for permission to review the decision of the university examiners not to award him a degree. Mr Beloff QC explained on his behalf that, since it could not be taken for granted that his other complaints about the procedures of the OIA would succeed, it would be some consolation for Mr Sandhar if the court decided that the OIA was not an independent tribunal on the basis that some other adjudicative procedure would have to be put in place which would then be available for other students, even if it would be too late to be of any benefit to him.

3. I must confess to some doubts whether that is a proper basis for an application for judicial review but I have swallowed those doubts on the basis (1) that the question of the OIA's independence is not a question which will go away (it has already been the subject of an obiter pronouncement by Mr C.M.G. Ockelton sitting as a deputy High Court Judge of the Administrative Court in Budd v OIA [2010] EWHC 1056 (Admin)) and (2) that, if an aggrieved student cannot take the point, it is difficult to see who can.

4. In these circumstances the court has decided that all aspects of the case are sufficiently substantial to warrant the grant of permission to apply for judicial review and we now proceed to decide the substantive judicial review application. We are acutely aware that in R (Siborurema) v OIA [2007] EWCA Civ 1365, which established that the OIA was in law amenable to judicial review, both Moore-Bick and Richards LJJ envisaged (paras 70 and 74) few cases could be expected to get through the permission filter, let alone succeed. But this case, like that case, does raise issues of general principle.

5. It is necessary, however, first to set out the factual background.

Facts

6. In September 2002 Mr Sandhar began a MBChB degree at Manchester University and successfully completed year 1 for the academic year 2002 – 3. In year 2 he failed Semesters 3 and 4 and failed re-sits in respect of those Semesters. In the academic

year 2004-5, he took year 2 again and passed Semesters 3 and 4. In the academic years 2005-6 and 2006-7 (years 3 and 4) he progressed normally passing the requirements for those years.

7. In June 2008 Mr Sandhar failed two elements of the Final Examinations for year 5. He was referred to the University's "Progress Committee". Before the Committee met, Mr Sandhar appealed against his examination results on the basis of mitigating circumstances, namely the death of his uncle and his mother having to travel to India leaving Mr Sandhar to look after his grandparents. He contended that he should be deemed to have past his Final Examinations. The Progress Committee decided that he could not be deemed to have qualified but that he should be allowed to re-sit the final exams in October 2008, or preferably May 2009 after repeating year 5.

8. On 28th July 2008 the University Faculty told Mr Sandhar that his appeal against his examination result had been dismissed, but that the opportunity to re-sit in October 2008 or May 2009 still stood. Mr Sandhar appealed this decision to the Registrar of the University, but this appeal was also dismissed.

9. In May 2009 he re-sat the two Final papers he had failed previously and failed both papers again. He was informed that he had been excluded from the MBChB programme as a consequence.

10. On 25th June 2009 he appealed against the decision to exclude him, on grounds of mitigating circumstances namely, anxiety caused by the previous year's appeal and the illness and then death of his grandmother; and on grounds of alleged procedural irregularities in the assessment process.

11. On 7th July 2009 the University Faculty allowed Mr Sandhar's appeal in part; it revoked his exclusion from the degree programme and confirmed that he was entitled to repeat year 5 (for a second time) and re-sit all elements of the Final Examinations in May 2010. Mr Sandhar has not availed himself to this offer and has never retaken year 5 or re-sat his Final Examinations.

12. On 8th August 2009 he appealed the Faculty's decision to the Registrar, claiming that he should be awarded the MBChB degree without retaking year 5 or re-sitting any of the papers he had failed. He relied in particular on his mitigating circumstances and he again complained that the correct procedures had not been followed.

13. On 2nd September 2009 the University completed its internal appeal procedures and decided that the Faculty's decision to revoke Mr Sandhar's exclusion and to allow him to retake year 5 and all elements of his Final Exams was reasonable. It accordingly dismissed his appeal but alerted him to the potential route of a complaint to the Office of the Independent Adjudicator for Higher Education ("the OIA").

14. On 27th October 2009 Mr Sandhar submitted a complaint to the OIA requiring an "emergency remedy from the OIA for specific performance of the contract", seeking a declaration and injunction requiring the University to award Mr Sandhar his degree, and asking for a "full merit review, oral hearing and fast track".

15. On 18th November 2009 Ms Anne Lee, the Adjudication Manager at OIA, wrote to Mr Sandhar explaining:-

i) The remedies he sought requiring the University to award him a degree could not be given by the OIA, because they were matters of academic judgment;

ii) In response to his request for a full merits review, she explained that "The nature and extent of the review is for the case handler at the OIA to decide";

iii) In response to his request for an "emergency remedy" she explained "I have assessed your case as requiring the full, more extensive procedure so that I will need to obtain a full response from the University";

iv) In response to Mr Sandhar's request for an oral hearing, she explained that "I will assess the question of whether it is necessary to hold an oral hearing, in order to undertake a full and fair review of your complaint, once I have the University's representations".

16. In December 2009 the University submitted its representations to the OIA, defending its position in full.

17. On the 12th January 2010 the OIA sent the University's representations to Mr Sandhar, inviting his comments by 9th February 2010. He has never provided his comments on the University's representations.

18. Instead on 22nd January 2010 his solicitors write a first pre-Action Protocol ("PAP") letter, challenging the decision of 18th November 2009 not to decide his complaint on an "emergency" or expedited basis.

19. On 26th January 2010 his solicitors wrote a second PAP letter, challenging the alleged failure to deal with the request for the oral hearing and full merits review.

20. On the 2nd February 2010 the OIA responded to the letters, explaining why the grounds of challenge were, in its view, misconceived. The letter also indicated that the OIA was still awaiting comments from Mr Sandhar on the University's submissions and that, once these had been received, a draft decision could be made about the substantive complaint to the OIA.

21. On the 10th March 2010 the OIA sent a further letter noting that Mr Sandhar had still not provided comments on the University's submissions and said that, on the assumption he had nothing further to say, a decision would be made on the material which they had as soon as possible. This elicited a reply from Mr Sandhar's solicitors saying that the OIA should not proceed to issue a decision. OIA then agreed to suspend their consideration of the decision.

22. On 23rd April Mr Sandhar's solicitors wrote a 3rd PAP letter challenging OIA's independence and on 30th April 2010 they issued judicial review proceedings asking for a full merits review and an oral hearing and also challenging the OIA's independence. Burnett J on the papers and Deputy High Court Judge David Holgate QC on a renewed oral hearing refused permission to bring judicial review proceedings but Arden LJ gave permission to appeal on 27th May 2011.

The independence of the OIA

23. The argument is that, because the OIA is funded by the Higher Education Institutions ("HEIs") it is unable to avoid the appearance of bias for the purpose of the well-known test set out in Magill v Porter [2002] 2 AC 357 at para 103 per Lord Hope of Craighead namely:-

> "would a fair minded and informed observer, having considered the facts, conclude that there was a real possibility that the tribunal was biased for lack of either impartiality or independence?"

24. The OIA is a body which has been set up to deal with student complaints as was envisaged by Part 2 (headed "Review of Student Complaints") of the Higher Education Act 2004 ("the Act"). Section 13 of the Act empowered the relevant Secretary of State to designate a body corporate as "a designated operator" if he was satisfied (inter alia) that such a body (1) met the conditions set out in schedule 1 to the Act that the body corporate

> "is capable of providing in an effective manner … a scheme for the review of qualifying complaints which meets all the conditions set out in schedule 2"

and (2) provided a scheme

> "for the review of qualifying complaints that meets all the conditions set out in schedule 2."

The Secretary of State was satisfied that the OIA was capable of providing a scheme for the review of student complaints and accordingly designated OIA pursuant to section 13 of the Act. This then displaced, pursuant to section 20 of the Act, the disparate jurisdictions formerly exercised by Visitors to HEIs in relation to student complaints.

25. The OIA itself was formed as a company limited by guarantee in 2003 with Articles of Association which provided for a Board of Directors numbering not fewer that 13 and not more than 16. The OIA originally had six members each of whom was entitled to appoint a director and the Articles provided that there had to be at least 7 independent directors co-opted by the Board from persons with experience or skills relevant to the purposes of the company.

26. Paragraph 2 of schedule 3 of the Act provides that the designated operator must provide a scheme for the review of qualifying complaints which meets all the conditions set out in schedule 2 of the Act and the OIA has established such a scheme; section 15 of the Act provides:-

> "(1) The governing body of every qualifying institution in England … must comply with any obligation imposed on it by a scheme for the review of qualifying complaints that is provided by the designated operator.
>
> …

> (3) The obligations referred to in sub-section (1) include any obligation to pay fees to the designated operator."

27. The conditions set out in schedule 2 required that the scheme for the review of qualifying complaints should apply to all qualifying institutions and must apply to all qualifying complaints (Condition A and B). Condition C requires the scheme to provide that every qualifying complaint

> "be reviewed by an individual who
>
> (a) is independent of the parties, and
>
> (b) is suitable to review that complaint."

28. The rules of the scheme provide, as one might expect, that the scheme does not cover a complaint to the extent that that it relates to a matter of academic judgment (Rule 3.2). Other relevant rules are:-

> "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.
>
> 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 review 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.
>
> 8 The Independent Adjudicator is appointed by and responsible to the Board. In determining any complaints under these Rules the Independent Adjudicator shall act independently of the Board, HEIs and complainants. The Independent Adjudicator is not an officer of the Company for the purposes of the Companies Act.
>
> ...
>
> 10 The OIA and its property and affairs shall be under the control and direction of the Board. The Board ... shall be responsible for ...
>
> 10.2 Preserving the independence of the scheme and the role of the Independent Adjudicator ... ."

29. It is not exactly a matter of surprise to discover that the OIA has to employ a considerable number of people to discharge its duties including the Independent Adjudicator, his or her deputy and a number of reviewers to review individual cases. They all have to be paid and there is no obvious source for such payment apart from the HEIs themselves unless it is to be said that the expenses of the complaints scheme which benefits the specific body of university students should somehow be met by the general body of taxpayers. That is no doubt an irrelevant consideration if a fair-minded and informed observer would conclude that there was a real possibility of bias. But would such an observer so conclude?

30. The evidence on which lack of independence is based is summarised in two witness statements of Mr Benjamin Elger, the Chief Operating Officer and Company Secretary of the OIA of 17th March 2009 the first of which was produced for the purposes of the Budd litigation but was again in evidence in the present case. From that evidence it appears that the OIA has 14 directors of whom six are nominated by the members of (and shareholders) in OIA. 5 of those 6 are said to represent the HEIs although none of them is a member of the respondent HEI in this case, Manchester University. These directors are duty bound to act in the interests of the OIA not in the interests of their nominators and there is no evidence that any of them have ever been in breach of that duty. The sixth nominated director is a nominee of the National

Union of Students. The other eight directors are Independent Directors appointed in open competition under Nolan Rules and are not drawn from the higher education sector. The Chairman of the Board is one of these independent directors.

31. Mr Sandhar's skeleton argument (para 20.2) asserts that the directors nominated by HEIs constitute a majority of the Board of Directors which approves the rule and procedure by which the OIA conducts reviews of HEIs but that is not, in fact, the case. It is the independent directors who constitute a majority.

32. It is, moreover, the Independent Adjudicator who has the responsibility for the adjudication of individual cases. Rule 8 of the scheme requires the Independent Adjudicator to act independently of the Board of Directors, the HEIs and complainants. He or she is appointed by the Board under Nolan Rules. Rule 10 of the scheme provides that the Board is to be responsible for (inter alia) preserving the independence of the scheme and the role of the Independent Adjudicator. There is no evidence that the Board has ever failed to live up to that responsibility and, pursuant to that rule, the Board of Directors is not involved in the adjudication of any individual complaint.

33. As far as funding is concerned, it is correct that the funds come from subscriptions made by the participating HEIs, as expressly envisaged by section 15 (3) of the Act. The allegation, faintly put forward at one time by Mr Sandhar, that that provision of the Act was incompatible with Article 6 of European Convention on Human Rights was rightly not pursued in the oral argument made on his behalf. In those circumstances it is legitimate for a well-informed and fair-minded observer to have particular regard to the fact that Parliament has envisaged that the OIA is to be funded by the universities. The OIA scheme is free to students and there is no link between the amounts paid and the number of or outcome of complaints made against any particular HEI. It is clear that the wages of individual case-handlers are not paid by the university against whom the complaint is levelled but come from the funds generally available to the OIA from all HEIs.

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

35. If the OIA were adjudged to lack the necessary independence, it is hard to see why the same objection would not apply to many Ombudsman schemes funded by levies on the businesses which come within the purview of such schemes or indeed to the disciplinary tribunals of many professional bodies such as the GMC or the Law Society.

36. Mr Ockelton in Budd, albeit not as a matter of direct decision, came to the same conclusion as I have done, see paras 98-104 of Budd v OIA. I agree with him

37. I turn therefore to the allegations of procedural impropriety, the supposed refusal on the part of the OIA to conduct a "full merits" review or an oral hearing.

Full Merits/Oral hearing

38. It is easier to treat these complaints together rather than separately since it is difficult to be sure what a full merits hearing is if it is different from a oral hearing. Conversely it is difficult to see how an oral hearing could be other than a full merits hearing. The distinction drawn by Moore-Bick LJ in para 70 of Siborurema between any examination of the underlying merits and a review of the University's decision may be thought to be somewhat elusive in practice.

39. I have already set out the gist of Ms Lee's reaction of 18th November 2009 to the requests for a full merits review in which she said that the nature and extent of the review is for the case handler at the OIA. It emerged at the hearing before us that Ms Lee was now the case handler and, if that had been the position at the time, no doubt she ought to have said so in order to achieve full transparency. The difficulty from Mr Sandhar's point of view, however, is that what he really wants (or at least wanted in 2009) was a decision that the Board of Examiners should deem him to have passed his final medical examinations in 2009 rather than allow him (for the second time) to retake year 5. The response of the University in December 2009 was at first blush persuasive in relation to that application and, until Mr Sandhar provides his comments to that response and the OIA reacts to that response, it is not possible to say that the OIA is not providing (or is not prepared to provide) a full merits review, whatever that may precisely mean. In this context I agree with (and would approve) the reaction of Mr Ockelton to a similar point being made to him when he said at para 73 of Budd v OIA:-

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

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

40. As far as any oral hearing is concerned, Mr Beloff submitted that it was possible here and now to say that an oral hearing was required for 3 particular reasons and that it had been refused. Since the three particular reasons were only articulated for the first time in the skeleton argument for this court, that is a difficult submission. But Mr Grodzinski for the OIA rose to the challenge and submitted that the particular matters relied on did not justify an oral hearing. He did, moreover, accept that, if Mr Sandhar submitted a response which raised matters which, in the reasonable view of the OIA did require an oral hearing, then an oral hearing would be provided.

41. The specific matters on which Mr Beloff on behalf of Mr Sandhar relied for the purpose of saying that on any view an oral hearing was now required were these:-

i) Whether the original Progress Committee had actually considered the nature of the appellant's mitigating circumstances when the minutes of its meeting gave no indication that it had. The minutes of that Committee simply stated:

> "The student submitted a supporting statement to the Committee but did not attend the meeting [...] The Committee discussed the student's case in his absence and noted that he had submitted an appeal against his examination results, which was being investigated by the Chair of the Assessments Committee."

ii) Whether the claimant had not received any teaching in 2008/9.

iii) Whether the question of whether to award him his degree had been referred back to the original Examination Board after the success of his appeal pursuant to para b point 7 of Regulation XIX Academic Appeals of the University's Examination Regulations.

42. The suggestion that the original Progress Committee, which considered the effect of Mr Sandhar's first failure of his final examinations in June 2008, may not have considered his mitigation has, to my mind, no relevance since it is long in the past. Mr Sandhar's complaint relates to the University's decision in 2009 to allow his appeal in relation to exclusion but to require him to retake year 5 for a second time before a degree could be awarded. A decision not to hold an oral hearing on the question whether the Progress Committee considered Mr Sandhar's mitigation in 2008 is entirely justifiable.

43. As to tuition for 2008-9 after Mr Sandhar's first failure, it is true that Mr Sandhar asserts that he was not provided with tuition. The University agrees that tuition was not provided but says that that was Mr Sandhar's choice. Mr Sandhar has not yet said whether he denies that that was his choice and asserts that he requested tuition which was refused. It is impossible therefore to say whether an oral hearing on that issue is required. One might also legitimately wonder whether, on any view, an oral hearing could be required on that point in the light of the fact that Mr Sandhar's mitigation was, in any event, accepted by the University in 2009 to the extent that his exclusion from the degree programme was revoked and he was told that he would be entitled to re-sit his finals in May 2010.

44. The question whether the University has failed to comply with Regulation XIX cannot be usefully resolved by an oral hearing. The University has not, so far, suggested that it did comply with Regulation XIX. There is not on the face of it any disputed area of fact. The consequences of non-compliance (if any) are, of course, a matter for the OIA but can hardly be assisted by having an oral hearing.

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

46. I would therefore refuse the application for judicial review so far as it relates to the failure of the OIA to hold a full merits review or an oral hearing.

Emergency procedure

47. That only leaves the (now theoretical) complaint that the OIA should have adopted but failed to adopt an emergency procedure in October 2009 so as to enable Mr Sandhar to take up conditional offers of employment he had received. The refusal to adopt the particular emergency procedure suggested by Mr Sandhar was eminently justifiable since he appeared to be wanting the OIA to say there and then that he should be deemed to have passed his finals and to have been awarded his degree so that he could take up one or more prospective appointments. To do that by any emergency procedure (or indeed at all) would be to interfere with matters of academic judgment which is outside the OIA's jurisdiction. Ms Lee did say in her letter of 18th November 2009 that the OIA did have a Preliminary Decision procedure but that she had decided a full response from the University was required. That was also justifiable since Mr Sandhar's complaints about the procedures adopted by the University obviously called for an answer. It is no doubt highly disappointing for a student in Mr Sandhar's position not to be able to take up conditional appointments as a result of failing his final examinations but it was never intended that the OIA should second guess the University's academic judgment in that regard.

Conclusion

48. I would therefore dismiss Mr Sandar's application for judicial review despite giving permission for it to be brought.

Lady Justice Black:

49. I agree.

Sir David Keene:

50. I also agree.