OUTER HOUSE, COURT OF SESSION

[2023] CSOH 44

P761/22

OPINION OF LORD LAKE

In the Petition of

CHASE SHAFFAR-ROGGEVEEN

Petitioner

for

Judicial Review of a decision of the sub-committee of the Students Appeal Committee of Edinburgh University taken on 1 December 2021

Petitioner: J Barne KC; Anderson Strathern LLP
Respondent: N McLean, Solicitor advocate; Brodies LLP

7 July 2023

[1] In 2019 the petitioner enrolled with the respondent to commence study towards a PhD in archaeology in their School of History, Classics and Archaeology. As with any of the respondent's postgraduate students, he was required to undertake a first progression review within 12 months of enrolment. He had that review, and the eventual outcome of it was a decision that he should be excluded from study. In a decision of 1 December 2021, the sub-committee of the respondent's Student Appeal Committee ("SAC") rejected his appeal against that decision. He challenges the appeal decision. While the challenge is to the decision of the SAC and turns on what that body did or did not do, to understand what was before it and provide context to the parties' arguments it is necessary to consider the events which led to the decision and the framework of applicable rules.

Background

[2] A number of different sets of rules and pieces of guidance make up the framework within which the decision was taken and the various stages it had to pass through. The requirement for a first progression review arises from regulation 13 of the Respondent's Postgraduate Assessment Regulations for Research Degrees (the "Assessment Regulations") applicable at the relevant time. It required that students be subject to such a review within 9 to 12 months of enrolment. Regulation 14 stipulates the possible outcomes of the review as follows:

> "The Postgraduate Director or Head of the Graduate School, in consultation with the supervisors will make one of the following recommendations after the annual review
>
> (a) confirmation of registration, for example for PhD, MPhil;
> (b) a repeat progression review must be undertaken within three months before confirmation of progression;
> (c) for part-time students only for the first progression review: deferment of the confirmation decision to the second annual review;
> (d) registration for a different research degree such as MPhil or MSc by Research;
> (e) registration for a postgraduate taught degree (for example MSc) or diploma can be recommended if the student has undertaken the coursework for that qualification;
> (f) exclusion from study.
>
> The College Postgraduate Committee is responsible for making the progression decision, having considered the recommendation of the Postgraduate Director or Head of the Graduate School."

If the outcome of the annual review is that a repeat progression review is to be undertaken in terms of sub-paragraph (b), regulation 5 states that it is to be undertaken within 3 months of the decision.

[3] The Assessment Regulations cross refer to the Respondent's Code of Practice for Supervisors and Research Students (the "Code"). Paragraph 3.1 of the Code indicates that

the review will be conducted by a panel which includes all the members of the student's supervisory team and may include one or more people appointed by the School. The inclusion of the supervisors on the panel is consistent with the reference to them in paragraph 14 noted above. Paragraph 3.1 of the Code also states that:

> "The panel will decide whether they think the student can progress to their next year, and will provide the student with feedback."
>
> "The supervisors will advise the School Postgraduate Director (or Head of the Graduate School) regarding the formal progression recommendation for submission to the College Committee for its approval."

Paragraph 3.2 of the Code states that where a supervisor thinks that progress has been consistently unsatisfactory they should discuss the matter with the student and follow that up with a written record of the discussion. It also says that where exclusion from study is recommended supervisors will provide students with a written explanation of their assessment.

[4] Where the recommendation from a review is that the student be excluded from further study, the Respondent's Withdrawal and Exclusion from Studies Procedure (the "Exclusion Procedure") is engaged. Paragraph 17 of this states that in this situation:

> "The Convener of the College Postgraduate Committee (or delegated authorising officer) will inform the student that exclusion from study for unsatisfactory academic progress has been recommended, and offer the student the opportunity to attend an interview. Where an interview is held, this provides an opportunity for the student to make a case for continuation."

Whether or not the option of an interview is taken up, regulation 19 requires the Convener of the College Postgraduate Committee or his delegate to determine whether to exclude the student or to exercise one of the alternatives available under the regulation 14. I would note that at this stage, the decision is taken by the convenor and that the function of the review panel is to make a recommendation to him as to the decision. Where the convenor's

determination is that the student should be excluded from further study, the exclusion procedure provides that an appeal may be made (regulation 41). The appeal is heard by the Student Appeal Committee and its sub-committees. The procedure for the appeal process is regulated by the Respondent's Student Appeal Regulations.

[5] The Student Appeal Regulations specify the available grounds of appeal. They are limited in scope and the appeal does not constitute a *de novo* determination of the decision to exclude. For appeals against exclusion, the Student Appeal Regulations stipulates that the available grounds are:

- Ground A: Substantial information directly relevant to the decision to exclude the student which for good reason was not available to the Head of College, or his or her delegate, or other authorised officer when their decision was taken.
- Ground B: Alleged irregular procedure or improper conduct of the Procedure for Withdrawal and Exclusion from Studies.

There are separate grounds which apply to academic appeals. In error, the appeal made in this case referred to those grounds rather than the ones for appeals against exclusion. Both, however, include reference to irregular procedure and improper conduct and the parties have proceeded on the basis that nothing turned on the fact that the wrong set of grounds were invoked. I have taken the same approach in this opinion. When an appeal is made, a sub-committee of the Student Appeal Committee will consider whether sufficient grounds have been set out for there to be further consideration of the case (Student Appeal Regulations, regulation 40).

Proceedings in respect of the petitioner

[6] The petitioner's first annual review was conducted by his supervisors, Dr Linda Fibiger and Dr Xavier Rubio-Campillo, and Dr Pickard, another employee of the respondents. The outcome was that he was required to undertake a repeat review within 3 months. The petitioner was given feedback from the review. This feedback raised the issue of the methodology he would employ in carrying out his research. Following the first review, the petitioner began to express concerns as to the relationship he had with his supervisors. The petitioner had a meeting with Dr Ugolini, Postgraduate Director, and Professor McDowall, Deputy Postgraduate Director, to discuss these concerns. The appointed supervisors nonetheless continued to have contact with him and gave him advice as to what was required of him in relation to the repeat review. On 11 August 2020, Dr Fibiger, provided him with feedback from the first annual review and further feedback was provided on 21 August by Dr Rubio-Campillo. The petitioner responded to this feedback with further information on 31 August 2020 although he expressed the view that some of what he was being asked for was "silly and a waste of time". There was then a reply from Dr Fibiger on 29 September 2020 in which she provided the petitioner with feedback on a draft of a document he had submitted for the repeat review. The substance of the feedback and the correspondence which followed concerned the methodology that the petitioner intended to use to complete the research required for his degree.

[7] The repeat review took place on 6 October 2020. The petitioner's supervisors were again part of the panel that carried out the repeat review. The petitioner had requested that they be excluded from the panel but was told that it was not possible. Once again, there was also a third member, a Dr Bendray, for this review. In addition, Professor MacDowall attended the review as a non-participant. The outcome of the repeat review was a

recommendation that the petitioner be excluded from study. This was passed by Professor McDowall to the Postgraduate Director, Dr Ugolini, in an email of 15 October 2020. She in turn recommended to the Post Graduate Dean that the petitioner should be excluded from study. In her email giving her recommendation, she said:

> "I would like to strongly recommend the exclusion of [sic] study of the first year PhD student, Chase Shaffar-Roggeveen.
>
> In addition to the recommendation of his supervisor from the follow up progression annual review, we also have a wealth of emails in support of our case."

[8] An email dated 23 October 2020 was then sent to the petitioner on behalf of the College Postgraduate Education Committee informing the petitioner that the committee had approved the recommendation and informing him of his right to an interview. The petitioner took up his right. The interview was held on 9 November 2020 and was conducted by the Dean of Postgraduate Education, Professor Stephen Bowd. The petitioner provided documents for the interview and it is apparent from the record of the interview that he focused his arguments on the issue of whether he had met the requirements set by his supervisors in preparation for the repeat review. At the end of the interview, Professor Bowd confirmed he would review the documents that had been provided and said he would ask the school for comment. When Professor Bowd sought comment from the petitioner's supervisors, their response indicated the basis on which they considered that what he had submitted did not comply with instructions he had been given and that the instructions were detailed and unambiguous. In an email dated 13 November 2020, Dr Fibiger stated that they had considered that:

> "There was insufficient evidence (especially in view of this being a repeat review) of how the research questions and methods could be linked to generate the data required to produce a PhD. This includes a lack of detail and critical understanding of methods and analytical processes, which are all vital to moving from the

> descriptive to the advanced critical engagement required to complete a PhD successfully."

She said they did not wish to prolong a project that in its current form "would not result in a PhD".

[9] On 24 November 2020, Professor Bowd sent an email to the petitioner which noted that his supervisors still considered there were weaknesses in the work he had submitted. It went on to state:

> "They [the Supervisors] have stated that the persistence of these weaknesses - even after extended correspondence, which I have seen - raised broader and serious concerns about the viability of the thesis and about the potential for progression to a successful submission. In sum, in the panel's academic judgment and despite very detailed advice about the expectations for the repeat review, your progress was consistently unsatisfactory, and the quality of the work did not reach the level of critical engagement expected at this level and in this field. In this case the panel had a duty of care to ensure that you that you [sic] did not proceed with work highly unlikely to meet some or all of the key criteria applied by examiners at the viva voce examination including work that makes a 'significant contribution to knowledge'."

Professor Bowd considered that the panel's actions were in accordance with provision in the Assessment Regulations which said that a candidate might be excluded if there are serious doubts about their research capability. He concluded that the petitioner should be excluded from his PhD studies. The information and comments that had been made available to Professor Bowd were not provided to the petitioner prior to the email of 24 November 2020 being sent.

[10] The petitioner then appealed Professor Bowd's decision in terms of the Exclusion Regulations. This was refused by the Appeal Committee on 10 February 2021 but that decision was set aside by the respondents. The reasons for that were not considered before me. Before the appeal could be reheard, the petitioner recovered material concerning him from the respondents by means of a subject access request in terms of data protection legislation. The petitioner then submitted a revised statement of appeal dated 8 July 2021

for the second appeal. This document was lengthy and was not well focused but it raised the following matters among others:

a) That his supervisors were prejudiced against him. He relied in this regard on a number of items of correspondence he had recovered including:

i. Emails in which Professor McDowall had forwarded to his supervisors his complaints about the guidance he had received from them.

ii. An email in which Professor McDowall had referred to him as a "...very problematic student who should never have been admitted".

iii. An email from Professor McDowall to Dr Fibiger which said, “I'm afraid this is all fairly predictable - one of his own admission references describes him as a very difficult person who doesn't listen".

iv. An email from Dr Fibiger to Professor McDowall dated 10 September 2020 in which she responded to an issue which had been raised by the petitioner in an email of that date.

b) That no or inadequate consideration had been given to the fact he had complained about his supervisors and they were the “examiners” for the purpose of the annual review.

c) That no or inadequate consideration had been given to the fact that he had not seen or been able to comment on the representations made to Professor Bowd after his interview.

d) In referring to doubts about his research capability and viability of the thesis, the decision of Professor Bowd relied on criticisms that he had not been notified of

prior to the decision. He claimed that it was incumbent on the respondent to explain the basis for their doubts and why they had not been disclosed to him sooner.

e) That no or inadequate consideration had been given to requirements of the Respondent's Code of Practice which had not been observed. He referred to a failure to comply with the requirements in paragraph 3.2 of the Code referred to above.

The appeal was considered by a sub-committee of the Student Appeal Committee and by letter of 1 December 2021 he was informed of their decision that he had not set out sufficient grounds for the appeal to be considered further.

The grounds of challenge

Grounds 1 and 4

[11] It is worth noting at the outset that while the unfairness and procedural impropriety are said to have arisen in the decision making prior to the decision by Professor Bowd, the challenge is to the decision of the Appeal Committee. Any ground of challenge must relate to its decision. I mention this as much of the focus on what happened concerns the interview the petitioner had with Professor Bowd but it is not the decision that must be considered in this application for review.

[12] The degree of overlap between grounds 1 and 4 is such that they can usefully be considered together. Both contend that the Appeal Committee did not consider arguments presented to it to the effect that the original decision taken had been unfair because the petitioner was not given information he required in order to argue that he should not be excluded. In the first ground of challenge, the unfairness was said to arise from reliance placed upon material that Professor Bowd had obtained from the supervisors which was not disclosed to the petitioner prior to his interview. The information he said he was not given

was that concerning doubts about his research capability, the viability of his proposed thesis and whether it would make a significant contribution to knowledge. The fourth ground is that the respondent failed to comply with the Code in that they did not disclose to him in the course of his review or prior to the interview matters that they relied on when taking their decision. The matters specifically referred to in this context are the same as said to arise from the information obtained by Professor Bowd after the petitioner's interview. It is contended that it too is a failure to adhere to the required procedure and gave right to unfairness.

[13] The decision of the SAC makes no mention of these arguments. It states merely that there is "no evidence of irregular procedure, improper conduct or lack of due diligence in the conduct of the assessment". The respondents submitted that sense of proportion has to be retained in respect of what is expected of a decision-maker in terms of reasons (*Uprichard* v *Scottish Ministers* 2013 SC (UKSC) 219, paragraph 44). While that is correct, it is notable that the decision here said nothing at all about the arguments noted above put forward to them and, even reading the reasons for the Appeal Committee's decision broadly, it does not appear that these matters were considered. It is apparent from the submission that the petitioner made to the Appeal Committee that both the lack of fairness and the failure to comply with procedures were within the matters raised in the context of the appeal. Were they relevant considerations which the Committee was bound to take into account and consider? In my view they were.

[14] I was referred to *R (Doody)* v *Secretary of State for the Home Department*, [1994] 1 AC 531 at 560, as authority for the proposition that what is required by way of fairness depends on the context and that it will often require that a person is informed of the gist of the case they need to answer. The same point was made by an Extra Division in *Glasgow*

City Council v *Scottish Information Commissioner*, 2010 SC 125, paragraph 82. In *Kanda* v *Government of Malaysia*, [1962] AC 322 (discussed to in *R (Ramda)* v *Secretary of State for the Home Department*, 2002 EWHC 1278, which was referred to before me), Lord Denning had said that if the right of a person to be heard is to be worth anything, it must carry a right of the person to know the case against him.

[15] The context here was that in terms of the Exclusion Procedure, the petitioner was entitled to seek an interview to "make his case" for why he should not be excluded. I do not consider that the language used elevates the matter to something on a par with a court process, but it is consistent with the use by Dr Ugolini in her email of 15 October 2020 of the expression "in support of our case". It is apparent that what is meant is that this was his chance to put forward his argument in response to the view that he should be excluded. As was pointed out by Mr Barne, this was his only opportunity in the process to do that. This meant that if the respondent had a "case" for the basis on which exclusion was ultimately recommended, the gist of it should have been effectively communicated to the petitioner prior to that interview. That was not done. The respondent contends that the petitioner received significant feedback and, by reference to *Ramda* that it was not necessary to enter into a dialogue. While it is true that the petitioner received feedback and that a dialogue is not required, he was not told of doubts about his research ability or as to the viability of his thesis and it was these matters which were the crux of the reason that he was excluded. It was a question of informing him of the matter that was the core of the decision that would be taken in relation to him and not a matter of protracted dialogue. That the petitioner was not told of this was a matter that ought to have been considered by the Appeal Committee. This is an issue of failing to take account of a material consideration and not a question of the merits of academic judgment.

[16] The respondent drew my attention to the fact that at the end of his interview with the petitioner, Professor Bowd told him he would seek comment from the HCA on the material that the petitioner provided for the interview. It was said that this was sufficient to put the petitioner on notice of the additional material that would be considered. The respondent also claims that the material did not include anything that the petitioner would not already have been aware of through feedback from his review and email correspondence from his supervisors. I do not consider that knowing that comments would be sought from the HCA is the equivalent of knowledge of the substance of the comments. It is the latter which was relied on and should therefore have been disclosed. For the reasons noted above, I do not accept that the feedback contained nothing that the petitioner would not already have been aware of.

[17] The respondents argued that any unfairness arising from the non-disclosure was cured by the fact that prior to submitting his statement of appeal for the second appeal, the petitioner had recovered emails referred to in para [10] (a)(i) to (iv) above. While it is correct that he had the materials by this time, that does not remove the unfairness. An appeal considers only whether there has been irregular procedure or improper conduct and is not a reconsideration of the merits of the underlying decision. This means that while the petitioner could (and did) claim that the procedure was flawed in that he did not have the information at the time of his interview, it could not, in effect, conduct that interview again and hear the arguments he might have made had he had the information at the time.

[18] For completeness, I record that I was referred to the decision in *Beltrami & Company Limited* v *Scottish Legal Complaints Commission,* 2022 SLT 663, but did not find it to be of assistance. It addresses a situation in which there was a failure to comply with an express

requirement that the detail of a complaint be notified to the person against whom it had been made.

Ground 2

[19] The second ground of challenge is that the SAC failed to have regard to the allegations made that there had been inadequate supervision and bias and that these were relevant considerations. The position in relation to inadequate supervision can be dealt with quite shortly. The decision letter said expressly that the Student Appeal Regulations "are not the appropriate mechanism to deal with complaints regarding supervision". It is therefore clear that they were not considered by the SAC when deciding whether there was enough to proceed to a full appeal. This approach conflicts with the Code of Practice which states that, "an appeal might question the quality of Supervision". On that basis, I consider that the complaint was a relevant consideration and should have been taken into account when considering the appeal. As is clear from the respondent's submissions, there is a dispute as to whether the supervision was in fact inadequate. That is not a matter I am in a position to determine. The point is that it was a matter that was raised before the sub-committee and that in expressly declining to consider it, they left a relevant consideration out of account.

[20] The position in relation to bias is less clear cut. The petitioner's position is not that the presence of his supervisors on the review panel *per se* creates a concern as to bias - it is that they had expressed views noted in para [10](a) above which raise the concern. In this regard, the respondents referred me to *Congregation of the Poor Sisters of Nazareth* v *Scottish Ministers*, 2015 SLT 445, as authority on what would be required for bias. One of the points referred to in the opinion of Lord Woolman after his review of the authorities is the fact that

the threshold for determining that there has been bias is a high one (para [30]). Lord Woolman also makes reference to a dictum from Kirkby J in *Johnson* v *Johnson*, (2000) 201 CLR , noting the fair-minded and informed observer from whose standpoint the appearance of a real possibility of bias must be judged will know that sometimes adjudicators say or do things that they might later wish they had not without disqualifying themselves from continuing to exercise their powers. In this case, it is likely that Professor McDowall and Dr Fibiger both regret the contents of the emails referred to in paragraph 10 above. However, Professor McDowall was not part of the panel which made the recommendation and was merely an observer, so his comments are not directly relevant. Dr Fibiger was part of the panel because she was the petitioner's supervisor. Having experience of the petitioner's work and a view of it is precisely why she should be in a position to conduct the review. While her comments were not appropriate, I do not consider that they meet the test for concluding that there was bias.

Ground 3

[21] The third ground is that the Appeal Committee erred in finding that the presence of an independent member would have helped ensure impartiality. As I have found that the decision is not vitiated by bias, this issue does not arise.

Ground 5

[22] The petitioner argues that the sub-committee erred in not considering alternative disposals in terms of regulation 14 of the Assessment Regulations. Of the alternatives available, the confirmation of registration (sub-paragraph (a)) was by implication rejected as the petitioner's work was not considered satisfactory. The option of a repeat review

(sub-paragraph (b)) was not available as it had already been exercised when the matter was first considered and the notes to regulation 15 indicate that there may be only one repeat review. This leaves the options of deferring confirmation to the second annual review (sub-paragraph (c)), registration for a different research degree (sub-paragraph (d)) and registration for a postgraduate taught degree if the student has undertaken the course work required for that qualification (sub-paragraph (e)). This ground must proceed on the basis that the other grounds noted above have not been upheld such that the substance of the decision relating to the petitioner remain. If that was the position, those reasons would be entirely inconsistent with allowing study to continue for another year and the sub-committee are not at fault for not expressly considering that option. The petitioner had made it clear in an email of 9 September 2020 that he did not wish to proceed to another research degree or a masters degree. He had not completed coursework for another taught degree. As these were not live options the sub-committee is not at fault for not considering them.

Remedies

[23] On the basis of my decision as to grounds 1 and 4 and the non-consideration of the issue of supervision in ground 2, I consider that the petitioner is entitled to reduction of the decision of the sub-committee of the Students Appeal Committee of Edinburgh University dated 1 December 2021. The respondents contended that notwithstanding this, the decision of the Appeals Sub Committee should not be reduced. They argued that there is no real possibility that the decision would have been different absent those defects, that on this basis, any error is immaterial and that the remedy of reduction should be refused. I do not accept this submission. The respondent submitted that by reference to *Clark* v *University of*

Lincolnshire and Humberside, [2000] 1 WLR 1988, and *R. (on the application of Kwao)* v *University of Keele*, [2013] EWHC 56 (Admin), that matters of academic judgement are non-justiciable. This was accepted by the petitioner and I agree with this proposition. It means that I am not in a position to judge what the outcome would have been had the errors in the process not existed. The position is therefore different from that in the case of *Ashiq* v *Secretary of State for the Home Department*, 2015 SC 602, referred to by the respondents. In that case, the decision in question concerned a matter on which the court could adjudicate competently so could reach a view on the merits. I consider that the correct approach in this regard was set out by Lord Boyd of Duncansby from *McHattie* v *South Ayrshire Council*, [2020] CSOH 4 paragraph 51, as follows:

> "it would only be where it was plain and obvious that the outcome would be the same that it would be right to refuse to reduce a decision on that ground. The court should not attempt to take over the decision making process or speculate as to what the outcome might be."

That approach was endorsed by Lord Richardson in *Kaagabot Limited and others* v *City of Edinburgh Council*, [2023] CSOH 10 cited to me. I do not consider that that test is met and accordingly the remedy sought by the petitioner should be granted.

[24] The respondents note that the petitioner has not sought reduction of the decision of Professor Bowd and yet relies on defects in his decision. It is correct that the petitioner does not seek to reduce Professor Bowd's decision. It is not correct, however, that the petitioner seeks to rely on failures in that decision in the petition. The grounds of challenge ultimately turn on the failure of the Appeal Committee to consider arguments that had been put forward as to why Professor Bowd's decision was flawed and, as such, failed to take into account a material consideration. In this regard I was referred to the decision in *R. (on the application of DR)* v *Head Teaching of St George's Catholic School*, [2002] EWCA Civ 1822, but

did not consider it to be relevant. It addresses the issue where an earlier decision "infected" a later one so it might be quashed. The issue here is concerned solely with the second decision. It is not suggested it is flawed simply because of the earlier decision. The flaws arise from failures in the process of taking the later decision. There is therefore no requirement to challenge Professor Bowd's decision. The effect of reduction of the decision of the Appeals Sub Committee is that they must consider afresh whether to allow the appeal against Professor Bowd's decision.

Decision

[25] In view of the above, I will grant the petitioner's motion, sustain the petitioner's second plea in law and reduce the decision of the sub-committee of the respondent's Student Appeal Committee dated 1 December 2021 in terms of which it was decided that sufficient grounds had not been established for the petitioner's appeal against his exclusion from study to be considered further.