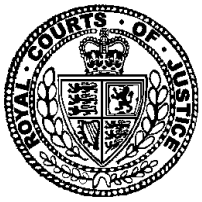

Neutral Citation Number: [2018] EWHC 1971 (Admin)

Case No: CO/5681/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2018

Before :

John Bowers QC sitting as a Deputy High Court judge

- -

Between :

THE QUEEN (ON THE APPLICATION OF B)

Claimant

- v -

THE OFFICE OF THE INDEPENDENT ADJUDICATOR

Defendant

- -
- -

Leon Glenister (instructed by John Ford Solicitors for the Claimant)
Paul Skinner (instructed by EJ Winter & Son LLP for the Defendant)

Hearing dates: 17 & 18 July 2018

- -

Approved Judgment

John Bowers QC :

1. The Claimant complains of a decision by the Defendant ("the OIA"). He seeks to reopen Fitness to Practise ("FTP") procedures dating back to 2010 and to "clear his name" as his Counsel put it because the Claimant realistically accepts that so long after the event it will now be difficult (if not impossible) for him to become a doctor. He says that his main aim is to avoid the ongoing stain to his reputation and CV of what happened between 2002 and 2009.

The history

2. It is necessary to set out some of the relevant history which is somewhat complex. The Claimant began the MB ChB medical course at the University of Leicester in 2002, but his registration was suspended in 2003 for one year due to after the Claimant was bound over for affray. He re-joined the course in 2004 and began Phase II of the course in 2006. He failed to pay fees in 2009.

3. On 26 May 2009, the Claimant made a long and trenchant complaint to the University about the organisation of the course. It was described by the Claimant's Counsel as "a blunt letter, which is a result of the Claimant having endured what he perceived as years of sub-standard training, bullying, discrimination and concerns about the standards of care delivered in hospitals to patients by Leicester graduates – concerns which had not been listened to".

4. Its tenor may be seen from these passages:

    A. "Any fool that is except for the ones employed by Leicester Medical School can see that a process where trainees teach trainees is a recipe for absolute disaster";

    B. "As a result of my placement in obstetrics I know as much about the delivery of neonates as the security guard at Morrison's supermarket";

    C. "I had timetables that were about as accurate as an Iraqi scud missile";

    D. "The cosy world of academia and the NHS is a great place to hide if you are bone idle and inept".

5. The University investigated the complaint and declined to uphold it for reasons of which he was informed by letter dated 7 July 2009. The University partly in response to these allegations reported the Claimant to the FTP Committee to consider his fitness to practise. This came after he had completed all 5 years of the course he was on, and had passed his exams to a high standard and after the University had originally decided not to go down such a procedure.

Fitness to Practise procedure

6. It is important to note that the Claimant did not take part in those proceedings whether orally or in writing as he made clear in an e mail dated 6 March 2010.

7. On 15 March 2010, the Claimant was found by the University of Leicester to be unfit to practise as a doctor and it was decided that he should not be awarded the MBChB or

be permitted to graduate (this latter aspect is not germane to the issues before me). In summary, the decision stated:

a. There were a number of substantiated instances of conduct which should be categorised as aggressive and unprofessional, which included "your bind over for affray in 2003"; "your withdrawal from the cardiovascular medicine block making independent unapproved alternative arrangements"; "the concerns expressed in statements from Dr Chohan and Ms McVicar about your conduct towards them and others"; "the sustained intemperate and abusive language of your letter of complaint to the Chancellor in 2009";

b. It noted that other "evidence was more circumstantial, but was consistent with the same picture"; and

c. The conclusion was "was reinforced by the frequent occasions in your history in which you had failed to engage fully and co-operatively with the Medical School and other University authorities, including but by no means limited to your decision not to meet the Dean to discuss your complaint, and your refusal to assist Professor Sayers in carrying out his investigation".

8. The Claimant thereafter made a complaint to the Defendant on two bases, the second being directly in respect of the Fitness to Practise decision. By decision dated 2 October 2011, the OIA refused to accept the complaint as it was not satisfied that the Claimant was unable to go back to the University to resolve matters. The Claimant sent further submissions on 8 November 2011 and 13 December 2011, acknowledging the internal complaints procedure had not been exhausted but requesting that the OIA should exercise the discretion which it has under its own rules. The OIA however reaffirmed its original decision on 11 January 2012. An application for judicial review followed but this was not granted leave.

The breach of contract claim

9. On 14 July 2015, the Claimant issued a civil claim against the University of Leicester for breach of contract, and in respect of relief seeking *inter alia*, an injunction to have the 2010 proceedings re-opened. The precise nature ofe this claim is at the heart of the second issue which I have to consider.

10. The claim made two central allegations as to a breach of contract that:

a. the University "acted unfairly in determining whether or not the Claimant was fit to practise as a doctor"; and

b. the University "wrongly withheld the Claimant's MB ChB degree".

The second part is not relevant to the issues before me.

11. The relevant particulars of breach as to the unfairness are in paragraph 32 of the Particulars of Claim and are all purely procedural and do not advert to the existence of fresh evidence.

12. Mr Hyams, the Counsel who drafted the pleadings for the Claimant, also sought somewhat tentatively an injunction on the following basis:

> "35. One possible remedy for the unfair procedure follows (as described above) in the determination by the University that the Claimant was not fit to practise is damages alone. However, it is still possible for the Claimant to have a fair consideration of the allegations concerning his fitness to practise and a fair hearing before a panel of the University's Fitness to Practice Committee, and the Claimant seeks an injunction, requiring the University to carry out a fresh investigation of the allegations concerning his fitness to practise and, if such investigation concludes that those allegations merit consideration by a panel of that committee, to convene a new panel of that committee, to determine afresh, and in a fair manner, whether or not the Claimant is fit to practise as a medical doctor. Therefore, the Claimant seeks (1) such reconsideration, and, if appropriate such a fresh hearing, and (2) damages." (I added underlinings for emphasis)

It is unusual in a pleading to talk about a "possible remedy" but it does appear to envisage new evidence being put in as it speaks of a "fresh investigation" and a request to "determine afresh".

The Tomlin Order

13. In due course, after a successful strike out application was made by the University on 14 October 2016 (which was then under application to be set aside) the whole claim was settled by a "Tomlin Order with a Confidential Schedule", by which the Claimant compromised all claims, rights, demands and set offs, whether known to the Claimant or the University or to the law, that he ever had, may have, or shall have against the University. I need to consider the terms of that Tomlin Order in more detail under Issues 2 and 3.

14. At the heart of his submissions, the Claimant says that to the extent the FTP Decision was challenged in the contract claim, that was only on the basis of the procedure adopted by the Panel and that there was no specific reference to new evidence (and I shall come to the submissions at greater length in due course).

15. The Claimant contends that it is also of great importance that during the negotiations the parties were aware that there was new evidence which the Claimant might want to deploy at some stage because of this interchange:

    a. By email on 14 February 2017, Ms Gill (the Claimant's solicitor) asked of the University's solicitor:

> "[The Claimant] would ask the University to confirm, for the avoidance of any doubt, that the revised agreement will not preclude the University from reopening the question of his fitness to practise on the basis of further evidence post-dating 11th March 2010 being made available."

b. In response, by email on 15 February 2017, Mr Rance (the University's solicitor) said:

> "I am sorry to be difficult, but the first point to note is that is a matter on which you will need to advise your client. It is not our / the University's role to add any additional gloss to the terms of the agreement, which have now been debated at some length and which we had understood was virtually agreed.
>
> That said, for the University's part, I am able to say that the University does not seek to pre-judge the outcome of any future developments, whatever they may be."

16. The Claimant says that it was never contended by the University that this should be brought within the scope of the 2015 contract claim, and it is implicit that the parties understood it to be a separate matter.

Fresh evidence

17. I now turn to the question of what that new evidence consisted. After the FTP hearing, the Claimant sought at various stages further information which specifically went to the conclusions which had been reached in the FTP Decision which I have summarised above. The Defendant points out that much of this information was available to the Claimant some years ago before the present Complaint (and some indeed at the time of the FTP proceedings which the Claimant chose not to attend).

18. By March 2017, the Claimant had compiled documentation which he says firstly went to the heart of the FTP Decision as a matter of substance, and secondly which was not available to him at the time of the FTP Decision. The Claimant has compiled a helpful list of documents and list of dates on which he obtained evidence (and for present purposes I accept that most of it was new evidence).

19. On 22 March 2017, the Claimant submitted his new evidence to the University and asked the University to re-open the FTP Decision. He began his submissions with this request:

> "I am writing to invite the University to apply an exceptional discretion to the reopening of my fitness to practise case following the emergence of new factual material likely to impugn the original finding of the Fitness of Practice panel".

20. The evidence sought to be relied on in a 12 page closely typed document dated 21 March 2017 contained *inter alia* the following (and these must be considered in the round as there is some element of overlap):

a. that the Claimant had made clear his concerns at the Kettering Hospital placement, which is recorded in an email from Shelley Gardiner to Elaine Barry on 19 July 2006 – "I was made aware of the absence of his haematologist on the 2nd day of their placement and think I mentioned it in passing". The FTP Committee explicitly rely upon the Claimant's withdrawal from the cardiovascular block in the decision, and the Claimant says that this provides

mitigation and explanation. The Claimant says that this email was not available to the Claimant at the time of the FTP Committee hearing.

b. In the End of Block Assessment Form dated 19 June 2007, the Claimant was described by his supervisor as "very keen and interested" and "exceptionally good". This assessment was explicitly "based on collective opinion" (which the Claimant perhaps wrongly assumes to be the views of everyone involved). The Claimant states that Ms McVicar appears to have contributed to this assessment, which casts he says significant doubt on the witness statement which she provided to the FTP Committee which was explicitly relied upon in the decision. The Claimant says that the Panel did not see this crucial document and this was not available to the Claimant at time of the FTP Committee hearing.

c. The Claimant asserts that new documentation makes clear there were no incident reports logged in his placement. The Claimant says that this again casts credibility doubts on the allegations made by Ms McVicar in her statement (which he says in any event was drawn up by Professor Sayers), which were explicitly relied upon by the FTP Committee, as she never sought an incident to be logged.

d. The Claimant says that in Bedford Hospital in or around mid 2007, the Claimant had made a complaint about his placement in gynaecology, as recorded in a note of a meeting dated 12 September 2007. This related to two incidents as well as his concern that due to his gender he was receiving less training than other students. The Claimant says that these complaints were acknowledged with some sympathy by the hospital with an apology (although I do not necessarily read it in that way).

e. Mr Siesage informed the Vice Chancellor that the Claimant was "offered…the opportunity…to see me and explain his complaint in more detail. He declined to take up this offer unless I saw him on neutral territory in the presence of his solicitor. I was not willing to do this and gave him extra time to state his case in writing". The Claimant says that this makes clear that the FTP erred in supporting its conclusion in the Claimant's alleged decision "not to meet the Dean to discuss [his] complaint". He had agreed to meet the Dean.

f. The Claimant says that the evidence raised issues with the University's response to the Claimant's complaint which relied upon general student satisfaction to dismiss it which the University had relied upon their complaint response before the FTP Committee. It is necessary to explain that the University's response to the Claimant's complaint used statistics from the National Student Satisfaction survey to dismiss it. In particular, the University set out various statistics from the NSS which purported to show other students were satisfied and, in effect, the Claimant was a "one off". For example "In the National Student survey for your year 84% of students were satisfied or very satisfied".

g. In addition, the Claimant submitted the FTP Decision concerning Dr Hathiari (a former student at the medical school), (which the Claimant says was not

available to the Claimant until he had been shut out of the University's processes), which refers to concerns about "whether (Dr Hathiari) had received sufficient support while she was at medical school", and conclusions that "Dr Hathiari's performance was well below the standards expected of an FY1 trainee." Dr Hathiari had been employed as an FY1 trainee between August 2009 and March 2010. As a consequence of the FTP Decision, the GMC wrote to all medical schools in the country to remind them of responsibilities to pass only students who were fit to practise medicine.

h. The Claimant also relies on new evidence which the Claimant says indicates a potential bias from the University, and in particular Mr Siesage (who also wrote the FTP Committee decision), in appointing a Panel:

i. As to the appointment of an investigator, Mr Siesage stated "I agree must be clinician and will have to be proper staff to avoid challenge";

ii. "Of course we cannot make them testify (though I think the GMC would say the doctors have an overriding duty) but we do need to do our best to persuade them";

iii. "Since then Professor Sayers has been interviewing witnesses to the Claimant's conduct to ensure the case is as sound as possible" – this indicates pre-determination;

iv. "Nigel [Siesage] is very very keen that you chair as opposed to a different lay member".

Clearly this last point does go to the procedure which was adopted by the FTP Panel.

21. The Claimant's letter concludes that "new evidence shows that the reports before the FTP panel, the evidence used to inform those reports and statements relied upon when reaching a decision of being unfit to practice are wholly unreliable". The University responded and the Claimant then brought the matter before the Defendant.

22. In the OIA Decision of 25 August 2017 (in respect of which this Judicial Review Claim is brought) it is stated that "all of the evidence he has now submitted relates to the fairness of the fitness to practise case in 2010". The Claimant says that this assertion is not correct as the evidence just referred to targets the substantive decision rather than the process by which that decision had been arrived at. The Claimant contends that had the new evidence been taken into account, the FTP Committee would have reached a different conclusion and his Counsel points out that he does not contend in this complaint that the FTP Committee had acted in a procedurally unfair manner, as he had in the High Court claim.

23. Although Mr Skinner for the Defendant is correct in saying that some of the material was available to the Claimant at the time of the FTP proceedings, I think the majority was new or at least was new to him. I make no specific findings on this as it is not necessary to do so for the purposes of this claim.

24. The University on 14 July 2017 refused to reopen the matter after a letter was received from the Claimant's solicitors. Accordingly the Claimant made a complaint to the University snd then on that being turned down to the Defendant dated 19 July 2017.

25. The Claimant suggested that the refusal by the University suffers from the following fundamental flaws:

    a. The letter fails to apply the test which the University has said that it would apply in deciding whether to re-open the FTP Committee decision, as set out above and in *R(Gopikrishna) v OIA* [2015] EWHC 207 (Admin).

    b. It fails to pay any attention to the documents, and therefore fails to engage at all with the Claimant's request for the new material to be considered. At a minimum, the Claimant says that the University must read the documents submitted in order to decide if the test is met and it did not do so.

    c. It does not come anywhere near to providing sufficient reasons for the decision.

    d. It uses an irrelevant date in looking at when the Claimant had the documents. The Claimant says that fact he had the documents in 2012 is irrelevant. The relevant point is that these were not available to him at the date of the FTP decision on 15 March 2010. In any event, the documents the Claimant relies on were delivered to him in dribs and drabs following a data protection request made prior to the FTP hearing which dragged out the process.

26. The Defendant's decision of 25 August 2017 set out:

    a. That the breach of contract claim meant that the complaint was not eligible to be considered pursuant to rule 3.3 of the OIA Rules

    b. The effective operation of the OIA Scheme would be impaired by the time elapsed since the FTP Decision (by rule 4.7 of the OIA Rules), although this on its own would not have caused the complaint to be ineligible.

    c. On the merits, the OIA would have considered the complaint as "Not Justified" in any event.

27. The Claimant primarily challenges in this judicial review application that his complaint was declared ineligible because it relates to the same subject matter as the 2015 civil proceedings.

The issues for the Court

28. In summary, in these proceedings the Claimant suggests that the subject matter of the 2017 complaint and the 2015 claim is not the same, or, depending on the degree of scrutiny which it is appropriate for the Court to give, that it was irrational for the Defendant so to conclude, and as such the decision that it was ineligible is unlawful. The Defendant contends that that is misconceived and invites the Court to find that the Defendant's conclusion that the subject matter of the 2015 claim and the 2017 complaint are the same is rationally, and indeed objectively and obviously, correct.

29. Further, the Defendant contends that, having gone on to consider what it would have done had the complaint been eligible and concluded on analysis that the complaint would not be justified, this is a case in which the Court can be properly satisfied that it is highly likely that the outcome would not have been substantially different even if the complaint were eligible, as a result of which relief should be refused under s 31(2A) of the Senior Courts Act 1981.

30. The parties are agreed on the three issues which I have to consider and I will do so after discussing the powers of the Defendant.

The Defendant's powers

31. The scope of the OIA's powers has been considered before by the courts although not I believe in the context of the first point raised by the parties here. The OIA is a private limited company which has been appointed under the Higher Education Act 2004 and has a function to review a 'qualifying complaint' made against a Higher Education Institution (including a university) and to determine the extent to which it is justified.

32. Section 12 of the 2004 Act defines qualifying complaint and states that it must be brought by a student or former student (so that it does not extend to prospective applicants).

33. Section 13 is distinct in function in that it gives power to the Secretary of State to designate a body corporate as the designated operator for England. That operator (here the OIA) must meet all of the conditions set out in schedule 2 which includes the ruling out of complaints if "relevant proceedings have been concluded" (Sched 3 para 3(2) (c) (i) which I will have to construe). The distinction between the functions of these two sections is an important part of the case for the Defendant and I will address it below.

34. Paragraph 3 of Schedule 2 of the 2004 Act sets out Condition B:

> "(1) Condition B is that the scheme provides that every qualifying complaint made about the qualifying institutions to which it relates is capable of being referred under the scheme.
>
> (2) A scheme does not fail to meet condition B only because it contains some or all of the following…
>
> …(c) provision that a qualifying complaint is not to be referred under the scheme if–
>
> (i) relevant proceedings have been concluded, or…
>
> (3) In sub-paragraph (2)(c) *"relevant proceedings"* means proceedings *relating to the subject matter* of the qualifying complaint that have been brought at first instance before a court or tribunal." (emphasis added)

35. Helpful general guidance about the approach of the court to the OIA has been given in *R (Zahid) v University of Manchester* [2017] EWHC 188 (Admin), where Hickinbottom

J (as he then was) succinctly set out the importance of the completion of a student's education:

> "5. For students, the completion of their education is important. They pay significant sums for their higher education – currently £9,250 per annum for home students [it was £1000 per year for the Claimant], and significantly more for overseas students – for several years. Medical and PhD students, for example, can expect to study for at least five years. Furthermore, for students who fail to complete a course, that can result in a loss of job opportunities and thus life-time income, particularly for those pursuing professional or vocational courses.

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

> "42…its procedures are intended by Parliament to be an alternative to court, procedures which are free of charge, confidential, informal and inquisitorial, with a view to resolving complaints in a non-judicial manner and without recourse to the court, by determining whether the HEI's actions were procedurally compliant and reasonable in all the circumstances, without adjudicating on formal rights and obligations; and making recommendations for steps that may be more flexible, constructive and acceptable to all parties than the restricted remedies available to a court of law. Given that Parliament has determined the role of the OIA, and conferred a broad margin of discretion in how it exercises its functions, the court will only interfere with its decision in a particular case with especial caution."

I also found valuable guidance in paragraphs 23-31 which sets out scheme.

36. Further, in *R (Maxwell) v Office of the Independent Adjudicator* [2012] PTSR 884 at para 23(7), Mummery LJ said "The courts will be slow to interfere with review decisions and recommendations of the OIA when they are adequately reasoned. They are not required to be elaborately reasoned, the intention being that its operations should be more informal, more expeditious and less costly than legal proceedings…"

37. I have also considered the Rules of the Defendant, the Defendant's "Guidance Note: Eligibility and the Rules" dated 9 July 2015 and the Explanatory Notes to the Act.

Ground 1: the proper standard of scrutiny

38. In the OIA Decision, the OIA determined that the contractual claim made by the Claimant related to the same subject matter as the complaint, and therefore the complaint was ineligible for its consideration. The first question is whether this is an issue for the Court to determine, or one for the OIA subject to rationality review (on *Wednesbury* grounds)?

Claimant's submissions

39. The Claimant submits that in the light of the statutory scheme, if a complaint is made which has not been the subject of "relevant proceedings" pursuant to paragraph 3 of Schedule 2 of the 2004 Act, which is then rejected by the OIA on jurisdictional grounds, there are two important consequences. Firstly, the scheme itself would fail to meet the requirements of the statutory scheme and be ultra vires. Secondly, the individual would be entirely shut out of the complaints scheme. He concludes from this that the matter of whether the OIA has jurisdiction over the complaint, namely whether "relevant proceedings" have been concluded or stayed, is a matter for the Court because it is a matter of jurisdiction of an ombudsman or adjudicator scheme. It is, says the Claimant, a heavy thing to exclude a complaint on this ground.

40. The Claimant relies on *R (Mustafa) v OIA* [2013] EWHC 1379 (Admin) in relation to section 12(2) of the 2004 Act which states that, to the extent a complaint constitutes a matter of academic judgment, that is not a "qualifying complaint" and is therefore outside the jurisdiction of the OIA. The question for the Court was whether the determination of academic judgment on a judicial review was one for the OIA or for the Court. Males J said:

> "53. When such questions do arise, they will go to the jurisdiction of the OIA. The OIA has a duty to consider those complaints which fall within the definition of "qualifying complaint" and cannot consider those which do not. The role of the court, therefore, will be to determine one way or the other whether or to what extent the complaint is excluded from consideration by the OIA by virtue of section 12(2), and not merely to review the OIA's decision on that point for rationality."

41. The Claimant also referred me to *R(AC) v OIA* (unreported, Administrative Court, 31 March 2017, CO/5366/2016 and submitted that it is determinative of this first issue. There was here an application to rejoin a course which the OIA ruled out on the basis that it was an admissions decision over which it did not have jurisdiction because of s12(2)(a) of the 2004. At paras 44 – 48, the court held that it was a question for the court to determine whether it is or is not. It is however to be noted that neither Ms Farris who appeared for the Defendant nor Ms McColgan who appeared for the University as an Interested Party contended otherwise so that the point was not fully argued as it has been before me.

42. The Claimant also says that another demonstration of this pattern to the effect that this is an issue for the courts to determine, albeit in relation to a different ombudsman, is to be found in *R (Parish) v Pensions Ombudsman* [2009] EWHC 32 (Admin) and [2009] EWHC 969 (Admin). It was necessary to consider in that case Section 146(6) of the Pensions Scheme Act 1993 which in material parts reads:

> "The Pensions Ombudsman shall not investigate or determine a complaint …:
>
> (a) if, before the making of the complaint …:

> (i) proceedings in respect of the matters which would be the subject of the investigation have been begun in any court or employment tribunal…" (My underlinings)

43. In *Parish,* it was argued by the Ombudsman that employment tribunal proceedings initiated by the Claimant fell within that provision so that the Ombudsman could not investigate. Keith J determined the question himself, rather than by reviewing the decision of the Ombudsman (second judgment at para 5). It must be noted that the Defendant states that the 1993 Act this is in materially different terms to the 2004 Act because it actually set up the Ombudsman role by statute (rather than merely setting out conditions for the appointment of the OIA, a private body as does the 2004 Act).

44. It is notable (and the Claimant relies on this on the second point to be discussed below) that despite an overlap between court proceedings and the complaint in terms of the facts in *Parish,* Keith J drew a distinction between the proceedings in terms of what they sought. Both related to the termination of the Claimant's employment – the employment tribunal had to consider whether the dismissal was "unfair"; whereas the complaint had to determine whether the termination was "in the interests of the efficiency of the service in which he [was] employed" (paras 5 and 6 of the second judgment). The Claimant submits that this is indicative of the Court's approach so as to not shut individuals out from complaints mechanisms simply because there is a factual connection between a complaint and legal proceedings (although that was not stated as a matter of principle in that case).

45. The Claimant further states that it is a core public law principle that an inferior tribunal (which he says includes a statutory body such as an Ombudsman) cannot determine its own jurisdiction. This is set out in *R v Shoreditch Assessment Committee ex p Morgan* [1910] 2 KB 859, which was quoted in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 at 197E: the Defendant however counters that on any view the OIA is not an inferior tribunal.

46. Further the Claimant states that whether legal proceedings are "relating to the subject matter of the qualifying complaint" is a matter which is within the expertise of the Court, and not something that the OIA has special expertise over.

Defendant's submissions

47. In response, the Defendant asserts that

    a. the question is one of statutory construction as to the appropriate level of review according to the highest authority (*R(A) v Croydon LBC* [2009] 1 WLR 2557 (esp paras 24-27,52 per Baroness Hale of Richmond), and the central factor in determining the question of Parliamentary intent as to whether a question is one for the Court or for the primary decision-maker, is whether the criterion to be applied is objective, admitting of a right or wrong answer, or imprecise, such that different decision-makers, each acting rationally might reach differing conclusions when applying it to the facts of a given case or it involves the exercise of judgement (also *R(Ali) v Justice Secretary* [2013] 1 WLR 3536 para 57).

b. There is authority to the effect that this is a matter for the OIA with *Wednesbury* supervision: As Pill LJ said in *R(Siborurema) v OIA* [2007] EWCA Civ 1365, at para 53 the "OIA is able, both in defining its scheme and in deciding whether particular complaints are justified, to exercise a discretion" [underlining added]. The Claimant refers however to para 74 where Richards LJ appears to limit the discretion there referred to "the decision whether a complaint is justified".

c. Further in *Zahid v University of Manchester* [2017] EWHC 188 (Admin), at para 42 Hickinbottom J (as he then was) notes that "The OIA has a broad discretion…as to the scheme it formulates*."* And this was a case in which the exclusion in Rule 3.3 of the OIA Rules was very much at the centre of the Court's attention. The formulation by the Judge in Para 42 of *Zahid* is important as the reference to discretion is both as to the scheme it formulates and in operating the scheme when formulated;

d. The Defendant contends that *R v Sec of State for Home Department ex p Onibiyo* [1996] QB 768 concerns a similar judgment as to whether something is a fresh claim and that is determined on *Wednesbury* principles; at 784g, Sir Thomas Bingham MR said that "Where an exercise of administrative power is dependent on the establishment of an objective precedent fact the court will if called upon to do so in case of dispute, itself rule whether such fact is established to the requisite standard…the decision whether an asylum seeker is a refugee is a question to be determined by the sec of state and the immigration appellate authorities whose determinations are susceptible to challenge only on *Wednesbury principles"* (also *WM (DRC) v Sec of State for the Home Dept.* [2006] EWCA Civ 1495; *Dowty Ltd v Wolverhampton Corp* [1976] 1 Ch 13 at 26b-h per Russell LJ; *R v Home Secretary ex p Khawaja* [1984] 1 AC 74 at 122a-h).

e. As a matter of fact, the OIA cannot have rules that do not comply with the conditions set out in Schedule 2 of the 2004 Act.

f. The Pensions Ombudsman case relied on by the Claimant does not apply as that statutory framework is materially different to the way in which the 2004 Act is structured.

g. The cases of *Mustafa* and *AC* as relied on by the Claimant are not on point as S12 of the 2004 Act is about qualifying complaints, whereas the rather different S13 which is relevant here designates the body to be appointed (at present the Defendant) and s13(3)(b) is a list of conditions subject to which the designation can take place. These are more appropriate for evaluation**;** instead, it provides for conditions which the scheme must meet before the Secretary of State may designate a body as the designated operator. These are separate. The Schedule 2, paragraph 3, carve out does not define the jurisdiction of the scheme itself.

h. The case of *R v Shoreditch Assessment Committee ex p Morgan* [1910] 2 KB 859 to the effect that no tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction is irrelevant as the OIA is not a tribunal of inferior jurisdiction.

i. "Relate to" which are the relevant words to be construed in the definition of relevant proceedings are words which require evaluation; they can have a narrow/wider definition and so is a word of indefinite application; see eg *Svenska Petroleum Exploration AB v Government of Lithuania* (No 2) [2007] QB 886 para 137.

Discussion

48. My task is thus in the light of these helpful submissions to construe Schedule 2 para 3(2) (c) of the 2004 Act which is headed "Conditions to be met by Students Complaints Scheme" and provides (in material parts) that "a qualifying complaint is not to be referred under the scheme if relevant proceedings have been concluded". "Relevant proceedings" are defined in para 3(3) as "proceedings relating to the subject matter of the qualifying complaint". I have to decide whether Parliament intended the court itself to decide this question or to allow the Defendant to do so subject only to review on *Wednesbury* principles.

49. As a matter of statutory construction (as stated in *R (A) v Croydon LBC* [2009] 1 WLR 2557 para 52) I believe that the criterion to be applied (i.e. "relating to the subject matter") is objective, admitting of a right or wrong answer, rather than evaluative. Further, it is appropriate that the court should so construe the provision as it is in a better position to decide this than the OIA. It is the sort of issue which the courts deal with every day.

50. Whilst "relating to" is not a straightforward concept it is not a spectrum on which the judgement of the OIA will be of particular assistance. I conclude that Parliament intended this issue to be decided by the court and I will go on to do so.

51. As to the authorities cited, in reaching this view I think that *Mustafa* and *AC* are to some extent helpful as background guidance although I agree with the Defendant that it does not conclude the matter as they focus on a different section of the 2004 Act. On the other hand, I do not think that the difference between sections 12 and 13 is as material as the Defendant suggests.

52. I do not believe the principle in *ex p Morgan* applies as the OIA is not a body of interior jurisdiction. Further I do not think that the judges in *Siborurema* and *Zahid* were intending their remarks on discretion to apply to a case such as this.

Was the subject matter of the complaint and the contract claim the same?

53. I must now decide whether the subject matter of the complaint to the OIA relates to the subject matter of the contract claim. This is the second issue.

Claimant's submissions

54. The Claimant emphasises that the complaint to the Defendant now is solely brought in relation to the Refusal and he does *not* complain about the procedure leading to the FTP Decision (which was in contrast the subject of the contract claim). The complaint relates to admitting new evidence and was a substantive matter as to whether the substantive

decision by the FTP Committee should be re-opened (which is the nature of the present complaint).

55. He says that the fact there was such a distinction was understood by both the Claimant and University when the Tomlin Order was signed in respect of the contract claim. In the email exchange cited above between the Claimant's solicitor and the University's solicitor, the matter of fresh evidence was raised and considered as a separate subject matter.

56. He also asks me to take into account the fine distinctions drawn in *Parish* – that even a factual overlap between the claims was insufficient.

57. The Claimant also places some weight on the fact that the OIA found the judicial review claim of 2012 (albeit not granted leave) was not "relevant proceedings". That judicial review followed a complaint to the OIA on the FTP decision, which the OIA refused to accept as it found the Claimant had not exhausted the University complaint mechanism. If that, which *did* involve the FTP Decision in a broader sense, was not "relevant proceedings", it is hard, he says, to see how the present complaint is either.

58. The Claimant further states that the OIA fails to engage with the Explanatory Notes on OIA rule 3.3 which state "The OIA will not consider matters which have already been decided by the courts". This, says the Claimant, indicates that the rule should be applied narrowly – nothing involving fresh evidence has ever been the subject of proceedings. It cannot be said the OIA complaint has already been decided by the Courts. The Explanatory Notes are he says consistent with the purpose of the statutory provision and rule 3.3, which is to prevent student's re-litigated issues which have already been decided by a Court. The issue with which the Claimant is concerned with has not been decided by a Court states the Claimant.

Defendant's submissions

59. The Defendant points to the fact that the Claimant stated on his complaint form that there had previously been a court or tribunal action relating to his complaint. I do not read much into this as the question was in a binary format on a computerised form leaving no space for explanation.

60. The Defendant argues that the Claimant's 22 March 2017 letter and submissions to the University asking it to re-open the 2010 fitness to practise proceedings which gives rise to the University's refusal, in turn giving rise to the complaint to the Defendant, relies on at least 16 matters relating to the alleged procedural unfairness of the 2010 fitness to practise proceedings (some of which are summarised above), including express allegations that matters were "procedurally improper" (first para), "not in accordance with …Procedures" (first para) and failed "to follow the rules of natural justice" (final para). Indeed, two pages of the submissions are under the heading "Bias and Procedural Irregularity".

Discussion

61. Although there are some differences between the contract proceedings and the Complaint I think that they are similar in that

a. they both seek to overturn the FTP;
b. they point to procedural faults albeit that the Complaint focusses more on new evidence than did the civil claim;
c. In both the Claimant's ultimate objective was to clear his name.

I think the court should take care not artificially to divide the proceedings from the complaint when they essentially relate to the same matter.

62. A useful question to ask here is "if the contractual claim has been resolved to the Claimant's satisfaction would the complaint to OIA have fallen away"; I think the answer to that is yes it would have, because the Claimant would have introduced new evidence in a renewed FTP investigation. I think there is so much degree of overlap between the complaint and the proceedings that they did relate to the same subject matter.

63. Further the whole point of the injunction pleaded by Mr Hyams on behalf of the Claimant in the High Court proceedings was to gain a further "investigation" and I find it difficult to accept that the Claimant would not have wanted to introduce new evidence had there been such an "investigation" and a fresh hearing. It is in that light that the Tomlin Order settling those proceedings must be viewed.

64. An analogy which I find of some assistance is that on remission by the Employment Appeal Tribunal to the Employment Tribunal after a decision is found to be procedurally unsound on appeal, the EAT may allow new evidence to be given although this is an unusual course; eg *Kingston v BRB* [1984] ICR 781; *Chief Constable of Kent Constabulary v Bowler* EAT308/17 at para 22. I do think that the High Court proceedings read as a whole were aimed in part at allowing a fresh investigation and new evidence.

65. Even assuming that all of the material in the later Complaint was truly new evidence it overlaps greatly with the procedural issues. In particular I think it a travesty to see the complaint and the proceedings as "two entirely distinct subject matters" as does the Claimant in paragraph 62 of his Skeleton Argument. I place no weight on the OIA's different approach to the judicial review proceedings.

66. Accordingly deciding as the court (in my view) must do, I judge that the Complaint was outside the scope of the Conditions because relevant proceedings have been concluded, albeit by a Tomlin Order (which preserved the strike out of those proceedings). I accordingly dismiss the Claim on this ground.

Issue 3: would the outcome not be substantially different?

67. I will deal more briefly with this third aspect of the case as it only arises if I am wrong on the second issue. By s31(2A) Senior Courts Act the court must "refuse to grant relief on an application for judicial review…if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred".

68. The OIA decided that had the complaint been accepted "we would have considered that it is not justified". There were three independent grounds for finding that the University's refusal to re-open the 2010 proceedings was reasonable:

a. That the Tomlin Order precluded it from doing so;
b. That the so-called 'new evidence' did not meet the relevant test in relation to whether to re-open the 2010 fitness to practise committee decision; and
c. That it was reasonable for the University to conclude that no fitness to practise panel could, in 2017, properly determine that a student who had sat his last MBChB exam in 2009 was fit to practise.

In paragraph 14 of the letter, it concludes "I am satisfied that it was reasonable for the University to have decided that there were no exceptional circumstances for reopening [the Claimant's] fitness to practise case in July 2017".

69. There is a high threshold for a finding that it is "highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred" for the purpose of section 31(2A) of the Senior Courts Act 1981. In *R (Logan) v Havering LBC* [2016] PTSR 603, Blake J said:

> "55 In my judgment, any consideration of whether the outcome was highly likely to have been substantially the same even if due regard had been had to the PSED should normally be based on material in existence at the time of the decision and not simply post-decision speculation by an individual decision-maker. Any other course runs the risk of reducing the importance of compliance with duties of procedural fairness and statutory or other requirements that certain matters be taken into account and others disregarded. Indeed, it would undermine the efficacy of judicial review as an instrument to ensure that the rule of law applies to decision-making by public authorities, by deterring claimants from bringing a case or the court from granting permission by a declaration by a decision-maker who has failed to obey the law to the effect that obedience would have made no difference. Whatever else Parliament may have intended to achieve by this legislation, I cannot infer that it included so draconian a modification of constitutional principles. It may well be that the new provision was only intended to apply to somewhat trivial procedural failings that could be said to be incapable of making a material difference to the decision made. If recourse can be had to the drafting history and statements of sponsoring ministers to assess the purpose of the legislation and the mischief to be cured there may be material support for such a conclusion. Such an approach is permissible without impugning parliamentary privilege where the issues of justification, proportionality and compatibility with European norms are engaged: see for example *R (Age UK) v Department for Business, Innovation and Skills (Equality and Human Rights Commission intervening) [2010] ICR 260* , paras 42-59."

70. This was cited in *R (Enfield) v Secretary of State for Transport* [2016] EWHC 3758 (Admin), in which Laing J set out:

> "106 The amendments to section 31 of the 1981 Act are not prescriptive about the material which the court may take into

> account in considering whether 'it appears' to it to be 'highly likely that the outcome for the applicant would not have been substantially different'. Nonetheless, the threshold stated in the amendments is relatively high. For that reason, and for the reasons alluded to by Blake J in Logan , it seems to me that a court should normally expect a witness statement or other document with a statement of truth to support a defendant's reliance on these amendments. There is no such material here. For that reason alone, I do not consider that the test in section 31(3C) or (2A) is met in this case. That means that I do not consider that the either the fact, or the outcome, of the Defendant's reconsideration means that I am bound to refuse permission to apply for judicial review on the argument about relevant considerations."

71. I was also referred to and found helpful *R(Wet Finishing Works Ltd) v Taunton Deane BC* [2017] EHWC 1837 (Admin) para 74 and *R(Haworth) v HMRC* [2018] BTC 22 at para 104.

72. I have also read the evidence put in by both parties on this aspect.

Claimant's submissions

73. The Claimant submits generally

a. that there is a high threshold for showing that the outcome would highly likely be the same, and the Court cannot be sure that the outcome would highly likely be the same.

b. the "investigation" which was made by the Defendant in its Decision was made outside of the OIA Rules and was unlawful and had the investigation been carried out lawfully it cannot be said the outcome would highly like have been the same.

c. the complaint was not considered pursuant to rule 6 of the OIA Rules and this meant it failed to seek a response and documentation from the University, and failed to provide the Claimant with a right to reply.

74. As to the Tomlin Order, the Claimant states that the email correspondence cited above when the Tomlin Order above was signed made clear there was an intention to submit further evidence in due course. Whilst the University's response did not commit itself to considering further evidence, it did, says the Claimant, obliquely encourage a view that he was entitled to submit further evidence. The University cannot, in light of that exchange, thus use so it is said the Tomlin Order as an absolute bar on the submission of new evidence.

75. As to the finding by the OIA that the "new evidence" did not meet the relevant test, the Claimant submits that the OIA adopted a completely irrelevant "test". The OIA cites the test for reopening a decision as that in paragraph 181 of *Gopikrishna*:

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

However, the Claimant states that this was never presented as a "test" in *Gopikrishna*. This was instead a scenario set out in the context of a "floodgates" concern, and related only to new medical evidence. It was not the test for whether the FTP Decision should be reopened. Importantly, that test is determined by the University rather than the OIA or Court.

76. The OIA's duty is to determine whether the University "properly applied its regulations and followed its procedures" (OIA Rule 6.2). The OIA has failed to consider (1) what the University's test was for reopening the FTP Decision; and/or (2) the test the University cited in *Gopikrishna* in its own evidence (set out above).

Defendant's submissions

77. The Defendant responds

a. On the Tomlin Order the Claimant simply ignores the first operative paragraph of the agreement.

> "This agreement is entered into in full and final settlement of, and each party hereby releases and forever discharges, all and/or any actions, claims, rights, demands and set-offs, whether in this jurisdiction or any other, whether or not presently known to the parties or to the law, and whether in law or equity, that it, its Related Parties or any of them ever had, may have or hereafter can, shall or may have against the other party or any of its Related Parties arising out of or connected with the Dispute and/or the Proceedings."

b. In relation to the Defendant's conclusions on the merits, such conclusions are subject to light-touch review on *Wednesbury* grounds only.

c. the emails are inadmissible to interpret the terms of the consent order as a matter of trite contract law (see Chitty on Contract, 32nd ed., 13-122).

Discussion

78. In relation to the s32(2) test I think it highly likely the result would have been the same even if the Defendant should have considered the Complaint. I think the Tomlin Order is as ample as it could be and I reject Mr Glenister's submission that it defined the dispute purely in relation to procedural matters. I see nothing *Wednesbury* unreasonable in the OIA decision.

79. It follows that I dismiss the claim. I wish to thank Counsel for the exemplary manner in which they conducted themselves.