Neutral Citation Number: [2024] EWHC 2003 (Admin)

Case No: AC-2024-LON-000706

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 July 2024

**Before** :

**Jonathan Moffett KC, sitting as a Deputy High Court Judge**

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**Between :**

**THE KING**

**on the application of**

| | |
|---|---|
| **KT** | **Claimant** |
| **- and -** | |
| **OFFICE OF THE INDEPENDENT ADJUDICATOR** | **Defendant** |
| **- and -** | |
| **UNIVERSITY OF READING** | **Interested Party** |

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**David Lawson** (instructed by **Sinclairslaw**) for the **Claimant**
**Siân McGibbon** (instructed by **EJ Winter & Son LLP**) for the **Defendant**

Hearing dates: 20th and 27th June 2024

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# JUDGMENT

**Jonathan Moffett KC, sitting as a Deputy High Court Judge :**

## A. INTRODUCTION

1. This claim for judicial review arises out of a complaint ("the complaint") made by the Claimant to the Defendant ("the OIA") about the Interested Party ("the University").

2. At the outset, it is important to note that, as I explain below, there is an anonymity order in place in relation to the Claimant. Accordingly, there must be no reporting of the Claimant's identity, or of any other information that may lead to his identification.

3. In brief, the Claimant was a student at the University. Various disciplinary allegations were made against him, and they were upheld by the University's Student Disciplinary Committee ("the SDC"). The SDC decided that the Claimant should be expelled from the University. An appeal by the Claimant to the University's Student Appeals Committee ("the SAC") was dismissed, and the Claimant subsequently made the complaint to the OIA.

4. On 2 November 2023, the OIA decided that the complaint was partly justified ("the outcome decision"), and set out proposed recommendations as to the steps that the University should take in order to provide redress to the Claimant ("the proposed recommendations"). Having considered representations from the Claimant and the University on the proposed recommendations, on 30 November 2023 the OIA issued its final recommendations ("the final recommendations"). Those final recommendations differed from the proposed recommendations in material respects.

5. In broad terms, the Claimant's claim for judicial review concerns four main elements of the OIA's decision-making. First, the Claimant argues that the outcome decision did not properly grapple with one of his grounds of complaint, which related to

whether the SDC had been properly constituted. As I explain below, there is a dispute between the parties as to whether it is properly open to the Claimant to advance this aspect of his challenge. Secondly, the Claimant argues that a decision taken by the OIA on 30 November 2023 not to continue its consideration of that part of his complaint which related to whether the SDC had been properly constituted ("the continuation decision") was unlawful. Again, there is a dispute between the parties as to whether the Claimant should be permitted to challenge the continuation decision. Thirdly, the Claimant argues that the process by which the OIA decided on the final recommendations was procedurally unfair, because he was not afforded an opportunity to comment on the University's representations on the proposed recommendations. Fourthly, the Claimant argues that the final recommendations did not properly reflect the outcome decision, and that the OIA failed to give adequate reasons for the final recommendations.

6. Permission to apply for judicial review was granted by Hugh Southey KC, sitting as a Deputy High Court Judge, on 8 May 2024.

7. Before me, the Claimant was represented by Mr David Lawson, and the Defendant was represented by Ms Siân McGibbon. I am grateful to both counsel for the assistance that they gave me. The University filed an acknowledgment of service indicating that it did not intend to contest the claim, and it was not represented at the substantive hearing.

8. Given the length of this judgment, it may be of assistance to the reader if I provide an index to the topics that I cover:

(1) The meaning and effect of the final recommendations: paragraphs 177–186

(2) Did the final recommendations properly reflect the outcome decision: paragraphs 187–197

(3) Did the OIA commit a substantive error of law in changing the proposed recommendations: paragraphs 198–208

(4) Did the OIA give adequate reasons for changing the proposed recommendations: paragraphs 209–214

(5) Did the OIA act fairly when changing the proposed recommendations: paragraphs 215–230

(6) Did the unfairness make any difference to the outcome: paragraphs 231–244

(7) Conclusion on the third challenge: paragraph 245

I. Summary and final order: paragraphs 246–257

## B. PROCEDURAL MATTERS

9. At the substantive hearing there were four procedural applications that required determination.

10. First, the Claimant sought to extend an order for anonymity that was made by Mr Southey KC when he granted permission to apply for judicial review. Mr Southey

KC's order provided that the Claimant be referred to by the letters "KT"; that there be no reporting of the Claimant's name and address, or of any other information that may lead to the identification of the Claimant; and that documents from the court file may be released only if they had been anonymised. The order was expressed to apply only until the substantive hearing. In his reasons, Mr Southey KC explained that he was not certain that an anonymity order was justified because, although the Claimant faces criminal allegations, such allegations are often reported and, although there is some reference in the documentation to the Claimant's mental health issues, they were of limited significance and not particularly serious. Accordingly, Mr Southey KC was persuaded only that it was appropriate to grant a time-limited anonymity order, so that the issue could be considered in greater detail at the substantive hearing.

11. Mr Lawson relied on two main matters in support of the application for anonymity. First, he relied on the fact that the evidence refers to personal and sensitive health issues from which the Claimant has suffered, including mental health issues involving a risk of self-harm and detention under s 136 of the Mental Health Act 1983. These were matters to which Mr Lawson had referred to in his skeleton argument, and to which he subsequently referred in his oral submissions. Mr Lawson said that any reporting of these matters which identified the Claimant would constitute an intrusion into the Claimant's private life. Secondly, Mr Lawson pointed out that, given the issues to which the claim gives rise, it was almost inevitable that my judgment would have to refer to the facts that the Claimant had been arrested on suspicion of having committed a criminal offence and that he was currently on bail, and it was likely that my judgment would remain permanently accessible to the public, even if in due course the criminal matter against the Claimant were not pursued. In light of the fact that the Claimant is a law student, and in due course he may wish to pursue a career in

the law, Mr Lawson said that a permanent public record of these matters could harm the Claimant in the future, particularly if he were to seek employment in the legal sector. The OIA was neutral on the application for anonymity.

12. I was conscious of the fact that an extension of Mr Southey KC's order would constitute a departure from the important constitutional principle of open justice, and the general rule that the parties to a claim should be named in any judgment on that claim. As such, I did not accept Mr Lawson's submission that the extension of Mr Southey KC's order would constitute only a low level of interference with open justice. Nevertheless, I was persuaded that the non-disclosure of the Claimant's identity was necessary in order to secure the proper administration of justice and in order to protect the Claimant's interests. In particular, although I considered that, if it were necessary for me to refer to the Claimant's health issues in my judgment, it was likely that I would be able to do so only obliquely, it was very unlikely that I would be able to avoid referring to the Claimant's arrest and bail conditions. I considered that these matters were an aspect of the Claimant's private life, and that for the reasons given by Mr Lawson, publication of them, if permanently linked to the Claimant, could have a significant adverse impact on the Claimant in future. As a result, I considered that the important principle of open justice was outweighed by the need to protect the Claimant's interests. Accordingly, pursuant to s 11 of the Contempt of Court Act 1981 and CPR 39.2(4), at the outset of the hearing I ordered that the Claimant continue to be referred to by the initials "KT", and that there be no reporting of the Claimant's identity, or of any other information that may lead to him being identified.

13. However, it seemed to me that the Claimant's interests could be adequately protected by an anonymity order alone; I did not consider that an extension of Mr Southey KC's order in relation to court documents under CPR 5.4C(1) was necessary in order adequately to protect the Claimant's interests. I therefore discharged that part of Mr Southey KC's order.

14. Secondly, by way of an application notice dated 10 June 2024, the Claimant sought permission to rely on his second witness statement. The OIA did not object to the Claimant's second witness statement being admitted into evidence, provided it were granted permission to rely on a second witness statement from Helen Megarry, the Independent Adjudicator. In turn, Mr Lawson did not object to Ms Megarry's second witness statement being admitted into evidence. Accordingly, at the outset of the hearing I granted permission to the Claimant to rely on his second witness statement, and to the OIA to rely on Ms Megarry's second witness statement.

15. The third procedural matter was an application by the Claimant to amend his statement of facts and grounds in order to add a new paragraph challenging the lawfulness of the continuation decision ("the first application to amend"). At the outset of the hearing I indicated to the parties that I wished to hear full argument on the claim before deciding the first application to amend, and I address it below. The fourth procedural matter was a further application made by the Claimant, on the second day of the hearing, that he be granted "permission to challenge all aspects of the defendant's decision from 2 November 2023 onwards" ("the second application to amend"). Again, I address the second application to amend below.

## C. THE OIA

16. The OIA is a body corporate and a registered charity. In general terms, the OIA performs a role similar to that of an ombudsman in respect of complaints made by students about their higher education providers.

17. Under s 13 of the Higher Education Act 2004 ("the 2004 Act"), the Secretary of State may designate a body corporate as the designated operator for England of a student complaints scheme that meets the requirements of Schedule 2 to the 2004 Act. The OIA has been designated as that operator.

18. Schedule 2 to the 2004 Act lays down the conditions that a student complaints scheme must meet. Paragraph 4 of Schedule 2 to the 2004 Act specifies condition C, which provides that a student complaints scheme must require that every qualifying complaint is "reviewed" by an individual who is independent of both the complainant student and the higher education provider against which the complaint is made. That individual is referred to as "the reviewer" in relation to the complaint (see Schedule 2, paragraph 11). As I explain below, it is relevant to note that Schedule 2 to the 2004 Act refers to the entire process by which the OIA considers and determines a complaint as a "review" of the complaint.

19. Paragraphs 5 and 6 of Schedule 2 to the 2004 Act lay down the conditions that must be met by a student complaints scheme in respect of the conclusions that a reviewer must or may reach in respect of a complaint, as follows.

> "*Review of complaint*
> 5 (1) Condition D is that the scheme requires a reviewer—
> (a) to make a decision as to the extent to which a qualifying complaint is justified; and
> (b) to make that decision as soon as reasonably practicable.
> …
>
> *Recommendation of reviewer if complaint justified*

> 6 Condition E is that the scheme provides that, in a case where a reviewer decides that a qualifying complaint is to any extent justified, the reviewer—
> (a) may recommend the governing body of the institution to which the complaint relates—
> (i) to do anything specified in the recommendation (which may include the payment of sums so specified), and
> (ii) to refrain from doing anything so specified, but
> (b) may not require any person to do, or refrain from doing, anything."

20. Paragraph 7 of Schedule 2 to the 2004 Act provides for a condition to the effect that a student complaint scheme must require that the parties be notified of the review's conclusions, as follows.

> "7 Condition F is that the scheme requires a reviewer to notify the parties to a qualifying complaint in writing of—
> (a) the decision the reviewer has made,
> (b) the reviewer's reasons for making that decision, and
> (c) if the reviewer makes a recommendation—
> (i) that recommendation, and
> (ii) the reviewer's reasons for making that recommendation."

21. The student complaints scheme operated by the OIA is set out in the OIA Scheme Rules ("the Scheme Rules"). The OIA has published a guidance note on the Scheme Rules ("the Scheme Guidance").

22. Section 1 of the Scheme Rules explains that the OIA "review[s] student complaints independently, impartially and transparently, and use[s]…learning from complaints to help improve policies and practices in higher education". As is the case with Schedule 2 to the 2004 Act, the Scheme Rules refer to the entire process of the OIA's consideration and determination of a complaint as a "review" of the complaint.

23. Sections 2 to 5 of the Scheme Rules make provision for who may make a complaint, the providers in respect of which a complaint may be made, the types of complaints

that the OIA can and cannot review, and the types of complaints that the OIA may decide not to review. Section 7 provides that the OIA will not review a complaint unless the relevant higher education provider has had a chance to consider the complaint internally, and has issued what is referred to as a "completion of procedures letter". Section 8 makes provision for the time limits within which a complaint must be made.

24. Section 9 of the Scheme Rules is headed "what does review mean?". Rule 9.1 answers that rhetorical question as follows: "[w]hen we have decided that we can consider a complaint we review it. This means obtaining all the relevant information we need to make a decision, and can include trying to settle the complaint". Rule 11.1 provides that, where the OIA has decided that a complaint is one which it can review, it will decide how to conduct the review and whether any more information is required.

25. Section 12 of the Scheme Rules deals with the gathering of information for a review. Insofar as is relevant, it provides as follows.

> "12.1. When we have decided that a complaint is one which we can review we will always:
>
> 12.1.1. Give the higher education provider the opportunity to comment on the Complaint Form and any accompanying documents;
>
> 12.1.2. Give the student the opportunity to respond to the higher education provider's comments on the complaint.
>
> 12.2. We may ask the student and/or the higher education provider to answer specific questions and/or provide additional information or documents.
>
> 12.3. We will normally give the student and the higher education provider the opportunity to comment on information received during the review where it is relevant to our decision.
>
> …"

26. Section 13 of the Scheme Rules makes provision for complaint outcomes, as follows:

> "13.1. When we decide that we have all the information and evidence that we need to make a decision we will prepare and issue a Complaint Outcome.
> …
> 13.3. The Complaint Outcome will set out our decision that the complaint is Justified or Partly Justified, or Not Justified, and the reasons for the decision.
> 13.4. In making our decision about the complaint we may consider whether or not the higher education provider properly applied its regulations and followed its procedures, and whether or not the higher education provider's decision was reasonable.
> …"

27. Paragraph 42 of the Scheme Guidance explains the circumstances in which the OIA will decide that a complaint is justified, partly justified or not justified, as follows:

> "If we have upheld all of the points the student has raised and no suitable remedy has been given or offered to the student, we will conclude that the complaint is Justified. If we have upheld most of the points the student has raised, or decide that a remedy given or offered is not adequate, we will conclude that the complaint is Partly Justified. If we do not uphold any part of the student's complaint, or if we conclude that the higher education provider has given or offered the student a suitable remedy for what has gone wrong, we will conclude that it is Not Justified."

28. Section 14 of the Scheme Rules provides for the OIA to make recommendations, as follows.

> "14.1. When we decide that a complaint is Justified or Partly Justified we may make a Recommendation or Recommendations that the higher education provider should follow.
> 14.2. The Recommendations we make may be different from an outcome that a Court might reach applying legal rules.
> …
> 14.4. Where we intend to make Recommendations we will send a copy of the proposed Recommendations, together with our reasons for proposing them, to the student and the higher education provider with the Complaint Outcome.
> 14.5. The student and the higher education provider may comment on the proposed Recommendations and will have 14 days to do so. We may extend the time for commenting on the proposed Recommendations where we consider it is appropriate to do so.
> 14.6. Once the time limit for commenting on the proposed Recommendations has passed and we have considered any comments

we have received, we will tell the student and the higher education provider that we have confirmed the Recommendations, or set out our revised Recommendations.

14.7. We expect the higher education provider to comply with any Recommendations we make in full and within the time limits we set, and to report to us when it has done so.

14.8. The student may choose whether or not to accept the Recommendations.

14.9. If the higher education provider makes an offer to the student in line with our Recommendations and the student accepts the offer in full and final settlement of their complaint, the student will not normally be able to pursue legal proceedings about the same issues.

…"

29. There is no obligation on a higher education provider to comply with a recommendation made by the OIA. Although rule 14.7 of the Scheme Rules sets out the OIA's expectation that a higher education provider will "comply with any Recommendations we make in full and within the time limits we set", the only sanctions available to the OIA if a higher education provider does not comply are to report the failure to comply to the OIA's board and to publish information about it in its annual report (see rule 14.10). As is made clear by rule 14.8, there is no obligation on a student to accept a recommendation made by the OIA.

30. Section 15 of the Scheme Rules is headed "conclusion of the review". Rule 15.1 provides as follows.

"15.1. The review process is completed:

15.1.1. When we decide that we cannot look at a complaint under Rule 10.5 or that decision is confirmed following a reconsideration under Rule 10.6;

15.1.2. When we decide to terminate a complaint under Rule 16.1, or that decision is confirmed following a reconsideration under 16.3;

15.1.3. When the student and the higher education provider confirm their agreement to a settlement;

15.1.4. When the Complaint Outcome is issued under Rule 13.1 if no Recommendations are made; or

15.1.5. When we tell the student and the higher education provider that our Recommendations are confirmed or set out revised Recommendations under Rule 14.6."

31. Paragraph 44 of the Scheme Guidance explains that "[o]ur review process comes to an end when we decide that we cannot look at a complaint, we terminate the complaint, the complaint is settled, we issue a Complaint Outcome, or we confirm our Recommendations if we have made any". Accordingly, as I have already mentioned above, the review of a complaint comprises the entire process by which the OIA considers and determines the complaint and, in a case such as the Claimant's, the review concludes only at the point at which the OIA issues final recommendations.

32. Rule 15.2 makes provision for the OIA to continue or re-open a review, as follows.

"15.2. We may reopen or continue with a review and issue a revised Complaint Outcome and/or revised Recommendations, if we decide there is good reason to do so because:
15.2.1. we receive new evidence which could make a difference to the outcome of the review, and which the student or higher education provider could not reasonably have given to us at an earlier date; or
15.2.2. we have reason to believe that there might be an error in the Complaint Outcome which has or might have seriously affected the outcome of the review.
15.3. Any request to reopen the review must normally be made within 28 days of the date of the Complaint Outcome, or the date we confirm our Recommendations where we have made Recommendations."

33. Paragraph 45 of the Scheme Guidance provides a further explanation of the continuation or re-opening of a review, as follows.

"45. Once we have issued our Complaint Outcome the student or the higher education provider can ask us to reopen our review of the complaint.
45.1. If we have decided that the complaint is Justified or Partly Justified and have proposed Recommendations, then the student or higher education provider can ask us to continue with our review instead of confirming our Recommendations

and closing the case. They should ask us to continue with the review when they comment on the proposed Recommendations. It is important for the student and the higher education provider to comment on the proposed Recommendations even if there is a request to continue with the review.

45.2. We will normally consider a request to reopen our review provided that it is made within 28 days of the issue of the Complaint Outcome (if the complaint is Not Justified), or the date we confirm the Recommendations (if the complaint is Partly Justified or Justified).

45.3. We will reopen our review, or continue with the review, if the student or higher education provider persuades us that there is new evidence which they could not reasonably have given us at an earlier date and which could make a difference to the outcome of the review. They will need to explain why it was not possible to give us that evidence before the Complaint Outcome was issued. It is unlikely that we would consider at this late stage new medical evidence which the student says is relevant to his or her complaint. However, we may consider evidence which the higher education provider had but which it did not disclose to the student.

45.4. We will reopen our review, or continue with the review, if the student or higher education provider persuades us that there might be an error in the Complaint Outcome which has or might have seriously affected the outcome. The error needs to be serious enough to be likely to make a difference to the decision (whether the complaint is Justified, Partly Justified or Not Justified, or has been terminated) or to the Recommendations we have made or are proposing to make.

45.5. If we decide not to reopen or continue with our review we will explain our decision.

…"

34. Section 16 of the Scheme Rules makes provision for the suspension or termination of the review of a complaint.

35. In her first witness statement, Ms Megarry helpfully summarises the effect of the Scheme Rules, and explains how the OIA applies them in practice. She makes the point that it is necessary for the OIA to deploy its resources proportionately and that, as a result, the OIA focuses on what it considers to be the issues that are central to a student's complaint, and it does not always seek to address each and every point

raised in a complaint. She also explains that, when considering what recommendations to make in relation to a complaint, the OIA bears in mind the likely impact on the resources of the relevant higher education provider and, where relevant, the impact on the resources of the OIA itself.

## D. RELEVANT FACTUAL BACKGROUND

### (1) The Claimant

36. The Claimant began his studies at the University, on its three-year LLB law degree course, in 2016.

37. The Claimant's studies have been interrupted for personal reasons (including those to which I have adverted above), by a decision taken by the University in 2019 to exclude the Claimant on fitness to study grounds, and by the COVID-19 pandemic. The University's decision in 2019 resulted in a complaint by the Claimant to the OIA, which was upheld as justified on 7 February 2020, as a result of which the Claimant was permitted to continue his studies. As matters currently stand, the Claimant has completed the first and second years of the LLB course, and he has completed several of his final year modules.

### (2) The University's decisions on the allegations against the Claimant

38. The events that culminated in the complaint began with two incidents that occurred at the University, on 20 and 23 November 2022 respectively. It was alleged that, in the early hours of 20 November 2022, the Claimant was found sleeping in a room in one of the University buildings in circumstances that indicated he was staying there overnight and that he had caused some damage. On 23 November 2022, there was an

altercation between the Claimant and a member of staff and two University security guards in the University library, which resulted in the police attending and arresting the claimant (although it appears that the police subsequently decided to take no further action). It was alleged that the Claimant was violent. The precise details of these allegations are not material for present purposes.

39. On 24 November 2023, the Claimant was informed that he had been suspended pending an investigation into the incident on 23 November 2023. The Claimant was told that, during the period of his suspension he must not enter any part of the University's grounds or premises.

40. The University's Student Disciplinary Procedure ("the Disciplinary Procedure") sets out the procedure to be followed when a student is accused of a breach of the University's Codes of Conduct. Such a breach is referred to as "misconduct" and, insofar as is relevant for present purposes, the University's Codes of Conduct include the Regulations for Student Conduct which are set out in Appendix A to the Disciplinary Procedure (see section 2 of the Disciplinary Procedure). Section 7 of the Disciplinary Procedure makes provision for allegations of serious misconduct. In brief, in a case of potential serious misconduct, an investigating officer is to be appointed to investigate the matter and to produce an investigation report (see section 7.1). If the investigation report concludes that there is sufficient evidence of a case to answer, the matter is to be referred to the SDC (see section 7.2).

41. An investigating officer was appointed to investigate both of the incidents referred to above, and he produced an investigation report dated 30 January 2023. The investigation report recommended that allegations of serious misconduct should be

referred to the SDC for it to consider. The investigation report also recommended that the Claimant's suspension be continued.

42. Section 7.2 of the Disciplinary Procedure provides that the SDC is to comprise a designated teaching and learning dean as chair (with the other teaching and learning deans serving as alternates), a school director of teaching and learning from a school other than the school at which the relevant student is registered, and an officer of Reading University Students' Union.

43. In the Claimant's case, the SDC comprised Professor Rav Savania (as chair), the School of Biological Sciences' Director of Teaching and Learning, and Reading University Students' Union's welfare officer. It appears that Professor Savania is the Pharmacy Department's Director of Teaching and Learning. As I explain below, the question whether Professor Savania was entitled to chair the SDC has emerged as a potentially important issue in this case.

44. The SDC considered the allegations against the Claimant at a remote hearing held on 3 March 2023, which the Claimant attended. The allegations against the Claimant alleged breaches of the following paragraphs of Appendix A to the Disciplinary Procedure: paragraph (e) (a student must not engage in actual or threatened physical violence), paragraph (g) (a student must not engage in bullying, intimidating and aggressive behaviour), paragraph (l) (a student must not disregard rules or reasonable instructions given by the University), paragraph (o) (a student must not remove without authorisation, misuse, abuse or damage University property), paragraph (q) (a student must not do anything or neglect to do something which creates a fire risk or in any way puts the health and safety of others or property at risk).

45. Section 7.3 of the Disciplinary Procedure provides that the chair of the SDC "will notify the student in writing of the decision, the reason for it and any penalty to be applied". On 24 March 2023, Professor Savania wrote to the Claimant setting out the SDC's decision. The SDC upheld each of the allegations against the Claimant. In relation to penalty, the letter stated as follows: "[b]ased on the finding, the Committee found the appropriate penalty to be…[r]emoval of student membership from the University of Reading". In effect, therefore, the SDC concluded that the Claimant should be expelled from the University, which was the most severe penalty available to the SDC in the Claimant's case. Professor Savania's letter did not set out any further reasoning in support of the penalty of expulsion.

46. Under section 8.2 of the Disciplinary Procedure, the Claimant had a right of appeal to the SAC. Such an appeal may be brought only on the following grounds:

> "• There has been a procedural error; or
> • New and relevant evidence is available that was not known at the time; or
> • The decision-making Committee acted unreasonably, or the impact of the sanction imposed was unreasonably disproportionate."

47. Specific provision for the procedure to be adopted by the SAC on an appeal is made by the "Procedures for the Student Appeals Committee" ("the SAC Procedures"). Paragraph 4 of the SAC Procedures re-states the grounds on which an appeal may be brought, as set out above. Insofar as is relevant to an appeal from the SDC in case such as the Claimant's, the SAC Procedures also provide as follows:

> "5. The Student Appeals Committee will not re-hear the case that has already been considered. Rather, the Committee will consider the appeal in accordance with the right of appeal set out in the procedure to which the matter relates, which will include whether there has been any failure of procedure and whether the decision reached was fair and reasonable in all of the circumstances.

> 6. The Student Appeals Committee will have the power to:
> Confirm the outcome decided by the original Committee
> OR
> (a) In respect of the Student Disciplinary Committee:
> Overturn the outcome and/or reduce the penalty decided by the Student Disciplinary Committee. If the Student Appeals Committee reduces the penalty, it will receive a copy of the relevant procedures and will impose an appropriate penalty set out in the relevant procedure.
> …"

48. There was a dispute between the parties as to the role of the SAC on an appeal and, in particular, as to the approach that the SAC would take should it re-consider the Claimant's case in accordance with the final recommendations. I address this dispute below.

49. The Claimant exercised his right of appeal, and relied on a number of alleged procedural errors. One of the procedural errors alleged by the Claimant relied on a contention that Professor Savania should not have chaired the SDC. This complaint was put in the following terms.

> "The procedure also states that the 'membership of the student disciplinary committee is: a designated teaching and learning dean as the chair (with the other teaching and learning deans serving as alternates)'. In my case the disciplinary hearing was not chaired by the dean – the university has 4 deans: [here the Claimant named the four individuals who he said were teaching and learning deans and he provided a hyperlink to the University's website which lists those four individuals as teaching and learning deans]. My hearing was not chaired be either one of them. The procedure does not allow any deviation from this. Rav Savania should not have chaired the hearing because he did/does not have the knowledge or expertise to lead such hearings."

50. As Ms McGibbon pointed out, there appears to have been two elements to the Claimant's complaint about Professor Savania acting as the chair of the SDC: first, Professor Savania did not meet the condition for appointment to that position, which required that the chair of the SDC be a teaching and learning dean; and, secondly,

Professor Savania did not have the necessary knowledge and experience to act as chair. For convenience, I shall refer to the issue whether Professor Savania met the condition for appointment as chair of the SDC as "the SDC chair issue".

51. It appears that Professor Savania was invited to comment on the Claimant's grounds of appeal. In relation to his position as the chair of the SDC, Professor Savania stated as follows:

> "As per the Committee list [hyperlink] published on the University website, page 48 confirms that I have been appointed Chair by Senate on a three year term due for review on 31.07.2025. I was initially appointed in September 2021 for a one year term, with a three year extension approved via Chair's Action on behalf of Senate on 22.07.2022. Any TLD not previously involved in the case can act as my alternate should I not be able to hear the case."

52. The hyperlink provided by Professor Savania took the reader to a document entitled "University of Reading Committee List 2022-23" ("the committee list"). The committee list refers to the SDC as a panel of a wider committee which exercises delegated powers on behalf of that wider committee, and states that its membership "shall comprise the Chair, a Student Officer from RUSU, which shall normally be the Welfare Office and one School Director of Teaching and Learning". The committee list then identifies the following individuals:

> "*Ex Officio*
> Mr Savania (chair) 31.07.2025
> Alternate: Any Teaching and Learning Dean who has not had any previous involvement in determining the result.
> The Students' Union (RUSU) Full-time Student Officers
> The School Directors of Teaching and Learning"

53. I note that, on 22 April 2024, the Claimant's solicitors wrote to the University to inquire whether Professor Savania is a teaching and learning dean, but insofar as I am aware there has been no reply to that letter.

54. The SAC held a hearing on 9 May 2023, which the Claimant attended. It appears from the minutes of the SAC hearing that the Claimant raised a wide range of issues at that hearing but, as Ms McGibbon pointed out, the minutes do not record that the Claimant expressly raised the SDC chair issue. However, the minutes do record that Professor Savania (who attended the SAC hearing) "said that [the Claimant] had referred to a lot of procedural issues which had already been addressed in [Professor Savania's] written response", and that the chair of the SAC told the Claimant that the SAC would consider "whether the procedures had been followed". The minutes of the SAC's deliberations record that the SAC agreed that "[t]he processes had been followed correctly with the correct panel composition".

55. On 23 May 2023, the University Secretary sent to the Claimant a completion of procedures letter setting out the SAC's decision. The letter explained that the SAC had concluded that the Claimant had not presented or evidenced substantive grounds for his appeal, the procedural elements had been satisfactorily addressed, the procedures had been followed, and the SDC had reached a conclusion on the balance of probabilities. As a result, the SAC had concluded that it had heard nothing new to justify varying the SDC's decision, and therefore the Claimant's appeal was not upheld.

## (3) The Claimant's complaint to the OIA

56. The completion of procedures letter dated 23 May 2023 opened the way for the Claimant to make a complaint to the OIA, and he did so on 28 July 2023. It appears that the Claimant completed an on-line complaint form, in which he set out his complaint very briefly, as follows.

> "Procedures have not been followed.
> The evidence against me has numerous errors and flaws.
> Evidence against me has been submitted after the investigation.
> My valuable utterances have not been minuted. Selective utterances have been minuted.
> In the investigation I was told that no statements have been given against me by the investigators.
> The investigators came to conclusions whilst they should have acted impartially."

57. Insofar as the Claimant referred to the relevant procedures not having been followed, he did not specify exactly what procedures he was referring to.

58. On 1 August 2023, the OIA sent an e-mail to the Claimant, summarising his complaint and informing him that the OIA had decided that the complaint was eligible to be reviewed. The OIA stated that, during the course of the review, it would look at whether the University had applied its regulations properly and had followed its procedures. The OIA did not ask the Claimant to provide any more details of his complaint, but it did inform him that it would be seeking more information from the University and that, when that information was received, the Claimant would be invited to comment on it.

59. The OIA requested information from the University on the same day. In response, by way of a letter dated 24 August 2023, the University provided the OIA with a copy of the Claimant's file and a brief chronology of relevant events. I was told that the University did not provide any substantive comments on the complaint.

60. On 25 August 2023, the OIA invited the Claimant to comment on the information that had been provided by the University, and on the same day a reciprocal invitation was sent to the University. The Claimant was asked to provide any such comments by 8 September 2023, but on that date the Claimant wrote to the OIA seeking further time. The OIA refused the Claimant's request for additional time on 13 October 2023, stating that it did not require from the Claimant any specific additional information or evidence in support of the complaint, and that it was not necessary for the Claimant to repeat any of the points that he had already made.

61. The OIA issued the outcome decision on 2 November 2023. The OIA decided that the complaint was partly justified. The outcome decision summarised the OIA's "key conclusions" as follows.

> "2.1. We are satisfied, overall, that the University followed the Student Disciplinary Procedures in regards to allegations of serious misconduct against [the Claimant].
> 2.2. The evidence shows that the Student Disciplinary Committee ('the SDC') considered all the evidence available, and we are satisfied that it provided a clear and reasonable explanation for its decision that allegations of serious misconduct had been proven. And we, therefore, think it was reasonable for the Appeal Committee to reject [the Claimant's] appeal against the SDC's decision about the finding of a breach of University regulaitons [*sic*].
> 2.3. We are, however, not satisfied that the SDC provided clear and sufficient reasons for the severity of penalty applied in the circumstances of this case. And we are, therefore, not satisfied that it was reasonable for the Appeals Committee to reject [the Claimant's] appeal on this basis."

62. The outcome decision went on briefly to set out the background to the complaint, and then set out the OIA's reasons by reference to three main topics: the procedures followed by the University, the reasonableness of the University's decision, and the reasonableness of the penalty imposed.

63. In relation to the procedures followed by the University, the outcome decision addressed the issues that had been raised in relation to Professor Savania acting as chair of the SDC in the following terms:

> "14.4 We are also satisfied that appropriate staff members were involved in the SDC who had no prior involvement in investigating allegations against [the Claimant]. We, however, understand that [the Claimant] raised some concerns about the role and appropriateness of the Chair nominated to the SDC. We can, however, see that, in their response to [the Claimant's] appeal, the Chair had confirmed:
>
> [the outcome decision quoted Professor Savania's response, which I have quoted above]
>
> 14.5. In any event, we are satisfied overall that the constitution of the SDC was in keeping with the University's Regulations. And we do not think there is any evidence of a reasonable perception of bias in relation to decisions made at various stages of the disciplinary process."

64. In her oral submissions, Ms McGibbon accepted that, in this part of the outcome decision, the OIA addressed both elements of the Claimant's complaint about Professor Savania having chaired the SDC, as it had been advanced to the SAC, i.e. both the SDC chair issue and the issue as to whether Professor Savania had the necessary knowledge and experience to act as chair.

65. In relation to the reasonableness of the University's decision, paragraph 18 of the outcome decision recorded that the OIA was "satisfied that it was reasonable for the Appeals Committee to reject [the Claimant's appeal] agains [*sic*] the SDC's decision that allegations of serious misconduct had been proven". The outcome letter went on to set out the following conclusion on this topic:

> "22. Overall, we think the evidence shows that it was reasonable for the SDC to conclude that allegations of serious misconduct relating to incidents on 20 and 23 November 2022 had been proven on the balance of probabilities. And that it reasonably explained which (and why the) allegations constituted a breach the regulations for student conduct. For all the reasons set out above, we are satisfied that it was

> reasonable for the Appeals Committee to reject [the Claimant's] appeal on this basis, and to conclude that: '*...significant breaches of the regulations for student conduct had occurred, each breach had been considered appropriately, and decisions made on the balance of probability* […] *the* [SDC] *had considered* [all the evidence] *as a whole…*'"

66. In relation to the reasonableness of the penalty imposed on the Claimant, the outcome decision stated as follows:

> "23. Having decided that the allegations of serious misconduct were proven the SDC went onto conclude that [the Claimant's] registration from the University should be withdrawn.
> 24. According to the Good Practice Framework: Disciplinary Procedures it is good practice for providers to give reasons for any penalty selected. They should explain why any lesser penalty was not suitable. It is good practice for the decision maker to go through the range of lesser penalties available, consider each, and to record that they have done so. If the misconduct is so serious that the most severe penalty is the only option, then the decision maker should explain why that is.
> 25. We can see that section 7.3 of the University's Student Disciplinary Procedures sets out the range of penalties open to an SDC at the conclusion of an SDC hearing. We can see that penalties range in severity from '*a formal warning*' and the imposition of a fine '*not exceeding £2,500...*', to withdrawal of a students membership from the University. Section 7.3, however, adds that a penalty should be imposed by a SDC: '*...having considered all the circumstances, including any mitigating circumstances submitted by the student…*'
> 26. In this case, it appears that the SDC Panel decided to apply the most severe penalty available under section 7.3. The SDC, however, does not appear to have provided any reasons for this decision. Or for why a less severe sanction would not have been appropriate in this case. For instance, we can see that the SDC had the option to suspend [the Claimant] from his studies for a period of 12 months. It's not clear whether the SDC considered whether suspension might be reasonable in the circumstances. And if so, it did not explain why withdrawal remained the only reasonable option.
> 27. From the evidence, we also do not think it is clear whether [the Claimant] was given a reasonable opportunity to present evidence in mitigation before a penalty was decided. And if so whether the SDC Panel had considered this evidence.
> 28. We acknowledge that the allegations proven against [the Claimant] were of serious misconduct. However, given the seriousness of the implications of the Panel's decision on [the Claimant's] academic progression, we are critical of the University's failure to provide clear and detailed reasons for the severity of penalty applied in all the circumstances. We also think that this would have been necessary in

> order to help [the Claimant] understand the reasons for why he had been withdrawn.
>
> 29. Overall, we cannot be satisfied that the SDC's decision about penalty reasonably explains why the most severe sanction available was the only appropriate option in the circumstances of this case.
>
> 30. In representations to us the University says that the Appeals Committee addressed the matter of proportionality of penalty at paragraph 1.05 of the Appeal Committee Meeting minutes. We have carefully considered the minutes of the Appeal Committee's deliberations. While we recognise that the Committee noted that the allegations proven could result in removal/withdrawal, we do not think that it reasonably demonstrated consideration for the severity of sanction recommended in the circumstance of this case. And it does not appear to have considered whether the SDC had reasonably taken into account any evidence of mitigation, or addressed any potential evidence in mitigation, before applying a severe penalty.
>
> 31. For these reasons, we have decided that this aspect of [the Claimant's] complaint to us is Justified."

67. The outcome decision explained the OIA's overall decision in the following terms:

> "32. Overall, we are satisfied that it was reasonable for the Appeals Committee to uphold the SDC's decision that allegations of serious misconduct against [the Claimant] had been proven. We are also satisfied that procedures applied in this case were reasonable and in line with the University's regulations. We are, however, not satisfied that the University has adequately addressed or explained the reasons for the severity of sanction applied, or that it reasonably demonstrated consideration for less severe penalties available under section 7.3 of the Student Disciplinary Procedure. We have, therefore, decided that [the Claimant's] complaint to us is Partly Justified and we have proposed some Recommendations to try and Put Things Right."

68. Mr Lawson submitted that the OIA's reasoning, as set out in paragraphs 23 to 31 of the outcome decision, revealed that the OIA had found three errors in the approach that had been adopted by the University, as follows. First, a procedural error, in that the SDC had not provided adequate reasons as to why it had decided to apply the most severe penalty available to it in the Claimant's case. Secondly, a further procedural error, in that the SDC had not afforded the Claimant an opportunity to make representations as to mitigation before it decided on penalty. Thirdly, a substantive

error, in that the SDC had not undertaken the exercise referred to in paragraph 24 of the outcome decision, i.e. starting with the least serious penalty available, and then working upwards in terms of severity until it identified the least serious penalty that was commensurate with the Claimant's misconduct. Mr Lawson argued that these three errors were reflected in the proposed recommendations which, he said, were directed at remedying each of those errors.

69. Mr Lawson is plainly correct insofar as the first error is concerned. It is clear from the outcome decision that the OIA found that the SDC did not give adequate reasons as to why it had imposed the most severe penalty that was available. However, I am not persuaded that the OIA found that the SDC had committed either of the second or third errors. The issue of the Claimant having an opportunity to make representations as to mitigation is addressed in paragraph 27 of the outcome decision, which records the OIA's view that it is not clear whether the Claimant was afforded such an opportunity. Similarly, paragraph 26 records the OIA's view that it is not clear whether the SDC considered the possibility of imposing a lesser penalty than expulsion. In my view, the outcome decision reveals that OIA was unable to determine whether the SDC had afforded the Claimant an opportunity to make representations in mitigation and whether the SDC had considered the imposition of a lesser penalty, and this lack of clarity contributed to the OIA's conclusion that the SDC had failed to give adequate reasons for its decision on penalty.

70. Further, for reasons which will become clear, it is important to recognise that the OIA's analysis did not stop there. I agree with Ms McGibbon that, on the topic of the reasonableness of the penalty imposed on the Claimant, the outcome decision reveals that the OIA's focus was ultimately on the approach adopted by the SAC. In my view,

this is apparent from paragraphs 2.3 and 30 of the outcome decision, which make the point that, because the SDC had not given adequate reasons for its decision on penalty, the SAC did not act reasonably when it decided not to uphold the Claimant's appeal from the SDC's decision. This understanding of the OIA's decision is, I think, consistent with the OIA's focus on the approach adopted by the SAC in the context of the reasonableness of the University's decision (see paragraphs 2.2 and 22 of the outcome decision).

71. The proposed recommendations were set out as an appendix to the outcome decision. The preamble to the proposed recommendations stated as follows (I have inserted a paragraph number for ease of cross-referencing):

> "[1] For the sake of clarity, it is for a new Student Disciplinary Committee to reach a decision independently about the appropriate level of penalty to apply in this case. We have not made any decisions about penalty are in no way indicative of what the SDC should decide following consideration of the evidence [*sic*]."

72. The first proposed recommendation was that the University should offer to pay to the Claimant £250 "for the distress and inconvenience because the SDC did not provide clear reasons for the severity of the penalty it decided to apply", which "will now have contributed to some additional delay in finalising the overall disciplinary process". Insofar as is relevant, the second proposed recommendation was as follows (again, I have inserted paragraph numbers for ease of cross-referencing):

> "[2] We recommend that with 28 days of the date we confirm the University should write to [the Claimant].
> …
> [5] to offer to re-arrange a Student Disciplinary Committee meeting, in accordance with section 7.2 of the Student Disciplinary Procedures, to reach a decision about the application of penalty in this case.
> [6] The reconvened SDC should be independent of any members with previous involvement in either investigating or making decisions about the

> allegations against [the Claimant].
> [7] We think it would be appropriate for a new SDC to have access to all the relevant evidence available from the investigation into allegations of misconduct. The SDC should also be provided with a copy of the previous SDC decision which explain the reasons for its decision that allegations had been proven. As well as a copy of our Complaint Outcome.
> [8] The University should provide [the Claimant] with the opportunity to submit a written statement for the SDC in mitigation ahead of a Hearing. [The Claimant] should also be invited to attend a new SDC Hearing.
> [9] For the sake of clarity, we do not think that a new SDC Panel should be convened to reconsider the allegations of serious misconduct. A fresh SDC should be convened to reach a decision about the appropriate penalty that should be imposed taking into consideration all relevant evidence, including evidence submitted in mitigation.
> [10] The SDC should provide clear reasons for its decision in writing.
> [11] [The Claimant] should be able to appeal the decision about penalty under section 8 of the Student Disciplinary Procedure if he remains unsatisfied with the outcome on penalty and is able to satisfy the relevant appeal grounds."

73. It appears that, at this point in the review, the OIA considered that the appropriate remedy was that a freshly-constituted SDC should make a fresh decision as to penalty, that in doing so the SDC should afford the Claimant an opportunity to make representations as to mitigation both in writing and orally, that the SDC should provide clear reasons for its fresh decision, and that the Claimant should have a right of appeal to the SAC against the fresh decision. As such, the provisional recommendations expressly addressed not only the fact that, as the OIA had found, the SDC had failed to give adequate reasons as to penalty, but also the consequent lack of clarity as to whether the SDC had adopted the correct substantive approach to its decision on penalty and as to whether the Claimant had been afforded an opportunity to make representations as to mitigation.

74. The proposed recommendations were sent to the Claimant and the University for each to comment on.

75. On 28 November 2023, the University wrote to the OIA. It asked that the OIA re-open its consideration of the complaint under rule 15.2.2 of the Scheme Rules, on the ground that there was an error in the complaint outcome, and under rule 15.2.1, because there was relevant new evidence. Although the University used the language of "re-opening" the complaint, it seems to me that, because the OIA's review of the complaint had at that point not yet been concluded, in reality the University was asking the OIA to continue its review, as envisaged by paragraph 45.1 of the Scheme Guidance.

76. As to the first point, the University referred to what it said was the normal practice of the OIA where it had concerns about the reasonableness of an outcome or a procedural irregularity, which involves (according the University) the OIA contacting the relevant higher education provider to give it an opportunity to rectify the error by either requesting further information or suggesting that the matter be settled. The University argued that the SDC should be permitted to provide an explanation of why it considered the penalty of expulsion to be appropriate in the Claimant's case. In this respect, the University referred to the fact that the Claimant had previously been subject to disciplinary proceedings, and it suggested that this information justified the decision of the SDC.

77. As to the second point, the University drew attention to the fact that, since the Claimant had made his complaint to the OIA, there had been further alleged incidents of misconduct, which had been reported to Thames Valley Police ("the police"). The University reported that the Claimant had been arrested and then released on police bail, which imposed on him the following conditions:

> "• not make any calls, directly or indirectly to University of Reading staff, students or any other persons linked to the University
> • not make any contact with Reading University by letter or any other electronic method, such as email or Microsoft Teams
> • Not to enter the County of Berkshire."

78. The University argued that these bail conditions made the second proposed recommendations "legally impossible".

79. The University's letter of 28 November 2023 was not shared with the Claimant prior to the final recommendations being issued.

80. The OIA's response to the University's letter of 28 November 2023 was not included in the bundle of documents that the parties had agreed for use at the substantive hearing, but a copy of it was provided to me during the course of the hearing. On 30 November 2023, the OIA sent an e-mail to the University stating that the OIA did not consider that the University's request to continue the review satisfied either of the grounds for continuing a review provided for by rule 15.2 of the Scheme Rules.

81. In relation to the University's first point, which sought a continuation of the review under rule 15.2.2 of the Scheme Rules, the OIA stated that it remained satisfied that it had had sufficient information to reach the outcome decision, and that the University had had a reasonable opportunity to provide the OIA with any information on which it wished to rely. Further, the OIA stated that it did not consider that the information that the University had provided to it indicated that there had been a material error in the complaint outcome.

82. In relation to the University's second point, which sought a continuation of the review under rule 15.2.1 of the Scheme Rules, the OIA stated that the information about the Claimant's arrest and bail conditions related to events that had occurred after the

conclusion of the University's internal procedures, and that it would not have had a material impact on the conclusions reached in the outcome decision. As a result, the OIA did not consider that the information provided by the University satisfied the requirements of rule 15.2.1. Nevertheless, the OIA went on to consider the second point in the context of the proposed recommendations. In this respect, the OIA stated as follows:

> "…in light of the University's comments regarding potential legal proceedings, and restrictive conditions placed on [the Claimant's] ability to interact with the University and members of its staff, we do think that it would be appropriate to amend our proposed Recommendations. This is to ensure that our Recommendations do not inadvertently create the potential for [the Claimant] to have to act in a way that may breach those restrictions."

83. The OIA went on to explain how it had changed the proposed recommendations. I return to those changes below.

84. Turning to the Claimant's response to the outcome decision and the proposed recommendations, it appears that, on 13 November 2023, the Claimant had telephoned the OIA to ask for additional time to comment on the proposed recommendations. Later that day, the OIA sent an e-mail to the Claimant granting an extension of time until 20 November 2023. In that e-mail, the OIA stated that "as our review has now reached its conclusion, this is an opportunity for you to comment on the practicality of our Recommendations rather than whether you agree or disagree with them". In passing, I note that the statement that the review of the complaint had concluded was not entirely accurate; under the Scheme Rules, the review did not conclude until the final recommendations had been issued.

85. On 14 November 2023, the Claimant sent an e-mail to the OIA stating that he did not agree that it had all of the information necessary to make a decision. It appears that

the Claimant provided the OIA with audio recordings that had been made at various stages of the University's disciplinary proceedings. On 18 November 2023, the Claimant sent a further e-mail to the OIA, enclosing his comments on the proposed recommendations. It is fair to say that the Claimant's comments were not particularly focused or easy to follow; they raised a very wide range of points over four closely-typed pages. Only the equivalent of two lines of the Claimant's comments were devoted to SDC chair issue, as follows: "[a]cording to s 7.2 a teaching and learning dean should have chaired the student disciplinary committee. If you go on to the Universitys [*sic*] website Rav Savania is not one of the 4 mentioned deans". The Claimant asked the OIA to look at the evidence again and to uphold his complaint as justified, and he also asked that the compensation "be increased to the max".

86. On 30 November 2023, the OIA sent an e-mail to the Claimant, responding to the representations that he had made on 14 and 28 November 2023. This e-mail set out the continuation decision. It explained that the OIA had decided that the review of the complaint should not be continued under rule 15.2 of the Scheme Rules, on the ground that the Claimant had not provided new evidence, or indicated errors, that would made a difference to the outcome decision.

87. In relation to the question whether there was new evidence that justified a continuation of the review, the OIA decided that the audio recordings were evidence that was previously available to the Claimant and that they could have been submitted before the outcome decision was taken. In relation to whether there had been a substantial error, the OIA expressed the view that the Claimant had not set out a material error in the reasoning in the outcome decision, and that overall it was reasonable for the OIA to rely upon the evidence that had been provided to it.

88. In relation to the first proposed recommendation, the OIA stated that it considered that the quantum of compensation to be appropriate. In relation to the second proposed recommendation, the e-mail referred to the University's letter of 28 November 2023, and informed the Claimant that it was available to him via the OIA's on-line portal. It appears that this was the first occasion on which the Claimant was informed about the University's letter. The OIA's e-mail continued as follows:

> "The University has advised that there may be some legal restrictions on your ability to interact with the University directly or indirectly at this time.
> In light of the University's comments I have decided it would be appropriate for us to make amendments to our Recommendations, and so that our Recommendations do not inadvertently create the potential for you to need to act in breach of any restrictions on your capacity to make contact with the University.
> …
> If you have any concerns about breaching any potential legal restrictions on your capacity to interact with the University in this way, then you should let us as soon as possible and we can consider placing the recommendation on hold [*sic*].
> I have set out further and more detailed reasons for our decision to amend our Recommendations in my correspondence with the University, as well as in the preamble to our confirmed Recommendations…."

89. The final recommendations were also issued on 30 November 2023. A box at the top of the final recommendations records that the date on which the complaint decision was issued was 1 November 2023, and that the date on which the recommendations were confirmed was 30 November 2023. The final recommendations, like the proposed recommendations, are headed "appendix", presumably by way of reference to the outcome decision. Insofar as is relevant, the preamble to the final recommendations states as follows (I have inserted paragraph numbers and letters to facilitate cross-referencing):

> "[1] We have carefully considered all the comments received. Having done so we have decided that it is appropriate to amend our Recommendations. This is because we have been notified that [the Claimant]

may be legally restricted from communicating directly or indirectly with the University pending the outcome of ongoing legal proceedings.

[2] In light of this we think that it is appropriate to make amendments to our Recommendations to indicate that the University's offers in line with Recommendations 1 and 2 should be sent to us in the first instance. If [the Claimant] chooses to accept the offers in full and final settlement then he should let us know and we will communicate his decision to the University.

[3] If [the Claimant] has any concerns that communicating his decision about the offers to the University through us may be in breach of any potential legal restrictions on his capacity to interact with the University, then he should write to us to discuss this as soon as possible. We can then consider placing the recommendations on hold.

[4] Specifically in relation to Recommendation 2 we have decided to amend our Recommendations as follows:

> [(a)] We think that it would appropriate and reasonable for the issues we have identified in relation to penalty to be considered in accordance with section 8.2 (rather than 7.2) of the Student Disciplinary Procedures, by an Appeals Committee (and not a new Student Disciplinary Committee).
>
> [(b)] This is because section 8.2 of the Student Disciplinary Procedures indicates that a student may appeal against the outcome of penalty applied under section 7.3 of that policy in accordance with the University's Procedures for the Student Appeals Committee ("the Appeals Procedures"). And we are satisfied that, in accordance with section 6 of those Procedures, an Appeals Committee has relevant powers to make decisions about the proportionality of penalty applied in relation to cases where allegations of serious misconduct have been established.
>
> [(c)] Furthermore, section 13 of the Procedures provides powers for an Appeals Committee to consider "privately any matter or point". And section 14 and 16 indicate that an Appeals Committee's decisions will not be invalidated by a student's non-attendance.
>
> [(d)] In addition, our confirmed Recommendations indicate that at the outcome of the Appeals process [the Claimant] should be provided with a new Completion of Procedures Letter which he can use to raise a new complaint with us if he remains unsatisfied with the University's decision. We think this provides [the Claimant] with the opportunity to raise any concerns about the outcome of the appeals process in a way which does not necessitate contact with the University.
>
> [(e)] We also note that [the Claimant] has already submitted extensive representations to the University, including an appeals statement, and in the circumstances, we think that it would be reasonable and possible for an independent Appeals Committee to consider the SDC's decision about proportionality of penalty on the papers only. That said, we think in reaching a decision the Appeals Committee should be careful to demonstrate consideration for any evidence of mitigation. We think it may be reasonable for an Appeals Committee to decide that there is sufficient evidence already available for it to be able to review the penalty applied by the SDC in all the

> circumstances without the need for [the Claimant] to submit further representations.
>
> [5] In our view the amendments to Recommendation 2 provide an appropriate mechanism for the University to reconsider the issued identified in the Complaint Outcome without the need for [the Claimant] to contact the University."

90. Mr Lawson sought to persuade me that the OIA's reasons for revisiting the proposed recommendations were set out in the subparagraphs under paragraph 4 in the quotation above. However, that is not how I read this part of the final recommendations. In my view, it is clear that the reason why the OIA decided to revisit the proposed recommendations is set out in paragraphs 1 and 2 of the final recommendations. In essence, the OIA accepted the University's contention that the bail conditions that had been imposed on the Claimant made compliance with the proposed recommendations impossible, and therefore it was necessary to make different recommendations. As I read the subparagraphs on which Mr Lawson relied, they explain why the OIA considered that the final recommendations would be practically workable and were appropriate in the light of the outcome decision. I am reinforced in my interpretation of the final recommendations by the fact that it is consistent with the explanation provided by the OIA in its e-mails to the University and to the Claimant on 30 November 2023, and in the OIA's response to the letter before claim, which stated as follows:

> "It is clear from that correspondence that changes were made in light of information provided to the OIA concerning the restrictions placed upon [the Claimant] as a consequence of his police bail conditions. The OIA was concerned that the originally proposed Recommendations may have inadvertently resulted in [the Claimant] breaching those conditions."

91. The first of the final recommendations was broadly in the same terms as the first of the proposed recommendations, save for provision for a mechanism by which the

University and the Claimant could communicate via the OIA. The second of the final recommendations was as follows (again, I have inserted paragraph numbers to facilitate cross-referencing).

> "[12] [The University should] write to us with an offer to [the Claimant] to make arrangements for an Appeals Committee meeting, in accordance with section 8.2 of the Student Disciplinary Procedures, to consider the proportionality of penalty applied by the SDC in relation to this case.
> [13] Following receipt of the University's offer [the Claimant] should let us know whether he wants to accept the offer in full and final settlement. We will communicate his decision to the University. If [the Claimant] accepts the offer then the University should make arrangements for an Appeal Committee to consider the case within 28 days of notification of acceptance.
> [14] We think it would be reasonable for the Appeals Committee to deliberate on this matter privately and on the basis of the papers only.
> [15] However, if having considered the papers the Appeals Committee decides that an Appeals Hearing would be necessary than it should follow the standard Appeals Procedures in respect of a Committee Hearing, and ensure that [the Claimant] is provided with the opportunity to attend (in person, or remotely).
> [16] If an Appeals Committee Hearing would be necessary in this case, than [*sic*] we think it may be reasonable and necessary for the University to suspend actioning a Hearing until it has been appropriately notified that any restrictions on [the Claimant's] contact with the University have been lifted. In this case, arrangements for an Appeals Committee Hearing should be made within 28 days of the date at which restrictions have been lifted. The University should notify us of this as soon as possible.
> [17] The Appeals Committee should be independent of any members who may have been previously involved in either investigating or making decisions about the allegations against [the Claimant]. However, the Appeals Committee should be provided with all the relevant evidence considered by the SDC when reaching its decision about allegations of serious misconduct, as well as the SDC's original decision about the relevant disciplinary allegations. The Appeal Committee should also be provided with a copy of our Complaint Outcome.
> [18] For the sake of clarity, we do not think that the Appeals Committee needs to reconsider the allegations of serious misconduct which we think have been reasonably proven and upheld on appeal previously.
> [19] Furthermore, it is for the Appeals' Committee to reach its own decision independently about the level of penalty applied in the circumstances of this case, or to, in accordance with its powers under the relevant procedures, make a decision about an appropriate level of penalty. The Appeals Committee should provide clear reasons for its decision demonstrating consideration for all evidence available – including, evidence in mitigation, and the range of penalties at its disposal.
> [20] We have not made any of our own decisions about what penalty should be applied in this case, and our decision is in no way indicative of what

> we think the Appeals Committee should decide following its consideration of all relevant evidence.
> [21] [The Claimant] should be issued with a new Completion of Procedures Letter at the conclusion of this process which he may use to raise a complaint with us if he is not satisfied with the outcome of the Appeals procedures."

92. In the Claimant's second witness statement, he confirms that he remains on bail and that, insofar as is relevant, the conditions remain as set out above. However, the Claimant has exhibited correspondence with the police which indicates that, if as a result of this claim it were to become necessary for the Claimant to have direct contact with the University via a nominated point of contact, the Claimant's bail conditions would be amended so as to allow for this. I return to the correspondence with the police below.

93. The University accepted the final recommendations and, on 21 December 2023, it wrote to the OIA making an offer to the Claimant in the relevant terms. That offer was relayed to the Claimant by the OIA on 8 January 2024, but the Claimant has not accepted it.

## E. THE CLAIM FOR JUDICIAL REVIEW AND THE OIA'S RESPONSE

94. On 12 February 2024, the Claimant sent a letter before claim in accordance with the Pre-Action Protocol for Judicial Review. In that letter, the Claimant indicated that the matter under challenge was the OIA's decision received by him on 3 December 2023 (i.e. the date on which he received the final recommendations), which was characterised as "the final decision of the OIA". This letter raised a number of proposed grounds of challenge, most of which appear to have been directed at the outcome decision, but none of which reflected the grounds eventually advanced in the

claim for judicial review. The OIA responded to the letter before claim on 22 February 2024. The OIA pointed out that the letter before claim appeared to be directed at the outcome decision.

95. The claim form was filed on 29 February 2024. Section 3 of the claim form identified the decision under challenge as "the OIA's decision in relation to the outcome and recommendations of the claimant's complaint" and gave the date of that decision as 30 November 2023 (i.e. the date of the final recommendations). Insofar as is relevant, section 8 of the claim form stated that the remedies sought were a declaration that the OIA had committed the errors alleged; an order quashing the decision of 30 November 2023 and either "a declaration that the 2 November decision stands" or a remittal to the OIA for redetermination. The Claimant's statement of facts and grounds referred to the remedies sought in similar terms. Accordingly, neither the claim form nor the statement of facts and grounds sought an order quashing the outcome decision; on the contrary, each sought a declaration that the decision made on 2 November 2023 stood.

96. Alongside the claim form, the claimant filed an application notice seeking an order that the claim be expedited, such that a substantive hearing take place on or before 31 July 2024. This was on the basis that, if the Claimant is to continue his degree course, he wishes to do so as soon as possible.

97. The Claimant's statement of facts and grounds identified three decisions that were said to be challenged, as follows:

> "21. The decision that the Student Disciplinary Committee was properly constituted.
> 22. The decision to accept further evidence about past events and/or the decision to change recommendations based on those events or on

current bail conditions without giving the claimant a fair opportunity to respond.

23. The decision to change recommendations from being a fresh decision as to sanction to an appeal of the decision to expel the claimant and (if this was the decision) that no new evidence/submission could be submitted in mitigation."

98. For convenience, I shall refer to these three challenges as, respectively, the first, second and third challenges.

99. The first challenge is directed at the OIA's conclusion in relation to the SDC chair issue. The Claimant contended that the OIA had either misunderstood the Claimant's complaint about the fact that Professor Savania had acted as chair of the SDC, or it had misunderstood the University's response to that complaint. In short, the Claimant contended that his complaint was that, under the Disciplinary Procedure, Professor Savania did not meet the condition for appointment as chair of the SDC because he was not a teaching and learning dean. The Claimant said that the University's response, to the effect that Professor Savania had been appointed as chair of the SDC, was not capable of providing an answer to his complaint: the issue was not whether Professor Savania had been appointed, it was whether he could be appointed.

100. In response, in both its summary grounds of resistance (filed on 18 March 2024) and its detailed grounds of resistance (filed on 3 June 2024), the OIA contended that its decision on the SDC chair issue was set out in the outcome decision, which the Claimant had not sought to challenge, and any challenge to the outcome decision would be significantly out of time. The OIA contended that, in any event, it had not committed a public law error in accepting Professor Savania's explanation as to the circumstances of his appointment as chair of the SDC, and that the issue was a relatively minor one in the context of the Claimant's appeal to the SAC and the

complaint. In both its summary and detailed grounds of resistance, the OIA made the point that the Claimant had not directly challenged the outcome decision.

101. In relation to the second challenge, the statement of facts and grounds focuses on the information that the University provided to the OIA on 28 November 2023 about the previous disciplinary proceedings against the Claimant. The Claimant contended that it was unfair for the OIA to rely on this matter when deciding to change the proposed recommendations to the final recommendations without first affording the Claimant an opportunity to make representations on it, and that it was unclear why the OIA had treated this matter as relevant in this context.

102. In response, in its summary and detailed grounds, the OIA argued that the Claimant's contentions in this respect were misconceived, because the OIA did not rely on the information about the previous disciplinary proceedings that had been provided by the University. The OIA stated that the reason for revisiting the provisional recommendations was the information that the University had provided about the Claimant's bail conditions.

103. In relation to the third challenge, the statement of facts and grounds contended that the final recommendations were less advantageous to the Claimant than the proposed recommendations in two main ways. First, if the Claimant's case were reconsidered by the SDC, the SDC would consider the question of what sanction should be imposed on the Claimant afresh. In contrast, if the Claimant's case were reconsidered by the SAC, under the Disciplinary Procedure and the SAC Procedures, the SAC would be limited to considering whether expulsion was "unreasonably disproportionate". Secondly, the proposed recommendations had provided for the Claimant to have an opportunity to submit to the SDC a statement in mitigation,

whereas the final recommendations did not envisage a similar opportunity in respect of the SAC. The Claimant contended that the OIA had failed to provide a proper explanation for these changes, that the changes were in any event not justified by the reasons for it that had been advanced by the OIA, and that the effect of the changes was that the final recommendations no longer properly addressed the errors identified in the outcome decision.

104. In response, in its summary and detailed grounds the OIA contended that it was, on any view, necessary to revisit the proposed recommendations in order to avoid the risk of the Claimant breaching his bail conditions. It also contended that the final recommendations represented a proportionate approach, bearing in mind the fact that they involved the OIA acting as an intermediary between the Claimant and the University, and the need to adopt a more "streamlined" approach so as to avoid placing an undue burden on the OIA in this respect. In addition, the OIA contended that the final recommendations gave adequate reasons as to why those recommendations were considered to be appropriate.

## F. THE FIRST CHALLENGE: THE OUTCOME DECISION

### (1) A threshold issue: is it open to the Claimant to advance the first challenge?

105. As I have explained above, the Claimant's first challenge relates to the way in which the OIA dealt with the SDC chair issue. The OIA's conclusion on this issue was set out in paragraphs 14.4 and 14.5 of the outcome decision, which was issued on 2 November 2023.

106. However, the Claimant did not seek directly to challenge the outcome decision until the second day of the substantive hearing. As I have noted above, although section 3

of the claim form identified the decision under challenge as "[t]he OIA's decision in relation to the outcome and recommendations of the claimant's complaint", it gave the date of decision as 30 November 2023 (i.e. the date of the final recommendations), and the Claimant did not seek any remedy in respect of the outcome decision. On the contrary, the Claimant sought a declaration that "the 2 November decision stands". When he granted permission to apply for judicial review, Mr Southey KC was clear that he was not granting permission to challenge the outcome decision.

107. Accordingly, the position before me is that, subject to the applications to amend which I address below, the only decision under challenge is the final recommendations. As a result, the question arises as to whether the Claimant may, as part of his challenge to the final recommendations, challenge the OIA's conclusion on the SDC chair issue.

108. Mr Lawson argued that the Claimant could challenge the OIA's conclusion on the SDC chair issue as part of his challenge to the final recommendations. His position was that, under paragraph 15.1.5 of the Scheme Rules, the OIA's review of the complaint remained ongoing, and was not finally resolved, until the final recommendations were issued, and that at that point a challenge could be brought to the overall result of the review, whether that involved a challenge to the OIA's decision on the merits of the complaint, to its decision as to recommendations, or to both. In this respect, Mr Lawson drew attention to the fact that the OIA's e-mail to the Claimant of 30 November 2023 demonstrated that the OIA was, until that date, prepared to contemplate continuing the review. Mr Lawson drew an analogy with the

position in the civil courts, in which appeals are brought against final orders rather than judgments on the merits.

109. Mr Lawson also made the practical policy point that, if a student (or a higher education provider) were required to bring a claim for judicial review of a complaint outcome before the OIA's final recommendations were known, there would be a risk that the claim would turn out to have been pointless. In particular, notwithstanding the fact that a student might be dissatisfied with an outcome decision, in due course he or she might be content with the eventual recommendations. Mr Lawson submitted that a student who brought a challenge to a complaint outcome before final recommendations had been issued risked being faced with an argument that the claim was premature or that he had failed to avail himself or herself of an adequate alternative remedy. Mr Lawson argued that, in circumstances in which the OIA provides a form of alternative dispute resolution which caters specifically for students who are unlikely to be legally represented (see, for example, *R (Maxwell) v Office of the Independent Adjudicator* [2011] EWCA Civ 1236, [2012] PTSR 884, paras 37-38 *per* Mummery LJ), it would be particularly undesirable to require a party to embark upon potentially time-consuming and expensive litigation before the OIA's review had finally concluded.

110. In response, Ms McGibbon argued that the OIA's conclusion on the SDC chair issue formed part of the outcome decision, and it was clear from the Scheme Rules that the outcome decision was a discrete decision which dealt with the merits of the complaint, and it was separate from the final recommendations, which were consequent upon the outcome decision. She submitted that the fact that, in a case such as the Claimant's, the review of a complaint is not finally concluded until final

recommendations are issued does not mean that a challenge to the final recommendations may be used as a vehicle for a challenge to each decision that is taken during the course of the review. Ms McGibbon contended that CPR 54.5 provides a complete answer to the Claimant's attempt to challenge the outcome decision: she said that the grounds to make a claim in respect of the OIA's conclusion on the SDC chair issue first arose when the outcome decision was issued, and that the time for challenging that conclusion therefore ran from 2 November 2023. Accordingly, Ms McGibbon said, any challenge to the OIA's conclusion on the SDC chair issue was long out of time. In response to Mr Lawson's policy point, Ms McGibbon responded that the OIA values certainty and, if a complaint outcome is to be challenged, it would wish that challenge to be commenced promptly. She told me that, where there is a challenge to a complaint outcome in a case in which the OIA intends go on to consider recommendations, the OIA does not argue that the challenge is premature, but in effect pauses the review pending resolution of the challenge, and the OIA does not proceed to make final recommendations until the challenge is resolved.

111. I consider that Mr Lawson is correct to characterise the review of a complaint by the OIA as a process which potentially comprises several stages. Insofar as is relevant for present purposes, once the OIA has taken a decision that it will review a student's complaint, the review of the complaint involves two main stages: first, consideration of the merits of the complaint, which results in the issuing of a complaint outcome; and, secondly, a provisional decision as to the remedy that should be offered to the student, which results in the issuing of proposed recommendations, upon which representations may be made, followed by a final decision as to the remedy that should be offered, which results in the issuing of final recommendations. In a case

such as the present, the review process is not concluded until final recommendations have been issued. Self-evidently, there is a link between a complaint outcome and final recommendations; final recommendations are (or at least should be) predicated on the complaint outcome.

112. Nevertheless, I consider that the Scheme Rules indicate that a complaint outcome constitutes a discrete decision that is distinct from a decision as to recommendations. Under the Scheme Rules, in each case in which the OIA decides to review a complaint, it issues a complaint outcome (rule 13.1), and does so as soon as it reasonably can (rule 13.2). In a case in which the OIA decides that a complaint is justified or partly justified, it then has a discretion as to whether to make recommendations (rule 14.1). Where the OIA decides to exercise that discretion, and proceeds to the second stage of the review, the Scheme Rules do not afford an opportunity to revisit the complaint outcome at that stage (*cf* rules 14.5 and 14.6). Accordingly, once a complaint outcome is issued, the OIA's decision on the merits of the complaint is in effect final, subject only to the power to continue or re-open the review under rule 15.2 (which itself presupposes that a complaint outcome is otherwise final).

113. In this respect, the Scheme Rules reflect paragraphs 5 and 6 of Schedule 2 to the 2014 Act, which envisage that a complaints scheme should provide first for a decision on the merits of a complaint, to be followed (in a case in which the complaint is found to be justified to any extent) by a decision as to what recommendations (if any) should be made in light of the decision on the merits. In my view, this supports a conclusion that a complaint outcome constitutes a discrete decision that is distinct from a decision as to recommendations.

114. Further, the Scheme Rules do not provide for a complaint outcome to be reissued at the point at which final recommendations are issued, or to be incorporated into final recommendations, such that final recommendations constitute a composite decision comprising both the complaint outcome and the recommendations. Although it might be argued that paragraph 7 of Schedule 2 to the 2014 Act envisages that a complaints scheme should provide for such a composite decision, I would not accept such an argument. In my view, there is nothing in paragraph 7 that expressly requires notification of a complaint outcome at the same time as or as part of notification of recommendations and, when paragraph 7 is considered in the context of paragraphs 5 and 6, it is in my view clear that such a requirement is not implicit in paragraph 7.

115. I was told by counsel that there is no authority, either in the specific context of the OIA or in any analogous context, that directly bears on this issue. Ms McGibbon told me that there had been several decisions of this Court at the permission stage in which the Court had proceeded on the assumption that a complaint outcome could be the subject of a claim for judicial review, but as I understood the position none of them confronted the issue before me, and none of them was shown to me (and, in any event, I anticipate that they would not have been citeable).

116. Mr Lawson relied on a line of case law in support of the proposition that, where a decision-making process involves one or more decisions leading up to a final decision, and a claimant considers that there is a legal error in an earlier decision, he or she is not necessarily required to challenge that earlier decision, but may be entitled to wait to challenge the final decision that affects his or her rights.

117. Mr Lawson's starting point was *R (Burkett) v Hammersmith and Fulham London Borough Council* [2002] UKHL 23, [2002] 1 WLR 1593. In that case, on 15

September 1999, a local planning authority resolved to authorise one of its officers to grant outline planning permission, provided certain conditions were met. On 6 April 2000, the claimant commenced a claim for judicial review of the resolution, alleging that the local authority had not properly considered the environmental impact of the relevant development. The claim was brought over six months after the date of the resolution and therefore, in that respect, it was out of time. Subsequently, on 12 May 2000, the relevant conditions having been met, planning permission was granted. Before the House of Lords, the claimant proposed an amendment to the claim which would enable it to challenge the grant of planning permission. The question for the House of Lords was whether the claimant's challenge had to be directed at the resolution (in which case it was out of time), or whether it could be directed at the grant of planning permission (in which case there was no limitation issue).

118. Lord Steyn, who gave the leading speech, held that, although it would have been open to the claimant to challenge the resolution, it did not follow that she could not wait until planning permission had been granted and then challenge it (see paras 38 and 42). In terms of the requirement imposed by CPR 54.5(1)(b), that a claim must be brought not later than three months after the grounds to make the claim first arose, Lord Steyn held that, in the context of a challenge to a resolution to grant planning permission, the relevant "ground" is the fact that there has been a decision to do an unlawful act in the future. In contrast, in the context of a challenge to a grant of planning permission, the relevant "ground" is that the grant itself constitutes an unlawful act; the fact that the unlawfulness might have been foreseeable at an earlier stage of the decision-making does not alter the position (see para 39). Accordingly, it was open to the claimant to wait and challenge the grant of planning permission.

119. In support of this conclusion, Lord Steyn referred to the fact that it is only the grant of planning permission that has any legal effect; a resolution has no legal effect, and it may transpire that for a range of reasons a resolution might never translate into a grant of planning permission, not least because the local planning authority might decide to reconsider or revoke the resolution (see paras 32 and 39). Lord Steyn expressed concern that a challenge to a resolution might be premature, and that a requirement to challenge a resolution would be in tension with the established principle that judicial review is a remedy of last resort (see para 42). Lord Steyn drew an analogy with the situation in which a decision-maker gives a provisional indication as to the decision that it is minded to make, subject to hearing further representations, and he was unable to identify a material difference between that situation and that which was before the House of Lords (see para 43). Finally, Lord Steyn pointed to what he saw as the policy arguments in favour of his approach, in particular the need for simplicity and certainty, and the need to avoid requiring claimants to bear the burden of bringing claims for judicial review that might not be necessary (see paragraphs 44-50). Lord Slynn and Lord Hope gave short concurring speeches, and Lord Millett and Lord Phillips MR agreed with both Lord Slynn and Lord Steyn.

120. Mr Lawson also cited *R (Eisai Ltd) v National Institute for Clinical Excellence* [2008] EWCA Civ 438, (2008) 101 BMLR 26. In that case, the claimant was the manufacturer of a drug used in the treatment of Alzheimer's disease. It challenged guidance issued by NICE to the effect that the drug was not a cost-effective treatment, on the ground that NICE had allegedly acted in a procedurally unfair manner by not providing the claimant with a fully executable version of the model that NICE had used to determine the cost-effectiveness of the drug. Richards LJ (with whom Jacob and Tuckey LJJ agreed) held that NICE had acted unfairly by not providing the

claimant with a fully-executable version of the model (see para 66), but NICE argued that a remedy should be refused under s 31(6)(b) of what is now the Senior Courts Act 1981, on the ground that there had been undue delay in bringing the claim for judicial review. The argument rested on the fact that NICE had expressly refused to provide the claimant with the model some 18 months before the claim was brought, and it was said that the claimant should have brought its challenge at that time (see para 69). Richards LJ rejected that argument (see para 70). He held that, had a challenge been brought at the time of the refusal to provide the model, it was likely that it would have been dismissed as premature, because at that time it was not yet known what the final outcome of NICE's appraisal of the drug would be, and the final outcome might have been acceptable to the claimant. Further, the claimant had an internal right of appeal against the outcome of the appraisal process, including on the grounds of procedural unfairness, and that might have been regarded as an adequate alternative remedy to a claim for judicial review.

121. Mr Lawson also relied on *Stagecoach East Midlands Trains Ltd v Secretary of State for Transport* [2019] EWCA Civ 2259, [2020] 3 All ER 948. In that case, the claimants brought claims against the Secretary of State for damages, declarations and injunctions in respect of decisions to disqualify them from competitions for various rail franchises. The claims were brought as ordinary claims under CPR Part 7, and relied in part on alleged unlawfulness in decisions that preceded the disqualification decisions (i.e. decisions as to the original invitation to tender and as to instructions to re-bid for the franchises). The Secretary of State argued that certain elements of the claims should be struck out, because they should have been brought with the three month time limit applicable to claims for judicial review and that, insofar as the claimants relied on alleged unlawfulness in decisions that preceded the

disqualification decisions, time had started to run on the dates of the earlier decisions. Having held that, to the extent that the claimants sought injunctions, the judicial review time limit might be applicable to the claims, Coulson LJ (with whom Sir Rupert Jackson and Newey LJ agreed) went on to consider the question of when that time limit started to run.

122. It is important, I think, to recognise the limit of what Coulson LJ decided in *Stagecoach*. The judge below had decided not to strike out the claims, on the basis that he could not determine limitation issues in a complex procurement case on a summary basis, without having regard to the evidence at trial. In order to succeed on the appeal, therefore, the Secretary of State had to show that the judge had erred because there was a hard-edged rule of law that any claim seeking to impugn the earlier decisions had to be commenced within three months of those decisions (see paras 115-116). Having considered the position by reference to case law in both the judicial review and procurement contexts, Coulson LJ held that there was no such hard-edged rule of law, and that the Judge had had no realistic option but to adopt the approach that he did (see paras 131-136).

123. In terms of the case law in the judicial review context, Coulson LJ reviewed *Burkett* and *Eisai*, but expressed wariness about extracting specific principles from them, noting that they each turned on their own facts and demonstrated a certain amount of flexibility in approach (see para 122). Nevertheless, Coulson LJ identified two general principles to be taken into account when deciding when the time limit for bringing a claim for judicial review starts to run: first, judicial review is a remedy of last resort, and an early challenge should not generally be made before the final outcome is

known and, secondly, the need for a readily ascertainable starting date and the disadvantages of a too broadly-based judicial discretion.

124. In *R (Fylde Coast Farms Ltd) v Fylde Borough Council* [2021] UKSC 18, [2021] 1 WLR 2794, the Supreme Court considered a challenge to a decision by a local authority to adopt neighbourhood development plan, in circumstances in which the challenge relied on an alleged flaw in a decision taken at an earlier stage of the seven-stage decision-making process, a decision that the claimant was out of time to challenge directly. The appeal turned on the proper interpretation of s 61N of the Town and Country Planning Act 1990, but Lord Briggs and Lord Sales JJSC (with whom the rest of their Lordships agreed) made some general observations on the situation in which a challenge is brought to a final decision taken at the end of and on the basis of a series of steps, and in which the final decision's lawfulness is impugned on the basis of alleged unlawfulness at an earlier step which cannot be challenged directly because any such challenge would be out of time.

125. Lord Briggs and Lord Sales JJSC referred to the tensions between differing considerations that may arise in such a situation (see para 38). On the one hand, requiring a claimant to bring a challenge to an earlier step at the time that it was taken could be premature and wasteful, and it could place a heavy burden on a potential claimant. On the other hand, allowing a claimant to wait could be dilatory, disruptive of good administration and wasteful in another way (in the sense that it might transpire that subsequent steps in the decision-making process were pointless). By way of examples of how these tensions had manifested themselves in the case law on what is now CPR 54.5, Lord Briggs and Lord Sales JJSC referred to *Burkett* and to the earlier decision of Laws J in *R v Secretary of State for Trade and Industry, ex p*

*Greenpeace Ltd* [1998] Env LR 415 (which was cited by Lord Steyn in *Burkett*) (see para 40). Having done so, they concluded that there is no clear and obvious way of resolving the tensions that they had identified, and that ultimately a choice has to be made between competing interests of different kinds, reflecting the particular balance of considerations as they happen to arise in the specific context (see para 41). Lord Briggs and Lord Sales JJSC went on to observe that, although the preponderance of judicial authority, as encapsulated in *Burkett*, might favour allowing a claimant to wait to bring a challenge, the authorities are not unanimous and it does not follow that the same approach should be adopted in relation to every different type of multi-stage decision-making (see para 44).

126. In my view, each of the authorities on which Mr Lawson relied is distinguishable. As to *Burkett*, the foundation for the Lord Steyn's reasoning in *Burkett* was the fact that the local authority's resolution did not itself have any legal effect and there was no certainty that it would necessarily result in a subsequent act that had legal effect (i.e. a grant of planning permission). In contrast, under the Scheme Rules, once the OIA issued the outcome decision, that decision was fixed and, although the review as a whole remained ongoing until the final recommendations were issued, thereafter there was no opportunity for either the Claimant or the University to procure its modification (subject to any application under rule 15.2). Further, although strictly speaking the outcome decision did not affect the Claimant's legal rights (because nothing that the OIA does has any binding effect on the Claimant), it did have legal consequences in the sense that it constituted a formal determination of the merits of the complaint under the Scheme Rules.

127. In *Eisai*, the decision not to provide the claimant with the model was, in effect, a decision as to the procedure to be followed when reaching a substantive decision, and the challenge to the substantive decision was a conventional fairness challenge to a decision that was alleged to be unlawful by reason of what was said to be unfairness in the procedure leading up to the substantive decision. In my view, the situation is different in the present case, where the outcome decision was a substantive decision in its own right. Although it might be said that in the present case, as in *Eisai*, the practical consequences of the outcome decision could not have been known until the final recommendations were issued, in my view that is the case only to a limited extent: the inevitable consequence of the outcome decision was that the OIA's recommendations would be predicated on its conclusion in relation to the SDC chair issue. In *Stagecoach*, Coulson LJ did not decide the point either way; it was sufficient for him to decide that there was no hard-edged rule of kind proposed by the Secretary of State. Finally, *Fylde Coast Farms* involved a particular statutory process, in respect of which Parliament had made specific provision for how and when challenges to certain of the stages of the decision-making must be brought.

128. More importantly, each of the authorities to which I have referred concerned a situation in which the claimant sought to challenge a later decision on the basis of an alleged flaw in a decision taken at an earlier point in the decision-making process. That is not the situation in the present case. In this respect, it is important to understand exactly what, as a matter of substance, the Claimant would have to challenge in order to achieve the outcome that he seeks on this aspect of his claim. If all that the Claimant were to achieve on this aspect of his claim was the quashing of the final recommendations, the outcome decision would be left intact, and any reconsideration of the recommendations by the OIA would have to be predicated on

the outcome decision as it currently stands. Yet that is not what the Claimant seeks; on this aspect of his claim, what the Claimant really seeks is a fresh outcome decision, to be followed by a fresh decision as to recommendations that is predicated on the fresh outcome decision. Accordingly, unlike in the cases to which I have referred above, it is not enough for the Claimant to impugn the later decision (i.e. the final recommendations); in order to achieve the outcome that he seeks, he has to impugn the earlier decision (i.e. the outcome decision). As such, as a matter of substance, the Claimant does not seek to challenge the final recommendations on the basis of an alleged flaw in the outcome decision; rather, he seeks to use his challenge to the final recommendations as a vehicle for a challenge to the outcome decision. In my view, this is a more fundamental basis on which the cases to which I have referred can be distinguished.

129. On the analysis that I have set out above, it is necessary for the Claimant to identify a way in which his challenge to the final recommendations can be used as the vehicle for a challenge to the outcome decision. One way in which the Claimant might do this would be to show that the outcome decision was in effect incorporated into the final recommendations. I have already explained why, in my view, the general position under the Scheme Rules is that the complaint decision was a discrete decision that was distinct from final recommendations. In terms of the particular facts of the Claimant's case, Mr Lawson did not seek to draw my attention to any specific feature that indicated that the outcome decision was incorporated into the final recommendations. I have noted above the fact that the final recommendations are headed "appendix", potentially suggesting that they were notionally appended to the complaint outcome. However, in the absence of any other indication that the complaint outcome was reissued alongside or as part of the final recommendations, I

consider that this would be far too slender a thread on which to hang an argument that the outcome decision was incorporated into the final recommendations, and it was not an argument that Mr Lawson advanced.

130. I am conscious that, in each of the cases to which I have referred above, the Courts attached particular significance to the policy considerations that weighed in favour of and against the adoption of a particular approach, something that Lord Briggs and Lord Sales JJSC expressly recognised in *Fylde Coast Farms*. Such policy considerations also featured in *R (Rafique-Aldawery) v St George's, University of London* [2018] EWCA Civ 2520, [2019] PTSR 658, in which Nicola Davies LJ (with whom Lindblom and Irwin LJJ agreed) considered whether a student who wished to bring a claim for judicial review of a higher education provider in addition to a complaint to the OIA was required to commence the claim before the OIA had determined the complaint (see para 18).

131. In my view, the policy considerations advanced by Mr Lawson carry greater force than those advanced by Ms McGibbon. I can foresee real practical disadvantages if students or higher education providers were required to challenge unfavourable complaint outcomes before they knew what recommendations (if any) the OIA would make; although it is possible that such disadvantages might be mitigated if an approach analogous to that envisaged by Nicola Davies LJ in paragraph 21 of *Rafique-Aldawery* were adopted. In addition, it strikes me that in one respect the Scheme Rules themselves reflect the fact that there may be practical advantages in not requiring a party to call into question a complaint outcome before the review has been finally concluded, in that (in case such as the Claimant's) the normal time limit for requesting that a review be reopened does not start to run until final recommendations

have been issued (see rule 15.3 of the Scheme Rules, although *cf* para 45.1 of the Scheme Guidance).

132. However, in view of the fact that the present case is distinguishable from the cases to which I refer above, I do not consider that it is open to me to depart from the analysis set out above on purely policy grounds. In any event, even if it were open to me to do so, those policy grounds are not of such force that they would cause me to depart from my analysis.

133. Accordingly, in summary, I have concluded that the Claimant cannot, as part of his challenge to the final recommendations, challenge the OIA's conclusion on the SDC chair issue.

**(2) The second application to amend: a direct challenge to the outcome decision**

134. My conclusion on the first issue above brings into play the Claimant's second application to amend. At the end of the first day of the substantive hearing, Mr Lawson floated the possibility that the Claimant might make an application to amend his claim to challenge the outcome decision. I suggested that, if such an application were to be made, it would be appropriate to do so by way of a formal application notice. In the event, at the outset of the second day of the substantive hearing, on 27 June 2024, I was provided with an application notice dated that day seeking an order "granting the claimant permission to challenge all aspects of the defendant's decision from 2 November 2023 onwards". The application notice had not been filed or issued and, as I understand the position, it has not been filed or issued since.

135. I indicated to Mr Lawson my provisional view that the order sought was framed in unduly wide terms, and as a result he refined the application to what I understood to

be an application for permission to amend the claim form to challenge the outcome decision, and for permission to apply for judicial review of the outcome decision. I was not provided with a draft amended claim form or statement of facts and grounds, but Mr Lawson indicated that, if permission were granted, he would rely on the arguments that were already advanced in relation to the SDC chair issue in the statement of facts and grounds.

136. Ms McGibbon resisted the application in both its original and refined forms. She argued that the application had been made extremely late in the day; that, as framed in the application notice, the order sought would be inappropriately wide-ranging; and that there had been a failure on the Claimant's part to act with procedural rigour.

137. It seems to me that I should approach the Claimant's application as an application under CPR 3.1(2)(a) for an extension of time for challenging the outcome decision. I understood that Mr Lawson accepted that this was in substance what the Claimant was asking for. Paragraph 6.4.4.2 of the Administrative Court Judicial Review Guide 2023 ("the Administrative Court Guide") provides a helpful summary of the factors that are likely to be relevant when considering whether to grant an extension of time for bringing a claim, by reference to *Maharaj v National Energy Corporation of Trinidad and Tobago* [2019] UKPC 5, [2019] 1 WLR 983, para 38 *per* Lord Lloyd-Jones. I note that paragraph 6.4.4.2 of the Administrative Court Guide has been cited with approval in *R (Dobson) v Secretary of State for Justice* [2023] EWHC 50 (Admin), para 31 *per* Fordham J, and *R (LJ Fairburn & Son Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2024] EWHC 65 (Admin), [2024] PTSR 656, para 132 *per* Hill J.

138. Before turning to consider the factors identified in the Administrative Court Guide, it is necessary to identify the extent of the delay. As I have already mentioned, the outcome decision was issued on 2 November 2023, and therefore the maximum three month period for challenging that decision would have ended on 2 February 2024. The second amendment application was not made until 27 June 2024, nearly five months later. Accordingly, even if one were to ignore the promptness requirement imposed by CPR 54.5(1)(a), the Claimant requires an extension of time of some five months, i.e. in effect a more than doubling of the maximum three month period provided for by CPR 54.5(1)(b). In my view, the length of the delay is itself a factor that weighs against the grant of an extension of time.

139. What is the Claimant's explanation for this delay? The evidence relied on in support of the application was set out in section 10 of the application notice as follows: "[t]he claimant pursued the defendant's process until its end (including the decision not to continue the review) and should be given permission to challenge the entire process from its final stage". As I understand the point made in the application notice, as elaborated upon by Mr Lawson in his oral submissions, the Claimant says that it was reasonable for him to wait for the conclusion of the review before commencing a claim for judicial review, and he should not be penalised for having done so. Mr Lawson suggested that, had the Claimant sought to bring a challenge to the outcome decision any earlier, he would have been at risk of being held to have acted prematurely or as having failed to pursue an adequate alternative remedy. In this respect, Mr Lawson sought to draw an analogy with the situation that arose in *Kwao v University of Keele* [2013] EWHC 56 (Admin), [2013] ELR 266. In that case, HHJ Wood QC, sitting as a Deputy High Court Judge, held that even if on a proper analysis the claimant should have challenged an earlier decision of the defendant

university, he would grant an extension of time on the basis that it was not unreasonable for the claimant to treat a later decision by the university to dismiss a grievance in relation to the same matter as being the point at which time for bringing a challenge started to run (see para 38).

140. In my view, HHJ Wood QC's decision in *Kwao* turned on the specific facts of that particular case, and it is of limited assistance in the different context of the Claimant's case. To my mind, the particular difficulty with the Claimant's argument that it was reasonable for him to await the conclusion of the review before commencing a claim is the fact that, whilst that argument might have gone some way to explaining or excusing a delay in challenging the outcome decision up until the point at which the claim for judicial review was brought (by which point a challenge to the outcome decision would already have been out of time), it does not explain or excuse the delay thereafter.

141. The question whether the Claimant should or could directly challenge the outcome decision has, in one way or another, been raised at every stage of the litigation: it was referred to by the OIA in its response to the letter before claim, on 22 February 2024; it was raised in paragraph 33 of the OIA's summary grounds of resistance, dated 21 March 2024; it was referred to by Mr Southey KC in his reasons for granting permission to apply for judicial review, in which he expressly recorded that he did not grant permission to challenge the outcome decision; it was raised again in paragraph 33 of the OIA's detailed grounds of resistance, dated 3 June 2024; and it was raised in Ms McGibbon's skeleton argument, dated 17 June 2024. Accordingly, the Claimant cannot have been unaware of the fact that his failure directly to challenge the outcome

decision was a point that was taken against him in these proceedings, and Mr Lawson did not suggest the contrary.

142. In these circumstances, I conclude that the Claimant has not put forward a good reason for at least the delay between the date on which the claim form was filed, i.e. 29 February 2024, and the date on which the second application to amend was made, i.e. 27 June 2024, a period of some four months. In my view, this is a factor that weighs heavily against the grant of an extension of time.

143. As to the importance of the issues raised by the proposed challenge to the outcome decision, whilst I recognise that the lawfulness or otherwise of the outcome decision is important to the Claimant (and, no doubt, to the OIA and the University), the challenge to the OIA's approach to the SDC chair issue is one that arises out of the specific facts of this particular case; it is not one that has any wider significance. In my view, this is a factor which is, at best from the Claimant's point of view, neutral.

144. Insofar as the prospects of the challenge to the outcome decision succeeding are concerned, I consider that, on the face of it, the Claimant has a strongly arguable case that the OIA's approach to the outcome decision was flawed. I will explain why.

145. The Claimant's case on the OIA's approach to the SDC chair issue was put in a range of ways by Mr Lawson, but in essence it came down to the point that the Disciplinary Procedure provided that the chair of the SDC had to be a teaching and learning dean, but there was no evidence (or at least no direct evidence) before the OIA to support a conclusion that Professor Savania was a teaching and learning dean. Mr Lawson accepted that the OIA was not required to approach the complaint as if it were a court and that its function is not to determine legal rights and obligations (see, for example, *Maxwell*, para 23 *per* Mummery LJ, and *R (Thilakawardhana) v Office of the*

*Independent Adjudicator for Higher Education* [2018] EWCA Civ 13, [2018] ELR 223, para 49 *per* Gross LJ). However, he pointed to the fact that the Scheme Rules themselves expressly envisage that the OIA may consider whether a higher education provider has properly applied its regulations and followed its procedures (see rule 13.4), and that the consideration of such matters has been recognised by the courts as one of the functions of the OIA (see, for example, *Maxwell*, para 23 *per* Mummery LJ). Mr Lawson also submitted that, by concluding that "the constitution of the SDC was in keeping with the University's Regulations", the SDC had chosen expressly to engage with the SDC chair issue and, having done so, it was required to adopt a lawful approach.

146. Mr Lawson argued that what he said was the flaw in the OIA's approach could be characterised in a number of ways: either the OIA had misdirected itself as to the meaning and effect of the Disciplinary Procedure (which Mr Lawson characterised as an error on a hard-edged question of law); the OIA's decision on the SDC chair issue was irrational, because there was no evidential basis for its conclusion (in that there was no direct evidence that Professor Savania was a teaching and learning dean); or the OIA failed to comply with its *Tameside* duty of inquiry (so-called after *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, HL, 1065 *per* Lord Diplock), in that it failed to take reasonable steps to obtain the information necessary to reach a conclusion on the SDC chair issue (because it failed to inquire of the University whether Professor Savania was a teaching and learning dean). Mr Lawson submitted that, because there was an error in the SAC's approach to SDC chair issue, it followed that the OIA had itself acted unlawfully by not identifying that error; in this respect he relied on *Thilakawardhana*,

para 82 *per* Gross LJ. Alternatively, Mr Lawson argued that the OIA had failed to give adequate reasons for its conclusion on the SDC chair issue.

147. There were two, interconnected, main limbs to Ms McGibbon's response. First, she emphasised that, in the overall scheme of the complaint, the SDC chair issue was a minor one (in argument, the SDC chair issue was referred to in terms of being akin to a needle in a haystack), that the OIA has a broad discretion as to how it goes about the review of a complaint, and that it is entitled to focus on what it sees as the important points (see, for example, *R (Siborurema) v Office of the Independent Adjudicator* [2007] EWCA Civ 1365, [2008] ELR 209, para 53 *per* Pill LJ, para 70 *per* Moore-Bick LJ, para 74 *per* Richards LJ, and *Burger v Office of the Independent Adjudicator* [2013] EWCA Civ 1803, para 50 *per* Hallett LJ). Ms McGibbon also referred to the need for the OIA to adopt a proportionate approach to its review of complaints which, as Ms Megarry explains in her first witness statement, often means that the OIA does not look into each and every point raised by a student in a complaint. Further, Ms McGibbon referred to the fact that the OIA is not required to give elaborate reasons for its decisions, and Court should approach the OIA's reasons with a degree of benevolence (see, for example, *Maxwell*, para 23 *per* Mummery LJ, and *R (Cardao-Pito) v Office of the Independent Adjudicator for Higher Education* [2012] EWHC 203 (Admin), [2012] ELR 231, paras 26-27 *per* HHJ Gilbart QC).

148. Secondly, Ms McGibbon argued that it was implicit in the reference in the committee list to Professor Savania's appointment as chair of the SDC being "*ex officio*" that he must have been appointed to the position as a teaching and learning dean. In this respect, she submitted that the SAC had been well-placed to determine whether the Disciplinary Procedure had been complied with, and the OIA was entitled to attach

weight to the SAC's conclusion on this issue (by reference to *Thilakawardhana*, para 82 *per* Gross LJ). Ms McGibbon also pointed to the fact that it did not appear that the Claimant had taken issue with the explanation that Professor Savania had provided to the SAC, and that the Claimant had not expressly resurrected the point in his complaint to the OIA.

149. However, although there is force in some of the points made by Ms McGibbon's argument, in my view her argument is unlikely to provide a complete answer to the Claimant's proposed challenge to the outcome decision. Although Ms McGibbon is entitled to say that the SDC chair issue was something of a needle in a haystack, and that the OIA is not necessarily required to embark upon the determination of what Mr Lawson characterised as hard-edged questions of law, the fact is that the OIA itself identified the SDC chair issue as one of the points that it should consider in its review of the complaint, and the OIA purported to address the issue expressly in paragraph 14.5 of the outcome decision. Having done so, it seems to me that it is strongly arguable that the OIA was required to deal with the SDC chair issue properly, both in terms of its substantive approach and in terms of the reasons that it gave. As Mr Lawson pointed out, once the OIA has decided to address a particular issue in a complaint outcome, it is required to give reasons for the conclusion it reaches on that issue (see *Cardao-Pito*, para 29 *per* HHJ Gilbart QC).

150. In my view, the difficulty that would likely face Ms McGibbon's submissions is the fact that there is nothing in the outcome decision to indicate that the OIA's approach to the SDC chair issue turned on the reference to Professor Savania being an *ex officio* appointment or that the OIA somehow deferred to the SAC's conclusion in the manner suggested by Ms McGibbon, and there is no evidence to that effect from the

relevant decision-maker at the OIA. On the contrary, the most obvious interpretation of paragraph 14.5 of the outcome decision is that the OIA decided for itself that Professor Savania met the condition for appointment as chair of the SDC. However, in light of the fact that there was no direct evidence before the OIA that Professor Savania was a teaching and learning dean, the basis for such a decision is unclear.

151. The fact that the Claimant has a strongly arguable case in relation to the SDC chair issue is a factor that weighs heavily in favour of granting an extension of time. In this respect, I also bear in mind the public interest in ensuring that unlawful decisions are corrected and the undesirability of shutting out what is, at least on the face of it, a strong challenge.

152. If I were to grant an extension of time, there would be prejudice to the OIA (and, consequentially, to the University), in the sense that the OIA would be required to answer a ground of challenge that was advanced very late in the day, and it would belatedly face the possibility of the claim succeeding on that ground of challenge. However, I do not think that the potential prejudice to the OIA, or the potential prejudice to good administration or the wider public interest, goes any further than that. In particular, Ms McGibbon was able to, and did, respond to Mr Lawson's substantive attack on the outcome decision. In my view, considering everything in the round, the absence of any significant prejudice is a factor which weighs in favour of the grant of an extension of time, albeit only slightly.

153. One additional factor to which I have had regard is the manner in which the application was made. This Court and the Court of Appeal have repeatedly stressed the importance of procedural rigour in claims for judicial review (see, for example, *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841,

paras 67-69 *per* Singh LJ, and *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605, [2021] 1 WLR 2326, paras 116-117). In light of the fact that an amendment to challenge the outcome decision directly was first mooted on the first day of the substantive hearing, but the second amendment application was not made until the second day, a week later, in my view the application was not one to which paragraph 2.8 of CPR PD23A applied, and the Claimant had time to comply with CPR Part 23. Despite this, the Claimant did not properly comply with the relevant requirements, and he did not provide the Court with a draft amended claim form or statement of facts and grounds. Further, in my view, it would plainly not have been appropriate to grant the order that was originally sought by way of the application notice, and this resulted in Mr Lawson having to advance a modified application in his oral submissions. In my view, the lack of procedural rigour on the part of the Claimant is a factor that weighs against the grant of an extension of time, albeit it does not tip the balance.

154. Finally in this context, I recognise that, in *Burkett*, Lord Steyn gave short shrift to what he described as the "technical point" that the target of the claim for judicial review in that case was the local authority's resolution and not the grant of planning permission (see para 31). However, in this respect, the situation with which the House of Lords was confronted in *Burkett* was the converse of the situation in the present case: in *Burkett*, the claim had in effect been brought too early and the claimant sought to amend it to challenge a later decision, whereas in the present case the claim has been brought too late and the Claimant is seeking to amend it to challenge an earlier decision. Accordingly, I do not consider that I can sweep aside the procedural difficulty that arises here in the same way as Lord Steyn was able to do in *Burkett*.

155. Drawing the threads together, overall I consider that the factors that weigh against granting an extension of time outweigh those that weigh in favour. In this context, it seems to me that the length of the delay and the absence of any good reason for much of that delay are the most significant factors. Accordingly, I refuse the application as made in the application notice, and I refuse the application made orally for permission to amend the claim form to challenge the outcome decision and for permission to apply for judicial review of the outcome decision.

156. Before leaving this issue, I should mention two further matters. The first is a subsidiary point advanced by Ms McGibbon in support of her argument that the Claimant should not be permitted to challenge the outcome decision. She submitted that the Claimant had an adequate alternative remedy to a challenge to the OIA's conclusion on the SDC chair issue, in the form of a request that the OIA continue its review of his complaint under paragraph 15.2 of the Scheme Rules, and that the Claimant had in fact availed himself of that alternative remedy. However, it seems to me that this argument is potentially inconsistent with Ms McGibbon's position on the first application to amend, in the context of which she emphasised the narrow scope of the OIA's discretion to continue a review. Accordingly, I would not have refused permission on this basis.

157. The second matter is a point that arose in the course of oral argument. As I have set out above, in my view the Claimant's challenge as set out in the claim form and statement of facts and grounds is properly understood as a challenge to the final recommendations, and not as a direct challenge to the outcome decision. However, had the Claimant considered that he had directly challenged the outcome decision, then the appropriate response to the order of Mr Southey KC would have been to

renew his application for permission to challenge the outcome decision under CPR 54.12(3) and (4), as envisaged by the case management directions that were made by Mr Southey KC. Such an application would have had to have been made within seven days of service of Mr Southey KC's order. The Claimant never made such a renewal application, and at no point did Mr Lawson argue that the second application was in substance such a renewal application.

**(3) The first application to amend: a challenge to the continuation decision**

158. In recognition of the possibility that he might not be able to challenge the OIA's conclusion on the SDC issue, the Claimant's fall-back position was that he should be permitted to challenge the continuation decision. However, no such challenge was advanced in the claim form or statement of facts and grounds, and therefore, by an application notice filed on 14 June 2024 (i.e. only three clear working days before the first day of the substantive hearing), the Claimant sought permission to amend his claim in order to advance a challenge to the continuation decision, by way of the insertion of the following paragraph into that part of the statement of facts and grounds that set out the Claimant's case on the first challenge:

> "28A. It was similarly unlawful for the defendant to refuse (in its decision of 30 November) to continue its review into whether the [SDC] was properly constituted. The Claimant's email gave reasons for the defendant to believe that there might be an error in the decision for the purposes of rule 15.2.2."

159. The e-mail mentioned is the Claimant's e-mail of 28 November 2023, to which was attached the four closely-typed pages to which I have referred above, and the reference to the OIA's decision of 30 November is a reference to the continuation

decision. Neither the continuation decision, nor the Claimant's e-mail, are currently mentioned in the statement of facts and grounds.

160. Mr Lawson contended that the proposed amendment would constitute a merely technical change in the Claimant's case, in that it relied on the same arguments that he had advanced in support of his challenge to the OIA's conclusion on the SDC chair issue. The OIA resisted the Claimant's application. Ms McGibbon relied on the fact that the application had been made only at a very late stage in the proceedings, and she submitted that the proposed amendment to the statement of facts and grounds did not set out adequate particulars of the grounds on which the continuation decision was sought to be challenged, in breach of the requirement for procedural rigour in claims for judicial review.

161. The continuation decision was taken on 30 November 2023. Accordingly, given that the first application to amend was made on 14 June 2024, in order to challenge the continuation decision, the Claimant would require an extension of time of some three and half months. As such, I consider that it is appropriate also to treat the first application to amend as, in substance, an application for an extension of time to challenge the continuation decision, and in this respect I shall again consider the factors identified in paragraph 6.4.4.2 of the Administrative Court Guide.

162. If granted, an extension of time of some three and a half months would in effect more than double the maximum three month period for bringing a claim for judicial review provided for by CPR 54.5(1)(b). The length of the extension required is a factor that itself tells against the grant of an extension of time.

163. In my view, the Claimant has not provided a good explanation for the delay in challenging the continuation decision. In particular, the application notice proffered

no explanation as to why the proposed challenge to the continuation decision was advanced only at such a late stage. In his oral submissions, Mr Lawson contended that the application was made not long after the order of Mr Southey KC dated 8 May 2024, and within days of the Claimant receiving the OIA's detailed grounds of resistance, which were filed on 3 June 2023. In fact, the application was made over five weeks after the order of Mr Southey KC and, although it was made within two weeks of the detailed grounds of resistance being filed, I have already explained how the issue of whether the Claimant could or should challenge the outcome decision has been in play throughout this litigation. In my view, the fact that the Claimant might require a fall-back to a direct challenge to the outcome decision (if such a fall-back were available) should have been apparent to him from the outset. In relation to the continuation decision, the Claimant cannot rely on an argument that he was waiting for the final recommendations before challenging the continuation decision, because both were issued on the same date. In my view, the absence of a good explanation for the delay in advancing the challenge to the continuation decision weighs heavily against an extension of time.

164. As in relation to the second application to amend, whilst I recognise that the lawfulness or otherwise of the continuation decision might now be important to the Claimant (and I emphasis the word "now": the continuation decision was not even mentioned in the letter before claim or in the current version of the statement of facts and grounds), the challenge to the continuation decision very much turns on the specific facts of the Claimant's particular case, and it seems to me that it is unlikely to have any wider significance. In my view, this is a factor which is, at best from the Claimant's point of view, neutral.

165. As to the prospects of a challenge to the continuation decision succeeding, I am not persuaded that the specific case put forward by the Claimant is a good one. In this context, it is important to recognise that, perhaps for understandable tactical reasons, Mr Lawson advanced only a very narrow challenge to the continuation decision. In essence, he said that, because the OIA's conclusion on the SDC chair issue was flawed, and because the Claimant referred to the issue in the four-page document that he sent to the OIA on 28 November 2023, the OIA was in effect bound to continue the review, and revisit the outcome decision, under rule 15.2.2 of the Scheme Rules.

166. I do not think that the position is quite as simple as Mr Lawson sought to suggest. Under the Scheme Rules, the relevant trigger for the OIA having a discretion to continue a review is that it has reason to believe that there might be an error in the complaint outcome which has or might have seriously affected the outcome. Accordingly, it seems to me that, in order to get a challenge to the continuation decision off the ground, it is likely that the Claimant would have to show that it was irrational for the OIA to conclude that the Claimant had not given it reason to believe that it had made an error in relation to the SDC chair issue that would make a material difference to the outcome decision. In my view, it is unlikely that any consideration of whether it was irrational for the OIA to reach that conclusion in the Claimant's case could turn solely on the question of whether an error has been identified; I consider that the wording of rule 15.2.2 (and, in particular, the reference to "reason to believe") is likely to introduce an element of judgement on the part of the OIA. It seems to me to be likely that any challenge to the rationality of that judgement would, in the present case, have to take into account the nature of the Claimant's request that the OIA continue the review and, in particular, the fact that the reference to the SDC chair issue occupied only two lines in four closely-typed pages of text that raised a myriad

of points. In my view, Ms McGibbon's point about SDC chair issue being a needle in a haystack would be likely to have much greater purchase in this context.

167. The difficulty with the very narrow challenge advanced by the Claimant is that it does not, and would not, grapple any of those points. The Claimant's challenge is based on a much more mechanistic approach, to the effect the OIA could not under rule 15.2.2 lawfully leave in place a part of the outcome decision that was predicated on what was said to be a hard-edged error. As Mr Lawson himself summarised his argument, if the outcome decision is wrong, the continuation decision must be wrong. For the reasons set out above, I am not persuaded that such a mechanistic approach is likely to be correct.

168. As a result, whilst for the purposes of considering the second application to amend I would be prepared to assume in Claimant's favour that his challenge to the continuation decision would meet the low threshold of arguability, I do not consider that it is anything more than merely arguable. As such, although this is a factor that weighs in favour of a grant of an extension of time, it does so only to a limited extent.

169. In relation to the prejudice that would arise if I were to grant an extension of time, in my view Ms McGibbon was entitled to make the point that the proposed amendment was not, as suggested by Mr Lawson, simply a technical change in the Claimant's case, but it would potentially introduce at a very late stage an entirely new issue, i.e. the rationality of the OIA's conclusion that the Claimant had not identified errors that would make a difference to the outcome decision. As a result, there would be the type of prejudice to the OIA (and, consequentially, to the University) to which I have referred above, in that the OIA would be required to answer an entirely new ground of challenge that was advanced very late in the day, and it would belatedly face at least

the possibility (albeit I think a slim possibility) of the claim succeeding on that ground of challenge. Again, however, I do not think that the potential prejudice to the OIA, to good administration, or to the wider public interest is any more extensive. In particular, Ms McGibbon did not argue that she would wish to adduce additional evidence in response to a challenge to the continuation decision, and I am not persuaded by her argument that she did not have sufficient time to address the substance of the challenge; despite the fact that the substantive hearing was originally listed for one day, it went part-heard, and in the end Ms McGibbon had more than a full court day to advance her submissions. Overall, the absence of any significant prejudice is a factor that, to a limited extent, weighs in favour of the grant of an extension of time.

170. Stepping back, and considering all of these factors in the round, I consider that, as is the case with the second amendment application, the factors that weigh most heavily in the balance are the length of the delay in advancing a challenge to the continuation decision and the absence of any good explanation for the delay. As a result, I consider that the balance tips against the grant of an extension of time, and I refuse the first application to amend.

**(4) Conclusion on the first challenge**

171. In summary, in relation to the first challenge, I have concluded that the Claimant is not by this claim for judicial review entitled to mount a challenge to the outcome decision, and I refuse the first and second applications to amend. It follows that I dismiss the first challenge.

## G. THE SECOND CHALLENGE: PROCEDURAL FAIRNESS

172. In his skeleton argument and in oral argument, Mr Lawson took the second and third challenges together, and in relation to procedural fairness he focused mainly on what he said was the unfairness that arose out of the OIA relying on the information that the University had provided in relation to the Claimant's bail conditions without affording the Claimant an opportunity to comment. In my view, it is convenient to consider that element of the second challenge in the context of the third challenge, and I return to it below.

173. The argument advanced in support of the second challenge in the Claimant's statement of facts and grounds (at paragraphs 31 to 35) can be addressed shortly. As I have explained, there the Claimant complains that it was procedurally unfair for the OIA to rely on the information that the University had provided in its letter of 28 November 2023 about previous disciplinary proceedings against the Claimant, without first affording him an opportunity to make representations. I consider that this argument fails on the facts, for the reasons given by Ms McGibbon.

174. In my view, it is clear that the provision by the University of information about previous disciplinary proceedings against the Claimant had no material effect on the result of the review. The OIA's e-mail to the University of 30 November 2023 indicates that the OIA understood (I think correctly) that the University had relied on that information in support of its request that the OIA continue the review under rule 15.2.1 of the Scheme Rules. As I have explained, the OIA declined that request. Further, as I have found, the reason why the OIA decided to revisit the proposed recommendations was because of the information that it received from the University

about the Claimant's bail conditions; it was not because of the information about previous disciplinary proceedings.

175. Accordingly, I do not consider that fairness required that the OIA afford the Claimant an opportunity to make representations in relation to the information provided by the University about previous disciplinary proceedings. As a result, I dismiss that part of the second challenge.

## H. THE THIRD CHALLENGE: THE FINAL RECOMMENDATIONS

176. I have summarised the Claimant's pleaded case on the third challenge above. In oral argument, Mr Lawson marshalled his arguments somewhat differently and, as I understood the points that he made, they can be considered by reference to five main questions: did the final recommendations properly reflect the outcome decision, did the OIA commit a substantive error of law by changing the proposed recommendations to the final recommendations, did the OIA give adequate reasons for the change, did the OIA act fairly when changing the proposed recommendations to the final recommendations, and did any legal flaw make any substantial difference to the eventual outcome? I shall address each of these questions in turn, but before I do so it is necessary to resolve a dispute between the parties as to the meaning and effect of the final recommendations.

### (1) The meaning and effect of the final recommendations

177. The Claimant's case is that, although the proposed recommendations envisaged that the SDC would take a fresh decision as to what penalty is appropriate in the Claimant's case, the SAC's role under the final recommendations would be much

more circumscribed, in that it would be limited to a review of whether the SDC's decision that the Claimant should be expelled was unreasonably disproportionate.

178. In this respect, Mr Lawson drew attention to what he said was the limited role of the SAC under section 8.2 of the Disciplinary Procedure and paragraph 5 of the SAC Procedures, pursuant to which the SAC may consider only the question whether the SDC acted unreasonably or imposed a penalty that was unreasonably disproportionate. Mr Lawson said that the consequence is that, on any reconsideration of the Claimant's case pursuant to the final recommendations, the SAC would be constrained to approach its consideration of the penalty applied in the Claimant's case on a very narrow basis. In this respect, Mr Lawson contrasted the position with that which would have prevailed under the proposed recommendations, pursuant to which it would have been open to the SDC to consider the question of penalty entirely afresh.

179. In response, Ms McGibbon sought to draw a distinction between the grounds on which the SAC may allow an appeal, and what it has power to do when it allows an appeal. Ms McGibbon argued that the narrow approach referred to in the Disciplinary Procedure and the SAC Procedures applies only at the former stage, and that in the present case, the effect of the outcome decision is that the SAC would in effect have no choice but to allow the appeal on the ground that there had been a failure of procedure. That being so, the SAC would have the power to consider the question of penalty afresh and, under paragraph 6 of the SAC Procedures, the SAC has full powers to confirm, reduce or overturn the penalty imposed by the SDC. Ms McGibbon argued that it was clear from the final recommendations that this was what the OIA envisaged.

180. In my view, the final recommendations could have been better drafted in order to ensure clarity as to what exactly the OIA envisaged, and it is unfortunate the imprecise use of language in the final recommendations left room for debate as to what their effect is. Nevertheless, I consider that, read fairly and as a whole, the final recommendations provide for the SAC to take its own decision as to what is the appropriate penalty in the Claimant's case. In my view, the starting point is paragraphs 2.3 and 30 of the outcome decision, which set out the OIA's conclusion that it was not reasonable for the SAC to reject the Claimant's appeal. Accordingly, the context for the final recommendations is the OIA's conclusion that the SAC should have allowed the Claimant's appeal on the basis that the SDC had failed to give adequate reasons for its decision as to penalty. In my view, these are "the issues" to which paragraph 4(a) of the final recommendations refers. These issues that go to a procedural error; they are not issues that go to whether the penalty imposed on the Claimant was disproportionate.

181. Paragraph 4(b) of the final recommendations explains that the reason why the OIA considers that it is appropriate for the SAC to consider those issues is because, under paragraph 6 of the SAC Procedures, the SAC has the power "to make decisions about the proportionality of penalty applied" in cases such as the Claimant's. I accept that the language of "decisions about the proportionality of penalty applied" could, read in isolation, be understood as a reference to the SAC considering whether the penalty applied by the SDC was proportionate (or, as Mr Lawson would say by reference to section 8.2 of the Disciplinary Procedure, whether the penalty applied by the SDC was "unreasonably disproportionate"), and a similar point could be made about the language used in paragraph 12 of the final recommendations ("to consider the proportionality of the penalty applied by the SDC"). However, I consider that the

express reference to paragraph 6 of the SAC Procedures, taken together with the reference to previously-identified "issues", indicates that what is envisaged is, consequent upon the identified failure of procedure, the SAC taking a fresh decision as to what is the appropriate penalty in the Claimant's case.

182. Paragraph 19 of the final recommendations also suffers from some unfortunate drafting, in that it is not entirely clear what the difference (if any) there is between the two alternatives either side of the conjunction "or" (i.e. between reaching a "decision independently about the level of penalty applied" and making "a decision about an appropriate level of penalty"). Nevertheless, I consider that, read as a whole and in context, paragraph 19 refers to the SAC reaching its own decision as to what is the appropriate penalty in the Claimant's case, an interpretation that is supported by the reference to the SAC giving reasons which demonstrate that it has considered the range of proposals at "its" disposal. In his submissions in reply, Mr Lawson accepted that this was at least a potential interpretation of this paragraph of the final recommendations. It is also an interpretation that is supported by paragraph 20 of the final recommendations, which in my view implies that the SAC will reach its own decision as to what penalty should be applied in the Claimant's case.

183. In light of the above, I consider that the final recommendations envisage that the SAC should re-consider the Claimant's appeal, it should allow the appeal under paragraph 5 of the SAC Procedures on the ground that there was a failure of procedure on the part of the SDC, and it should then proceed to make its own decision as to what is the appropriate penalty in the Claimant's case under paragraph 6 of the SAC Procedures. In my view, this approach is achievable within the terms of the Disciplinary Procedure and the SAC Procedures: in effect the SAC will, under paragraph 5 of the

SAC Procedures, have to conclude that there was a procedural error and, having done so, it will need to go on to determine for itself what is the appropriate remedy, under paragraph 6.

184. As I explain below, one of the Claimant's complaints about the final recommendations is that they do not provide for the Claimant to make representations in mitigation before the SAC takes a decision as to what is the appropriate penalty in the Claimant's case. Mr Lawson contrasted this with the position under the proposed recommendations, which expressly provided for the Claimant to have the opportunity to make representations in mitigation (see paragraph 8). In my view, the Claimant is correct that the final recommendations do not expressly require the SAC to invite representations in mitigation from the Claimant. However, that does not mean that the final recommendations absolve the SAC of any responsibility to consider representations in mitigation.

185. Paragraph 19 of the final recommendations provides that the SAC should give clear reasons for its decision as to what is the appropriate penalty in the Claimant's case, and in particular the SAC should demonstrate that it has considered evidence in mitigation. Paragraph 4(e) of the final recommendations explains that, in view of the fact that the Claimant has already submitted extensive representations to the University, the SAC might be entitled to decide that it already has sufficient evidence to consider the issue of penalty without the need for the Claimant to submit further representations.

186. In my view, the effect of the final recommendations is that the SAC must consider the issue of mitigation and expressly address it in its reasons. When considering the issue of mitigation, the SAC will need to consider whether it is necessary to seek further

representations from the Claimant; that is envisaged by paragraph 4(e) of the final recommendations, but in my view the SAC would be required to do this in any event. In the event that the SAC fails to act reasonably or fairly in relation to the issue of mitigation, it will be open to the Claimant to make a fresh complaint to the OIA (see paragraph 21 of the final recommendations). Accordingly, although the final recommendations do not provide that the SAC must afford the Claimant a fresh opportunity to make representations, their practical effect is that the SAC must consider whether to do so.

**(2) Did the final recommendations properly reflect the outcome decision?**

187. Mr Lawson argued that, although the proposed recommendations had properly reflected the outcome decision, the final recommendations did not. The starting point for this aspect of Mr Lawson's argument was his submission that, in the outcome decision, the OIA had concluded that the Claimant had never had the benefit of a proper decision from the University on what was the appropriate penalty in his case, because the SDC's decision was flawed by reason of the three errors that Mr Lawson said were identified in the outcome decision (summarised in paragraph 68 above). Mr Lawson argued that the final recommendations fail properly to reflect these errors, in that they do not provide for the Claimant to have a fresh decision as to the penalty that should be imposed in his case, and they do not provide for the Claimant to make representations in mitigation before such a decision is reached.

188. I have already set out my conclusion as to what the final recommendations provide for, and that disposes of the major part of the Claimant's complaint about the final recommendations not providing for him to have a fresh decision as to penalty: in my

view, the final recommendations do provide for him to have such a decision. For the avoidance of doubt, I do not consider that the Claimant can complain that the final recommendations do not envisage a fresh decision that involves starting with the least serious penalty available, and then working upwards in terms of severity until the least serious penalty that is commensurate with the Claimant's misconduct is identified (as referred to in paragraph 24 of the outcome decision). Indeed, I consider that the reference in paragraph 19 of the final recommendations to the SAC providing reasons that demonstrate that it has considered "the range of penalties at its disposal" envisages that the SAC should adopt such an approach.

189. Further, insofar as the Claimant complains that OIA has concluded that the fresh decision is to be taken by the SAC rather than the SDC, I consider that (subject to the Claimant's points about the change from the proposed recommendations to the final recommendations) this was a conclusion that the OIA was lawfully entitled to reach.

190. Neither party made any submissions as to the approach that the OIA should adopt when deciding what recommendations (if any) it should make in a case in which it concludes that the complaint is justified or partly justified. Neither Schedule 2 to the 2004 Act nor the Scheme Rules provides any guidance as to the approach that the OIA should adopt in this respect. The Scheme Guidance is slightly more illuminating, in that it sets out the following explanation of recommendations (see paragraph 43.1):

> "Some of our Recommendations are designed to put things right for the individual student. The aim of these Recommendations is to return the student to the position they were in before the circumstances of their complaint occurred."

191. In the present case, the outcome decision referred to the fact that the OIA was making recommendations (at that point, the proposed recommendations) "to try and Put

Things Right" (see paragraph 32). Accordingly, it seems to me that, absent any indication to the contrary, I should proceed on the basis that the objective of the final recommendations was to put the Claimant back in the position that he would have been in had the identified error on the part of the University not occurred, and therefore I should ask myself whether the OIA was rationally entitled to conclude that the final recommendations would achieve that objective.

192. Ms McGibbon argued that the final recommendations did put the Claimant back in the position that he would have been in had the University not committed the error identified in the complaint outcome. In this respect, Ms McGibbon emphasised the fact that, as I have found, in the complaint outcome the OIA's ultimate focus was on the role played by the SAC and, in particular, the fact that the SAC should have allowed the appeal from the SDC on the ground that the SDC had failed to give adequate reasons for its decision on penalty (as the Disciplinary Procedure and the SAC Procedures envisage that it should). Ms McGibbon argued that, by sending the Claimant's case back to the SAC for it in effect to allow the appeal and decide on the appropriate penalty itself, the Claimant was being put back in the position that he should have been in. In this respect, Ms McGibbon submitted that, had the SAC stepped in to address the failure of the SDC to give adequate reasons, the Claimant could not sensibly have complained to the OIA about that issue; in such a situation, the internal processes of the University would have operated as intended, by providing for the internal self-correction of procedural errors.

193. In my view, bearing in mind my conclusion as to the effect of the final recommendations, the OIA was rationally entitled to conclude that the final recommendations would put the Claimant back in the position that he would have

been in had the University's internal process worked correctly, essentially for the reasons given by Ms McGibbon. In the context of his submissions on the first challenge, Mr Lawson emphasised (by reference to *R (AW) St George's, University of London* [2020] EWHC 1647 (Admin), [2020] ELR 626, para 78 *per* Anthony Elleray QC) that the Claimant was entitled to have the University follow its own procedures, and he argued that the OIA should act accordingly. It seems to me that this point is equally pertinent in the present context. Although it might be argued that, had the University followed its own procedures, the Claimant would have had a properly-reasoned decision from the SDC in the first place, it seems to me that the OIA is rationally entitled to adopt a wider focus, and to look at compliance with the University's procedures as a whole. On that approach, had the University complied with the Disciplinary Procedure and the SAC Procedures overall, the SAC would have allowed the Claimant's appeal and it would have considered the issue of the appropriate penalty afresh. In my view, this is what the final recommendations were intended to, and would, achieve.

194. As to the Claimant's complaint about the final recommendations not providing for the Claimant to make representations in mitigation before the SAC reaches a decision as to the appropriate penalty in his case, it is important to recall that, as I have explained above, the OIA did not conclude that the Claimant had not been afforded an opportunity to make representations as to mitigation to the SDC; rather, the OIA decided that the opacity as to whether the Claimant had been afforded such an opportunity contributed to its conclusion that the SDC had failed to give adequate reasons for its decision on penalty.

195. As I have also explained above, I consider that the effect of the final recommendations is that the SAC must consider the issue of mitigation and expressly address it in its reasons and, in considering the issue, the SAC must consider whether the Claimant should be afforded a fresh opportunity to make representations. In my view, the OIA was rationally entitled to conclude that this would put the Claimant back in the position that he would have been in had the University's internal processes worked correctly. If the final recommendations are properly implemented, it should be clear from the SAC's reasons how exactly the issue of mitigation has been considered in its decision-making, including its consideration of any representations made by the Claimant. Further, if fairness and reasonableness require that the Claimant be afforded an opportunity to make fresh representations in relation to mitigation, the SAC should afford such an opportunity, otherwise the University is at risk of a yet further complaint to the OIA.

196. Finally on this point, I note that paragraph 4(e) of the final recommendations refers to the fact that the Claimant had already submitted extensive representations to the University, including an appeals statement. Neither party took me to those representations to show me what, if anything, the Claimant had said in relation to mitigation and, in reviewing the bundle of documents for the purposes of preparing this judgment, it was not apparent to me that I had been provided with the full extent of the Claimant's representations. Accordingly, I am not in a position to decide, and neither party asked me to adjudicate on, the question whether the OIA was rationally entitled to conclude that it might be fair and reasonable for the SAC to proceed solely on the basis of the representations previously submitted by the Claimant.

197. In light of the above, I consider that the OIA was rationally entitled to conclude that, in light of the complaint outcome, the final recommendations would put the Claimant back in the position in which he would have been had the University's internal procedures been properly applied.

**(3) Did the OIA commit a substantive error of law in changing the proposed recommendations?**

198. Mr Lawson argued that what he said were the reasons put forward by the OIA for changing the proposed recommendations to the final recommendations could not rationally justify that change. In particular, Mr Lawson argued that, even if the SAC could consider the penalty that should be imposed on the Claimant afresh (which Mr Lawson disputed), that did not justify the change, because the SDC could also consider the issue of proportionality afresh. He advanced a similar argument in relation to the point that the SAC could consider the Claimant' case in his absence (see paragraphs 4(c) and 14 of the final recommendations), arguing that the SDC and the SAC each had the same powers in this respect. Further, Mr Lawson argued that the provision for the final recommendation to be put on hold (see paragraph 3 of the final recommendations) could equally have been applied to the proposed recommendation. In essence, Mr Lawson submitted that everything that is identified in the final recommendations as a reason for changing the proposed recommendations could, with some tweaking, have been achieved under the proposed recommendations.

199. However, as I have explained above, I do not consider that, on a proper reading of the final recommendations, the matters to which Mr Lawson referred were put forward by the OIA as an explanation as to why the change from the proposed recommendations

to the final recommendations was made; rather, they explain why the OIA considered that the final recommendations would be practically workable and were appropriate in the light of the outcome decision. In my view, in this respect they are different from the OIA's reason for revisiting the proposed recommendations, which was the fact that the Claimant was prohibited from contacting the University.

200. As a result, I consider that the first question that arises in the present context is whether it was irrational for the OIA to decide to revisit the proposed recommendations at all. In my view, it is clear that it was necessary for the OIA to revisit the proposed recommendations in an important respect. The proposed recommendations required there to be contact between the Claimant and the University, in respect of the communication of the University's offer (see paragraphs 2 and 5 of the proposed recommendations), the arrangement of the proposed SDC hearing and any subsequent appeal (see paragraphs 8 and 11), and potentially the conduct of the SDC hearing itself (see paragraph 8). Because the Claimant's bail conditions prohibited him from contacting the University, those elements of the proposed recommendations were no longer workable. Accordingly, I consider that it was rational for the OIA to decide to revisit the proposed recommendations.

201. That being the case, it seems to me that, because the OIA was rationally entitled to conclude that the final recommendations would put the Claimant back in the position that he would have been in had the University's internal process worked correctly, the OIA was rationally entitled to conclude that the change that should be made was the change to the final recommendations.

202. In my view, in this context, it is sufficient for me to decide that the OIA was rationally entitled (a) to revisit the proposed recommendations, and (b) to conclude

that the final recommendations would put the Claimant back in the position that he would have been in had the University's internal processes operated properly. I do not consider that it is necessary for me to go further and conclude that (c) the specific change from the proposed recommendations to the final recommendations was rationally justified by the fact of the Claimant's bail conditions. I recognise that this may appear to be a fine distinction, but in my view it is right to draw it.

203. In my view, once the OIA had decided that the proposed conditions were unworkable as a result of the Claimant's bail conditions, its discretion to determine what recommendations it would be appropriate to make instead was again at large. I do not consider that in this respect, subject to any considerations of procedural fairness (which I address below), the OIA's discretion was constrained by the proposed recommendations. The proposed recommendations did not give rise to anything akin to a right, or even a legitimate expectation, on the part of the Claimant; under the Scheme Rules and in their own terms, the proposed recommendations were only ever proposals that were expressly subject to change. As such, I do not consider that such that the OIA had to justify the extent to which the final recommendations departed from the proposed recommendations, whether by reference to the reason for revisiting the proposed recommendations or to some other justification. To conclude otherwise would, in my view, accord the proposed recommendations a status that they did not have.

204. The thrust of the Claimant's argument to the contrary was predicated on a factual submission to the effect that, in order to address the problem posed by the Claimant's bail conditions, less significant changes, and in particular changes that were less disadvantageous from the Claimant's point of view (i.e. changes that retained a role

for the SDC), could have been made to the proposed recommendations. That might be so, but unless the Claimant can point to something akin to a right that arose out of the proposed recommendations, his argument collapses into a submission that, because there was a rational alternative to the final recommendations, it was irrational to adopt the final recommendations. Indeed, in submitting that the proposed recommendations should be treated as the starting point for what could be considered reasonable, Mr Lawson came close to expressly making such an argument. In my view, such a submission cannot survive the basic principle of public law that there might be more than one rational response to a particular situation, and the fact that it might be rational to adopt one response does not mean that it is irrational to adopt a different response. In the present case, I consider that, provided the OIA was entitled to revisit the proposed recommendations, the rationality of the final recommendations must be judged on their own terms, not by reference to whether different, hypothetical recommendations might have been made.

205. In light of the above, I do not consider that the OIA committed a substantive error of law in changing the proposed recommendations to the final recommendations.

206. Before leaving this question, I should address a point made by Ms McGibbon in her oral submissions. She argued that there was in any event a specific and rational justification for the change from the proposed recommendations to the final recommendations, in that there was a need to ameliorate the impact of the recommendations on the OIA's limited resources. In essence, her point was that, because of the bail conditions, and in order to avoid the Claimant having to contact the University directly, it was necessary for the OIA to step in and act as a go-between. The burden that this would impose on the OIA would be greater if the

University's internal procedures were to restart at the SDC level, with a right of appeal to the SAC, than if they were to restart at the SAC level, with no further right of appeal.

207. At an abstract level I can see that the point made by Ms McGibbon might have some force. However, it seems to me that it faces the difficulty that it is not properly substantiated by the evidence before the Court. There is nothing in the final recommendations that indicates that the issue of the burden on the OIA's resources was a matter that it took into account when deciding to change the proposed recommendations to the final recommendations. In this context, Ms McGibbon referred me to the evidence of Ms Megarry but, although Ms Megarry discusses in general terms the need for the OIA to use its resources proportionately, she does not say in terms that this was a reason for changing the proposed recommendations to the final recommendations. In any event, Ms Megarry was not the decision-maker in the Claimant's case, and there is no witness evidence from the Senior Assistant Adjudicator who undertook the review of the complaint that explains what he did and did not take into account when deciding on the final recommendations.

208. Accordingly, I do not consider that I can proceed on the basis that the specific reason put forward by Ms McGibbon was part of the OIA's reasons for changing the proposed recommendations to the final recommendations. Nevertheless, for the reasons that I have set out above, this point does not affect my overall conclusion on this question.

**(4) Did the OIA give adequate reasons for changing the proposed recommendations?**

209. The Claimant argued that the OIA was under a duty to give reasons for changing the proposed recommendations to the final recommendations, but that the reasons given by OIA did not properly explain the changes that were made. In this respect, Mr Lawson relied upon points that were similar to those that he made in relation to the question whether the OIA committed a substantive error of law in changing the proposed recommendations. He argued that the OIA has failed properly to explain why the restriction imposed by the Claimant's bail conditions justified the particular change from the proposed recommendations to the final recommendations.

210. Although I was referred to some authority on the extent of the reasons that the OIA must give when it is required to give reasons, neither party referred me to any authority that bears on the question whether the OIA is under a duty to give reasons for making changes to proposed recommendations. The Scheme Rules do not provide an express answer: although rule 14.4 provides that the OIA will give reasons for putting forward proposed recommendations (see also paragraph 42.2 of the Scheme Guidance), neither the Scheme Rules nor the Scheme Guidance say anything about giving reasons for any changes that are made to proposed recommendations. Nevertheless, for present purposes, it is sufficient for me to proceed on the basis of an assumption (but without deciding) that, in a case in which the OIA decides to change proposed recommendations, it must give adequate reasons for doing so.

211. In my view, the Claimant's complaint about the reasons is closely related to his complaint about the substantive approach adopted by the OIA in changing the proposed recommendations to the final recommendations and, in my view, it faces broadly the same problem. I consider that, even if the OIA were required to give reasons for changing the proposed recommendations, in the present case that

obligation would have gone no further than a requirement to explain why the OIA considered that it was appropriate to revisit the proposed recommendations, and why the final recommendations were considered to be an appropriate response to the outcome decision. In this respect, the OIA was entitled to be brief (see, by analogy, *Maxwell*, para 23 *per* Mummery LJ, and *Cardao-Pito*, paras 26-27 *per* HHJ Gilbart QC).

212. In particular, I do not accept that the OIA was required to go further and to give reasons why the Claimant's bail conditions justified the particular change made. I have explained above why, as a matter of substance, the OIA was not required to justify the particular change made by reference to the bail conditions, and I do not consider that any duty to give reasons could go further than the OIA's substantive duties; if that were to be the case, it would result in the tail of a procedural duty to give reasons wagging the dog of the substantive approach required of the OIA.

213. In my view, the final recommendations discharged any obligation to give reasons. In particular, paragraphs 1 and 2 of the final recommendations clearly explain that the OIA decided to revisit the proposed recommendations because the Claimant's bail conditions prohibited him from contacting with the University. I consider that this adequately captured the OIA's reason for revisiting the proposed recommendations, and the OIA was not required to go further. In addition, the final recommendations explained why the OIA considered that the final recommendations were an appropriate response to the outcome decision (i.e. why they would put the Claimant back in the position in which he should have been had the University's internal procedures been properly applied). In particular, as I have explained above,

paragraphs 4(a) and (b) set out the OIA's (correct) view that the SAC can consider the question of the appropriate penalty in the Claimant's case afresh.

214. As a result, insofar as the OIA might have been under a duty to give reasons for changing the proposed recommendations, I consider that it complied with that duty.

**(5) Did the OIA act fairly when changing the proposed recommendations?**

215. The penultimate question that arises for consideration is whether the OIA acted in a procedurally fair manner when it changed the proposed recommendations to the final recommendations.

216. On this aspect of his case, Mr Lawson focused on that part of the University's letter of 28 November 2023 that referred to the fact that it was impossible to comply with the proposed recommendations because the Claimant had been arrested and was on bail subject to conditions that prevented him from contacting the University. Mr Lawson argued that this aspect of the University's letter caused the OIA to make a significant change to the proposed recommendations, and the Claimant should have been afforded the opportunity to make representations on this aspect of the University's letter. In this respect, Mr Lawson drew attention to rule 12.3 of the Scheme Rules, which provides that the OIA will normally give both the student and the higher education provider the opportunity to comment on relevant information received during the review.

217. As part of his argument, Mr Lawson submitted that the change that was made to the proposed recommendations resulted in final recommendations that were materially less favourable to the Claimant. In addition to his point about the SAC not considering the appropriate penalty afresh, which I have disposed of above, Mr

Lawson relied on three main points in this respect. First, the proposed recommendations provided for the Claimant to attend a hearing of the SDC, whereas the final recommendations provide for the SAC to consider the Claimant's case on the papers only, and to convene a hearing only if it considers that such a hearing is necessary. Secondly, the proposed recommendations provided for the Claimant to submit to the SDC representations as to mitigation, whereas the final recommendations do not necessarily require that the Claimant have such an opportunity in relation to the SAC. Thirdly, the proposed recommendations provided for the Claimant to have a fresh decision as to penalty from the SDC, with a right of appeal to the SAC, whereas the final recommendations provide for the Claimant to have a fresh decision only from the SAC, with no further internal appeal available. I accept that the final recommendations were less favourable to the Claimant in these respects.

218. Ms McGibbon raised a preliminary objection to this element of the Claimant's case, in that the argument advanced by Mr Lawson was not pleaded in the Claimant's statement of facts and grounds. There is some force in this objection. As I have noted above, the arguments set out in relation to the second challenge in the statement of facts of grounds related only to that part of the University's letter which relied on information about previous disciplinary proceedings against the Claimant, and the arguments set out in relation to the third challenge make no mention of a procedural fairness point (*cf* paragraph 48 of the statement of facts and grounds). However, I have quoted above paragraph 22 of the statement of facts and grounds which does, albeit only very briefly, raise the point, and the point was addressed in Mr Lawson's skeleton argument (at paragraph 39). Accordingly, although I have some sympathy

with Ms McGibbon's objection, I do not consider that it would be right to shut out this element of the Claimant's case on the basis that it has not been pleaded.

219. The starting point for Ms McGibbon's substantive response was the Scheme Rules. She submitted that the OIA's duty to seek representations on recommendations is delimited by the Scheme Rules, rule 14.5 of which provides for the parties to have an opportunity to make representations on proposed recommendations, but which make no express provision for a party to have an opportunity to comment on representations made by the other party. In this respect, Ms McGibbon relied on Ms Megarry's evidence to the effect that, in view of its limited resources, the OIA needs to adopt a proportionate approach to inviting representations, and it cannot provide either a student or a higher education provider with unlimited opportunities to make representations. In Ms McGibbon's submission, the Claimant had to show that there was something exceptional in his case which required the OIA to depart from the Scheme Rules.

220. I do not agree. There was no dispute between the parties that the OIA is subject to a duty to act fairly, and such a duty has been recognised by the courts (see, for example, *Burger*, para 48 *per* Hallett LJ). Since *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, 143 ER 414, 420 *per* Byles J, it has been clear that the common law duty to act fairly may require a public body to supplement a procedure laid down by legislation if it is necessary to do so in order to ensure procedural fairness (see *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812, [2018] 4 WLR 123, para 68 *per* Singh LJ). Although the Scheme Rules are not themselves a statutory procedure, they are established under the 2004 Act, and I do not see any reason in principle why a different approach should be adopted in relation

to them. In this respect, Ms McGibbon was constrained to accept that, if common law fairness required the OIA to supplement the procedures provided for by the Scheme Rules, it could do so. In my view, the straightforward issue that arises in the present context is whether the OIA acted fairly by not affording the Claimant an opportunity to make representations on the relevant part of the University's letter of 28 November 2023.

221. On that issue, Ms McGibbon stressed that, because the proposed recommendations were only provisional, and this was not a case in which the OIA was revising a final decision that had already been made in the Claimant's favour, the requirements of fairness were attenuated, and the OIA was not required to afford the Claimant an opportunity to make representations on the University's letter.

222. As to what fairness requires, the only case to which I was referred was *Citizens UK*, in paragraphs 69 to 75 of which Singh LJ cites several other authorities, including the well-known passage from Lord Mustill's speech in *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, 560. There, Lord Mustill explained that what fairness requires is context-specific, but that fairness will very often require that an individual who may be adversely affected by a decision has an opportunity to make representations before the decision is taken and that, in order to ensure that any representations are effective, fairness will very often require that the individual is informed of the gist of the case that he or she has to answer.

223. In the present case, the Claimant's complaint was not he had not been told of the gist of the case that he had to answer (after all, the review was concerned with the Claimant's complaint against the University), it is that the University raised a crucial point, which the OIA then took into account without first affording the Claimant an

opportunity to comment on it. In this respect, the Claimant's complaint is an example of what used to be called an "*audi alteram partem*" argument, i.e. an argument that the decision-maker is required to hear the other side before reaching a decision. There is no inviolable rule that, in a context such as the present, a decision-maker must always provide one party's representations to the other party in order to enable the latter party to comment. Instead, as Lord Mustill made clear in *ex p Doody*, what fairness requires depends on the context.

224. In my view, the context in the present case has two important features. First, the OIA was in effect operating in a dispute-resolution capacity as between the Claimant and the OIA. Although distinctions between judicial, quasi-judicial and administrative decision-makers have long been consigned to history (see *Ridge v Baldwin* [1964] AC 40, HL, 77-79 *per* Lord Reid), I consider that the fact that the OIA was resolving a dispute between two parties at least in general terms makes it more likely that fairness will require that representations made by one party are shared with the other party.

225. Secondly, the University put the Claimant's bail conditions forward as a complete bar to the proposed recommendations; it argued that the bail conditions made the second of the proposed recommendations "legally impossible". In essence, the University was saying that the proposed recommendations, on which the Claimant was entitled to make representations under rule 14.5 of the Scheme Rules, were nugatory, and that the OIA would have to return to the drawing board. Accordingly, the University's representations potentially struck at the core of the proposed recommendations, and those representations were therefore of potentially great significance to the Claimant's complaint. Indeed, as it transpired, the University's representations did have a significant (and, as Mr Lawson explained, materially disadvantageous) impact on the

recommendations that were made in the Claimant's case. In the words of rule 12.3 of the Scheme Rules, the University's representations were undoubtedly relevant to the OIA's decision as to the final recommendations.

226. In light of the above, I consider that, given the potential (and actual) significance of the University's representations, fairness required that the Claimant be provided with those representations (or at least the gist of them) and be afforded an opportunity to comment on them.

227. I should make it clear that I do not consider that the OIA is inevitably required to afford one party an opportunity to comment on the other party's representations on proposed recommendations; as always in the context of fairness, much will depend on the particular circumstances. For example, it might be that the OIA decides that the relevant representations do not merit a change to the proposed recommendations or it might be that the representations propose only minor, immaterial tweaks to the proposed recommendations. In such cases, it is unlikely that fairness would require that the other party have an opportunity to comment on the representations. In my view, this goes some way to answering the OIA's concerns about the burden that a duty to share representations would place on it. However, as I have explained, the situation in the present case was quite different.

228. I recognise that the Claimant was, self-evidently, well-aware that he was subject to bail conditions that prohibited him from contacting the University, and it was plainly open to him to raise them with the OIA if he had wished to do so. Nevertheless, Ms McGibbon did not argue that the fact that the Claimant was aware of his bail conditions provided an answer to the Claimant's fairness challenge, and I think that she was right to do so. Although the Claimant was aware of the factual underpinning

for the University's representations, he was not aware that the University was relying on that factual underpinning as a fundamental objection to the proposed recommendations.

229. In light of the above, I consider that the OIA acted unfairly, and therefore unlawfully, by not providing the Claimant with the University's letter (or at least the gist of it) and affording him an opportunity to comment on that part of the University's representations which maintained that it was impossible to comply with the proposed recommendations.

230. By way of postscript on this point, I should record that during the course of argument I raised the question whether, in a case in which the OIA is minded to make final recommendations which are significantly different to the proposed recommendations, the OIA might be under a duty to seek representations from the parties on those recommendations, either in order to give proper effect to the right to make representations provided for by rule 14.5 of the Scheme Rules, or by analogy with the approach that is adopted in the context of consultation exercises (see, for example, *R (Smith) v East Kent Hospital NHS Trust* [2002] EWHC 2640 (Admin), (2003) 6 CCL Rep 251, para 45 *per* Silber J). It occurred to me that such an argument might be materially different to the more conventional fairness argument advanced by Mr Lawson, which relied very much on the fact that the Claimant had not been provided with the University's representations on the proposed recommendations. However, Mr Lawson did not seek to advance such an argument and, in light of my conclusion above, it is unnecessary for me to say anything more about it.

**(6) Did the unfairness make any difference to the outcome?**

231. In light of my conclusion on the fairness issue, I must turn to consider what I understood to be Ms McGibbon's main submission in response to the Claimant's fairness argument, a "makes no difference" argument under s 31(2A) of the Senior Courts Act 1981 ("the 1981 Act"). Under s 31(2A), I must consider whether I am required to refuse a remedy on the ground that it is highly likely that the outcome for the Claimant would not have been substantially different had the conduct complained of not occurred. What I shall refer to as "the s 31(2A) point" was raised for the first time in Ms McGibbon's oral argument. In light of the way that the Claimant's arguments on the fairness issue developed, she cannot be criticised for that, but the practical consequences are that I have had no authority on s 31(2A) cited to me and, in addition, I received no argument from the Claimant on the point. Although Ms McGibbon referred me to the approach adopted by the Court of Appeal in response to a complaint of procedural unfairness in *Siborurema* (see paras 60-66 *per* Pill LJ), that decision pre-dates the introduction of s 31(2A) and, in any event, it was a decision that turned on its own facts.

232. Nevertheless, I consider that, insofar as is relevant for present purposes, the principles to be applied are well-established and are unlikely to be controversial. A helpful summary, which has been cited with approval, is set out in *R (Cava Bien Ltd) v Milton Keynes Council* [2021] EWHC 3003 (Admin), [2022] RVR 37, para 52 *per* Kate Grange KC, sitting as a Deputy High Court Judge. In particular, I remind myself that I must not step into the forbidden territory of assuming the role of primary decision-maker. Instead, my task is to assess whether I can be sufficiently confident as to what would have transpired in the relevant hypothetical counterfactual situation.

233. In the present case, I consider that the relevant outcome for the Claimant is the final recommendations and, in light of my conclusion above, the relevant conduct is the failure to provide the Claimant with the University's letter (or at least the gist of it) and to afford him an opportunity to comment on that part of the University's representations which maintained that it was impossible to comply with the proposed recommendations (see s 31(8) of the 1981 Act and *R (DAT) v West Berkshire Council* [2016] EWHC 1876, (2016) 9 CCL Rep 362, para 65 *per* Elisabeth Laing J). Accordingly, I need to consider what might have happened had the Claimant been afforded the opportunity to comment on the University's representations and, in particular, whether it is highly likely that the final recommendations would not have been substantially different.

234. It is clear that the Claimant could not have disputed the fact that his bail conditions prohibited him from contacting the University and, as I have concluded above, it is clear that the Claimant's bail conditions made the proposed recommendations unworkable. It seems to me that, in paragraph 14 of his first witness statement, the Claimant essentially accepts this. However, the Claimant also says that, had he been given the opportunity to do so, he would have wished to investigate whether it was possible to have his bail conditions varied so that he could engage with the University in the manner envisaged by the proposed recommendations.

235. Ms McGibbon's response is that this would not have made any difference to the eventual outcome, because it is now clear from the Claimant's own evidence what the police's answer to a request to vary bail conditions would have been: the police would have refused a variation. However, I do not agree with this interpretation of the Claimant's evidence.

236. The Claimant has exhibited to his second witness statement a series of e-mails between the solicitors who are representing him in relation to his potential criminal matter and the police. On 9 May 2024, the Claimant's solicitors wrote to the police, stating that, in light of the final recommendations, there will have to be some form of contact between the Claimant and the University. As a result, the Claimant's solicitors asked for the first and second bail conditions to be removed. The police responded by way of an e-mail sent on 21 May 2024. The police explained that they had been in touch with the University regarding the Claimant's request, and that the University had told them that "with the contact restrictions imposed by the police bail conditions, the revised recommendations agreed by the OIA outlined that the appeal to reconsider the proportionality of the penalty applied to [the Claimant] could be done as a paperwork exercise, without [the Claimant] being present". The police went on to state that "[i]f the outcome of the judicial review is that the university takes further action by way of direct contact with [the Claimant], then a university staff person will be nominated as a point of contact for him to liaise with. I will then amend the police bail conditions to allow for this".

237. I consider that two points emerge from this correspondence. First, it seems tolerably clear that the University told the police that, as matters currently stand in light of the final recommendations, the Claimant does not need to have direct contact with the University. In light of that, it is perhaps unsurprising that the police did not respond to the Claimant's solicitors' request by varying the bail conditions. Secondly, if the position were to change, the police would be prepared to consider an appropriate, albeit potentially limited, variation of the bail conditions to enable to the Claimant to have some direct contact with the University. In my view, this correspondence does not support a conclusion that it is highly likely that, had the Claimant requested a

variation in his bail conditions in November 2023, the police would have refused it. On the contrary, I consider that, if anything, it indicates that there would have been a realistic possibility that the police might have agreed to at least some variation of the Claimant's bail conditions.

238. In the course of her submissions on the s 31(2A) point, Ms McGibbon referred me to Ms Megarry's second witness statement, in which Ms Megarry speaks in general terms to the approach that the OIA would adopt in circumstances in which there is a potential conflict between its recommendations and bail conditions. In particular, Ms Megarry says this:

> "…The OIA recognises that there may be circumstances in which bail conditions may possibly change in the future. However, the OIA must consider the position as it actually is at the time its recommendations are made. The OIA would not consider it appropriate to make recommendations requiring contact between University staff and a student at a time when the student is subject to bail conditions which prohibit such contact.
>
> Rather, the OIA has taken and would continue to take the approach of making recommendations which can be accommodated within bail conditions as they currently stand…."

239. I did not understand Ms McGibbon to argue that Ms Megarry's evidence on its own demonstrates that, had the Claimant sought a variation of his bail conditions in November 2023, it would not have made any difference to the OIA's decision-making. In my view, Ms McGibbon was right not to do so, for four main reasons. First, as I understand Ms Megarry's evidence, she speaks only to the general position, and she does not purport to say that the OIA operates an inviolable rule in relation to bail conditions (indeed, any such inviolable rule would be likely to give rise to legal issues in itself). Secondly, Ms Megarry was not the decision-maker in the Claimant's case, and she does not purport to address the specific facts of his case. Thirdly, as I

understand the passage quoted above, Ms Megarry is referring to the OIA's usual position at the point at which it comes to make final recommendations. She does not address the situation that would, on the counterfactual which I must consider, have arisen in the present case, in which the Claimant would have wished to seek a variation in his bail conditions before the OIA settled on its final recommendations. Fourthly, I consider that paragraph 3 of the final recommendations indicates, in the Claimant's case, a potential willingness on the part of the OIA to put matters on hold to allow time for any difficulties arising in relation to bail conditions to be addressed.

240. In light of the above, I consider that, had the Claimant been provided with the University's letter of 28 November 2023 and an opportunity to comment, there is a realistic possibility that he would have sought to vary his bail conditions, that the police would have granted at least some variation that might have rendered the proposed recommendations (potentially with some tweaks) workable, and that the Claimant would then have been able to make appropriate representations to the OIA in response to the University's contention that that bail conditions rendered the proposed recommendations "legally impossible". In light of paragraph 3 of the final recommendations, I also consider that, had the Claimant needed more time in order to seek a variation of his bail conditions, there is a realistic possibility that the OIA would have granted it. In my view, paragraph 16 of the final recommendations provides some support for that conclusion, as it indicates that the OIA is willing to contemplate some delay on the part of the University if time were required to obtain a variation of the Claimant's bail conditions.

241. I am not in a position to speculate exactly what form a variation to the bail conditions (if any) might have taken, or what exactly representations the Claimant might have

been able to make in the light of any variation, but even if any variation had been limited to that envisaged in the police's e-mail of 21 May 2024, it would have been open to the Claimant to have made representations to the effect that the only changes required to the proposed recommendations were the removal of the provision for him to be invited attend an SDC hearing (paragraph 8) and appropriate provision for an appeal to the SAC to be conducted only on the papers (paragraph 11). I have no reason to think that the OIA would have considered any such representations with anything other than an open mind and, in view of the fact that the proposed recommendations were the OIA's starting point as to what was appropriate to "put things right" in the Claimant's case (see paragraph 32 of the outcome decision), I consider that there would have been a realistic possibility that the OIA would have acceded to such representations.

242. In consequence, I am not satisfied that it is highly likely that, had the OIA provided the Claimant with the University's letter of 28 November 2023 (or at least the gist of it) and afforded him an opportunity to comment on the relevant part of the University's representations, the final recommendations would not have been substantially different.

243. In addition, it seems to me that there is also the possibility that, had the Claimant been afforded an opportunity to comment on the University's representations, he might have suggested ways in which the proposed recommendations could have been tweaked in order to make them workable notwithstanding his bail conditions (i.e. regardless of any potential variation of the bail conditions). In this respect, Mr Lawson argued that, for example, the provision that was made in the final recommendations for the SAC to sit in the absence of the Claimant could equally have

been made in respect of the SDC. Again, in view of the fact that the proposed recommendations were the OIA's starting point as to what was appropriate to "put things right" in the Claimant's case, I do not think that I can safely conclude that it is highly likely that the OIA would not have acceded to such a suggestion. Ms McGibbon did not suggest that the OIA would have concluded that any tweaks that might have been proposed by the Claimant could not have been accommodated within the terms of the University's internal procedures.

244. As a result, I am not satisfied that it is highly likely that the OIA would have settled on the final recommendations even if the Claimant had been provided with the University's representations and afforded an opportunity to comment on them. Accordingly, I do not consider that the conditions laid down by s 31(2A) of the 1981 Act are met, and therefore that provision does not require me to refuse a remedy on this aspect of the Claimant's case.

### (7) Conclusion on the third challenge

245. For the reasons set out above, I dismiss the third challenge. However, I consider that the Claimant has made out that part of the second challenge which I have addressed immediately above, and that s 31(2A) of the 1981 Act does not require me to refuse a remedy in relation to that part of the second challenge.

## I. SUMMARY AND FINAL ORDER

246. In summary, I dismiss the Claimant's first and third challenges, but the second challenge succeeds, albeit only to the limited extent that I have set out above.

247. When I circulated my judgment in draft, I invited submissions in writing on the appropriate order. In the event, the parties were agreed that I should quash the final recommendations, and I shall do so. However, there was a dispute as to whether I should grant two additional final remedies, and a dispute as to costs.

248. As to the first additional final remedy, the Claimant sought a declaration that the final recommendations were unfair for the reasons given in the judgment. In my view, it is unnecessary to grant such a declaration; in that respect this judgment speaks for itself.

249. As to the second additional final remedy, the Claimant sought a mandatory order requiring the OIA within 28 days or a reasonable period to invite the parties' representations on the proposed recommendations and thereafter to make a decision as to final recommendations within a reasonable time. In my view, this proposed order faces the threshold objection that the unfairness which I have identified was not (as the order sought presupposes) a failure by the OIA to invite representations on the proposed recommendations; the unfairness related to the failure to invite the Claimant's comments on the University's representations on the proposed recommendations.

250. The consequence of quashing the final recommendations is that the review of the complaint remains uncompleted, and the OIA will need to resume its decision-making process in order to decide on final recommendations and thereby complete the review. It is therefore not necessary to grant a mandatory order requiring the OIA to complete the review. In my view, how the OIA proceeds is a matter for it to determine in the light of the circumstances as they currently stand, provided it acts lawfully (which includes acting in accordance with the requirements of procedural fairness). As a

result, I do not consider that it would be appropriate for me to grant a mandatory order constraining its freedom in that respect.

251. As to costs, the Claimant submitted that, because he was the successful party, he should be entitled to at least some of his costs of the claim, but he accepted that, because he failed on two of his grounds of challenge, he should be awarded only 50% of his costs. Mr Lawson argued that it was not unreasonable to advance the grounds of challenge, and that the two applications to amend did not significantly contribute to the costs of the claim.

252. Mr Lawson drew my attention to a "without prejudice save as to costs" offer that was apparently made by the Claimant on 13 June 2024 and rejected by the OIA on 17 June 2024. Despite Mr Lawson's reliance on that offer, I was not provided with a copy of it; I was provided only with the OIA's reply. In any event, I do not consider that the offer assists the Claimant, because it appears from the OIA's response that the Claimant's proposal for settlement was that the OIA adopt the proposed recommendations as final recommendations, which goes well beyond what the Claimant has in fact achieved by bringing the claim.

253. The OIA's position was that there should be no order as to costs. Ms McGibbon argued that, bearing in mind the balance of the points on which the Claimant and the OIA succeeded, there was no clear successful party. Alternatively, even if the Claimant were the successful party, the costs attributable to the narrow point on which the Claimant succeeded are offset by the costs of the points on which the OIA succeeded. Ms McGibbon also pointed to what she said was a failure by the Claimant properly to comply with the Pre-Action Protocol for Judicial Review, in that the letter

before claim did not advance any of the grounds of challenge that were eventually relied on by the Claimant.

254. In my view, the Claimant is the successful party: he has obtained the quashing order that he sought in section 8 of the claim form. In order to succeed even on the narrow point on which I have found in his favour, it was necessary for the Claimant to incur the costs of bringing a claim and the costs of a substantive hearing. As such, I consider that it would be appropriate to award the Claimant at least some of his costs.

255. However, the vast majority of the points argued by the Claimant were unsuccessful, the fairness challenge on which the Claimant eventually succeeded came to the fore only at the substantive hearing, and (contrary to the position adopted by the Claimant) the quashing order does not affect the outcome decision. In my view, the costs of bringing (and defending) the claim would have been significantly lower, and the substantive hearing would have been significantly shorter, had the Claimant advanced only the fairness challenge on which he eventually succeeded. Further, it seems to me that, in principle, the OIA would be entitled to the costs of the two unsuccessful applications to amend.

256. Exercising my discretion under CPR 44.2(1), and having regard to all the circumstances, including in particular the conduct of the Claimant and the extent to which the Claimant has succeeded on his case, I consider that the appropriate order as to costs is an order that the OIA pay 25% of the Claimant's costs, to be subject to detailed assessment on the standard basis if not agreed.

257. Finally, I should note that, as part of his submissions on the appropriate order, the Claimant provided me with a draft of what was referred to as a "restricted reporting order". In my view, this draft order, if made, would in substance be an injunction

against the world at large prohibiting the publication of the identity of the Claimant. It was never previously suggested that I should grant such an injunction, and the Claimant did not provide me with any justification for doing so. In my view, the normal order under s 11 of the Contempt of Court Act 1981 and CPR 39.2(4), which I made at the outset of the hearing, and which is recorded in my final order in terms similar to those set out in paragraph 7.12.9 of the Administrative Court Guide (and in terms similar to those suggested by Ms McGibbon), is sufficient to protect the Claimant's interests. I therefore decline to grant the proposed injunction.