# JUDICIAL REVIEW IN EDUCATION:
# A CASE LAW UPDATE

## Introduction

1. This talk outlines the most interesting judicial review cases in education in the last 12 months. It addresses the following topics:
   (i) School transport;
   (ii) GCSE examinations;
   (iii) Eligibility for student funding in higher education;
   (iv) Universities;
   (v) The Office of the Independent Adjudicator;
   (vi) Costs in judicial review claims in the Upper Tribunal.

## School Transport

2. The issue in *R (M and W) v. London Borough of Hounslow* [2013] EWHC 579 was whether the Defendant was obliged under section 508B of the 1996 Act to make travel arrangements for eligible children all the way from their respective homes to school and back again, or instead (as contended by the Defendant), if in an appropriate case transport could be provided from a pick-up point a reasonable distance from an eligible child's home.

3. Section 508B(1) of the 1996 Act provides:

> "A local authority in England must make, in the case of an eligible child in the authority's area to whom subsection (2) applies, such travel arrangements as they consider necessary in order to secure that suitable home to school travel arrangements, for the purpose of facilitating the child's attendance at the relevant educational establishment in relation to him, are made and provided free of charge in relation to the child."

4. Subsection (2) provides:

> "This subsection applies to an eligible child if—
>
> (a) no travel arrangements relating to travel in either directions between his home and the relevant educational establishment in relation to him, or in both directions, are provided free of charge in relation to him by any person who is not the authority, or

(b) such travel arrangements are provided free of charge in relation to him by any person who is not the authority but those arrangements, taken together with any other such travel arrangements which are so provided, do not provide suitable home to school travel arrangements for the purpose of facilitating his attendance at the relevant educational establishment in relation to him."

5. Subsection (3) defines "home to school travel arrangements" in relation to an eligible child as "travel arrangements relating to travel in both directions between the child's home and the relevant educational establishment in question in relation to that child".

6. Subsection (5) provides that "travel arrangements" in relation to an eligible child "include travel arrangements of any description made by any parent of the child only if those arrangements are made by the parent voluntarily".

7. Sales J held that the Defendant was not, in every case, obliged to arrange direct transport for an eligible child from their home to school. It was potentially lawful for a local authority to arrange for transport via a pick-up point from a reasonable distance from the child's home. Whether this would be suitable in any given case would require consideration of the circumstances of that case concerning both the abilities and disabilities of the child, the position of the parent, and what can reasonably be expected of them (at §17). But whether the travel arrangements are "suitable" is a question of judgment for the LA (at §21).

8. Sales J reached that conclusion for the following reasons:
   (i) The definition of "travel arrangements" in section 508B(3) of the 1996 Act only requires travel arrangements "relating to" travel in both directions between home and school. The phrase "relating to" indicates a weaker form of connection between relevant travel arrangements and the child's journey from home to school than an alternative formulation (such as "covering" or "covering the entirety of") (at §16).
   (ii) Subsection (2) removed the duty under subsection (1) if there is a suitable free transport service provided by a person other than the local authority, including one which involves a pick-up point at a reasonable distance from the child's home. There shouldn't be a greater onus on the local authority where the duty arises under section 508B(1) than if section 508B(2) applies (at §18(i)).
   (iii) The Judge rejected the argument that the word "suitable" in the phrase "suitable home to school travel arrangements" relates only to the mode of transport and not to the extent of the transport arrangements (at §18(ii)).

(iv) It was common ground that the LA could make arrangements for non-eligible children under section 508C of the 1996 Act that included a pick up some distance from the home. The definition of "travel arrangements" in section 508C(3) was closely similar to the definition of "home to school travel arrangements" in section 508B(3). The same meaning should be given to the near identical wording in each section (at §18(iii)).

(v) The definition of "eligible child" in Schedule 35B to the 1996 Act covered a wide variety of children. It may be possible for some of those children to get to school without difficulty if they only had to walk to a designated pick-up-close to their home. If every child had the right to insist on a pick-up, considerable public expense would be incurred going well beyond what would be involved in setting up more efficient travel arrangements with designated pick-up points (at §18(iv)).

(vi) Reviewing the case-law, Sales J concluded that the general standard in this area "is that the parent must do those things which are reasonably practicable to be done and which an ordinary prudent parent would do" (at §18(v)).

(vii) In *Surrey County Council v. Ministry of Education* [1953] 1 WLR 516 Lynskey J held that the LA should "cover the cost of taking the child by public transport from a point reasonably near his home to a point reasonably near the school—I do not say to the school door, but reasonably near thereto" (in comments approved by the House of Lords in *Devon County Council v. George* [1989] 1 AC 573). Sales J said the ruling in the *Surrey* case has been accepted as governing the extent of the obligation on a LA for some time, and there is no clear language in sections 508B and 508C to indicate Parliament intended that there should be departure from that principle (at §18(vii)).

(viii) If a parent did not voluntarily consent to walk with the child to the pick-up point, that part of the journey would not constitute a "travel arrangement" (and so there was no incompatibility with section 508B(5) of the 1996 Act).

**GCSE Examinations**

9. In *R (London Borough of Lewisham and Others) v. AQA, Edexcel, and Ofqual* [2013] ELR 281 (Admin); [2013] ELR 281 the claimants sought judicial review of the determination of the C/D grade boundary awarded in respect of examinations and controlled assessments for English GCSE in June 2012. In particular, the claimants were concerned about the fact that for similar (or the same) assessments, candidates were required to obtain a higher mark in June 2012 than in January 2012 in order to achieve a C grade. It was asserted that the awarding organisations ("AOs") had acted, in response to a direction from Ofqual, to set the grade boundary so that the

number of students obtaining a C grade would not exceed the predicted number by more than 1%.

10. The AOs asserted that the January 2012 grade boundary had been set too low, and if it had remained in the same place, there would have been a dramatic (and unjustified) increase in the award of a grade C than in previous years.

11. Ofqual stated that it had applied a policy of "comparable outcomes" to ensure that there was not variation in inter and intra year grades. Key Stage 2 data was used to predict outcomes, and the AOs were required to report if they exceeded the predicted outcome by more than 1%. Any such variation required justification.

12. The Court held that the defendants had not given improper weight to statistical material predicting the proportion of candidates who should achieve C grades, and had not fettered their discretion. With hindsight, the grading of students who took the assessments in January 2012 had been too generous, but that did not require the June 2012 cohort to be treated in the same way. Ofqual was entitled to take the view that priority should be given to ensuring that standards were consistent year on year, and the awarding organisations could not ignore that. There were no assurances about grade boundaries remaining constant between assessment dates, nor any consistent past practice, such as to give rise to a legitimate expectation. Although the difference in treatment between the January and June cohorts required justification, such justification was held to have been clearly established, in circumstances where any unfairness between the January and June cohorts could not be remedied without creating further unfairness elsewhere. The approach taken by the defendants was one which was properly open to them.

13. However, the Court rejected the suggestion that the decisions of the awarding organisations were not amenable to judicial review at all. Nor, on the facts of the case, did the possibility of intervention by Ofqual represent an alternative remedy that should have been pursued in preference to judicial review.

14. The Court's judgment contains a discussion of "conspicuous unfairness" as a ground of challenge in judicial review. It holds that, whilst it is ultimately for the court to decide whether the decision-maker has abused its power by acting in a way which is conspicuously unfair, that does not give the court a wide discretion to substitute its own view of the substantive merits. Rather, conspicuous unfairness should be seen as a particular form of irrationality. It may be the best description for a complaint based on a sudden change of policy or inconsistent

treatment, but judicial review will lie only if a reasonable body could not fairly have acted as the defendant did.

15. Finally, an argument based upon the public sector equality duty was also rejected by the Court, on the footing that equality implications could have no bearing upon the assessment of performance and the setting of grade boundaries (as opposed to e.g. fixing curricula and setting examination papers).

**Eligibility for Student Funding in Higher Education**

16. There are new issues about the eligibility for student finance of those who have lived here for many years, but have not regularised (or - as children - had regularised) their immigration status. We are aware that these are creating problems for a number of would-be students.

17. The Education (Student Support) Regulations 2011 ("the 2011 Regulations") govern eligibility for student support for higher education courses commenced on or after 1 September 2012. Support available is by way of grant (towards, for example, maintenance costs) and by loan (to cover tuition fees).

18. The 2011 Regulations require an applicant to:
    (i) have a prescribed immigration status (e.g. to be settled in the United Kingdom, to be a refugee, to be an EEA worker, or have indefinite leave to remain);
    (ii) (for the most part) have been ordinarily resident in England on the first day of the first academic year of the course; and
    (iii) (for the most part) have been ordinarily resident for 3 years in the United Kingdom or Islands (or, for certain prescribed immigration statuses, in the EEA/Switzerland or Turkey).

***Changes in eligibility***

19. For courses starting before 31 March 2011, applicants with discretionary leave to remain ('DLR') were also eligible for student finance (there is a slight quirk to this general principle, see below).

20. The history of the changes to the statutory regime is as follows:
    (i) The applicable regulations in force prior to 1 September 2012, were the Education Student Support Regulations 2009 ("the 2009 Regulations"). The 2009 Regulations provided that a "person with leave to enter or remain" was eligible (at paragraph 5 of

Schedule 1). Regulation 2 of the 2009 Regulations defined a "person with leave to enter or remain" as a person:

> "(a) who has been informed by a person acting under the authority of the Secretary of State for the Home Department that, although he is considered not to qualify for recognition as a refugee, it is thought right to allow him to enter or remain in the United Kingdom;
> (b) who has been granted leave to enter or remain accordingly; and
> (c) whose period of leave to enter or remain has not expired... ; and
> (d) who has been ordinarily resident in the United Kingdom and Islands throughout the period since he was granted leave to enter or remain."

(ii) An application for judicial review of this definition (in the Student Fees Regulations, but in identical terms) was brought by Temilola Arogundade against the Secretary of State for Business, Innovation and Skills ("the SSBIS") in 2010. Ms Arogundade had been granted discretionary leave to remain as a result of a claim under Article 8 of the European Convention on Human Rights. She alleged, *inter alia*, that the definition was irrational as she would have been in a better position had she made an obviously hopeless asylum claim. The SSBIS conceded the claim in August 2010 and agreed that persons such as Ms Arogundade should be deemed to fall within the definition.

(iii) After this claim, the SSBIS passed the Education (Student Fees, Award and Support) (Amendment) Regulations 2011 amended the 2009 Regulations for courses starting after 31 March 2011 so that the immigration category "persons with leave to enter or remain" was deleted, and replaced by a "person granted humanitarian protection".

21. This means that students who would historically have been eligible for student finance and who have often lived here for many years are no longer eligible (for example, young people who came to the United Kingdom as unaccompanied asylum seeking minors who are usually granted DLR to their eighteenth birthday, any young person who is granted DLR on human rights grounds).

***The Kebede Litigation***

22. Facts:

(i) The Kebede brothers ("the claimants") are aged 19 and 21. They came to the country from Ethiopia when they were young children, accompanied by an older brother who made an unsuccessful application for asylum and then abandoned them in 2004. Although they do not have asylum, they have no family or other links in Ethiopia.

(ii) The claimants had been looked after by Newcastle City Council and were "former relevant children" to whom leaving care duties under the Children Act 1989 ("the 1989 Act") were owed. Although it has been their statutory parent since 2004, NCC did not apply for leave to remain for the brothers until around 2009. They have DLR until 2014, and the overwhelming likelihood is that they will eventually be granted indefinite leave to remain.

(iii) The claimants wish to attend university and both were offered places, but they did not qualify for a student loan. The claimants had no family to whom they could turn to for assistance with fees/living expenses, and had applied for (and been refused) a commercial loan.

23. These facts have given rise to two judicial reviews which, for LSC reasons, have inconveniently not been linked.

24. *Kebede* (1): application for judicial review of the refusal by Newcastle City Council to provide a grant/loan to cover living expenses and tuition fees at university, [2013] EWHC 355. This claim succeeded, but is due to be heard by the Court of Appeal on 22 July 2013.

25. The relevant provisions of the 1989 Act are as follows:

(i) Section 23C(4) of the 1989 Act imposes a duty to provide assistance to a former relevant child under section 24B(2) to extent that "welfare and education or training needs require it"

(ii) Section 24B(2) provides for assistance to live near the place where he receives his education, and section 24B(2)(b) – provides by "making a grant to enable him to meet his expenses connected with his education or training"

26. The Claimant argued that tuition fees were "connected" with education and that their education needs required the Defendant to support him.

27. The Defendant argued, first, that tuition fees were not "expenses connected with education" as "connected" presupposes the former relevant child is already in education. A former relevant child is not entitled to payment for the education itself.

28. The Judge rejected this argument as tuition is plainly a part of education, and in ordinary language a tuition fee is "connected to education".

29. The Defendant argued, second, that Parliament could not have indeed section 23C to oblige the local authority to pay tuition fees for those with DLR given that such people are not permitted to get loans. The Judge rejected this argument. The fact that the relevant student loans regulations mean that those with DLR cannot get loans does not change the interpretation of the 1989 Act.

30. Two subsequent issues arose:
    (i) Who decides what are "educational needs"? Can the child say—I *need* to study at an expensive university in the United States?
    (ii) Can the local authority take account of financial resources as in *Barry* when assessing needs?

31. Answer:
    (i) The local authority decides so a claimant cannot require US University.
    (ii) BUT cannot take account of resource. This is like *Tandy* – objective assessment of what are educational needs and must meet them.

32. In sum: the local authority assesses whether former dependent child's educational, training or welfare needs requires payment for education (this question will give rise to obvious difficulties). If it does so require, the local authority has a duty to pay for it.

33. Newcastle City Council has permission to appeal to the Court of Appeal. The hearing is listed on 22 July 2013.

34. *Kebede* (2): an application for judicial review of the decision of the SSBIS to issue the 2012 Regulations. The claimants argue that the eligibility requirements in the 2012 Regulations are contrary to Article 2 of Protocol 1 to the ECHR and contrary to Article 14 read with Article 2 of Protocol 1 (on the basis that it constitutes an absolute bar to education and/or a bar to education that discriminates on the ground of immigration status). This claim is duty to be heard on 16 July 2013.

***Ordinary Residence***

35. *R (Arogundade) v. Secretary of State for Business, Innovation and Skills* [2012] EWHC 2505 (Admin). Facts:
    (i) A came to the United Kingdom in 2003 on a tourist visa and overstayed.

(ii) A applied for discretionary leave to remain on Article 8 grounds in September 2007. This was refused; the AIT (as then was) allowed her appeal in February 2009. A was granted discretionary leave to remain in September 2009.

(iii) In January 2010 A was granted student support to attend university. The SSBIS terminated students support in September 2010 on the basis that A was not ordinarily resident for 3 years prior to January 2010 (i.e. from January 2007) as she was not lawfully present in the United Kingdom throughout that period.

36. In the Administrative Court, Robin Purchas QC (sitting as a Deputy Judge of the High Court) held that the correct meaning of "ordinarily resident" in the 2009 Regulations was that given to the same term by the House of Lords in *R (Shah) v Barnet London Borough Council* [1983] 2 AC 309. In relation to student support, therefore, "ordinarily resident" means the place a person has chosen to live as part of his or her regular order of life (either for a short or long duration) but a person is not ordinarily resident in a place if his or her presence is unlawful.

37. A appealed to the Court of Appeal; her appeal was heard on Monday 24 June 2013. She asserts:

(i) that the 2009 Regulations do not contain a definition of ordinarily resident;

(ii) that there is no need to imply one in; to the extent that it is legitimate to require a connection between the UK and the recipient of student support that is provided by the prescribed immigration statuses (cf *Shah* in which the relevant regulations did not limit student support by nationality or immigration status);

(iii) that it is wrong to apply the principle statutory interpretation of *ex turpi causa* (a person should not profit from their wrong) so as to imply lawfulness into the meaning of "ordinarily resident". The Supreme Court held in *Welwyn Hatfield Borough Council v. Secretary of State for Communities and Local Government* [2011] 2 AC 304 held that the principle that a person should not benefit from his own wrong is not unlimited; rather the conduct said to disentitle a person must be considered in context and with regard to any nexus existing between the conduct and the statutory provision. Here, A's overstaying did not bear directly on her receipt of a student loan, and her conduct in overstating (whilst illegal) was not of such nature and gravity that it ought to have disentitled her from support.

38. The Regulations have now been amended so that there is a specific statutory definition of 'ordinary residence' for this purpose to mean 'and lawfully'. It is possible that on the right facts, a challenge could be mounted to the application of this criterion, on a similar basis to the challenge to non-eligibility of those with DLR. (Many applicants for student finance will in fact have been habitually resident here for many years before applying for finance; have no

prospect of living anywhere else; and will have arrived as children, so no 'fault' can be ascribed to them in having failed to regularise their immigration status earlier. Yet they will be delayed or precluded from access to higher education for many years. It must be open to doubt if this is compatible with the ECtHR's judgment in *Ponomaryov v Bulgaria* [2011] ECHR 5335/05.

**Universities**

39. In *R (Kwao) v. University of Keele* [2013] EWHC 56; [2013] ELR 266 the claimant challenged the Defendant's decision to award him a masters degree rather than a doctorate in education following the examination of his thesis on the basis, *inter alia*, that the decision was *Wednesbury* unreasonable. The Administrative Court held that the decision was squarely a challenge to academic judgment on which the court was not equipped to adjudicate, and so the challenge was not justiciable.

**The Office of the Independent Adjudicator**[1]

40. The Office of the Independent Adjudicator ("the OIA") is the body set up under the Higher Education Act 2004 to deal with student complaints about the decisions of Higher Education Institutions (HEIs) affecting them, other than those decisions concerning academic judgment. The OIA is a corporate body but it was established in *Siborurema v OIA* [2008] ELR 209 that it is subject to judicial review, though, as Moore-Bick LJ there stated (§70), this fact did not mean:

> "that the procedures and decisions of the OIA are to be treated as if it were a judicial body or that every complaint must be investigated in the same way. The nature and seriousness of complaints referred to the OIA is likely to vary widely and is therefore likely to call for a variety of different approaches... It is for the OIA in each case to decide the nature and extent of the investigation required having regard to the nature of the particular complaint and on any application for judicial review the court should recognise the expertise of the OIA and is likely to be slow to accept that its choice of procedure was improper. Similarly, I should not expect the court to be easily persuaded that its decision and any consequent recommendation was unsustainable in law".

41. Richards LJ, with whom Moore-Bick LJ agreed, stated at §74 that "The decision whether a complaint is justified involves an exercise of judgment with which the court will be very slow

[1] This part of the talk is based on a talk given by Aileen McColgan.

to interfere. A Complainant dissatisfied with the OIA's decision will often have the option of pursuing a civil claim against the HEI, which may well be an appropriate alternative remedy justifying in itself the refusal of permission to apply for judicial review of the OIA's decision".

42. The decision of the Court of Appeal in *Siborurema* emphasised the discretion accorded to the OIA by the 2004 Act. And in *Maxwell v OIA* [2011] EWCA Civ 1236 the Court of Appeal ruled that the OIA was not required to adjudicate complaints of disability discrimination brought by the applicant there, though a finding of discrimination, were it made, would be likely to result in a decision on the part of the OIA that the HEI had not acted reasonably.

43. There are two recent decisions in judicial review claims brought against the OIA, namely *Burger v OIA* [2013] EWHC 172 (Admin) and *Mustafa v OIA* [2013] EWHC 1379 (Admin). The OIA was successful in defending both of these claims. The latter is perhaps more interesting, turning as it does on the definition of academic judgment and hard-edged questions going to the jurisdiction of the OIA. The former is less immediately important but is of some interest as the claimant has been granted permission to appeal by the Court of Appeal. Further, the decision of the Administrative Court in *R (Matin) v. University College, London* [2012] EWHC 2474 (Admin); [2012] ELR 487 deals with a judicial review of the university when a complaint has been rejected by the OIA.

***Mustafa v OIA***

44. Mr Mustafa essentially challenged a decision on the part of Queen Mary, University of London, to deny him the masters degree for which he was studying because of a finding that a significant piece of coursework had been plagiarised. His internal appeals having failed, he challenged the HEI's decision on broad grounds to the OIA. The OIA rejected his complaint because, it took the view, the question whether work had been plagiarised was one of academic judgment which was outside its jurisdiction. Mr Mustafa's application for judicial review, which again was wide-ranging, was eventually given permission on the narrow question whether a determination of plagiarism <u>always</u> involved academic judgment. The OIA's position was that (1) it did and (2) even if it was wrong about this, the particular determination of plagiarism in this case did involve the exercise of such judgment (the determination of plagiarism turning neither on the application of the "Turnitin" or similar programme nor on a mechanical assessment of a degree of similarity between different documents). An extract from the decision of Males J follows:

> "**[51]** The exclusion of OIA jurisdiction contained in s 12 of the Act and repeated in r 3 of the OIA's rules applies "to the extent that it [the complaint] relates to matters of academic judgment". This does not exclude in its entirety any

complaint which involves a matter of academic judgment, but does so only "to the extent" that the complaint "relates to" such a matter... the exclusion applies where the central subject of the complaint is a dispute about an academic judgment and that complaints where such disputes are peripheral are not intended to be excluded. This is a helpful way of looking at the matter, though it is always preferable to apply the words of the statute rather than to gloss them. Questions may arise, therefore, as to the extent to which the OIA can consider a complaint which does involve a matter of academic judgment, but where the correctness of that judgment is not a central issue. An example may be a complaint that a finding of plagiarism had been reached by a process which was unfair. Indeed the OIA did consider – and rejected – Mr Mustafa's complaint that the finding of plagiarism against him was unfair because other students had done what he had.

**[52]** Obviously, the exercise of academic judgment does not encompass everything which academics do, and not all judgments which academics have to make will qualify as academic judgments. The exclusion applies only to those matters which involve the exercise of a certain kind of judgment which, beyond saying that it is "academic", the statute does not define. It is, however, the nature of the judgment which determines whether the judgment qualifies for the label "academic", and not whether the decision is easy or difficult. But there must still be an exercise of judgment. That said, the courts have at least been willing to consider whether an academic judgment was made *bona fide* or whether it was …and it may be that these qualifications are also implicit in the exclusion in s 12(2) of the 2004 Act.

**[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 s 12(2), and not merely to review the OIA's decision on that point for rationality. However, although such questions will no doubt arise and may present difficulties, in my judgment the present case does not require exploration of the outer limits of the area of exclusion and the broad issue of principle identified by Sir Stephen Sedley does not in truth arise.

**[54]** To my mind, it is reasonably clear that the question whether plagiarism has been committed often (and perhaps usually) will require an exercise of academic judgment, but that it need not necessarily do so. Take the case, for example, where a student lifts wholesale an article from the internet which he presents as

his own work without attribution or other acknowledgement. The computer programme will demonstrate 100% copying and no judgment is required, academic or otherwise, in order to determine that there has been plagiarism. It may be that such a case will be referred to an academic to decide what to do, but that will be a decision on what to do about the plagiarism and not a determination whether plagiarism has taken place – or even if it is, it is not a determination which requires any exercise of judgment…

**[56]** Once the possibility is accepted that some decisions that plagiarism has been committed may not require an exercise of academic judgment, the question arises whether the OIA's decision is tainted by an error of law. If the OIA had decided that it could not consider the complaint merely because it involved an allegation of plagiarism, without considering whether determination of that allegation related to a matter of academic judgment, that would have been an error of law. However, I do not regard the OIA as having so decided. Its decision, as I read it, was not that *any* determination of whether plagiarism existed was *necessarily* a matter of academic judgment, but that on the facts *this* particular determination was…

**[59]** Even if my interpretation of the OIA decision is wrong, however, and it does proceed on what I have held to be the wrong basis that such a determination necessarily involves an exercise of academic judgment, that is not the end of the matter. There would be no point in quashing the decision for error of law if on the facts the only possible conclusion is that the university's determination in this case did indeed involve an exercise of academic judgment – or indeed, since the decision is for the court and not a decision for the OIA subject to review for rationality, if that is the conclusion which I reach. In that event, the error of law would be immaterial.

**[60]** I do consider that the university's determination involved an exercise of academic judgment, the correctness of which is central to the complaint which Mr Mustafa wishes the OIA to consider, and indeed (if contrary to my view, this is the test) that this is the only possible conclusion. In order to explain that conclusion, it is necessary to focus on the nature of the issue which had to be determined. The issue here was not whether Mr Mustafa had lifted sections of his essay verbatim from the websites listed as his references. He admitted that he had. Nor was it whether he had set out such sections as quotations by using quotation marks or indents. He did not suggest that he had and it was obvious that he had not. Nor indeed was it whether "extensive quotations" with proper acknowledgement could constitute plagiarism...

> **[61]** Rather, the question was whether there had been a "proper acknowledgement" of what Mr Mustafa was doing, by means of the numbers in square brackets at the end of the paragraphs in question. This was precisely the issue correctly identified by Professor Wright as being the issue on which Mr Mustafa's appeal from the examination offences panel depended. In order to determine that issue it was necessary to have knowledge of academic conventions for making such acknowledgements and to apply that knowledge to what Mr Mustafa had done in order to reach a decision as to how these endnotes should be understood. It required consideration in the light of such conventions of whether the endnotes were meant to signify that some or all of the preceding paragraph was a verbatim quotation from the reference cited or merely (as would be a common use of footnotes or endnotes) that the information contained in the paragraph had been derived from the referenced source. That required an exercise of judgment and the nature of that judgment was academic. Indeed a phrase such as "proper acknowledgement", which was the phrase used in the university's regulations, is inherently likely to involve an exercise of judgment.
>
> **[62]** Mr Lawson submitted also that it was significant that the endnotes were contained in paragraphs of an introductory or factual nature, and that the later sections of the essay containing Mr Mustafa's own analysis did not include them. However, that submission goes to the question whether there was plagiarism and not to the nature of the judgment required to be made in order to determine that question. The extent to which different paragraphs of the essay were properly to be characterised as introductory or factual as distinct from analytical and the significance of that characterisation for determining the existence of plagiarism were themselves matters of academic judgment."

***Burger v OIA***

45. *Burger* was a case in which the applicant complained that the LSE at which he was an economics student had not published assessment schemes pertaining to his course. He had failed examinations without which he could not progress with his PhD studies in economics at the HEI. There was much confusion along the way over whether he wanted marking schemes or assessment criteria, his complaint initially being of an alleged failure to publish the former while the LSE regulations required the production and publication of the latter. The OIA, understanding that the terms "marking scheme" and "assessment criteria" were synonymous, interpreted the LSE Regulations to require publication only to staff (it being clearly perverse to publish such schemes to students). The applicant was given limited permission to challenge the OIA's rejection of his complaint.

46. At the eventual hearing Mostyn J ruled that the OIA had fallen into error in determining that the regulations did not require the publication of assessment criteria. However, having considered the content of assessment criteria published by other LSE departments, Mostyn J characterized (§17) "these verbal descriptions of what is required as banal and statements of the obvious". Among the reasons for the claimant's fail were "inadequate referencing" and "inaccurate citation". Even had assessment criteria been published, however, they may well not have included a criterion of adequate or accurate citation or reference. The Judge concluded (at §22):

> "In my judgment the error here was not material. It arose from regrettable confusion as to what assessment criteria actually comprised and its unhappy conflation with a marking scheme, publication of which most definitely cannot be made to students."

47. So far so unsurprising, it might be thought. What does merit comment is the recent grant of permission to appeal by Sir Richard Buxton on the ground that he was not satisfied that the error of fact made no difference to the outcome in the case: "Whilst one might agree with the judge that most of the assessment criteria of other departments that the court was shown were requirements that any educated person … should find self-evident, the specific factual references being required in exam answers does not obviously fall into that category…".

***Matin***

48. The claimant in Matin challenged the defendant's decision to refuse to readmit him to his undergraduate medical degree course after he had withdrawn. Upon the claimant issuing an application for judicial review, the defendant stated that he had an alternative remedy, namely a complaint to the OIA. The claim was stayed pending the outcome of the complaint. The OIA determined that the claimant's complaint was not justified, but no challenge was made to that determination.

49. Wyn Williams J held that an unchallenged decision of the OIA did not inevitably cure any illegality or unfairness made by the institution whose actions it had investigated (at §33) but a Court should take account of the decision of the OIA and in particular that part of the decision that determined whether the claimant had been treated fairly. The Court should be slow to reach any conclusion which undermined the decision of the OIA, but the decision of the OIA was not binding on the Court (at §34).

**Costs in Judicial Review Proceedings in the Upper Tribunal**

50. In *R (ER) v. First-tier Tribunal and Hertfordshire County Council* [2013] UKUT 294 (AAC) a three judge panel of the Upper Tribunal considered the rules on costs in judicial review proceedings in the Upper Tribunal. They held that where:

    (i) the claim was a claim against the tribunal (as opposed to a decision maker such as the secretary of state or a local authority); and

    (ii) only the Upper Tribunal had jurisdiction to hear the claim (here, because the application for judicial review was of an excluded decision for the purposes of the Tribunals, Courts and Enforcement Act 2007, namely a decision of the First-tier Tribunal to review a decision);

    The starting presumption in respect of costs is that the Upper Tribunal should make the same order as it could have done on an appeal (in SEN cases, no order for costs absent unreasonable behaviour).

**Conclusions**

51. A conspicuous absence from this talk is school exclusions. Despite the introduction of the new regime in September 2012, and predictions of a resulting flood of litigation, no judicial review claims have yet been heard.

**Sarah Hannett**
**Matrix Chambers**
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