Neutral Citation Number: [2020] EWHC 1647 (Admin)

Case No: CO/2321/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 June 2020

Before :

Anthony Elleray QC Deputy High Court Judge

- -

Between :

The Queen	**Claimant**
on the application of	
AW	
- and –	
ST GEORGE'S, UNIVERSITY OF LONDON	**Defendant**

- -
- -

Rory Dunlop QC (instructed by Doyle Clayton) for the Claimant
Aileen McColgan (instructed by Kennedys) for the Defendant

Hearing dates: 18 and 21 February 2020

- -

APPROVED JUDGMENT

Anthony Elleray QC Deputy High Court Judge:

1. The Claimant is "AW". She has been represented before me by Mr Dunlop QC.

2. The Defendant is "SGUL". It has been represented before me by Ms McColgan.

3. AW was registered with SGUL on a Bachelor of Medicine and Bachelor of Surgery ("MBBS") course. On 12 March 2019 SGUL decided to terminate her registration. The Decision Letter was served on 3 April 2019.

4. AW seeks Judicial Review of:

   (1) the termination;

   (2) the failure to warn her that her registration might be terminated;

   (3) the refusal to (a) hear a complaint about the determination decision or (b) issue her with a Completion of Procedure ("COP") letter as required by the rules of the Office of the Independent Adjudicator ("OIA").

5. SGUL denies the grounds of complaint. It nonetheless asserts that if grounds are made out, relief should be refused under s.31(2A) of the Senior Courts Act 1981 as it is "highly unlikely that the outcome of Applicant would have been substantially different if the conduct complained of had not occurred."

Principal Events

6. In September 2012 AW started a four year MBBS course at SGUL's Hospital Medical School.

7. AW passed her first and second year examinations in 2013 and 2014.

8. In August 2014 AW began her third year, the "P Year".

9. Regulations for the MBBS Programme in Medicine were in place.

10. Regulation 6.1 provided:

> "In accordance with General Medical Council rules and European Union Council Directive 2005/36, Article 24, the MBBS (both the 4 year and 5 year streams) and the F1 Foundation Year 1 following shall, taken together, consist of not less than 5,500 hours of theoretical and practical instruction."

11. Regulation 6.4 relating to the 4 year stream provided:

> "For the 4 year stream, a student shall be required to complete not less than 4 academic years study which shall, in accordance with University London Regulation 1 (Section C), be at least 45 months from initial enrolment to graduation."

12. Regulation 7.1.4 dealing with the 4 year stream provided:

> "This comprises Year 1, Year 2 (Transition (T) Year), Year 3 (Penultimate (P) Year) and Year 4 (Final (F) Year).

13. Regulation 7.1.5 provided:

> "Year 1 is called Clinical Science: Year 2 (T Year), Year 3 (P Year) and Year 4 (F Year) will be called Clinical Practice."

14. Regulation 7.8.1 provided:

> "The structure of the Penultimate Year shall be as follows:
>
> *Up to and including 2014-15*
>
> There will be seven 6 week clinical attachments as follows:
>
> - Obstetrics and Gynaecology
> - Paediatrics
> - Neurology/Disability/Stroke/Palliative Care
> - Psychiatry
> - Medicine and Cardiology
> - Surgery and AMU
> - Specialities and MSS
>
> *From 2015-16 onwards*
>
> There will be clinical attachments as follows:
>
> - Introduction to Clinical Practice (four one week blocks)
> - Integrated Medical Specialities and AMW (10 weeks)
> - Integrated Surgery Specialities and Palliative Care (10 weeks)
> - Obstetrics and Gynaecology (5 weeks)
> - Paediatrics (5 weeks)
> - Neurology (5 weeks)
> - Psychiatry (5 weeks)
> - Advanced Clinical Practice (ACP) (1 week)."

15. The P Year students were streamed in relation to the clinical attachments. I understand AW was on the B stream. Her last attachment was in June 2015.

16. On 1 July 2015 AW had a kidney scan which revealed a left renal lesion. AW says she was given a working diagnosis of renal cancer needing a biopsy.

17. On 13, 17, 20 and 21 July 2015 AW took her P Year exams. On 29 July 2015 AW's results were published. She had failed relatively narrowly.

18. Between 3 and 5 August 2015 AW re-sat those exams as she was entitled to do. But again she failed narrowly.

19. In September 2015 AW began to re-take the P Year as agreed by SGUL.

20. On 4 December 2015 AW was emailed by Dr Ibison, the Deputy Director of Students of SGUL, referring to her undertaking a formal needs assessment with the Occupational Health Team ("OH"). The email stressed why a needs assessment was necessary including medical evidence where appropriate. The email referred to the disability needs assessment process. On 9 December 2015 SGUL's Disability Adviser submitted a request for reasonable adjustment on AW's behalf in respect of amongst other matters medical absences for her disability. Correspondence between AW and SGUL continued that month concerning further evidence.

21. On 2 March 2016 AW applied for an Interruption of Studies ("IOS"). The background was that she had been offered and wished to take up treatment for her disability in France. On 7 March 2016 AW began 10 weeks' absence for treatment and recovery. On 21 March 2016 a French biopsy report identified renal cell carcinoma. On 2 June 2016 AW was informed that she could not return to her P Year course because an Interruption of Studies period had begun and absent OH confirmation that she was fit to do so. On 22 June 2016 AW wrote to Professor Higham, the University Principal at SGUL, complaining about the need for an IOS when a sickness of more than four weeks occurred, IOS policy being interpreted to bar participation in a year if the student had had more than four weeks' absence.

22. On 12 January 2017 SGUL made an OH referral relating to AW. She saw an OH Locum on 20 February 2017, but he left without producing a report. On 15 August 2017 Dr Thayalan, a Consultant Occupational Physician contracted with SGUL, wrote to Ms Philippa Tostevin, then Course Director of MBBS (she is now Professor). He referred to AW suffering from a medical condition that required treatment and monitoring at a specialist centre in France and then a specialist unit in the UK. Follow-up and monitoring would go through her medical training period. He referred to the 2016 treatment and three monthly reviews until April 2017. He indicated that her condition would require periodic review in French and UK units and the then planned reviews including then planned reviews in 2017 and early 2018. He considered that AW was "currently fit for training". He indicated that required adjustments/support would enable her to be given time off to attend clinic and assessment appointments in France and UK specialist units. He also mentioned a knee condition. He planned an update in October 2017. On 17 August 2017, he emailed his report to Ms Tostevin. He did conduct telephone reviews in October 2017. On 27 November 2017 AW's then solicitors (Sinclairs) wrote to Ms Tostevin referring to the want of a response to Dr Thayalan's report. On 15 December 2017 SGUL replied stating they were awaiting Dr Thayalan's update admitting that he should have been contacted after his earlier, ie August 2017, report. On 18 December 2017 Dr Thayalan sent his updated OH report to Ms Tostevin and AW.

23. On 24 January 2018 SGUL through Joanna Carroll, its Head of Clinical Medicine Administration and International MBBS, wrote to AW. She referred to having discussed AW's request with Ms Tostevin who had read both Dr Thayalan's reports and had asked her to formulate a reply. Ms Tostevin had informed her that both

reports stated AW was fit to return to study but the reports did not contain any medical details and the only recommendations stipulated that she might need to attend clinical appointments abroad. She said, "I am happy to confirm that we'll be able to accommodate this reasonable adjustment." She said that any reasonable request for absence from clinical placements would be considered in line with the MBBS attendance policy. She indicated that exact practical arrangements for taking time off would need to be agreed with the relevant speciality lead. She set out that the academic and clinical leads would discuss the request and agree whether any of the time missed would need to be remediated to ensure AW did not miss out on any teaching and could be successfully signed off for the placement. On 24 January 2018 AW replied (to Yeshiaka Sharan to whom the 24.01.18 letter had been copied). She took issue with the letter not dealing with any necessary time away which might go beyond four weeks. Her email set out that she did not consent to Ms Tostevin disclosing the OH reports or their contents to anyone. She sought a reply by Ms Tostevin to the letter of Sinclairs on 27 November 2016 so as to set out the response to reasonable adjustments required in Dr Thayalan's OH reports. On 31 January 2018 Ms Carroll replied that MBBS attendance policy did stipulate that no more than 20% of the required contact hours could be missed. On 16 February 2018 AW again wrote to Ms Sharan stating that the proposals on 31 January 2018 of the MBBS Programme Team were unclear. She made a number of complaints. Ms Carroll for SGUL replied on 12 March 2018. AW says that she was told on 26 March 2018 that an IOS was now necessary due to four weeks' plus absence. On 13 April 2018 Ms Carroll wrote again to AW. She observed that AW's expected date of return to study was 26 February 2018. She said that as AW had missed more than six weeks of her clinical experience it would not be possible to remediate that time during the remainder of the current academic year prior to the P Year exams. It was therefore necessary to extend the current period of interruption for another year. The Interruption of Studies Panel had approved the IOS extension until 25th February 2019. Other points included AW's need to extend her registration.

24. On 3 June 2018 the Claimant issued a County Court claim against SGUL. The claim alleged breaches of the Equality Act 2010 on the basis of disability and breaches of the Human Rights Act 1998, Article 14 and Article 2, Protocol 1 of the ECHR. The claim sought damages and a declaration of discrimination and an injunction. The value of the claim was set out as an expectation of recovery of more than £10,000 but not more than £25,000. AW would appear to have issued the claim in person.

25. On 14 June 2018 AW applied to extend her maximum study period. On 17 July 2018 the Registration Extension Panel ("ERP") agreed that given AW's plan to return to study in February 2019 a one year extension would not allow adequate time to complete the programme (should her progress not be delayed) and decided that an extension should be granted until 31 August 2020. Minutes referred to AW's academic performance having not been strong and a need for her to show marked improvement in her engagement with members of staff and the programme in general. The minutes discussed AW's health difficulties. The Panel members observed that they had not been able to find any OH reports or a list of reasonable adjustments on her student file. It set out an understanding of the Panel that that was because AW had refused permission for the OH Doctor to transfer her report to SGUL. It set out an agreement that if AW were to be granted an extension of her period of registration it was essential that she allow members of staff who would be tasked with implementing any adjustments access to the report including reasonable adjustments recommendations so that it would be possible to make those adjustments. In granting the extension to AW's period of registration, the ERP made recommendations to be arranged by the Head of MMBBS Clinical Medicine and Administration:

- AW to be reassessed by OH prior to her return to study in February 2019 as her health and reasonable adjustments might change in the intervening period;

- AW should attend her occupational health appointment on the understanding that the OH Doctor would need to disclose her OH report including recommended reasonable adjustments to the Head of MBBS Clinical Medicine Administration and any staff responsible for their implementation so that any recommended reasonable adjustment could be actioned.

26. On 23 July 2018 AW wrote to SGUL to raise concerns about the 17 July decision and errors in its minutes. On 7 August 2018 AW appealed against the ERP decision.

27. On 10 October 2018 Particulars of Claim in the County Court claim were issued challenging, amongst other matters, the policy on attendance and four weeks' absence. On 6 December 2018 SGUL filed its Defence to the County Court claim. Time for its service was to be extended by order of that court on 22 March 2019, an order that also dismissed with costs an application by AW to strike it out.

28. On 25 January 2019 SGUL (by Ms Carroll) made a referral for OH assessment in relation to AW. It referred to the expected return to study on 25 February 2019 and an Occupational Health assessment being needed to confirm AW's fitness to study as well as to identify any specific recommendations required to facilitate her return and adjustments to be put in place for clinical attachments she would be attending. The points made in the referral included that all students including those with disability or chronic conditions were having to meet the attendance requirements to satisfy the "Doctor as a Professional Domain".

29. On 30 January 2019 SGUL by a board member Ms Swarbrick upheld the 17 July 2018 decision.

30. On 31 January 2019 SGUL sent four letters. One was Ms Swarbrick's decision. One from Ms Carroll referred to the proposed return to study on 25th February 2019. It set out the requirement to undergo an Occupational Health assessment to confirm fitness to return to study. It attached the OH referral form. A letter from Ms Trubshaw (Director of Governance and Legal Insurance Services) was a "Completion of Procedures letter". It related to internal procedures of SGUL concerning the upholding of the ERP decision.

31. On 19 February 2019 AW wrote to Ms Trubshaw. She set out dissatisfaction with the decision of Ms Swarbrick but explained that she would not be making a referral to the OIA but set out her view that the County Court was considering the disability discrimination and would be made aware of the Swarbrick decision as another instance of the application of impugned policy. She set out an issue as to the compulsion of disclosure of OH reports to University Administrators and an issue in relation to the extension of the maximum period of study decision. The letter contended that AW's current interruption of studies imposed in April 2018 failed to have negotiated or agreed reasonable adjustments as part of her return to studies arrangements. The letter sought a further extension to registration whilst disputes were resolved.

32. On 22 February 2019 SGUL through Ms Pigott, the Head of Medical Programme Administration, wrote to AW. She referred to the failure of AW to attend Occupational Health before she could return on 25 February 2019. She set out that it was a requirement of her return to study that she should be assessed to ensure fitness to return. The letter warned that failure or refusing to attend the Occupational Health

appointment would mean AW was disqualifying herself from being able to return to study so that she would not be eligible to enter the P Year exams later that year. It set out that if AW did not complete that academic year she would be unable to complete her MBBS degree within the maximum registration period. She said that it would mean that AW would not be able to graduate with a St George's MBBS degree and set out that it would also mean that she would be unable to pursue her undergraduate medical studies at any other British medical school. She urged urgent efforts to attend OH so that AW could be cleared as fit to study.

33. In reply on 22 February 2019 AW sent a copy of her letter of 19 February 2019 to Ms Trubshaw.

34. On 12 March 2019 SGUL had prepared a letter from Jenny Laws, Academic Registrar, to AW terminating AW's registration on the MBBS Graduate Entry Medicine course with effect from the date of that letter. It set out two reasons for that termination. The first related to the expectation that AW would return to study on 25 February 2019 as stipulated in the letter of 31 January 2019 and a requirement as part of the process for an OH assessment to confirm that AW was fit to return to study. It referred to an appointment with OH having been arranged for 12 February 2019 which had been cancelled by AW. It referred to the letter of 22 February 2019 asking her to make urgent efforts to attend OH and the failure of AW to re-arrange her OH appointment. It set out that accordingly she could not return to complete the course. The second reason was the expectation of a return on 25 February 2019 to complete outstanding P Year placements in Paediatrics, Neurology, Psychiatry and Palliative Care. The letter referred to the failure of AW to attend her first placement allocated in Paediatrics and the failure to inform the Placement Co-ordinator of her absence. It also referred to her failure to complete the enrolment process. The letter referred to stipulations in Article 4.11 of the St George's General Regulations for Students and Programme of Study 2017-2018.

35. The letter of 12 March 2019 as drafted was discussed internally by SGUL and was sent out on 3 April 2019. On 4 April 2019 AW asked what right of appeal she had. She was told she had a right to complain. On 5 April 2019 SGUL through Ms Laws replied by email that there were only two possible outcomes of complaint: (a) that the registration remained terminated or (b) that AW might be permitted to return under some agreed mechanism within SGUL Regulations. She observed that the second outcome could not be agreed on an informal or semi-formal basis.

36. On 17 April 2019 SGUL through Mr Morrison its Director of Legal Services, set out that SGUL was no longer prepared to consider a complaint from AW. He relied on the ERP appeal having not been upheld and the ERP conditions which AW was saying prevented her from returning to study at an appropriate time which in turn resulted in the termination of registration. He set out the view that complaints could not be used to effectively appeal against the outcome of an appeal made under other procedures. He set out that in those circumstances SGUL did not believe acting in good faith that it was in the best interests of AW to make a complaint under the Students' Complaint procedure. He set out that it would be wasting AW's time as there would be no outcome that would be satisfactory to AW which would allow her return to study as the conditions of return remain undisturbed regardless of the complaint as the appeal from the ERP decision had been refused. He referred to it being open to AW to make complaints to the OIA.

37. On 24 May 2019 AW served on SGUL a Letter before Action concerning a Judicial Review claim.

38. On 7 June 2019 SGUL responded to the Judicial Review pre-claim letter. On the same date AW asked for COP letters.

39. On 10 June 2019 this Judicial Review claim was filed. On the same date SGUL refused to complete Completion of Procedure letters. That was questioned by AW on 17 June 2019.

40. On 19 June 2019 AW served her Judicial Review claim. She was then acting in person.

41. The grounds challenged the termination of registration decisions of 12 March/3 April 2019. The decisions were said to be unlawful because:

> "(a) On a proper interpretation of [SGUL's] rules:
>
> (i) Her non-attendance at Occupational Health Assessment was not a basis to terminate her place on the course; and
>
> (ii) It was necessary for the Defendant to write to [AW] before terminating her place on the course and to listen to evidence and submissions from her.
>
> (b) It is unfair to terminate someone's place at university:
>
> (i) Without inviting them to comment; and
>
> (ii) Without given them some system of review, either internally or to [the OIA].
>
> (c) Denying [AW] the chance to complain to the OIA is unfair and/or frustrates the legislative purpose of the OIA scheme.
>
> (d) [SGUL] acted in breach of the Public Sector Equality Duty."

The claim also applied for an extension of time to consider a challenge to the decision of Ms Swarbrick on 30 January 2019 and sought anonymity for AW.

42. On 20 June 2019 SGUL again refused further COP letters. It asserted the de-registration had merely followed automatically as a result of the failure or refusal to comply with the requirements laid down by the ERP which had been the subject of appeal which upheld the decision of the ERP and led to a COP at that time.

43. On 8 August 2019 AW issued a second County Court claim. Her solicitors were Fry Law. The claim again asserted unlawful discrimination contrary to the Equality Act 2010 relating to her disability. The Claim Form put forward an expectation of damages not exceeding £5,000.

44. On 20 August 2019 AW applied for a stay of this Judicial Review claim. Her first witness statement was then made. It asserted that this claim should be stayed pending the outcome of the County Court claim. Ms Makin of SGUL's solicitors, Kennedys' filed a statement on 22 August 2019 opposing the stay.

45. Permission was granted on 5th November 2019 by Peter Marquand sitting as a Deputy High Court Judge on the grounds advanced save for that based on Section 149 of the Equality Act 2010 which was refused. The Equality Act ground was thought to add nothing to the other grounds. It was noted that the County Court proceedings alleging breaches of the Equality Act were being brought by AW. At his Orders 2, 3 and 4 Mr Marquand refused the application to extend time to bring a challenge in relation to the decision of 30 January 2019, the application dated 20 August 2019 for a stay of this claim and the application to expedite the hearing (of this claim). Mr Marquand at Paragraph 5 of his Order said that the identity of AW should not be disclosed under further order. At his Order 6 he provided for the description of AW in these proceedings as "AW". At Order 7 he provided for non-parties not being able to obtain documents on the Court file other than his Order duly anonymised without the permission of a Judge. At his Order 8 he provided reporting restrictions to apply to information which might lead directly or indirectly to the identification of AW and for the publication of the name and address of AW to be prohibited. By Order 9 he gave permission for any non-party affected by his Paragraphs 5 to 8 to apply on notice to have those paragraphs set aside or varied. Mr Marquand observed that the anonymity had been sought by AW due to a medical condition which may have a genetic component that was not known to other family members. He noted that there was no anonymity in the County Court proceedings. This Judgment refers to AW by that anonymised description. The anonymity has not been challenged before me. To my mind, the anonymity of AW is perhaps surprising given her past has included her call to the Bar, her issue of this claim in person, her identification in witness statements in this claim and in disclosed correspondence and a want of anonymity in the County Court claims. I did not, however, at the hearing invite consideration of disclosure of her name and I do not order it.

46. On 13 December 2019 SGUL filed detailed Grounds of Defence. Mr Morrison had made a first statement for SGUL on 12 December 2019. Further, a statement was made on 13 December 2019 by Professor Higham. Both have been filed in these proceedings.

47. On 23 December 2019 AW filed a reply to the detailed Grounds of Defence. She also applied for permission to lodge further evidence which was opposed by SGUL on 7 January 2010.

48. On 14 January 2020 Mr Justice Johnson refused the application to file further evidence but provided on terms for AW to renew her application by agreement. An Order was made on 22 January 2020 extending deadlines in the Order of Mr Justice Johnson. On 24 January 2020 AW filed further evidence, her second statement of that date. On 30 January 2020 Mr Morrison filed a second witness statement (in reply). Further, on 30 January 2020 a statement of Professor Tostevin was filed together with a third witness statement by Mr Morrison dated 7 February 2020 and a third statement of AW dated 14 February 2020.

49. In the event, on the eve of the hearing before me the parties agreed that further evidence should be permitted and read by me. Further, on the second day of the hearing before me a fourth witness statement of Mr Morrison was filed and read by me.

SGUL Regulations and Policies

The General Regulations

50. At the start of each academic year SGUL publishes "General Regulations for Students and Programmes of Study" ("the General Regulations"). Their wording has changed between 2012 and 2019 but their structure had not. Regulation 4.1 has addressed registration. "In these regulations 'registration' is the process by which St George's accepts a person as a student. 'Enrolment' is the process by which a registered student declares his or her active participation on the programme of study (usually for an academic year). A student who does not re-enrol may, with the permission of St George's, remain registered as a student, and enter for assessment where required and allowed to do so". At all material times the General Regulations have permitted certain situations in which a student's registration may be terminated.

51. First, Regulation 4.10 of the General Regulations has provided in general for termination after a student has failed assessments a maximum number of times (although SGUL has a discretion to permit a further attempt).

52. Regulation 4.11 of the General Regulations has given SGUL a discretion to terminate the registration of students whom SGUL could not get hold of even after repeated and extensive correspondence. The 2017/18 session wording cited in the termination decision was in these terms:

> "All students must abide by the Attendance Policy. A student's attendance is closely monitored throughout their programme. Students are required to seek permission for, and keep SG well informed about, any absence. Unsatisfactory attendance is followed up in accordance with the procedure pertaining to the programme of study concerned. Students who do not maintain contact with SGUL by completing normal formalities and/or responding to correspondence (following repeated and extensive reminders) will, at the discretion of the Academic Registrar, have their registration terminated."

The wording of Regulation 4.11 was amended for the 2018/19 session so as to provide as follows:

> "All students must abide by the Attendance Policy. A student's attendance is closely monitored throughout their programme. Students are required to seek permission for, and keep the University informed about, any absence. Unsatisfactory attendance is followed up in accordance with the procedure pertaining to the programme of study concerned and the overarching St George's Attendance Policy. Students who do not complete normal formalities and meet satisfactory attendance requirements (following repeated and extensive correspondence) will, at the discretion of the Academic Registrar, have their registration terminated."

53. Regulation 4.12 made provision for registration to be terminated where the student had not been granted leave to remain in the UK for the whole period of study. Regulation 4.13 provided for interruption of studies (see below).

54. Regulation 4.15 provided:

> "Regardless of the provisions for termination of a student's registration because of failure in assessments, a student may be suspended from his or her studies or have his or her entry to assessments cancelled and have his or her registration terminated on the following grounds:
>
> (i) persistent unsatisfactory attendance and/or performance;
>
> (ii) lack of aptitude for the course;
>
> (iii) unfitness to practise in the profession for which the course provides qualification.
>
> The procedure to be followed in such cases shall be prescribed by the Senate as the Procedure for Consideration of Fitness to Study or Practise."

The Fitness to Study or Practise Procedures

55. Pursuant to Regulation 4.15 SGUL published Fitness to Study or Practise Procedures. At the start of any formal progress, SGUL has been obliged to provide a student with the details of any serious concern raised (see Paragraph 3.1.1). There has to be an investigating officer who has to "act in a proportionate way" and "consider whether the behaviour is better dealt with through student support and remedial tuition rather than through a formal hearing." Only if the investigating officer decides that the behaviour is "so serious or persistent as to call into question the student's ability to continue on the course or their fitness to practise after graduation" is the matter referred to the Hearing Committee (Paragraph 3.1.2).

56. If the matter is referred to a Hearing Committee and the student is given written notice of the allegations against them (Paragraph 3.2.3) the student has a right to be accompanied by a friend or representative, including a lawyer (Paragraph 3.3.2). The student is allowed to call witnesses and make submissions (Paragraph 3.3.3). The Hearing Committee has a power to expel, but only where the student's behaviour is "incompatible with their continuing in a professional programme" (Paragraph 3.4.1(e)). The student has a right to request a review/appeal of any sanction (Paragraph 4.2).

Attendance Policy

57. The Defendant has Regulations specific to the MBBS course ("the MBBS Regulations"). The MBBS Regulations explain at Paragraph 6.1 that there are two possibilities for the MBBS course: The "5 year stream" and the "4 year stream" but, whichever stream was chosen, the overall course is said to involve not less than 5,500 hours. The MBBS Regulations further explained at Paragraph 6.2 that the 4 year stream should normally be completed in six academic years, but this could be extended in accordance with the Procedure for Consideration for an Extension of the Maximum Period of Study (registration period) ("the Extension Procedure").

58. SGUL has also published a "Doctor as a Professional Domain Handbook" (2017/18) ("the Handbook"). Appendix 4 of the Handbook covers situations where "serious mitigating circumstances (health or personal) … have necessitated absence from clinical attachments." It has provided that:

> "If the duration of time to be made up is more than 4 weeks (in T or P Year) the student will need to interrupt their study (IOS) and repeat attachments in full the following year."

IOS Policy

59. As noted, General Regulation 4.13 provided for IOS;

> "The Principal, Principal's nominee, appropriate Dean and appropriate Course Director (or his or her nominee) shall have the authority to approve a student's application to interrupt his or her studies for a specified period. The period should not exceed one academic year in the first instance: at the end of this period, a further period of interruption can be granted by the Course Director (again to a maximum of one year)".

SGUL published a policy on the Interruption of Study ("IOS") for MBBS students. It explained at Paragraph 1.3 that IOS are granted on grounds of extenuating circumstances such as illness (Paragraph 2.1). "Circumstances that would normally be investigated under the Fitness to Practise or Study process or student disciplinary process will not be considered as appropriate grounds for an [IOS]" (Paragraph 1.3). It provides where an IOS is granted, a student's registration continues without enrolment on a specific year of the course (Paragraph 2.4). It provides that an IOS may be provisional with an agreed date for review (Paragraph 7.1). Under Section 10, "Return to Study", it is provided that the student's task to be completed long term is "Renewal" on the student's ID card.

The Extension Procedure

60. SGUL published an Extension Procedure. This procedure permits ERPs to grant or refuse an application for an extension to the maximum period of study. When an extension period is granted, the Panel is given a discretion to decide the length of that that extension (Paragraph 2.7). The Extension Procedure makes no provision for ERPs to grant an extension subject to conditions.

The Complaints Procedure

61. SGUL has published a policy called "Student Concerns: Complaints Procedure" (2018-2019) ("the Complaints Procedure"). This allows students to complain about actions of the University. "Students" are defined to include "Those who have left the University within a period of 3 calendar months" (Paragraph 1.3). The Complaints Procedure was said not to have been appropriate for "appeals" against the decision of a Committee of SGUL taken under the formal stage of another procedure (Paragraph 3.1).

The OIA Rules

62. The Higher Education Act 2004 ("the HEA") established a system for review of student complaints, providing that the Secretary of State might designate a body corporate as a designated operator for England. Pursuant to Section 13 of the HEA the OIA is designated to be the operator of that scheme. Paragraph 2 of Schedule 3 obliges the OIA to provide a scheme ("the Scheme") for the review of "qualifying complaints".

63. At all material times OIA rules provided as follows:

> *"7. Completing the higher education providers internal processes*
>
> *7.1. We will not review a complaint unless the higher education provider has had the opportunity to look at it first. This means that normally the student needs to have completed the provider's internal processes before complaining to us.*
>
> *7.2. The higher education provider will send the student a letter confirming when the student has completed under the provider's internal processes. This letter is called 'Completion of Procedures Letter' and must comply with our guidance on Completion of Procedure Letters.*
>
> *7.3. In exceptional circumstances we may decide to review a complaint when the student has not completed the higher education provider's internal processes and/or does not have a Completion of Procedures Letter.*
>
> *7.4. We will not normally review a complaint which arises from information or evidence which a student has retained after the date of the Completion of Procedures Letter or, where they do not have a Completion of Procedures Letter, more than 28 days after the student stops being a student.*"

64. The OIA's guidance on the Completion of Procedures Letter provides as follows:

> "*WHAT IS A COMPLETION OF PROCEDURES LETTER (COP LETTER)?*
>
> *A the Completion of Procedures Letter is a letter which a provider sends to a student when they have reached the end of the provider's internal processes, whenever there is no further avenue for the student internally. Normally a student cannot complain to us without a COP Letter …*
>
> *4. WHEN SHOULD PROVIDERS ISSUE A COMPLETION OF PROCEDURES LETTER?*
>
> *Providers should issue a COP Letter at the end of complaints, academic appeals, academic and non-*

academic disciplinary procedures, fitness to practice procedures, fitness to study procedures, harassment and bullying procedures: in fact, at any point where the student has reached the end of the line and there are no further steps they can take internally …

4.3. Complaints that are about more than one issue

Students may have to follow two sets of procedures where the mattes are not related, for example if a student has a complaint about student accommodation, and is also subject to Fitness to Practise procedures, this should result in two COP Letters. If the student raises concerns during an academic appeal that ought to have been raised under the provider's complaints procedures, then it may be necessary to follow both processes and to issue a COP Letter at the end of each one. If a student has a complaint about how the provider handled their complaint or appeal, for example a complaint about delay, they should not then have to make a separate complaint of the provider's complaints procedure before being issued with a COP Letter ...

5. WHEN HAVE INTERNAL PROCEDURES BEEN COMPLETED?

In most cases it will be clear that the provider has made its final decision and that its internal procedures have been completed. However, there are some circumstances where this is less clear. We set out some examples below and indicate whether COP Letters should be issued (see Section 14 for examples where more than one provider is involved) …

5.4. A COP Letter should be issued when the provider reaches a final decision that results in the exclusion or suspension of a student under any of those procedures, including disciplinary procedures.

5.5. A COP Letter should be issued when the provider reaches a final decision that results in a student being removed from student accommodation.

5.6. A COP Letter should be issued where a student makes both a complaint and an appeal about the same or related issues. The provider should issue a COP Letter in respect of each procedure cross-referencing as appropriate. The student should be reminded that the 12 months time limit applies to both cases. We may decide to suspend our consideration in the first case in order to review both cases together."

First Ground

65. The first ground has been that the decision to terminate registration by the letter dated 12 March 2019, sent out on 3 April 2019, was unlawful. It refers to interpretation of SGUL's rules. It asserts that non-attendance on an OH Assessment was not a basis for termination. Further, it is asserted that it was necessary for SGUL before termination to write to AW and to listen to her evidence and submissions.

66. Mr Dunlop QC begins by submitting that the letter dated 12 March 2019 was what he calls the "actual decision". He submits that a Public Authority would act unlawfully if making a decision to terminate which is inconsistent with its published regulations and/or policies.

67. Mr Dunlop QC puts that point four ways:

(1) It is a general public law principle that a Public Authority must act consistently with its published policies unless there is a proportionate reason not to, for example an unforeseen situation;

(2) Public law principles offer legitimate expectations;

(3) In Contract, the regulations and policies being part of the contract between SGUL and its student;

(4) In fairness, a student pays a lot of money and devotes a lot of time to study meaning he or she has a reasonable expectation of not losing the benefits of such payment and time unless a situation arises as set out in the regulations/policies. He submits that it is unfair to terminate registration for reasons they cannot anticipate reading those regulations and policies.

68. In context, Mr Dunlop QC cites from the decision of Andrew Grubb sitting as a Deputy High Court Judge in ***R (Crawford) v. University of Newcastle-upon-Tyne*** **[2014] EWHC 162 (Admin)**. In that case the claimant, a former medical student at the defendant university, challenged a decision by the University that he had failed his final examination by reason of his performance in a clinical assessment. The claim was dismissed. The Learned Judge observed at Paragraphs 19 and 20 as follows:

> "(19) The Defendant is a public body created by the University of Durham and Newcastle Upon Tyne Act 1963. It is not disputed that in this case it was performing public functions subject to judicial review and public law principles.
>
> (20) As the Claimant was a fee-paying student there was also a contractual relationship between the Claimant and the Defendant (see *Clarke v. University of Lincolnshire and Humberside* [2000] 1 WLR 1988, [2000] ELR 345). Whilst the Defendant does not accept the terms of the Stage 5 MBBS Handbook relied upon by the Claimant are, in themselves, contractual terms as they lack the necessary specificity for a contract term, there can be no doubt that if the Claimant were to make good his principal argument he has been assessed contrary to its terms, that it would be a breach of an implied term that the University would follow its published procedures. Likewise, even if the Academic Appeals Procedure does not

> form part of the contract between the parties, I am in no doubt that it is an implied term of the contract between the Defendant and Claimant that the University will act fairly in applying its Academic Appeal Procedure (see by analogy *R v. Disciplinary Committee of the Jockey Club ex parte Aga Khan* [1993] 1 WLR 909). The substance of the Claimant's case against the Defendant does not, in my judgment, turn upon the claim as couched in terms of public law or contract. I shall, therefore, focus on the claim applying public law principles."

The Learned Judge also at Paragraph (54) observed:

> "There is no dispute between the parties as to the approach applying public law principles that I must adopt. The Defendant will have acted unlawfully if the method of calculating the Claimant's grade for the 'skills' domain in the MOSLER was not in accordance with what is stated in the MBBS Stage 5 Handbook. If it is not, the Defendant will have acted unlawfully in failing to apply its stated methodology and contrary to the Claimant's lawful expectation. If the MMBS Stage 5 Handbook amounts to a 'clear and unambiguous assurance devoid of relevant qualification' that the Claimant would be assessed on the methodology relied upon by him (see *R v. Inland Revenue Commissioners ex parte MFK Underwriters* [1990] 1 WLR 1545) per Bingham LJ (as he then was) at 1570 approved in *Paponette v. The Attorney-General of Trinidad and Tobago* [2010] UKPC 32, [2012] 1 AC 1, per Lord Dyson at [28])."

69. Ms McColgan argues that Regulations 4.10 and 4.12 provide for the automatic termination of registration and Regulation 4.11 provides for termination at the discretion of the Academic Registrar. She notes that Regulation 4.15 provides for termination on Unfitness to Practise grounds. She also observes that the General Regulations make reference to assessment offences and misconduct without stating in terms that a student may have their registration terminated in connection with either. Mr Dunlop QC referred me to General Regulation 12 dealing with assessment offences. Regulation 12.1 provides:

> "An assessment offence shall be considered to be any attempt by a student to gain improper advantage in an assessment …"

Regulation 12.2 provides that an alleged assessment offence shall be handled in accordance with the *Procedure for Considering Allegations of Assessment Irregularity* which have been made by the Senate. He also refers me to Regulation 20. Regulation 20.2 defines misconduct. Regulation 20.4 provides:

> "In the case of misconduct a formal student disciplinary procedure has been approved by Council in accordance with the St George's Scheme."

Mr Dunlop QC therefore accepts that should one just read the General Regulations and not the policies to which they refer it will not cover every situation in which termination is permitted, but he continues that the policies as a whole do provide an

exhaustive list of the situation in which SGUL may terminate registration. He argues that, for example, a failure to follow reasonable instructions might fall within the definition of misconduct, but there are then processes for dealing with misconduct. There could not be automatic termination for a failure to comply with and to follow instructions.

70. Two reasons were given in the termination letter. The first was the failure to meet "agreed conditions required to return from a period of interruption." Reference is made to a letter of 31 January 2019 which set out an expectation of return to study on 25 February 2019 and as part of the process the requirement to undergo an OH Assessment to confirm fitness to return to study. Reference is made to an appointment with OH arranged for 12 February 2019 and following cancellation by AW of that appointment, the reminder letter sent on 22 February 2019 and its request to "make urgent effort to attend Occupational Health so you can be cleared as fit to study." The reason continued that the failure to re-arrange the Occupational Health appointment meant that AW could not return to complete the course. The relevant letter dated 31 January 2019 was that of Ms Carroll (Paragraph 30 above). Mr Dunlop QC states that reliance on that letter would not justify termination given:

(1) The want of power under the Regulations to send a student a letter telling him to do something and then simply terminating their registration if they do not. The failure to obey a reasonable request might enable action to be taken, for example, for misconduct or FTP (Fitness to Practise) procedures, but that is not, Mr Dunlop QC submits, a power instantly to terminate.

(2) Secondly, the letter did not give any particular date by which AW had to attend the OH referral. It simply acknowledged the expected return date of 25 February 2019 and the requirement to undergo an OH Assessment. The position of AW set out in her letter of 19 February 2019 was that the assessment was premature when AW had not agreed when she would return. On 22 February 2019 AW emailed Ms Catlow, a Disability Adviser, copying her into the letter of 19 February 2019 to Ms Trubshaw. She observed that until the date for return had been agreed, it was not then the case. An updated report was premature because it might become out-of-date. Mr Morrison by emails on 17 April 2019, 7 June 2019 and 20 June 2019 asserted there had been requirements laid down by the ERP (on 17 July 2018) and had made recommendations relating to OH re-assessment prior to return. Mr Dunlop QC points out the ERP did not have power to impose conditions. Ms McColgan refers to Ms Carroll's letter of 13 April 2018 (Paragraph 23 above) setting out the approval by the Interruption of Study Panel to IOS extension until 25 February 2019 and the need for a new assessment by OH prior to return from the extended period of interruption. But Mr Dunlop QC takes the point that such did not inform the "agreed conditions" ground of termination in the letter dated 12 March 2019. He contends that Ms McColgan's reference to IOS extension and the condition of an OH Assessment is an argument as to what SGUL might have relied upon by the letter of 12 March 2019, not what it in fact relied upon.

71. The second reason in the letter of 12 March 2019 was "the failure to attend." It refers to the expectation that AW would return to study on 25 February 2019 to complete outstanding P Year placements in Paediatrics, Neurology, Psychiatric and Palliative Care. The reason refers to a failure to attend the first placement allocated in Paediatrics at St Helier Hospital or to inform the Placement Co-Ordinator on the MBBs Programme Team of AW's absence. It also stated that AW had failed to

complete the enrolment process. It referred to Article 4.1 of the General Regulations for Students' Programmes of Study 2017-18 (Paragraph 52 above). Mr Dunlop QC's submissions in relation to the "failure to attend" reason and its reference to Regulation 4.11 and the failure to re-enrol are that such was a make-weight and the principal reason was Reason 1, the failure to meet agreed conditions. He submits that if Reason 1 was unlawful, I could not be sure that SGUL would have taken the same decision. He refers again to the want of reliance on Regulation 4.11 in the cited emails of Mr Morrison. He contended that his justification for not allowing a complaint was that termination was the automatic consequence of Reason 1 and the failure to attend an OH appointment. In the AOS no reliance was placed on Regulation 4.11. Indeed, the latter contended that SGUL was justified in the decision on the basis that "It was no longer possible for the Claimant to complete her studies within the requisite period." Mr Dunlop QC observes that was not a reason in the termination letter. In Paragraph 6.5 of the Detailed Grounds of Defence SGUL had admitted the decision to terminate "did not depend wholly or mainly on Regulation 4.11", a point Ms McColgan has also accepted. Further, Regulation 4.11 involved a discretion by the Registrar. As SGUL was minded to terminate for Reason 1, Mr Dunlop QC argues that the discretion may have operated differently if SGUL had recognised Reason 1 could not be relied upon.

72. Further, Mr Dunlop QC contends that Reason 2 was flawed given Regulation 4.11 permitted termination for "students who did not maintain contact by completing enrolment formalities and/or responding to correspondence", but AW had maintained contact at all times responding to practically all correspondence. But on that point Mr Dunlop QC observes that SGUL could not have had the 2018/19 wording in mind as they did not cite that wording of Regulation 4.11.

73. Ms McColgan contends that SGUL's position is that the letter of 12 March 2019 did no more than confirm that which had become inevitable four weeks after AW had failed to return to her studies on 25 February 2019, namely that as a result of the failure to enrol in circumstances in which she had not applied for or been granted a further Interruption of Studies and had no further extension beyond the extended maximum period of study, she could not complete the course in the (extended) required timeframe. Such being case, Ms McColgan contends termination was inevitable. In relation to the letter of 12 March 2019, she contends that SGUL does not rely heavily or mainly on Regulation 4.11. The first reason did not involve Regulation 4.11.

74. Nonetheless, Ms McColgan contends that SGUL would have been entitled to rely on Regulation 4.11 to terminate the registration in its 2018-2019 provision that:

> "Students who do not complete enrolment formalities and meet satisfactory attendance requirements (following repeated and extensive correspondence) will, at the discretion of the Academic Registrar, have their registration terminated."

Discussion

75. I make two preliminary observations which matter to me, even if they may be simplistic.

76. First, the termination of a student's registration would in most cases be a serious matter for the student. When I was a student, I might have been "sent down". Had

that been under consideration, I would have expected a case to be made out against me and the opportunity to reply.

77. Secondly, a university may, in hopefully rare cases, have the need to terminate a student's registration or to send him or her "down".

78. I accept the points made by Mr Dunlop QC cited at Paragraph 67 above. First, a university should act consistently with its published policies. Second, a student would have a legitimate expectation that it would do so. Third, a university's regulations and policies are part of the contract between it and the student. At least they include and impose obligations where both are concerned. Fourth, given the fees paid and time spent by the student, the student would reasonably expect regulations and policies to govern, for example, provisions relating to termination of registration, as a matter of fairness.

79. The first reason in the letter of 12th March 2019 was the failure of AW to meet agreed conditions for returning from a period of interruption of studies.

80. AW by reason of her illness was granted IOS in April 2016 which she says was granted until 27 February 2017.

The Relevant Grant of Interruption

81. On 13 April 2018 AW was granted a further Interruption of Studies until 25 February 2019.

82. It has not been made clear to me whether there had been a formal grant for example until February 2018. The documents I have considered concern problems in 2017 relating to the reporting on and procuring of an OH assessment. On 26 March 2018 SGUL through Ms Carroll had expressed the need for an IOS where there had been a four weeks absence. The MBBS set out the hours of study required in the four year term and, as I have noted, the need to complete it in six years subject to permitted extension. The "Handbook" had, as I have noted, expressed the need for an IOS if the duration of time to be made up was more than four weeks in the P Year and for repeat attachments in the following year.

83. The letter of 13 April 2008 relating to the IOS to 25 February 2019 had made the point that AW would need, given the health grounds for interruption, to undergo a new OH assessment.

84. Candidly, in my view, such should have been obvious to AW and SGUL.

85. On 22 February 2019 SGUL through Ms Pigott made the point that AW should make urgent endeavours to attend OH so that she could be cleared for further study.

86. On 19 February 2019 AW had written to SGUL (through Ms Trubshaw, a letter copied to Mr Morrison). That letter is noted at Paragraph 31 above.

87. Its short terms were, in my view, AW's requirement for a further extension of her registration until her disputes with SGUL had been resolved. Those included her contention that SGUL should qualify its attendance policy where she is concerned to cater for any further treatment she required for her cancer.

88. It is unfortunate that AW did not explain when she expected to be able to return to and complete her course. She could not, in my view, have expected SGUL simply to leave open questions of further interruptions of study or extensions of registration. Professor Higham in her statement at, for example, Paragraph 20 sets out:

> "It is vital that students who wish to practise professionally have current knowledge and that the treatment of a patient is as up-to-date as possible."

She observed that she would have been concerned that AW having started the course in 2012 would have the knowledge and competence in 2019 to meet the standard required if she was given a further year or two years to complete her course. I would not question those points, although I accept, as is submitted for AW, that it would be for the relevant committee or panel that would have made any decision for further Interruption of Studies or further extension of registration.

89. There is to my mind a problem with the first ground of termination of a "failure to meet agreed conditions" for the return from IOS. AW had not "agreed" a condition. The ERP had not on 17 July 2018 had power to impose or sought to impose a condition on the extension until 31 August 2020. The IOS until 25 February 2019 as explained to AW on 13 April 2018 had noted the need for a further OH assessment before returning to studies. That should, as I have explained, have been obvious to AW.

90. The "problem" as it appears to me is that SGUL had not explained to AW that if she did not attend an OH assessment before 25 February 2019 SGUL would decide whether or not her registration should be terminated. Further, as Ground 1 had observed, SGUL had not sought her observations or submissions on the point.

91. The second point in the letter of 12 March 2019 raises the failure of AW to return to study on 25 February 2019 to complete her outstanding P Year placements and not attending the first of those planned placements in paediatrics or informing the Placement Co-Ordinator or the MBBS Programmes Team of her absence. The point is also made that she did not complete the enrolment process. I understand AW's points to be that as she had said on 19 February 2019 she wanted SGUL first to resolve her discrimination/attendance issues with her. As to enrolment, she considered she was already enrolled and she had paid her fees for the P Year. I also note that cited IOS policy 2.4 did not state there was a need to re-enrol at conclusion of a suspension.

92. To my mind it was and will have been an obvious concern to SGUL on 12 March 2019 that AW either could not or would not complete her course.

93. Nonetheless, the problem remains to my mind that SGUL did not write to AW to explain that it was considering termination of her registration and invite her evidence and submissions in that regard. It is for that reason that I have come to the conclusion that the decision of 12 March 2019 served on 3 April 2019 was unlawful.

Second Ground

94. The second ground has been that it is unfair to terminate someone's place at university:

(1) without inviting them to comment; and

(2) without giving them some system of review either internally or to the OIA.

As formulated in argument by Mr Dunlop QC, the OIA points are restricted to his submissions on Ground 3. Ms McColgan does not object to that reformulation except so far as it might be relevant to costs. Mr Dunlop QC makes the first point, which is not challenged, that there was a duty on SGUL to act fairly in relation to a consideration of termination of registration. He contends that fairness required SGUL to inform AW in "sufficient" detail (i) of the reasons why they were considering termination of registration and (ii) to give her an opportunity to respond. He cites ***Dymoke v. Association for Dance Movements Psychotherapy UK Ltd*** **[2019] EWHC 94**, a decision of Mr Justice Popplewell (as he then was). The claim in that case concerned the claimant's membership of a company promoting relevant dance music psychotherapy and encouraging standards in its practitioners. At Paragraph 65 the Learned Judge concluded that there was an implied term that the contract between the company and Ms Dymoke that she would be treated fairly in relation to her termination and in particular that she would be informed of the complaints or concerns in sufficient detail to enable her to respond to them and would be given a reasonable opportunity to respond. He found that the giving of such information would apply not only to the substance of the complaints but also to the question as to whether they justified the sanction of termination of membership.

95. Mr Dunlop QC submits that it was not enough for SGUL to tell AW that she was expected to return to study in February 2019 and expected or recommended to attend an OH assessment or referral. Mr Dunlop QC says that SGUL needed to be fair to AW to make it clear to her that if she did not attend the OH referral by a certain date or enrol by a certain date her registration would be terminated. That did not happen in this case. Ms McColgan submits that SGUL was not under an obligation to issue AW with any more warnings than it had by the time of the letter of 12 March 2019. She draws my attention in context to the letters of 13 April 2018 (at Paragraph 23 above), 17 July 2018 (at Paragraph 25 above), 31 January 2019 (at Paragraph 30 above, the letter from Ms Carroll), 1 February 2019 and 22 February 2019 (at Paragraph 32 above). The letter of 1 February 2019 was one of three automated emails setting out "It is a condition of continued registration that you enrol for each year", a point in regard to which AW says that she thought she had already enrolled in P Year. Mr Dunlop QC addresses those letters in turn. He acknowledges that they communicate expectations and recommendations, but none of them says "Do X by Y date or your registration will be terminated." I agree with Mr Dunlop QC. SGUL failed fairly to AW to make clear that if she did not attend an OH referral by a certain date or re-enrol by a certain date her registration would be terminated.

96. The unfairness which I have described correlates with the problem I have already found in regard to the letter of 12 March 2019.

Ground 3

97. Ground 3 refers to denying AW the chance to complain to the OIA as being unfair and/or frustrating the legislative purpose of the OIA scheme.

98. As formulated in argument by Mr Dunlop QC, there are two separate elements to Ground 3, namely the refusal to hear a complaint or appeal (internally) or to issue a COP letter.

99. Mr Dunlop QC asserts that the refusal to hear a complaint was a breach of SGUL's own policy. In context, he refers to SGUL's "Student Concerns Complaints Procedure 2018-2019". At Paragraph 1.2 it provided:

> "This procedure applies for students and recent students of [SGUL]. The term 'student' includes those registered or enrolled on a programme. It includes those on an interruption study or suspension and those who left the University with a period of 3 calendar months."

As Mr Dunlop QC notes, AW asked to complain the day she received the termination decision. At Paragraph 1.3 complaint is defined, including in relation to "the actions of a member of staff … except … as detailed in Paragraph 3 below." Paragraph 3 dealt with matters not covered under the Students' Complaints Procedure. Paragraph 3.1 says that the procedure is not appropriate for dealing with "appeals" against the decision of a Committee of SGUL taken under the formal stage of another procedure. Mr Dunlop QC explains that the decision impugned was not a decision of a Committee under another procedure (e.g. FTP Committee). It was a decision to terminate AW's place taken by their Academic Registrar, not by a Committee and not under the formal stage of another procedure.

100. As Mr Dunlop QC submits, the only defence in Ms McColgan's Skeleton is that a complaint would have amounted to an appeal against Ms Swarbrick's decision of 30 January 2019. She had upheld ERP's recommendations as reasonable. As Mr Dunlop QC submits, it does not follow that the Academic Registrar was entitled to terminate AW's registration for failing to follow those recommendations. Such was a separate decision to be made and required consideration why AW was not following the recommendations and whether her refusal to do so was so serious as to merit termination. Mr Dunlop QC says that decision should have been made by an FTP Committee, but it was not. It was a decision made by the Registrar outside that process and as such AW was entitled under the policy to complain. As I have noted (Paragraph 35 above) on 5 April 2019 AW was told she had a right to complain but on 17 April 2019 SGUL through Mr Morrison set out that SGUL was not prepared to consider a complaint given the upholding of the failure of her ERP appeal and the ERP conditions. In my view, AW was entitled to make her internal complaint for the reasons Mr Dunlop QC has submitted.

101. Mr Dunlop QC submits that SGUL should have issued a COP letter. Under the OIA Rules termination required a COP letter. The OIA Guidance Note update in January 2019 says at Paragraph 5.4:

> "A COP letter should be issued when the Provider reaches a final decision that results in the exclusion or suspension of a Student under any of its procedures, including disciplinary procedures."

102. Mr Dunlop QC does not seek on behalf of AW any mandatory order to issue a COP letter, not least because the termination has been challenged under County Court proceedings and indeed in this case. He submits, however, that I should still make a declaration that a COP letter should have been issued so that universities and students will in future know where they stand. Mr Dunlop QC submits that a COP letter should have been issued in relation to the termination decision. The fact that one had been issued in relation to Ms Swarbrick's decision that the ERP recommendations have been reasonable is not a reason for failing to issue a COP letter relating to the termination decision by Ms Laws. A point is made in the Skeleton Argument of Ms McColgan that the OIA might have accepted a complaint anyway but, as Mr Dunlop QC observes, the failure to issue a COP letter left a student in the position of AW in a statue of uncertainty. In seeking a declaration relating to the failure to issue a COP

letter, Mr Dunlop QC submits that there is a public interest in the Court upholding OIA Rules and making it clear to universities that they will be held to account for a failure to issue COP letters.

103. I accept that SGUL through Mr Morrison was wrong to consider that a complaint would have amounted to an appeal against Ms Swarbrick's decision of 30 January 2019. A finding that the recommendations of the ERP were reasonable did not lead to a finding that the Registrar was entitled to terminate registration for failure to follow those recommendations. Such was a separate decision to be made and was made which would have entitled a COP letter.

104. Nonetheless, I do not consider that it would be appropriate to make any declaration in that regard. The real issue which I have already considered under Ground 1 and Ground 2 is whether SGUL should have given AW the opportunity to give evidence or make submissions in relation to the decision to terminate her registration. That did not happen, hence in short terms the unlawfulness in that regard that I have found.

Relief

105. In relation to Section 31(2A) of the Senior Courts Act 1981, Mr Dunlop QC observes that before its enactment a finding that a claimant had not been given a fair opportunity to make representations would almost inevitably have led to relief. Courts were unlikely to refuse relief on the basis that having a fair opportunity to make submissions would have made no difference. He submits that "outcome" for the purposes of Section 31(2A) is not restricted to the final decision but also includes the hearings which lead to that outcome. He submits that someone who is heard but then does not get what he wants has a different "outcome" to someone who is never heard. Further, he submits, that a Court is likely to require a signed witness statement with a statement of truth before it even considers any submission that relief should be refused under Section 31(2A). In ***R (B) v. Office of the Independent Adjudicator*** **[2019] PTSR 769** a complaint by a former university medical student against the OIA relating to a decision by the university following an investigation that he was not fit to practise was dismissed because that complaint was "relevant proceedings which had been concluding making ineligible the further complaint to the OIA." But for my purposes, the decision of John Bowers QC sitting as a Deputy High Court Judge in that case is referred to me for comments made by him at Paragraphs 69 and 70 of his Judgment citing from earlier decisions. He observed that there is a high threshold for finding that it is "highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred" for the purpose of Section 31(2A) of the 1981 Act and/or the expectation of the Court. In considering whether the test in Section 31(3C) or (2A) was met, the Court would expect a witness statement to support reliance on those amendments to Section 31. Mr Bowers QC at Paragraph 78 did consider for the purposes of Section 31(2A) in that case that it was highly likely that the relevant result would have been the same even if the defendant OIA should have considered the complaint. In ***R (Balajigari) v. SSHD*** **[2019] 1 WLR 4647** the Court of Appeal was considering Judicial Review of decisions by the SSHD in four cases relating to refusal to the claimants in respect of claims of indefinite leave to remain in the UK. At Paragraphs 134 to 141 the Court of Appeal was considering whether a legally flawed decision would not be quashed where the errors are immaterial. It noted that in the decision of the Court of Appeal in ***R v. Chief Constable of Thames Valley Police ex p Cotton*** **[1990] 1 IRLR** Bingham J (as he then was) at paragraph 60 had observed that:

> "While cases may no doubt arise in which it can properly be held that denying the subject an adequate opportunity to put his case is not in the circumstances unfair. I would expect those cases to be a rarity."

In ***Balajigari* at 136** the Court of Appeal considered the new sub-section (2A) to Section 31 of the 1981 Act. At **141** the Court of Appeal declined for want of relevant submissions to deal with the threshold of materiality affected by Section 31(2A) in cases of the kind before that Court. The observation in that paragraph was that factors identified by Bingham LJ in ***Cotton*** remain relevant to assessment. In ***R (Bahbahani) v. Ealing Magistrates Court* [2019] EWHC 1385 (Admin); [2019] 3 WLR 901** the Court was considering Judicial Review of convictions of the claimant where the claimant's agent had been impersonating him, that being contrary to the relevant criminal statute which required that the claimant should be present at the hearing. The case was wholly unusual, but the Court rejected argument that relief should be refused because the claimant would have been convicted anyway. At Paragraph 78F the Court in rejecting the submission observed that "outcome" was not limited to verdict, though the Divisional Court of the Queen's Bench Division when speaking of a criminal trial was not suggesting that point was limited to criminal trials.

106. AW contends that I should quash the decisions of 12 March 2019 as sent out on 3 April 2019 as I found them unlawful under Grounds 1 and 2. Ms McColgan's Skeleton Argument puts forward three reasons which were not relied on in the termination letter as to why SGUL was "entitled" to terminate. Ms McColgan submits such are reasons why the termination decision should not be quashed despite its unlawfulness. The three reasons are, first, that SGUL would have been entitled to rely on Regulation 4.11 of the 2018/2019 General Regulations, could have relied on the IOS Panel's decision of 13 April 2018 and that AW had no time to complete her studies within the maximum period and the ERP would not have granted a further extension.

107. Mr Dunlop QC raises a fundamental point for rejecting those arguments, principally that such points should have been made at the time to AW and AW needed to be given a fair opportunity to respond. She was not given that opportunity. I consider that AW if given the opportunity to address in evidence or by submissions the proposal to terminate her registration could have addressed any reliance in fact made on Regulation 4.11 of the 2018/2019 General Regulations or the decision of 13 April 2018 relating to IOS and her need for a further OH assessment before resuming her course on 25 February 2019. Further, she would have set out any reason she may then have had for the grant of a further extension to her registration. She was not given that opportunity.

108. In relation to the failure to enrol and Regulation 4.11 of the 2018/2019 General Regulations, Mr Dunlop QC makes points which have force. First, Regulation 4.11 in its earlier form and in its 2018/2019 form gives a discretion. Slight reliance had been placed on Regulation 4.11 at the time of the impugned decision. I should be cautious in accepting an assertion that SGUL would have placed more reliance on Regulation 4.11 if they had otherwise understood their reason at the time was a bad one. Second, there is no witness statement from SGUL stating that if consideration were given to non-enrolment alone they would still have terminated. In the absence of any such evidence from SGUl it makes it difficult to find that it was highly likely that they would have done so. Third, the failure of AW to re-enrol required correspondence giving her warning of the possibility of termination if she did not enrol. Repeated and

extensive correspondence had not related to the need to enrol by 12 March 2019 or face termination. Fourth, AW contends that she would have enrolled if she had been given the relevant warning of a possible termination. The point appears to me that she was simply not given the relevant opportunity to enrol in answer to a threat to terminate registration.

109. Next, in relation to the 13 April 2018 letter setting out the decision of the IOS Panel to grant IOS until 25 February 2019 it did not in any event require AW to attend an OH appointment by a particular date or to enrol by a particular date. Further, there is no power under SGUL's policies to terminate without going through the FTP procedures for failure to follow an IOS recommendation or condition. Yet again, there is no signed witness statement from SGUL saying that it was highly likely to have terminated because of the failure to carry out the OH re-assessment simply because the OH re-assessment had not taken place prior to the expected date of resumption of studies.

110. The next point concerns the inability of AW to complete her degree within the registration period which had been extended to August 2020. Mr Dunlop QC makes, in my view, an important point that I cannot be satisfied with any degree of certainty what the ERP would have done if AW had returned to university in 2019 or 2020 and completed her P Year and then applied to the ERP for one more year.

111. Considering the matters discussed from paragraphs 105 to 110 above, I am not persuaded that this is a case in which I should refuse relief for my findings of unlawfulness under grounds 1 and 2.

112. For reasons I have already given, I do not consider it appropriate for me to declare that SGUL should have heard AW's complaint immediately after receipt of the termination decision or that it should have provided a COP letter. In practice, I have concluded that the relief I should give is to quash the decision of 12 March 2019 as served on 3 April 2019. I shall give the parties 14 days from the handing down of this decision to address me on issues as to costs or permission to appeal. Such will be dealt with on paper.

113. I should acknowledge that at the close of his submissions Mr Dunlop QC invited me to inform the parties as to whether I would quash the decision since AW might have had the opportunity to conclude P Year by August 2020. The short reason I did not give such a decision at the close of two days' submissions was that I needed carefully to consider and for that reason reserve my decision. I would hope that in the light of my quashing decision that both SGUL and AW will have the opportunity to determine whether it is possible for AW to resume studies to complete the P Year and then the final F Year of her course. In context, they will have in mind how to deal with and avoid unnecessary consequences of the recent Covid-19 lockdown.