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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

CS' Application [2015] NIQB 36

IN THE MATTER OF AN APPLICATION BY CS FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS TAKEN BY THE QUEEN'S UNIVERSITY OF BELFAST DATED 24 SEPTEMBER 2014 AND 1 OCTOBER 2014

HORNER J

A. Executive Summary

[1] This is a judicial review of decisions made on 24 September 2014 and 1 October 2014 by Queen's University Belfast ("QUB") to 'temporarily withdraw' the applicant from the University for the duration of a Sexual Offences Prevention Order ("SOPO") which expires on 5 September 2019, after which period the applicant could apply to the University for re-admission. It is important to emphasise that this is not an appeal on the merits. This is an application for judicial review.

[2] The court has declined to grant the judicial review for the following reasons:

(i) It has concluded that the Board of Visitors has exclusive jurisdiction to hear the applicant's appeal from the decisions of which he complains, subject to four exceptions. These are that the Board can be subject to judicial review when it exceeds its jurisdiction, abuses its powers, breaches the principles of natural justice and/or does not protect the rights a party enjoys under the European Convention of Human Rights ("the Convention").

(ii) Regardless of the exclusive jurisdiction of the Board, the court requires the applicant to exhaust his remedy before that Board prior to seeking any judicial review.

(iii) The judicial and extra judicial support from many eminent legal figures for the exclusive jurisdiction of the Board of Visitors offered over hundreds of years, remains as true today as when it was originally offered. Indeed, there are good grounds for concluding that the judicial tide flows even more strongly in favour of hearings taking place before such bodies. Of course, as a public authority the Board is now obliged to act in a Convention compliant way.

(iv) In any event the challenge is premature. The process has not yet run its course. At common law and under the Convention, the whole process has to be considered in assessing whether there have been breaches of the applicant's convention or common law rights. The court is not in a position, nor should it try to determine whether the applicant's common law or convention rights have been infringed. This should only take place after there has been a full hearing before the Board of Visitors.

B. Introduction

[3] In this application the applicant seeks to judicially review QUB arising out of decisions made to suspend him as a student from studying Chemical Engineering for a period of 5 years. He has successfully completed 2 years of his course to date. At the end of this period, the applicant has the option to re-apply to continue his studies, but he has no guarantee of being admitted back to QUB. The first decision under challenge is the decision of the Review Panel comprising Wilma Fee, the Director of Academic and Student Affairs, Chris Hardacre, Head of School of Chemistry and Engineering and Kara Bailie, Head of Student Welfare. It is contained in a letter dated 24 September 2014 to the applicant informing him that he would be temporarily withdrawn from the University for the duration of the SOPO which would expire on 5 September 2019 and which was imposed by Her Honour Judge Philpott on 5 September 2014 at Belfast Crown Court on account of his commission of various sexual offences. After that period he could then apply to QUB for re-admission. The second and central decision which the applicant seeks to

judicially review is the decision of the Review Appeals Panel which met on 1 October 2014 and which heard an appeal from the first decision. They concluded:

> "Based on the evidence presented the Panel found no reason to overturn the decision of the Panel of 24 September 2014, therefore the appeal was not upheld. The Panel did take into consideration the fact that this was a lengthy period but concluded that the SOPO was either workable or was not, regardless of its duration."

[4] An application for judicial review was filed by the applicant on 29 September 2014, that is after the first decision but before the second decision. The applicant was granted anonymity through email correspondence on 29 September 2014, a day before the matter was brought before the court as an emergency leave application. The leave application was adjourned to permit, inter alia, amendment of the Order 53 Statement to include a challenge to the second decision. Leave was granted on 19 November 2014. At that time the court did not have detailed information relating to the appointment and independence of those Visitors who comprised the Board of Visitors, to whom the applicant could petition, that is effectively appeal, the two earlier decisions.

[5] This judicial review gives rise to a number of interesting issues, the chief one of which had been anticipated in Croskery's (Andrew) Application [2010] NIQB 129, namely what effect the Human Rights Act 1998 has on visitorial jurisdiction. However, in that case, given the nature of the dispute, namely whether the applicant's degree should be reclassified, the trial judge may not have adequately described the nature of the hearing before the Board in other types of case: see page 235(a). There are a number of other issues which also require resolution. The court acknowledges the assistance and support it received from counsel on all sides at both the leave and hearing stage. Detailed and carefully thought out written skeletons were submitted by both sides and these were augmented by well-constructed oral submissions. Indeed after the submissions had concluded, two further cases were drawn to the attention of the parties. Their legal teams responded promptly with further detailed written submissions.

C. Background

[6] It is essential to provide a context to this judicial review challenge. The central facts are as follows:

(i) The applicant is 21 years old. He is a student at QUB where he had been studying Chemical Engineering successfully for 2 years. This is a 4-5 year course. He commenced the course in September 2012. The applicant has a certain amount of computer expertise which the court understands is necessary to allow the applicant to carry out this course of studies.

(ii) On 31 January 2013 whilst in first year, the applicant was arrested and interviewed in relation to the possession of indecent images of children. He made admissions to the police and he was released on police bail. The conditions of bail included:

(a) Not to have any unsupervised contact with anyone under 18 years of age; and

(b) Not to use a computer or the internet.

(iii) The applicant failed to report what had happened to QUB. Most importantly he did not inform QUB of the bail conditions. This was a significant omission because it is common case that much of the applicant's course can only be accessed via a computer. Further there are a number of students at QUB under 18 years. But significantly there are many school children on the University campus all under the age of 18 pursuing a variety of activities from time to time.

(iv) The applicant says that he observed the conditions of his bail by obtaining assistance from two friends and his family to access the internet for him. He does accept that he breached the conditions of his bail on two occasions, but he did so having sought prior permission from the police. They granted him the necessary permissions, he claims. He then accessed "computers on more than one occasion on each of these instances".

(v) Affidavit evidence has been filed by QUB making it clear that it does not accept that the applicant accessed the computers on the campus in accordance with the conditions of the SOPO. Ms McNeely, the Head of Student Affairs and the Acting Head of Academic Affairs at QUB in her second affidavit said at paragraph 18:

> "The University does not accept that the Applicant did not breach his bail conditions given the nature and extent of his accounts being accessed."

She goes on to say at paragraph 24:

> "The University is concerned about these examples as they demonstrate that the Applicant's accounts have been used in computer sessions presumably commenced by other users who have not logged out when leaving the terminal for a short while. Therefore students from other programmes have logged onto the network to make the computer usable, at which point one can do things like

> access the internet, use a word processor, access QOL, etc … The University is therefore concerned at the prospect of the applicant being able to '**piggy-back**' on other users' sessions, which would leave his presence and activity undetectable and untraceable."

(vi) The applicant first appeared at Belfast Magistrates' Court on 24 July 2013. He was released by the court on bail subject to the same conditions as before.

(vii) On 28 July 2014 the applicant pleaded guilty to specimen offences. There were three counts of making indecent photographs contrary to the Protection of Children Order, one count of making an indecent photograph of a child and a number of counts of possessing indecent photographs. It is not disputed that the applicant accessed the most appalling and depraved images of children. Sentence was deferred until 5 September 2014.

(viii) On 29 July 2014 an emergency precautionary suspension was imposed upon the applicant by QUB. The University Regulations are clear in that there was a duty on the applicant to notify the University as soon as he was convicted of the offences. QUB consider that there is a breach of good faith on the part of the applicant and that he should have contacted it when he was first charged and granted police bail. It remains unhappy that he continued with his course at University while subject to onerous conditions as to, inter alia, computer use, and yet the University authorities remained in the dark.

(ix) A meeting of the Review Panel was arranged for 6 August 2014. In the meantime the applicant's solicitor, Mr Mackin had made contact with QUB. He was informed that he could not be in attendance. The applicant did have the option of appearing in person, but chose to make written representations. These were dated 5 August 2014. In the statement the applicant admitted his involvement in the offences as previously described, he confirmed that he had been living at an address in County Tyrone, the home of his grandmother and that his conditions of bail were to reside there and have no unsupervised contact with children under the age of 16 years. He said:

> "I accept that I did not report this matter to the authorities in Queen's University and regret that the University became involved through the media. I have had great difficulty coming to terms with both my problems and dealing with these matters as they appeared before the Courts. In due course, when various medical reports are available I can provide these to the University."

(x) On 6 August 2014 the applicant received a letter from Professor Tony Gallagher, Pro Vice Chancellor, informing him that in accordance with the University Conduct Regulations, Section 5 "Precautionary suspension of or exclusion pending a hearing". The decision was that the emergency precautionary suspension imposed on 29 July 2014 should continue "pending the outcome of the criminal proceedings." In a letter he was offered the continuing support of the University's occupational health physician and asked to contact Ms Kara Bailie, Head of Student Welfare. He was also told that the suspension would be reviewed every 4 weeks, that the review would be undertaken by Professor Gallagher and that it would not involve a hearing. He was given the opportunity to make written representations for the purpose of Professor Gallagher considering whether or not to extend the period of suspension. Subsequent reviews did take place.

(xi) On 5 September 2014 the applicant was sentenced to a Probation Order of 3 years' duration. Most importantly a SOPO was made for a period of 5 years' duration. This contained the following conditions.

(a) The applicant was prohibited from:

> "using any computer, iPhone or mobile device which would facilitate internet access unless approved by his designated Risk Manager ("DRM") and the following conditions are met:
>
> (i) it retains, and has capacity to display the history of internet use;
>
> (ii) it does not have any cleaning software installed and;
>
> (iii) the defendant is able to and does make the device available for inspection to a Police Officer;
>
> (iv) he must not delete the history of internet use on any device used for internet access."

(b) He was prohibited from any work or any other activity, whether paid or unpaid or voluntary which exposed him to contact with any child under the age of 18 years unless approved by his DRM and he was not to have access to or association with any child or children under the age of 18 years without the approval of Social Services save for that which is unforeseen and unavoidable in the course of daily life.

(c) He was also prohibited from denying police access to his home, computers and associated media storage, to include search and examination without the suspicion of an offence having been committed, to ensure he was complying with the terms of the SOPO and submit a risk management under the Public Protection Arrangement for Northern Ireland.

(d) Finally, he was prohibited from entering into any future relationship without prior or verified disclosure having been made in respect of his offending with his DRM.

(xii) According to the legislation under which the SOPO is made, such an order can only be made provided the court is satisfied that:

(a) it is *necessary* for the purpose of *protecting the public* from *serious sexual harm* (emphasis added);

(b) it must relate to something that the offender is threatening or likely to do.

(xiii) The Pre-Sentence Report produced for the court described the applicant as being addicted to pornographic images of children and of him "becoming obsessed with this type of material". It noted that he saved "files to his pen drive". This is to prevent detection by others who might be using his computer. There was evidence that he had actively sought to cover his tracks when using the internet. The applicant found that his "use of child pornography became very problematic over a relatively short period of time." Thus, there was objective evidence of the applicant's computer skills and knowledge together with his willingness to use them to carry out offending behaviour without being detected. He was assessed as being at a medium likelihood of re-offending.

(xiv) In her sentencing remarks the Deputy Recorder noted, inter alia, that:

(a) He had put his University education in jeopardy;

(b) She did not see why with proper supervision that he should not be allowed to continue his education;

(c) While there might be difficulties in working with the SOPO, it should be served on his supervisor if QUB decided to take him back;

(d) He remained at risk of the police coming to his home and searching his computer to ensure that he was complying with the SOPO.

(xv) QUB found out about the conviction through reports in the press. The applicant had instructed his solicitor to make contact with QUB but when he did so, Queen's University was aware of his offending through its reporting in the local media.

(xvi) On 24 September 2014 the applicant was advised that a Review Panel had considered his case in the context of the risk and the level of responsibility which the University would be required to assume "in the event of your returning to Queen's". The applicant made short written representations and did not appear. It concluded:

> "Taking all the information into account, the Panel agreed that acceding to your request to return could not be accepted in light of your current circumstances. You will, therefore, be temporarily withdrawn from the University for the duration of the Sexual Offences Prevention Order, which expires on 5 September 2019, after which period you may apply to the University for re-admission."

It also advised that if he was dissatisfied with the Panel's decision he might appeal to the Pro Vice Chancellor.

(xvii) The applicant's solicitor then sent a pre-action protocol letter to QUB on 25 September 2014. There was no reply and an Order 53 Statement was issued on 29 September 2014 and leave for judicial review was sought on an urgent basis because the applicant had been due to enrol for his course on 29 September 2014.

(xviii) A meeting of the Review Appeals Panel took place on 1 October 2014. The panel comprised Professor James McElnay, Pro Vice Chancellor, Professor Tom Millar, Dean of Engineering and Physical Sciences, Dr Joan Rahilly, Director of the Institute of Theology and Ms Helen McNeely, Acting Head of Academic Affairs. The applicant was not permitted legal representation. He attended on his own, although his father had brought him there. His father was not permitted to accompany or assist the applicant during the hearing. The Panel considered evidence about the access of minors to the School of Chemistry and also the use of computers and software required during the third year of study on the BSc Chemical Engineering course. It concluded:

> "Based on the evidence presented the Panel found no reason to overturn the decision of the Panel of 24 September 2014, therefore the appeal was not upheld. The Panel did take into consideration the fact that this was a lengthy period but concluded the SOPO was either workable or it was not, regardless of its duration."

(xix) The applicant was formally advised of the decision by letter dated 3 October 2014 which set out in some detail the reasons for the decision of the Review Appeals Panel. It stated:

> "The Appeals Panel were of the view that the restrictions placed on you were incompatible with the normal business of the University and placed an unacceptably onerous burden on the University in relation to your compliance with the SOPO.
>
> The Appeals Panel was concerned when you disclosed, for the first time, that restrictions on computer use/internet access had been in place as part of your bail conditions, without the knowledge of the University."

The letter also went on to advise that the applicant had exhausted the University's internal procedures. However, he was entitled to petition the Board of Visitors. The Visitors are appointed by the Privy Council. They are wholly independent of QUB, they are not paid by the University although some of the expenses which they incur may be reimbursed by QUB. They comprise Sir Malachy Higgins, who chairs the Board. He has completed two 5 year terms of office and his appointment has been extended for a further 2 year period to conclude in December 2015. He is a retired Lord Justice of Appeal with a special interest and expertise in the criminal law. The other members are Her Honour Gemma Loughran, a retired County Court Judge, who had many years' experience as a Crown Court Judge, Ms Ann Shaw who is a person experienced in the governance of a range of public and voluntary bodies, and Mr Denis Wilson who is the Convenor of the Board of Visitors at QUB and who acts as Secretary to the Board. He is able to access secretarial assistance from QUB as and when required. He is not employed by QUB.

(xx) The jurisdiction of the Board of Visitors under the Charter, Statutes and Regulations is a very wide one and all sides agreed that this particular matter potentially came within the Board's wide jurisdiction.

[7] It is against the above factual background that the applicant's challenge to the decisions of QUB that he should "remain temporarily withdrawn and will not be permitted to apply for re-admission to the University until 5 September 2019", must be considered.

D. The Challenge

[8] The Order 53 Statement has undergone various mutations during the course of these proceedings. The challenge that the applicant now makes can best be summarised as follows:

(1) Are the applicant's Convention rights under Article 2 Protocol 1, Article 6 and Article 8 engaged and, if so, are they violated?

(2) Has there been a sea change since the passing of the Human Rights Act? Accordingly are all the cases which comment favourably on visitorial jurisdiction to be disregarded, or at best, given limited weight? Or can they be applied compatibly with the applicant's Convention rights, even if engaged?

(3) The process to date has been unlawful in that:

(a) It has not complied with the rules of natural justice.

(b) It has not been Article 6 compliant.

(c) The appeal before the Review Appeal Panel was unfair and contrary to natural justice, procedurally unfair and contrary to the law.

(d) The decision was disproportionate.

(4) Further any hearing before the Visitors would not be Article 6 compliant and in any event would not repair earlier breaches of the applicant's Convention and common law rights.

(5) Insofar as the hearing before the Visitors is an alternative then it should be disregarded because:

(a) there is no funding available before the Visitors and the applicant would be denied legal representation; and

(b) there will further unacceptable delay.

(6) In response, QUB dispute each of these propositions seriatim. Although it only formally contends that the applicant's human rights are not engaged as per (1) above, it denies that there has been any breach of those rights in the circumstances of this case. Its answer to the other alleged breaches is that even if they occurred in the process to date, firstly, this Court has no jurisdiction whilst there is an extant right or appeal to the Board of

Visitors; and, secondly, and in the alternative, this application is premature and it is necessary to wait until the process is run, including the hearing before the Visitors (and, if necessary, any judicial review before the High Court) before determining whether the procedure is Convention and Common Law compliant.

E. Convention Considerations

[9] Article 6(1) of the European Convention on Human Rights ("the Convention") provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life if the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The two main complaints made about the hearings to date, and which it is claimed infringed the applicant's Article 6 rights, were firstly that they were not open to the public and secondly that the applicant was not legally represented and had no access to Legal Aid in order to pay for legal representation. However, QUB stated that even if this were true, and Queens did not accept this argument, the applicant had the right to appeal to the Board of Visitors. He had not done so but instead had chosen to attack the process prematurely, before it had taken its course. The applicant claimed that each earlier hearing tainted or had the potential to taint the other or any further hearing. An example provided was the conclusion reached by the Review Appeals Panel about the applicant's ability to complete his course and observe the conditions of his SOPO regarding computer use. Professor Hardacre who is the Head of School of Chemistry and Chemical Engineering sat on the Review Panel. He provided substantial information on this issue in the absence of the applicant who only made written representations. Consequently his evidence was not challenged. No one from the School was available for the Review Appeals Panel hearing although Dr Sheldrake, Director of Education in the School was contactable by phone should the Appeals Panel have required clarification. It does not appear that any such clarification was sought. Instead the Review Appeals Panel appear to have relied on the earlier unchallenged evidence of Professor Hardacre and he is quoted in the decision as saying:

> "Level 3 Chemical Engineering has a major component of design and CAD which requires access to computers within the School and across the campus and also requires file sharing with other members of the class in group projects. I do not see how it would be practical for us to ensure that all the files and computers he would access during these activities at the level of internet access restriction and browsing history traceability required by the SOPO".

The applicant had no notice that this evidence was going to be adduced. He does not accept that this evidence is correct. He strongly challenges this conclusion. So there is a major dispute about whether "online activity is a pre-requisite for someone doing his course". The applicant says that this is a classic example of how the earlier hearing infected the later hearing, making both hearings unfair to the applicant.

[10] The argument advanced on behalf of QUB was that even if there was merit in such an argument, which it did not accept, the fact was that the applicant had the right to appeal to the Board of Visitors. He had chosen not to do so. The process was therefore incomplete and this application was premature. The major difference between the applicant and QUB was whether the court should look simply at the two hearings in isolation or look at the entire process in the round. It was not disputed that a judicial review of the hearings before the Review Panel and the Review Appeals Panel required the court to take into account the Convention's general principles of law, which included the proportionality principle. In R (Daly) v Secretary of State for the Home Department [2001] UKHL 26 Lord Steyn at paragraph 24 said that proportionality is "applicable in respect of review when Convention rights are at stake." In Tweed v Parades Commission for Northern Ireland [2007] 1 AC 650 at 655 Lord Carswell said that:

> "The proportionality of a public authority's interference with a protected Convention right is likely to call for a careful and accurate revaluation of the facts."

Professor Anthony in his book, Judicial Review in Northern Ireland (2nd Edition) at 5-20 says:

> "Put strictly, in the event that the decision-maker does not give consideration to rights during the decision-making process, it may be that the court would have to subject the final decision to close scrutiny to ensure that the decision-maker has struck the appropriate balance between all affected rights and that the decision is in that way compliant with the ECHR."

[11] However, under the Convention jurisprudence the court must look at the whole process. De Smith's Judicial Review (7th Edition) at 8-036 states:

> "It is well-established in the case law in the ECtHR that the requirements of art. 6 are satisfied if either (a) the initial decision-maker is independent and impartial or (b) there is control by a judicial body with full jurisdiction, which does satisfy the art. 6 requirements. In other words the question is whether the composite procedure satisfies art. 6."

The right to an appeal hearing which is Convention compliant will normally cure any earlier defects in the process: see Albert and Le Compte v Belgium [1983] 5 EHRR 533. Of course, the applicant maintains that any hearing before the Board of Visitors is not sufficient to protect his Convention rights. This is an argument that will need to be explored in some depth later on in the judgment.

[12] Article 2 of Protocol No. 1 to the Convention states:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

The effect of the "suspension for 5 years" of the applicant with no guaranteed right to return is to deprive the applicant of the ability to access tertiary education. At the very best he will be denied the opportunity to study chemical engineering at QUB for 5 years. In Sahin v Turkey [2007] 44 EHRR 5 the Grand Chamber considered the issue of a university education in the context of an applicant who had been refused admission to lectures, courses and tutorials because she was wearing an Islamic headscarf. It held at paragraph 141:

> "… it is clear that any institutions of higher education existing at a given time come within the scope of the first sentence of Art. 2 of Protocol No. 1, since the right of access to such institutions is an inherent part of the rights set out in that provision. This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very term of the first sentence of Art. 2 of Protocol No. 1 read in its context and having regard to the object and purpose of the Convention, a law- making treaty."

It went on to make clear that this right was not an absolute one at paragraph 154. It said:

> "In spite of its importance, this right is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access **by its very nature calls for regulation by the State.** Admittedly, the regulation of educational institutions may vary in time and in place, inter alia, according to the needs and resources of the community and the distinctive features of different levels of education. Consequently, the contracting states enjoy a certain margin of appreciation in this sphere, although the final decision as to observance of the Convention's requirements rests with the Court. In order to ensure that the restrictions that are imposed do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness, the Court must satisfy itself that they are foreseeable for those concerned and pursue a legitimate aim. However, unlike the position with respect to Arts. 8 to 11 of the Convention, it is not bound by an exhaustive list of '**legitimate aims**' under Art. 2 of Protocol No. 1. Furthermore, a limitation will only be compatible with Art. 2 of Protocol No. 1 if there is a reasonable relationship of proportionality between the means employed and the aims sought to be achieved."

Consequently the Board of Visitors and any subsequent reviewing court will have to consider whether any "suspension" imposed upon the applicant is proportionate in all the circumstances.

[13] Art 8 of the Convention states:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There should be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Both parties agreed that this Article did not add to the protection enjoyed by the applicant pursuant to Articles 6 and 2 of Protocol No. 1. Consequently it did not require individual consideration.

[14] The court is satisfied that in considering the Convention issues it should look at the whole process. This involves considering the hearing before the Board of Visitors and the right to such a hearing being reviewed by this court on certain limited, but defined grounds.

F. Common Law Considerations

[15] It was submitted on behalf of the applicant that there had been wide-ranging breaches of the common law in respect of the conduct of the Review Panel hearing and the Review Appeals Panel hearing. It has to be recognised that this is a most unusual situation. It is one that it seems unlikely that QUB has had to cope with before. That is part of the problem. QUB says that it did not deal with this issue as a disciplinary matter. It points out with some force that if it had, then the applicant would have been dealt with under the Conduct Regulations and he would have been liable to expulsion either on the ground of indecent behaviour or for bringing the name of the University into disrepute. Leaving aside the issue of double jeopardy and the trial Judge's remarks that she could see "no reason why with proper supervision, you shouldn't be allow (sic) to continue that education", it is clear that the precautionary suspension was imposed under paragraph 5.2 of the Conduct Regulations. However, the decision to "suspend the applicant for 5 years" was made pursuant to Appendix 2 which has been designed to provide a framework for making decisions about the admission of applicants to QUB who want to study there but who have a criminal record. QUB maintains and has maintained that neither hearing was a disciplinary hearing under the Conduct Regulations and it did not impose a disciplinary sanction. It was not an adversarial process but was a "risk management meeting" looking at how QUB might "fit the SOPO into QUB life".

[16] Clearly Appendix 2 was designed to deal with a somewhat different situation to the instant one, namely the admission of applicants with criminal records. The attempts at moulding this procedure to fit the applicant's situation has not been a particularly happy one. Two examples should suffice. QUB appears to have confused the Conduct Regulations with Appendix 2 when it prevented the applicant from being accompanied by his father as a friend to the Review Appeals hearing: see the provisions at paragraph 7.10. This refusal appears to have been prompted by paragraph 10.1 of the Conduct Regulations which restrict those accompanying an accused to a registered student, a member of staff of QUB or University Chaplaincy. In the instant case the applicant complains that he was psychologically disturbed and in a vulnerable position. He required his father for support. That support was denied to him unlawfully at the Review Appeals Tribunal. Furthermore, while denying a student the right to be admitted to a university course may be an administrative act, different considerations may arise when:

(a) that person is already a student at the university with an expectation of completing his degree course;

(b) he has successfully completed 2 years of his course; and

(c) he has been suspended for 5 years but has no right of automatic admission at the end of that 5 years but simply the right to apply again presumably under Appendix 2.

Accordingly, the effect of a "suspension" in those terms is to deprive the applicant of the right to a tertiary education. So although what has been imposed in this case on the applicant has been called a suspension, it could just as easily be labelled an expulsion with the right for the applicant to apply in 5 years' time under Appendix 2.

[17] Another example of where QUB has confused the Conduct Regulations with Annex 2 is where it is sought to rely on paragraph 6.11 of the Conduct Regulations when the dispute arose about whose responsibility it was to arrange for the applicant's DRM either to attend the Review Appeals Panel to give oral testimony or to provide a written statement on the issue of the risk posed by the applicant completing his course. The court would have expected the Review Appeals Panel, if acting under Appendix 2, to have relied on paragraph 11 and exercised its discretion to seek written evidence from the DRM whose contact details had been provided to it by the applicant. It is not necessary to consider the other complaints of breaches of the common law levelled at the hearings at QUB because as Burton J said in Davies v Farnborough College of Technology [2008] IRLR 14 at page 19 it is "trite law" that ordinarily a fair and independent appeal can cure an original defect if it is comprehensive enough to offset the earlier unfairness. In this case the applicant enjoys the right to an appeal hearing before an independent and experienced Board of Visitors. Furthermore, any decision of the Board of Visitors is subject to review by this court. It is therefore unnecessary for this court to explore any further the complaints of the applicant about common law unlawfulness, which, if they do have any substance, and this court makes no further comment on that issue, are capable of being cured at the subsequent hearing(s).

G. The Board of Visitors

[18] As has been previously recorded in this judgment, it is not contested that this dispute comes within the jurisdiction of the Board of Visitors given that the applicant has the right to petition them in respect of the 5 year "suspension" imposed upon him by QUB. In Philips v Bury Holt CJ said as long ago as 1692:

> "… the office of visitor by the common law is to judge according to the statutes of the college and to expel and

> deprive upon just occasions, and to hear appeals of course. And from him, and him only, the party grieved ought to have redress and on him the founder reposed so entire confidence that he will administer justice impartially, that his determinations are final and examinable in no other court whatsoever."

[19] It is unnecessary for this court to chart the jurisdiction of the general visitorial powers of the Board of Visitors as this has already been done in a magisterial fashion by Kelly LJ in Re Wislang's Application NI 1984 page 63. The product of his considerable researches and learning is set out at page 73A-91H. In the circumstances this court will simply highlight a number of issues pertinent to this particular judicial review. The Board of Visitors was a creature of the common law. Although visitorial jurisdiction survives in both universities in Northern Ireland, that is QUB and the University of Ulster, it has been abolished in England and Wales following the passing of Section 20 of the Higher Education Act 2004 and the coming into existence of the Office of the Independent Arbitrator.

[20] Up until the coming into effect of the Human Rights Act 1998 the visitorial jurisdiction was considered to be exclusive and final save for where the courts would hear applications for judicial review where there had been a failure to observe the rules of natural justice by the Board or where the Board had acted in excess of its jurisdiction.

[21] In R (Ferguson) v Visitor of the University of Leicester [2003] ELR 562 in giving the judgment of the Court of Appeal in England, Kay LJ held that judicial review did not lie to impeach the decisions of a Visitor taken within his jurisdiction (in the narrower sense) or on questions of fact or on law. The only matters that could be challenged by way of judicial review are that the Visitor had exceeded his jurisdiction, or that he has abused his power or that he had acted in breach of the rules of natural justice (per R v Lord President of the Privy Council ex parte Page [1993] AC 628). To that statement of the law must be added the right of the High Court to grant a judicial review when there is evidence that the applicant's Convention rights have been infringed.

[22] Visitorial jurisdiction has generally been looked on with considerable favour by the courts and by respected commentators for hundreds of years.

(i) William Blackstone in his commentaries in the Laws of England Volume 1 (10th Edition 1787 at page 480) said:

> "For corporations being composed of individuals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit,

> inquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil or eleemosynary."

QUB is an eleemosynary corporation established for the promotion of learning.

(ii) In AG v Talbot [1747] 3 Atk at 674 Lord Hardwicke said of visitorial jurisdiction:

> "… it is a more convenient method of determination of controversies of this nature, it is at home, **forum domesticum**, and final in the first instance, and they should be adjudged in a short way **secundum arbitrium boni viri**; it is true this power may be abused, but if it is exercised in a discreet manner, it is much less expense than suits at law, or in equity; and in general, I believe, such appeals have been equitably determined."

(iii) In R v Dunsheath ex parte Meredith [1951] 1 KB at 312 Lord Goddard CJ said:

> "… it is a very desirable thing that in a matter of this sort there should be some means of obtaining a final decision. The matter should not have to be brought before courts with the possibility of an appeal first to the Court of Appeal, and then to the House of Lords, on a matter which, after all, is a domestic matter referring to the Government and internal affairs of the University."

(iv) Sir Robert Megarry in the case of Patel v Bradford University Senate [1978] 1 WLR 1488 at 1499 said:

> "It is, I suppose, possible to criticise the visitatorial jurisdiction in university life as being a survival from past ages that ought to be abolished or reformed, and in the meantime at least construed restrictively by the courts. Why, it may be said, should most university students be precluded from access to the courts in many matters of dispute with the university authorities?
>
> I think that there is much that can be said in answer. I shall take three examples. First, there is no question of the students being denied access to a tribunal that can resolve the dispute: the only question is whether that tribunal is to be the visitor or the courts. For students who seek to

have a university decision set aside or reversed the advice in most cases should be 'Go to the visitor, not to the courts.'

Second, there is much to be said in favour of the visitor as against the courts as an appropriate tribunal for disputes of the type which fall within the visitatorial jurisdiction. In place of the formality, publicity and expense of proceedings in court, with pleadings, affidavits and all the apparatus of litigation (including possible appeals to the Court of Appeal and, perhaps, to the House of Lords), there is an appropriate domestic tribunal which can determine the matter informally, privately, cheaply and speedily, and give a decision which, apart from any impropriety or excess of jurisdiction, is final and will not be disturbed by the courts. This aspect of the matter has been the subject of repeated high judicial approval: see Attorney-General v Talbot (1748) 3 Atk 662, 674, 676, *per* Lord Hardwicke LC; St John's College, Cambridge v Toddington, 1 Burr 158, 199, 200, *per* Lord Mansfield CJ; Ex parte Wrangham, 2 Ves Jun 609, 619, *per* Lord Loughborough LC; Thomson v University of London, 33 LJ Ch 625, 635, *per* Kindersley VC; and Rex v Dunsheath, Ex parte Meredith [1951] 1 KB 127, 132, *per* Lord Goddard CJ.

Third, the extent of visitatorial jurisdiction in university life has greatly expanded in recent years. When Oxford and Cambridge were the only universities in England, a relatively small portion of the university population was within the visitatorial jurisdiction, and then only in relation to the colleges; and for those universities that remains true today. But with the founding of the 19th century universities came the general extension of the visitatorial jurisdiction to all the undergraduate members, instead of only the scholars. The same applies to the 20th century universities, as appears from a valuable article by Dr J W Bridge at (1970) 86 LQR 531, to which Mr Picarda referred me. (I am indebted to this article as well as to the lucid restatement of the law governing visitors which is set out in a book which Mr Picarda studiously refrained from citing, Picarda's *The Law and Practice Relating to Charities* (1977) pp 422–433.) The general picture of only a small part of the small undergraduate population of the universities being within the visitatorial jurisdiction has

> changed into a picture of the great majority of the far larger undergraduate population of the universities being within it. The visitatorial jurisdiction exercisable by the Lord Chancellor on behalf of the Crown must now be of formidable dimensions; for in most of the modern universities the Crown appears to be the visitor.
>
> It is true that there are recent instances where the visitatorial jurisdiction seems to have been forgotten or overlooked. It may indeed be that in Reg v Aston University Senate, Ex parte Roffey [1969] 2 QB 538 the short answer to the applicants (if anyone had taken the point) would have been that the court lacked jurisdiction, but that their complaints that they had been the victims of defective procedure and the lack of a fair hearing 'are essentially matters which touch the internal affairs or government of the college and are therefore matters confined by law to the exclusive province of the visitor': Herring v Templeman [1973] 2 All ER 581, 591, *per* Brightman J, a point not affected by the appeal: [1973] 3 All ER 569. Nobody could suggest that there was any need for the courts to intervene in the cause of natural justice in a case in which the Lord Chancellor appears to have had exclusive jurisdiction and had ample powers to rectify any failure of natural justice. In any case, no oversight such as there may have been in the Aston case can alter the law.
>
> The general picture is thus of a visitatorial jurisdiction which has much to commend it, and in recent years has greatly expanded. In those circumstances, I do not think that it should be regarded as something that should be construed restrictively, or as being an anachronism which at most is to be barely tolerated. Instead, I would regard it as being a valuable institution for contemporary society, and one which ought to be supported and maintained."

(v) The House of Lords has also endorsed the visitorial jurisdiction. In R v Hull University Visitor ex parte Page [1993] AC 682, Lord Browne-Wilkinson said at page 704C:

> "I accept that the position of the visitor is anomalous, indeed unique. I further accept that where the visitor is, or is advised by, a lawyer the distinction between the peculiar domestic law he applies and the general law is

> artificial. But I do not regard these factors as justifying sweeping away the law which for so long has regulated the conduct of charitable corporations. There are internal disputes which are resolved by a visitor who is not a lawyer himself and has not taken legal advice. It is not only modern universities which have visitors, there are a substantial number of other long-established educational, ecclesiastical and eleemosynary bodies which have visitors. The advantages of having an informal system which produces a speedy, cheap and final answer to internal disputes has been repeatedly emphasised in the authorities, most recently by this house in Thomas v University of Bradford [1987] AC 795: see per Lord Griffith at 825D; see also Patel v University of Bradford Senate [1978] 1 WLR 1488 at 1499-1500."

(vi) In the same case Lord Griffiths said at 945E:

> "If it is thought that the exclusive jurisdiction of the visitor has outlived its usefulness, which I beg to doubt, then I think it should be swept away by Parliament and not undermined by judicial review."

(vii) It is not just the courts which have made favourable observations about the exclusive jurisdiction of the visitor. Commentators have also expressed favourable and supportive views. JW Bridge in "Keeping the Peace in Universities" 86 LQR 550 decried any attempt to import the legal paraphernalia of the courts into the universities. He stressed the advantages of the visitorial jurisdiction over the courts in terms of suitability, cheapness, expedition and informality. He quoted the Hart Report which said:

> "To turn the hearing of every disciplinary charge into a formal public trial would be, at the best, time wasting and, at the worst, might damage young men's careers, and might sharpen and harden what has been a generally mild and even friendly attitude to those faced with disciplinary charges."

Those requirements are met by visitors who have traditionally been obliged "to pay more attention to matters of necessary substance than of positive form."

[23] Despite these judicial statements of approval of the exclusive visitorial jurisdiction from some of the most eminent judges of their time and the favourable views of highly respected legal commentators, Ms Quinlivan QC on behalf of the

applicant has urged this court to assume jurisdiction on the basis that the Board of Visitors in these types of cases is now redundant. She claims that the exclusive jurisdiction as previously understood of the Visitor has changed utterly since coming into effect of the Human Rights Act 1998. She says the protection of the applicant's Convention rights cannot be assured before the Board of Visitors. She claims that if the appeal is heard by the Board there will inevitably be breaches of his Article 6 rights and that the rights he enjoys under Article 2 of Protocol No. 1 (and Article 8) will neither be respected nor protected. It is in those circumstances she urges this court to assume jurisdiction.

[24] However, it is asserted that the Board of Visitors does not sit in public and that that constitutes a breach of Article 6(1). It would be surprising if the applicant genuinely wanted a public hearing. He has always sought to have the title of the proceedings anonymised because of the significant mental health risks for him that would attend any personal publicity. The claim that he would necessarily wish the public to be allowed to attend such a hearing and which might result in his identification and/or which could lead to further interest in the social media has a hollow ring to it. But there is a simple answer. The Board of Visitors is the master of its own procedure. If the applicant wants a public hearing, he can request one from the Board of Visitors. There is no material before this court to suggest that the Board would not respond sympathetically should such an application be made to it.

[25] The applicant complains that there was no Legal Aid for a hearing before the Board of Visitors and, thus, he will be deprived of legal representation. There is a paucity of information about the applicant's financial means and about any financial assets to which the applicant may have access. The applicant asked the court to assume that he has limited means because he is eligible for Legal Aid. However, attention is drawn to the following matters:

(i) The court is asked to draw the inference that his means are limited given that the applicant is eligible and has been granted legal aid for these judicial review proceedings. It is noteworthy that he has had the benefit of legal assistance throughout his struggle with QUB, although not at any hearing. It is his solicitors almost exclusively who have corresponded with the University.

(ii) According to the papers he has been able to seek private psychological assistance. There is nothing before the court about how this was funded or who funded it.

(iii) There is no evidence to what the costs of having legal representation before a Board of Visitors is likely to be, bearing in mind that such a hearing is likely to be informal and expeditious and user friendly.

(iv) In a judicial review any applicant puts himself at risk of being ordered to pay the costs of the other side if he loses. In this case the applicant has Legal Aid. This does not prevent the court from awarding costs against an unsuccessful applicant, although the usual order is that such costs should not be enforced without further order. However, it is important to realise that the stay can be removed should there be a material change in the applicant's circumstances. Obviously the costs QUB incurs before the Board of Visitors are likely to be substantially less than the costs which it will have to incur before a court of law. If the matter proceeds before the Board then it is unlikely that QUB will find it necessary to instruct solicitors or counsel. Indeed, in the most recent submissions, QUB have confirmed that if the applicant does not have legal representation before the Board of Visitors, then it will not avail of legal representation either.

(v) The submission that the court should ignore the fact that the applicant has the right to judicial review in circumstances discussed elsewhere in this judgment, and thus entitlement to legal aid, is wrong. By the same token the court cannot ignore the applicant's right to legal aid before this court. The potential for a judicial review of the Board forms part of the process: see R (Alconbury) v Secretary of State for the Environment (2001) UKHL 23. It is the process as a whole, including judicial review, that must be considered.

[26] As discussed, the right to Legal Aid is not critical to whether the proceedings before the Board of Visitors are Article 6 compliant. This issue was discussed in Perotti v Collyer-Bristow (a firm) and Others [2003] EWCA Civ 1521. Chadwick LJ giving the judgment for the Court of Appeal had to deal with a personal litigant who was asking the court to provide him with legal representation. He said at paragraph 29:

> "There is no obligation imposed therefore, in express terms, to provide free legal representation in civil cases. Nevertheless, it is not in doubt that one aspect of the right to a fair hearing, conferred itself in terms by Article 6(1) is effective access to the courts. The point is made in Airey v Ireland [1979] 2 EHRR 305, 314 at paragraph 24. The European Court of Human Rights said this:
>
> > **'The Convention is entitled to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. It may therefore be ascertained whether Mrs Airey's**

> **appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.'"**

He goes on to say at paragraphs 31 and 32:

> "31. Miss Moore suggests in her written submissions, in my view correctly, that the obligation on the State to provide Legal Aid arises if the fact of presenting his own case can be said to prevent him from having effective access to the courts. But a litigant who wishes to establish that without Legal Aid his right of effective access will have been violated has a relatively high threshold to cross.
>
> 32. It is, in my view, important to have in mind that however much this court, and indeed any other court, would welcome the assistance it can be given by a legally qualified and competent advocate, the test is not whether (with such assistance) this court would find it easier to reach the decision which it has to reach on the facts of the case. This court, and other courts, have ample experience of cases in which the material is not presented in an ideal form; I have not found it impossible to reach such decisions in such cases. The tests under Article 6(1), as it seems to me, is whether a court is put in a position that it really cannot do justice in the court because it has no confidence in its ability to grasp the facts and principles of the matter on which it has to decide. In such a case it may well be said that a litigant is deprived of effective access; deprived of effective access because, although he can present the case in person, he cannot do so in a way which would enable the court to fulfil its paramount and overarching function of reaching a just decision. But it is the task of courts to struggle with difficult and ill-prepared cases; and courts do so every day. It is not sufficient that the court might feel that the case could be presented better; the question for the court is whether it feels that the case is being, or will be, presented in such a way that it cannot do what it is required to do – that is to say, reach just decision. If it cannot do that the litigant is effectively deprived of proper access to the courts."

Kerr J reached the same view in Re Lynch's Application for Judicial Review (18 June 2002) when he said:

> "Article 6 of the Convention does not guarantee the right to legal aid for civil proceedings … The claim to be entitled to legal aid derives from the enshrined right to a fair and public hearing. But, in contrast to the position in a criminal trial, the Convention does not specify that for a trial to be fair, civil claims must be legally aided."

He concluded:

> "It would appear, therefore, that Article 6 of the Convention will require that legal aid be available only where it is impossible as a matter of practicality for a litigant to have access to the courts without it and where a matter of fundamental importance is at stake."

These authorities support the proposition that the test is whether it is possible in the absence of legal representation that the party will have effective access to the Board of Visitors so as to ensure that the Board is able to reach a just decision, fair to both sides.

[27] The issue of legal representation was subject to further more detailed discussion and analysis by the Court of Appeal R (On the Application of G and Others) v Director of Legal Aid Case Work and Another (British Red Cross Intervening) (2014) EWCA Civ 1622. Lord Dyson MR in giving the judgment of the Court had to consider the test for determining when Article 6 of the Convention and Article 47 of the EU Charter of Fundamental Rights ("the Charter") required the provision of legal aid in civil cases generally. The court doubted whether there was any material difference between the relevant provisions of the Charter and the Convention in the protection that they offered, that is Article 47(3) of the Charter and Article 6(1) of the Convention. It accepted that the level of procedure of protection provided by Article 47 of the Charter corresponded to that provided by Article 6(1) of the Convention.

[28] The Court of Appeal went on to conclude at paragraph [46] as follows:

> "[46] The general principles established by the ECtHR are now clear. Inevitably, they are derived from cases in which the question was whether there was a breach of article 6(1) in proceedings which had already taken place. We accept the following summary of the relevant case-law given by Mr Drabble: (i) the Convention guarantees rights that are

> practical and effective, not theoretical and illusory in relation to the right of access to the courts (Airey para 24, Steel and Morris para 59); (ii) the question is whether the applicant's appearance before the court or tribunal in question without the assistance of a lawyer was effective, in the sense of whether he or she was able to present the case properly and satisfactorily (Airey para 24, McVicar para 48 and Steel and Morris para 59); (iii) it is relevant whether the proceedings taken as a whole were fair (McVicar para 50, P,C and S para 91); (iv) the importance of the appearance of fairness is also relevant: simply because an applicant can struggle through "in the teeth of all the difficulties" does not necessarily mean that the procedure was fair (P,C and S para 91); and (v) equality of arms must be guaranteed to the extent that each side is afforded a reasonable opportunity to present his or her case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent (Steel and Morris para 62)."

It further commented at paragraph [72] as follows:

> "Where legal aid is required will depend on the particular facts of circumstances of each case, including:
>
> (a) The importance of the issues at stake;
>
> (b) The complexity of the procedural, legal and evidential issues;
>
> (c) The ability of the individual to represent himself without legal assistance, having regard to his age and mental capacity."

[29] While the applicant's continuing third level education at QUB is undoubtedly important to him, he is an intelligent young man and the issues to be decided are not complex. The applicant should have no difficulty in accessing the Board of Visitors. Indeed, given the make-up of the Board of Visitors, it is highly likely that if the applicant is unrepresented, then the proceedings will be organised so as to ensure that the applicant is able to put his case, and challenge the case put on behalf of the University in an effective manner. Both Sir Malachy Higgins, the Chairman of the Board, and Mrs Gemma Loughran have very considerable experience in dealing with personal litigants through their years of service as judges. They are particularly

well qualified to ensure that the applicant, even if he does not have any legal representation, will have effective access to the hearing before the Board. It seems to this court that the Board is likely to adopt a more inquisitorial approach if the parties are unrepresented to ensure that they are able to play a full part in the proceedings. This court agrees completely with the comment of Lord Dyson in R (On the Application of G and Others) v Director of Legal Aid Case Work and Another at paragraph 185 where he said:

> "Finally, we note that an important strand of the submissions of Mr Chamberlain is that, to some extent at least, courts (and in particular specialist tribunals) were able to adopt an inquisitorial approach and in that way ensure that litigants in person enjoy effective access to justice. We accept that this will be possible in many cases."

No credible case has been made that the applicant in this case, without legal assistance before the Board of Visitors, will be deprived of effective access. The court can be reassured given the identity of those on the Board of Visitors that it will be able to fulfil its paramount and overarching function of ensuring both sides receive effective access to justice and that ultimately a fair and just decision will be reached.

[30] The claim that the hearing before the Board of Visitors will not be sufficiently expeditious is one that is without factual foundation. Indeed, the Board as a master of its own procedure can fast track the process, if required. The court can be confident that the Board will come to a final conclusion well before the new academic year begins and the time fixed for enrolment. The application before this court is not to quash the decision but to send it back to a tribunal to make findings of fact on key issues, something which this court is significantly ill-equipped to do as the parties recognise. There is every reason to conclude that with the interruption of the long vacation, the requirement to arrange a fact finding hearing and the pressure of present court business that it will be impossible for this court to deliver a judgment within the necessary timescale, should that be necessary. It is far more likely that the Board of Visitors will be in a position to deliver its final judgment before the deadline of enrolment for next year's course.

[31] The suggestion that the Board of Visitors, who both parties agree is a public authority for the purpose of the Human Rights Act 1998 unlike the two domestic tribunals, the Review Panel and the Review Appeals Panel, would act unlawfully and in a way that is incompatible with the applicant's human rights is baseless and without merit. The court can have complete confidence given the experience and expertise of the Board's members, and in particular the two retired members of the judiciary, that the applicant's Convention rights will be both respected and protected as the Board is duty bound to do. The applicant has not been able to put forward any convincing reasons to persuade the court that the Board will not act in a

Convention compliant way nor in a way that guards and protects the applicant's common law rights.

Further this court considers that the resounding endorsement of visitorial jurisdiction by distinguished judges and legal commentators still holds good today. Therefore Sir Robert Megarry's exhortation to invoke the visitorial jurisdiction, and not to go to the courts, remains good advice. Indeed the judicial tide is flowing even more strongly today in favour of the courts enforcing the exclusive jurisdiction of tribunals, especially ones that can offer, as here, cheap, informal, effective and expeditious justice. In this case the applicant enjoys the right of access to an independent and impartial tribunal whose worth has been proved over hundreds of years and who the court can have confidence will act as a public authority in a Convention compliant manner.

[32] In deciding whether the risk posed by the applicant can be managed should he return to QUB and whether the terms of the SOPO can be complied with while he completes his course, it seems to this court there are three important issues that need to be addressed and in respect of which clear and unambiguous findings of fact have not been made to date in a fair and lawful fashion. There may, of course, be other findings of fact that the Board of Visitors considers have to be made.

(a) Did the applicant adhere to the conditions of bail restricting his use of computers, save for the two occasions when he sought and was granted permission by police contrary to those conditions so he could complete his casework?

The applicant says that he did. QUB believes that he did not. Ms McNeely empathically avers:

> "That QUB does not accept that the Applicant did not breach his bail conditions."

The reason why this is so important is that if the applicant's claim is accepted then it provides strong evidence that he will abide by conditions which are imposed upon him under the SOPO and that his word can be relied on. If he did not, then he has deceived the police, attempted to deceive QUB, potentially committed perjury and his word is not worth a candle. The answer to this question also bears on the issue of whether or not it will be possible for him to complete his course given the restriction on his access to the internet. If he completed almost two years of his course and yet observed his bail conditions (apart from on two occasions) this provides some comfort that he can continue his studies. The applicant's compliance with his bail conditions remains to this day a live issue.

(b) Is the applicant able to complete his Chemical Engineering course while being bound by the conditions of the SOPO?

The evidence of Professor Hardacre at the first hearing was that he could not. He claimed that he had consulted with his colleagues and it was not feasible for the applicant to complete his course with the SOPO in place. This evidence was not challenged because the applicant did not appear but simply gave written representations. The applicant could not realistically have been expected to deduce what the attitude or evidence of Professor Hardacre and his colleagues would be. At the second hearing as the court has noted, Professor Hardacre did not appear. The Review Appeals Panel appears to have accepted the Professor's earlier opinion and the applicant was not in a position to challenge this in his absence. The applicant disputes Professor Hardacre's conclusion. This dispute requires resolution as it lies at the heart of the issue of whether the applicant can continue with this course and observe the conditions of his SOPO.

(c) Can the risk of re-offending be managed if the applicant is permitted to complete his course at QUB?

Before this court there was an arid argument about whose responsibility it was to bring Mr Crawley, the DRM, to the hearing and/or obtain an affidavit and/or a statement from him on the issue of managing the risk of re-offending. The fact is that the DRM did not attend and he provided no input. While QUB no doubt will have cogent evidence to give on this issue, it is difficult to see how it can be fairly addressed without a contribution from the DRM. Evidence from NIACRO and Belfast Met may also be relevant to this issue. Either party can ensure it is before the Board who will then, in the light of the findings, have to determine whether the disqualification of the applicant was a proportionate response. If it finds that it is not, then we will have to consider what is a proportionate response in the light of all the relevant considerations.

[33] There is much to be said for these findings being made by an independent and objective tribunal. The Board of Visitors fits that bill although it is noted that their procedure states that the Board of Visitors will not normally make findings of fact. At paragraph 4 of the Guidance which deals with the functions of the Board, it states:

> "As has been said by a former Chairman of the Board, Lord Scarman, in his ruling in a previous appeal to it:
>
> > **'Questions of fact, especially those involving the exercise of specialised judgments in the life and work of the University are primarily for the University and not, save in exceptional circumstances for the visitor or a court to find.'"**

However, in the light of the history of this matter to date, the Board may feel that this case is an exceptional one and that it is well-placed to make those findings

where the independence and objectivity of its conclusions are not open to challenge. In Regina v Visitors to the Inns of Court and Another [1994] QB 1 Nicholls VC said at page 42:

> "There remains Miss Calder's fourth ground of appeal; that the visitors misunderstood their role. She contends that the visitors were sitting as an appellate tribunal, not (as they seem to have thought) as a reviewing tribunal, and hence they failed fully and properly to carry out their duties as visitors. As to this, first, I can see no reason to doubt that an appeal to the judges as visitors is precisely that; an appeal. It is so described in the authorities. In Lincoln v Daniels [1962] 1 QB 237 Devlin LJ at page 45 referred to it as **a rehearing of an appeal**. Thus the visitors will look afresh at the matters in dispute and form their own views. The procedure followed in the conduct of such an appeal is a matter for the visitors. The current visitors' rules provide that fresh evidence will be admissible only in exceptional circumstances. In the absence of fresh evidence the appeal will be comparable to an appeal in the Civil Division of the Court of Appeal."

[34] As I have recorded Ms Quinlivan QC on behalf of the applicant has told the court that she seeks not to quash the decision but to have this course remitted to QUB to reconsider the various issues and to make findings of fact. This could present a problem because much of her submissions related to the complaint of unfair and unlawful treatment which she claims the applicant received before the Review Panel and the Review Appeals Panel and the tainting effect of one on the other. Accordingly, the Board would be the ideal tribunal to make the findings of fact on such issues as they considered crucial and critical. The Visitors should be considered beyond reproach. However, if the Board did not feel able to do so, and it is entirely a matter for them, then they could remit to a Panel which they considered could act fairly and in a lawful manner, such findings of fact as the Board requires to be made.

[35] It seems to this court that the Visitors as masters of their own procedure, can hear the appeal de novo. Alternatively they can, as this court has been asked to do, send it back to a panel to make the necessary findings of facts. Out of an abundance of caution the Board might consider that such a panel should be comprised of differently constituted personnel, so it cannot be suggested that the Panel's view will be clouded by what it is claimed is apparent or actual bias. As I have recorded, the relief sought by the applicant is not that this court should make findings of fact, but that it will remit it back to QUB to allow those findings of fact to be made.

[36] This court rejects all complaints levelled against the Board as not being the appropriate body to hear and determine the issue of whether the applicant should be precluded from completing his studies, until at the very earliest, his SOPO has expired.

(i) The Board of Visitors as a public authority will be obliged to act in a Convention compliant manner.

(ii) There is no reason to doubt that the Board will act in accordance with the common law as it has done for hundreds of years in coming to the conclusions as to whether the applicant should be permitted to complete his Chemical Engineering course at QUB despite the imposition of the SOPO by the Deputy Recorder.

(iii) The Board can sit in public, if the applicant so requests.

(iv) While there is no Legal Aid, the cost of legal representation is likely to be much more modest than before a court. Even if the applicant is not able to afford any legal representation, the experience and expertise of the members of the Board in dealing with personal litigants will certainly ensure that he receives a fair and just hearing and that he has full and effective access to the process. In any event QUB will ensure equality of arms. If the applicant has no legal representation at the hearing, then neither will QUB.

(v) The Board, unlike a court of law, has not only legal expertise and experience to draw on, but also experience and expertise of higher education. There is much authority to support the importance of the court respecting the jurisdiction of these tribunals. For example, Deeny J said In the Matter of an Application by Daniel Hughes (A Minor) (2006) NIQB 27 at paragraph [6]:

> "Firstly it seems to me very much a matter that can be considered by the Special Educational Needs Tribunal. It is necessary expertise, information, opportunities for examination to reach a conclusion about that. It seems to me it would be quite wrong of the court to intervene in that matter where an alternative remedy is available."

(vi) The experience of hundreds of years provides powerful evidence that the Board will determine this dispute in a fair, just and expeditious manner. The favourable comments from distinguished judges and commentators over the years should be afforded due weight.

(vii) The court should not interfere and seek to diminish or to devalue the role of the Board when Parliament has taken the deliberate decision to retain visitorial jurisdiction in Northern Ireland.

(viii) In any event this court retains an overreaching jurisdiction to correct errors where the Board of Visitors has breached the principles of natural justice, acted in excess of its jurisdiction, abused its powers or acted in a way which was not Convention compliant. The court is satisfied that the Board of Visitors retains its exclusive jurisdiction subject to the court's right to carry out a judicial review in certain limited, but well recognised situations.

[37] If this court had known at the outset of the process the basis upon which the Visitors to the Board had been appointed and their independence from QUB, leave would almost certainly not have been granted.

For the reasons which are set out, the court unequivocally concludes that this alternative remedy of petitioning the Board of Visitors must first be exhausted by the applicant. This court is completely satisfied that the hearing before the Board of Visitors provides not only an alternative, but a much better alternative, to the procedure promoted by the applicant. As Mummery LJ said in R (Maxwell) v Office of the Independent Adjudicator for Higher Education [2011] EWCA Civ 1236 at paragraph 38:

> "Recent years have seen the growth of alternative processes of inexpensive dispute resolution: they are not intended to be fully judicial, or to be operated in accordance with civil law trial procedures, or to be dependent on what is fast becoming a luxury of legal advice and representation. The new process of the advantage of being able to produce outcomes that are more flexible, constructive and acceptable to both sides in the all or nothing results of unaffordable contests in courts of law."

If the court is wrong about the Board of Visitors having exclusive jurisdiction, then it would decline to grant any relief, until the applicant exhausts his right to petition the Board of Visitors.

H. Lack of Candour

[38] The lack of candour displayed by the applicant to the court (and to QUB) in the early stages of this dispute, is deeply troubling. It is difficult not to conclude that the applicant's admissions to the court (and to QUB), only occurred because he had concluded that they were bound to come out in any event. The applicant's averment in his first affidavit that he had fully co-operated in an open and transparent manner

could not have been further from the truth. His failure to inform the court that he had deliberately kept his wrong-doing and his conditions on bail from QUB so as to ensure that he had access to the campus and its computers and the internet for whatever reason, can only undermine confidence in the applicant and his credibility. The applicant's behaviour towards the court (and QUB) fell well below the standard that the court expects. The fact that the applicant eventually came clean when discovery was inevitable provides the court with limited comfort. The court does weigh in the balance the considerable psychological stress the applicant was under at the time. Therefore it has not been necessary in the circumstances of this application to impose any sanction on the applicant. This criticism should suffice. This court emphasises that all parties to a judicial review are bound by the duty of candour no matter how uncomfortable it may feel or how detrimental to their case it may be.

I. Conclusion

[39] For the reasons given, this application for judicial review is rejected. Any complaints which the applicant has about his treatment by QUB can be and should be resolved before the Board of Visitors. This court retains the right to review that decision in the limited circumstances set out in its judgment, namely if there is a breach of the rules of natural justice, if the Board acts in excess of its jurisdiction, abuses its powers or if there was a failure to respect the applicant's Convention rights.