Court of Appeal issues guidance on complaint procedure against universities (St George's, University of London v Rafique-Aldawery; University of Leicester v Sivasubramaniyam)

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Local Government analysis: Students and their universities who find themselves at-odds can encounter considerable cost and complexity when establishing the necessary recourse to justice. Daniel Sokol, barrister at 12 King's Bench Walk, considers the consolidated cases of St George's, University of London v Rafique-Aldawery; University of Leicester v Sivasubramaniyam and their impact on a complaint procedure against universities.

St George's, University of London v Rafique-Aldawery; University of Leicester v Sivasubramaniyam [2018] EWCA Civ 2520, [2018] All ER (D) 75 (Nov)

What are the practical implications of this case?

When students seek to challenge a decision of a Higher Education Institution (HEI), they start with the institution's internal procedures. If that fails, they have two main public law options—judicial review (JR) or a complaint to the Office of the Independent Adjudicator (OIA). The OIA and the Administrative Court exercise different functions. The cases of *St George's, University of London v Rafique-Aldawery; University of Leicester v Sivasubramaniyam* concerned the relationship between JR proceedings and OIA complaints.

Practically, the Court of Appeal suggested that students who were unsure as to which route to follow, should write to the HEI and put them on notice of a possible JR if the OIA fails to provide a suitable remedy. This notice would constitute a 'significant factor' later on when the Administrative Court exercised its discretion to extend time (as the OIA usually takes longer than three months to reach a decision).

This low-cost approach has the benefit of protecting the student's position with regards to JR while allowing review by the OIA.

What was the background?

The two respondents were medical students who had been expelled from their course. They issued protective JR proceedings and obtained stays pending resolution of their OIA complaints. The High Court granted the stays to permit the OIA complaint to run its course—the OIA, under its rules, cannot review a decision that is still 'live' in the courts—and gave detailed guidance on the timing and procedure to be followed in three scenarios:

• the student has lodged a complaint to the OIA but, despite wishing to reserve his or her right to bring a JR claim, has not issued such a claim
• the student has lodged an OIA complaint and issued a JR claim
• the student issued a JR claim but does not wish to lodge an OIA complaint

The defendant universities opposed the application for a stay on the basis that the OIA was best suited to address the issues in dispute and that JR should be a remedy of last resort.

The High Court accepted that the OIA provided an alternative remedy to JR but stressed that there was still residual scope for JR in the event that students were dissatisfied with the outcome and wished to pursue their strict legal rights.

Given the uncertain relationship between an OIA reference and JR, the High Court found that it was reasonable for the claimants to have issued a protective claim. Further, a refusal to grant the stays would block consideration by the

OIA, leaving the students with the ‘unattractive choice’ between choosing between the OIA and JR for resolution of their complaint.

What did the Court of Appeal decide?

The Court of Appeal found that the lower court was wrong to grant stays for the two students. It found force in the appellant’s contentions that the High Court’s guidance would:

• impel students to issue JR proceedings for fear of losing that option later
• deprive the HEI of its normal protection in JR proceedings, ie short time limits
• undermine the statutory complaints procedure (as set out by the Higher Education Act 2004) by encouraging students to issue protective JR applications at the same time as lodging OIA complaints

The Court of Appeal observed that the OIA was a suitable alternative remedy to JR, itself amenable to JR. The danger of the High Court’s guidance, said the court, is that it could encourage a rigid approach leading students to contemplate JR proceedings when often the simpler and cheaper OIA option would be preferable.

The Court of Appeal noted that, by the time students seek to appeal or complain against their HEI, they will know the reasoning of the institution and can determine whether the OIA is the suitable reviewer. The court then set out the practical recommendation described in answer to the first question above.

Interviewed by Julian Sayarer.

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