Neutral Citation No: [2021] NIQB 62	*Ref:*	**SCO11552**
	ICOS No:	**18/111604/01**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**14/06/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF APPLICATION BY RAYMOND NHEMBO FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE UNIVERSITY OF ULSTER AND THE VISITOR OF THE UNIVERSITY OF ULSTER

_____

The applicant was unrepresented and appeared in person
Fiona Doherty QC and Bobbie-Leigh Herdman (instructed by Carson McDowell LLP) appeared for the proposed respondents

_____

SCOFFIELD J

Introduction

[1] This is an unusual case, partly because of the facts on which it is based, partly because of the procedural route by which it reached this court, and partly because it deals with the now somewhat antiquated (although still applicable) law relating to the exclusivity of visitorial jurisdiction.

[2] The factual background giving rise to the applicant's complaints is to be found in his treatment by the university authorities when he was in his final year of study for a Masters in Engineering degree at the University of Ulster ('the University') in the 2015/16 academic year. The applicant has raised a number of issues about his supervisor's decision to alter his final year project and the process which was followed in respect of this. He pursued his complaints through the internal university processes, including by means of appeal to the University Visitor, and thereafter in civil proceedings which remain extant. He has latterly sought to invoke the supervisory jurisdiction of the High Court, principally in respect of the actions of the university authorities which formed the basis of his initial complaint but also in respect of the Visitor's consideration of his appeal.

[3] Mr Nhembo was unrepresented in these proceedings and informed me that he had had difficulty securing a solicitor to represent him, notwithstanding my encouragement to him that he should try to secure legal representation. However, he presented his arguments in a range of written documents and his oral submissions in particular were presented with admirable focus, economy and courtesy. The same may of course be said of Ms Doherty QC, who appeared for the proposed respondents with Ms Herdman. I am grateful to them for the assistance provided.

Factual background

Mr Nhembo's final year project

[4] In light of the conclusions reached below, it is unnecessary to go into the detailed factual background to the applicant's complaints at length. In summary, however, Mr Nhembo contends that the process leading to the assessment of his final year project was unfair.

[5] The applicant was enrolled on an MEng Mechatronics Engineering and German Masters programme. In the course of that degree, he was required to complete a project in his final year. The applicant says that he was initially allocated a project in the following terms: "*Design of an analogue circuit to measure impedance and frequency response in plasma and fluidic circuits*" ('Project A'). However, he was later instructed to undertake a project in different terms, namely "*Impedance Measurement Project based on AD5933 circuit*" ('Project B'). Finally, he says that he was actually assessed and allocated marks on the basis of a yet further variation in the project, namely "*Design of an analogue circuit to measure impedance and frequency response in fluidic circuits*" ('Project C'). The applicant compares himself to other students who, he says, were given a project which remained unchanged and were then assessed on that project. In the event, the applicant failed his final year project, receiving a final mark of only 40%, which affected the degree he was awarded (a Bachelors degree, rather than a Masters degree).

[6] The applicant contends that Project B, which he was instructed to undertake, was unsuitable, since the circuit involved (the AD5933 circuit) should not be used to measure complex impedance as the board could not be calibrated correctly. Thus, he says, the circuit he was instructed to use was unsuitable for the purposes of the project and was liable to lead to inaccurate results, which his project supervisor would have known. There were a variety of further difficulties which (on the applicant's case) gave rise to unfairness, including that his supervisor was absent for the poster presentation element of his assessment; that he did not receive his first two assessments' marks and feedback prior to his final report write-up; and that there was a change to a submission deadline which resulted in the relevant School not accepting his hard copy final report submissions. In short, the applicant alleges

that the professor supervising his final year project was responsible for his failing the project.

[7] The marks allocation sheet for the applicant's final project, co-signed by two supervisors, includes the following comments agreed by them:

> "*Very poor report. The student showed some (but not sufficient) engagement during the project but in essence failed to understand the rudimentary basis of the project. He appeared to have no understanding of elementary circuits and impedance and needed to be guided painstakingly through each minor step. The report clearly showed a lack of understanding of the subject. This is a surprising result for a MEng student.*"

[8] As appears above, the applicant has a variety of complaints about the way in which his project was changed and the disadvantages for him to which he says this gave rise. The University's case, in summary, was that the applicant was struggling with the project assigned to him and that it was changed, with his full knowledge, in order to assist him by making the project less difficult. The applicant takes strong issue with this, partly because he denies that any changes to his project were made in consultation with him or with his consent. He contends he was ultimately taken by surprise by the project details on which he was assessed. In any event, even assuming that the project was made easier for him, he contends that this inevitably meant that there would be fewer marks available to him for successful completion of the project, thereby again disadvantaging him as compared with other students.

The former Visitor's decision

[9] The applicant complained to the University about the way in which he said his project had been altered and assessed. His complaint progressed through the University's internal complaints system and eventually reached an appeal to the Visitor of the University (then, the Rt Hon Sir Séamus Treacy, a Lord Justice of Appeal). The applicant submitted a variety of written documents to the Visitor, including a summary of his appeal. The university authorities responded in writing to the applicant's written appeal document and addressed its main points. The applicant then had an opportunity to, and did, provide a further written document responding in detail to the University's response.

[10] The documents provided to the Visitor maintained the case on the part of the University that the quality of the applicant's work was poor; that he had been provided with significant individual tuition and guidance by a number of staff but had, despite this, shown very little understanding of the subject of impedance measurement; and that he had been unable to obtain sufficient and meaningful results or to provide sufficient and useful analysis of the measurements he did obtain. The academic staff involved disputed that there had been a major change in the applicant's project, albeit they accepted that the applicant had at one point been

offered an alternative project outline which was for a non-electronics project (which he had refused). Although the reference to "*design*" of an analogue electronic circuit had been removed from the project description, the staff asserted that the applicant had shown himself unable to design even the most rudimentary analogue circuit. There were a variety of assertions contained in the applicant's representations which the university staff contended either to be simply untrue or to be misconceived or misleading in some way.

[11] In turn, the applicant's detailed response contended that various aspects of the university authorities' representations were misleading or false; that he had carried out all instructions that he had been given; that his project had been unfairly and unjustly changed without his consent; that he had not been adequately supported; and that other students had been treated more favourably without justification.

[12] The Visitor gave a written decision dated 11 October 2018, the core findings of which are as follows:

(a) There had been a change between the title of the project which had been allocated to the applicant and the title of the project in respect of which he submitted work and was assessed. However, this occurred after significant engagement between the applicant and his supervisor and the Visitor found "*no evidence supporting a claim that the change was made arbitrarily, or without regard to the student and his progress*".

(b) A comparison of the two different titles for the project confirmed that the amended project had fewer elements which the student needed to address and so "*supports the University's claim that the change was made in order to help Mr Nhembo who was considered to be struggling with the demands of his original project*".

(c) In relation to the applicant's contention that he had been provided with inappropriate equipment, there was a direct conflict of evidence on this issue between the applicant and university staff. The Visitor accepted that this was an issue entirely within the scope of the subject-specialist staff involved and he further accepted the evidence of those staff that the applicant was "*simply mistaken in the claims he makes on this point*".

(d) The papers considered by the Visitor disclosed evidence in which the applicant was offered both feedback and support.

[13] In summary the Visitor's overall conclusion (expressed in paragraph 21 of his decision) was as follows:

> "*I find no evidence that the treatment received by Mr Nhembo was not in compliance with University requirements or the*

expected procedures governing such matters. Far from being treated unfairly the evidence suggests that every effort was made to support the student and to help him to succeed. For these reasons I am not persuaded that there was any unfairness or failure to follow procedure in this case."

The applicant's civil proceedings and the application to this court

[14] Following the Visitor's decision, Mr Nhembo brought civil proceedings in the Small Claims Court against the University by way of application dated 13 November 2018. Initially, this was a claim for breach of contract seeking refund of his fees for the 2015/16 academic year plus interest, although the claim has been exponentially widened and increased since that time. In due course, when Mr Nhembo raised an allegation of race discrimination contrary to article 18 of the Race Relations (Northern Ireland) Order 1997 ('the 1997 Order'), the case was transferred to the County Court on 14 March 2019 to be dealt with there, since the Small Claims Court has no jurisdiction to hear such a claim (see article 54(2) of the 1997 Order).

[15] Mr Nhembo made an application for the removal of the proceedings from the County Court to the High Court on 30 November 2020 on the basis that he wished to invoke the High Court's supervisory jurisdiction in judicial review. He indicated that, in the course of the proceedings in the County Court, the judge had indicated that his complaints required judicial review, which is why he had sought to have the proceedings removed to the High Court to facilitate this. The removal application was initially considered by Master McCorry, who took the view that it was intended to be an application for judicial review and therefore fell outside his removal jurisdiction. The Master therefore referred the matter to the Judicial Review Office. By a Case Management Directions ('CMD') Order of 25 March 2021 I ordered that the applicant's application for removal and supporting affidavit should be treated as his Order 53 statement and grounding affidavit for the purposes of his intended application for judicial review, albeit that the Order 53 statement was an irregular one and would require re-formulation in due course in light of how the case proceeded.

[16] The applicant's removal application, seeking removal of the case to the High Court for judicial review, outlined the following "*main complaints*": (a) unfair treatment and prejudice; (b) unlawful race discrimination; (c) that his project was replaced in an unfair and illegal way on 22 October 2015; (d) misinformation and concealment; (e) that his project was changed in an unfair way on 4 March 2016; (f) lack of common law duty of care; (g) acts of omission and negligence; and (h) that the first respondent failed to issue a licence for him to carry out the main part of 'Project B'.

[17] The CMD Order of 25 March 2021 also indicated that a leave hearing should be convened in this case, at which the following issues ought to be considered: delay; the law on the exclusivity of the visitorial jurisdiction; the relevance of the ongoing

private law proceedings, given that a variety of private law claims were being mounted; and the question of alternative remedy.

[18] In the meantime, a case management review hearing was convened on 15 April 2021 to explore the grounds on which the applicant wished to seek judicial review and the relief which he was hoping to secure; and also to provide advice to the applicant about the judicial review process and, in particular, the issues which ought to be addressed at the stage of applying for leave. At the review hearing, Mr Nhembo clarified that he was seeking relief against both the University authorities *and* the University Visitor. After this review hearing, Mr Nhembo had the opportunity to lodge a variety of documents clarifying the case he was making and the relief which he was seeking and also to respond in writing to the skeleton argument provided on behalf of the proposed respondents.

[19] In one such document, entitled 'Case Against Respondent's Visitor', the applicant raised the following grounds of challenge to the Visitor's decision: alleged error of fact within the Visitor's ruling (as to the Visitor's summary of the various project titles); the failure to offer an oral hearing; and the failure to consider certain issues in his decision, namely race discrimination, Article 14 ECHR and the fact that the applicant "*was instructed "to forget" part 2 of 2 of Project B*". Then, in his skeleton argument for the leave application, the following grounds were relied upon: (a) *Wednesbury* unreasonableness; (b) negligent misstatement at common law; (c) violation of Article 2 of the First Protocol to the European Convention of Human Rights; (d) breach of articles 18, 20 and 21 of the Race Relations (Northern Ireland) Order 1997; (e) lack of common law duty of care; and (f) systematic maladministration. In addition, an alleged breach of section 75 of the Northern Ireland Act 1998 was raised against the Visitor.

[20] Having considered the written materials, I provided the parties with an agenda for the leave hearing (principally for the assistance of Mr Nhembo) identifying the key issues for discussion at that hearing. These focused on the questions of delay, alternative remedy, the relief the applicant was seeking, and his reasons for rejecting the offer of reconsideration by the new Visitor (discussed below: see paragraphs 25-32).

[21] Both parties were agreed that the civil proceedings which had been issued by the applicant remain extant. I understand that the applicant is intending to make, if he has not already made, a further application to remove those proceedings from the County Court to the High Court, this time on the basis that the damages which he is seeking exceeds the monetary jurisdiction of the County Court. The applicant seeks £10m by way of damages, although how this figure has been reached and is to be broken down has not yet been particularised. The respondents have drawn the applicant's attention to the provisions of article 54(2) of the 1997 Order, which provides that his race discrimination claim can only be brought in a county court (although whether that also precludes removal of an action containing such a claim

may be open to argument). In any event, the applicant's civil proceedings remain live.

Private law matters

[22] It is clear to me that a number of the grounds of challenge which the applicant wishes to pursue are not matters of public law but, rather, private law causes of action. For instance, the applicant's reliance upon negligence, negligent misstatement at common law and lack of common law duty of care (which I understand to amount to a claim of breach of duty of care which was owed to the applicant), as well as any claim he may seek to pursue in breach of contract, are clearly matters of private law which should be pursued in the normal way by means of an action in the civil courts. Indeed, the applicant has commenced civil proceedings for this very purpose. The same may be said of his claim of race discrimination.

[23] I accept the proposed respondents' submission that the basic nature and purpose of judicial review proceedings is to identify public law flaws in decision-making and provide an appropriate remedy to rectify unlawfulness in public law terms in a relevant decision. It is not the purpose of judicial review proceedings to adjudicate upon private law disputes between parties; and nor are such proceedings an appropriate forum within which to resolve contentious disputes of fact given the well-known unsuitability of judicial review procedures for this purpose in the majority of cases (see, for instance, *Re Toner's Application* [2017] NIQB 49, at paragraphs [9]-[10]). Indeed, the pursuit of such claims in this forum, where the factual basis asserted by the applicant in respect of many of his complaints is disputed and likely to require detailed oral evidence from witnesses, may well put the applicant at a considerable disadvantage. *Re Barron's Application (Leave Stage)* [2010] NIQB 21 is an example of the court refusing leave to apply for judicial review because of the availability of a claim in tort which would be a more efficient and convenient means of resolving the complaint (see paragraph [12] of the decision of Treacy J). Although there is sufficient flexibility to permit civil claims to be argued alongside judicial review claims in one set of proceedings where this is necessary or appropriate, this is generally undesirable. Certainly, where separate civil proceedings have already been issued for this purpose, it would be highly unusual for the Judicial Review Court to permit those claims to proceed before it. The applicant's extant civil proceedings are both the appropriate forum for the determination of the applicant's private law claims and also a clearly effective alternative remedy by means of which he may pursue them.

[24] For these reasons, I refuse the applicant leave to apply for judicial review on those grounds mentioned above which in my view constitute private actions and whose pursuit in these proceedings, in the circumstances of this case, would represent a misuse of the court's process. The remainder of this judgment deals with grounds advanced by the applicant which are properly to be characterized as public law complaints (such as procedural unfairness and irrationality).

The proposed respondents' offer of remittal to the Visitor and the relief sought by the applicant

[25] Before turning to the applicant's remaining grounds, it is necessary to note that the respondents have said that they were not initially aware that Mr Nhembo's proposed application for judicial review had the decision of the former Visitor as one of its targets. Having learned of this and reflected upon the matter, the respondents proposed a way forward which might resolve the issues in the proceedings. The respondents accept that the decision of the Visitor does not address the allegation of race discrimination which had been made by the applicant. There is a dispute, which need not be resolved for present purposes, as to whether this claim was or was not contained in an *amended* appeal statement provided by Mr Nhembo. In any event, it is common case that the applicant wished a complaint of race discrimination to be considered by the Visitor and that this was not addressed by him, or at least not expressly. The University considers it likely that the Visitor was not made aware of this allegation through administrative error. However that came about, on that basis alone (and without prejudice to their other objections to the application) the respondents were willing to consent to an Order remitting the matter to the current Visitor of the University, the Honourable Mr Justice McAlinden, with a direction that the appeal be reconsidered by him, pursuant to RCJ Order 53, rule 9(4). Mr Justice McAlinden replaced Lord Justice Treacy as the University's Visitor in May 2019 (having been appointed to that role by Her Majesty The Queen in Council in April 2019). It was clarified at the leave hearing that this proposal would see the current Visitor reconsider the matter in full, rather than simply considering the issue of race discrimination in isolation.

[26] This proposal was outlined in open correspondence of 17 May 2021 but, in advance of that, had been raised with the applicant at a meeting between the parties on 14 May 2021. The applicant indicated at that meeting that he was not agreeable to this approach as a means of resolving the judicial review proceedings; and that he does not now wish to have his appeal considered afresh by the current Visitor (notwithstanding an indication he had given at the review hearing of 15 April 2021 to the effect that this was part of the relief he was seeking, along with the opportunity to re-sit his final year project).

[27] Indeed, in a further document provided to the court, entitled 'Relief Sought by Plaintiff', Mr Nhembo clarified that the "*sole relief sought is Claim damages for £10 Million and maximum court charges…*". When responding to the respondents' skeleton argument, and at the leave hearing, the applicant refined this position further. He was clear that he is not content with his case being reconsidered by the new Visitor, since he considers it unlikely that the Visitor will substitute his opinion for that of the academic staff who were in charge of his course; and has no faith that the visitorial process will provide a speedy or satisfactory resolution of his complaints. He refers to the fact that the University's guidance in relation to the role of the Visitor states that, "*It is unlikely that the Visitor will intervene to substitute his*

opinion on academic matters for the opinion of the University authorities and that he will only intervene if there has been some real impropriety on the part of the University". He does not wish to go through the "*pain and stress*" of a further visitorial appeal. Moreover, he no longer has any wish to undertake his final year project again (or any version of it) in order to seek to secure the degree for which he originally hoped. This is partly as a result of health issues he has experienced since the initial source of his complaints arose.

[28] The primary relief the applicant now seeks is damages for loss occasioned to him by the University's alleged mistreatment of him; although he also seeks a review by the court of the procedures to be applied by the University to situations such as his (styled by him as a request that the court "*write new laws*" to stop universities changing individual student assessments). Therefore, the applicant is no longer seeking any concrete relief in the particular circumstances of his case other than damages; albeit he contends that further guidance should be given by the court for future cases to be considered by university authorities which may raise similar issues.

[29] I do not consider this to be an appropriate case for the court to grant leave to apply for judicial review with a view to setting out detailed rules or guidance for the conduct of university authorities where they are setting, overseeing or marking academic assessments. Firstly, these are generally matters of academic judgment in which the court has little if any role and no expertise. Secondly, the requirements of fairness to students in respect of such matters are principally for the University Visitor to determine and enforce. However, they are a matter of common sense in any event: students should be made aware of the requirements of projects they are to undertake and any changes to these after the project has been set should be made after consultation with the student and in circumstances where the student knows what has been changed and why it has been changed. In my view, the controversy in the present case arises not because of any serious doubt about what fairness generally requires in such cases but because of disputes of fact as to how and why any changes were made to the applicant's project. Thirdly, these issues are likely to arise in such a wide variety of circumstances that it seems to me unlikely that the court would be able to give any further overarching guidance which is likely to be of assistance. As this case demonstrates, these issues are highly fact-specific. Fourthly, insofar as it is appropriate to permit a judicial review to proceed as a form of test case in order to provide guidance for future cases, this will usually require full argument and it will generally be inappropriate to do so where one of the parties is unrepresented.

[30] Accordingly, in this case I proceed on the basis that the applicant has disavowed any remedy other than that of damages. The proposed respondents emphasised that the offer outlined above remained open as a means of resolving the judicial review proceedings (without prejudice to the applicant's right to proceed with his proceedings in private law). In light of the applicant's more recent clarification of his position, however, the respondents contended that the remedy

sought by him may appropriately be pursued in his private law proceedings. I accept that submission.

[31] I also consider that the applicant is wrong to place so little faith in the prospect of further consideration by the new Visitor which has been offered to him. Although there are undoubtedly significant elements of academic judgment which arise in his case – upon which the court is just as ill-equipped, indeed less well equipped, than the Visitor would be to adjudicate – the applicant also submitted that his case was about broader questions of the University's procedures (which he termed "*operational negligence*" or "*systemic maladministration*"). Indeed, it is on this basis that the applicant urged me to grant leave so that the court could lay down guidance for future similar cases. However, if and insofar as such matters arise, they can plainly be dealt with by the Visitor. The University's guidance on his role specifically notes that, "*… the role of the Visitor is to ensure that the Statutes, Ordinances and Regulations of the University have been properly observed and carried out and that natural justice is observed wherever it may apply between the appellant and the University*" and that "*the Visitor is normally concerned with such matters as procedural propriety, fairness, prejudice and irregularity*".

[32] Given the limitations on the court's role where the visitorial jurisdiction is in play (see the discussion below), the only realistic remedy available to the applicant in these proceedings if he were successful in his challenge to the decision of the Visitor would be for the court to quash the outcome of the previous Visitor's consideration of the appeal and remit the matter to be considered afresh by the new Visitor. This is what the proposed respondents have offered; but the applicant has made clear he is not interested in such an outcome. I understand the reasons for the applicant's unwillingness to re-engage in the visitorial process but, particularly in light of the fact that an entirely fresh consideration would have been undertaken by a new holder of the office, in the final analysis I consider this refusal to represent an unreasonable failure to accept an alternative remedy in the context of these proceedings.

The Visitorial jurisdiction

The general principle of exclusivity

[33] The proposed respondents contend that the matters which gave rise to the applicant's original complaints (relating to the quality of teaching with which he was provided and the academic judgment that he should fail his final project) fall within the jurisdiction of the University Visitor and that, as such, they are immune from enquiry and adjudication by the civil courts. The basis of this submission is a legal principle of long standing, namely that if a matter falls within the jurisdiction of a visitor, the visitor's jurisdiction is exclusive. The decision of a visitor may itself be liable to be set aside for public law error in certain cases; but, in respect of matters upon which the visitor has jurisdiction, no court may tread.

[34] The respondents have drawn attention to the general statement of this legal principle in *Attorney General v Talbot* (1747) 3 Atk 663, in which Lord Hardwicke LC said that "*the general powers of a visitor are well known; no court of law or equity can anticipate their judgment or take away their jurisdiction, but their determinations are final and conclusive*". More modern restatements and applications of the principle may be found in the cases of *Thomas v University of Bradford* [1987] AC 795 and *R v Lord President of the Privy Council, ex parte Page* [1993] AC 682.

[35] In *Thomas,* the House of Lords held that where the dispute related to the correct interpretation and fair administration of the domestic laws of the university, its statutes and its ordinances, it fell within the jurisdiction of the visitor and not the courts of law. In that case (which involved the dismissal of a lecturer) this was the case notwithstanding that the dispute's resolution would affect the plaintiff's contract of employment. The plaintiff there was not relying upon a contractual obligation apart from an obligation of the university to comply with its own domestic laws. Accordingly, her claim fell within the exclusive jurisdiction of the visitor and the court lacked jurisdiction to intervene. It was further held, *per curiam,* that the visitor in the course of his supervisory jurisdiction must be entitled, in order to ensure that the domestic law of the university is properly applied, to redress any grievance that has resulted from its misapplication.

[36] In *Page,* the House of Lords again held, applying its earlier decision in *Thomas*, that, where a visitor's decision was made within his jurisdiction (in that he had power under the relevant regulating documents to enter into the adjudication of the dispute in question), his decision was not amenable to challenge by judicial review on the ground of error in fact or law contained in that decision. Accordingly, the court had no jurisdiction to entertain the applicant's application for judicial review in that case.

[37] These are decisions of the highest authority to the effect that, where a visitor has jurisdiction, the courts' jurisdiction is excluded. A key question, therefore, is whether the particular matter in dispute falls within the jurisdiction of the Visitor in this case.

[38] Generally, matters relating to the awarding of degrees, and the academic processes and assessments leading to the awarding of degrees, will fall squarely within the internal rules and laws of a university which are the province of its visitor (should it have one). This is plain from the statement of Kindersley V-C in the case of *Thomson v University of London* (1864) 33 LJ Ch 625 on which the respondents rely, in which he said:

> "*The holding of examinations and the conferring of degrees being one, if not the main or only object of this university, all the regulations, that is, the construction of all the regulations and the carrying into effect of all those regulations as among persons who are either actually members of the university or*

> *who come in and subject themselves to be at least pro hac vice members of the university – I mean with respect to the degrees which they seek to have conferred upon them – all those are regulations of the domus; they are regulations clearly in my mind coming within the jurisdiction, and the exclusive jurisdiction of the visitor.*"

[39] Disputes of the type raised in the present case, therefore, which relate to procedures for academic assessment, will generally fall clearly within the jurisdiction of the University Visitor and, so, outside the jurisdiction of the civil courts. Indeed, this is an approach which has been approved and applied by the courts of Northern Ireland in recent years in several cases.

[40] In particular, in *Re Croskery's Application* [2010] NIQB 129, Treacy J (as he then was), having rejected submissions that the applicant's rights under Article 6 or Article 2 of the First Protocol ECHR were engaged, held that a dispute about the classification of the applicant's degree fell within the exclusive jurisdiction of the Board of Visitors of Queen's University, Belfast (see paragraphs [7] and [22] of the judgment). The issue in that case, concerning the awarding of a degree and the level of degree awarded, bears some similarity to the issue in the present case.

[41] In addition, in *Re CS's Application* [2015] NIQB 36, a case involving a 'temporary withdrawal' of a student from his studies (akin to a suspension), Horner J concluded that the Board of Visitors of Queen's University had exclusive jurisdiction to hear an applicant's appeal from the decisions of which he complained (see paragraphs [2](i) and (iii) of the judgment); and that the Board itself could and would act in a Convention compliant way. The court also approved and adopted the "*magisterial*" discussion of visitorial powers set out by Kelly LJ in *Re Wislang's Application* [1984] NI 63; although Horner J also went on to set out his own erudite and illuminating observations on the issue at paragraphs [20]-[22] of his judgment.

[42] These cases are examples of the court recognising its own lack of jurisdiction in light of extant visitorial jurisdiction covering the subject matter of the dispute. Visitors will generally be persons of experience and wisdom, with established reputations for independence, impartiality and judgment – frequently those holding, or who have held, high judicial office. A considerable element of trust is reposed in them to supervise the affairs of the institution with whose superintendence they are charged. Where their jurisdiction is engaged, subject to the encroachments on the visitorial jurisdiction discussed below, the ordinary courts will, and must, leave them to do their job.

Encroachments on the principle of exclusivity

[43] It is, of course, necessary to properly understand the limits of a visitor's jurisdiction in order to avoid the ordinary courts of law declining jurisdiction (or wrongly considering that they have no jurisdiction) when they can and should

consider a legal claim made against a university. The most obvious cases will be those where the claim is brought by a third party (such as a supplier or contractor) who is not a member, former member, or member of staff of the university. In those cases, the dispute is not an internal one for the university's own internal dispute resolution mechanisms. However, there are certain civil claims – such as, in this case, the applicant's claim in race discrimination – which are matters of ordinary civil law which also stand apart from the University's internal legal system. That was recognised by Hoffman J in his decision in *Hines v Birkbeck College* [1986] Ch 524, in which he said this:

> "*The visitor is a domestic forum appointed by the founder for the purpose of regulating the foundation's domestic affairs in accordance with its statutes, including the determination of domestic disputes. As Sir Robert Megarry V-C said in Patel's case [1978] 1 WLR 1488, 1493: 'The visitor has a general jurisdiction over all matters in dispute relating to the statutes of the foundation and the internal affairs and membership of the corporation.' On the other hand he has no jurisdiction over matters which are not concerned with the enforcement of the internal rules of the foundation, such as disputes with non-members or contracts between the corporation and members which involve the application of the general law. These are within the jurisdiction of the ordinary courts.*"

[44] Within the applicant's civil proceedings, there will no doubt be arguments about whether his various private law complaints fall within or outside the Visitor's jurisdiction which the court dealing with those proceedings may have to resolve. I am not concerned with that debate. However, in recent times there have also been a number of developments which have intruded into areas which were previously clearly a matter for visitorial jurisdiction alone.

[45] When faced with the argument in this case that the University Visitor had exclusive jurisdiction in respect of matters within his purview, the applicant initially responded by relying on section 20 of the Higher Education Act 2004 which, he contended, "*revoked*" the exclusive jurisdiction of the Visitor. To some degree, that is correct. Section 20 of the 2004 Act was designed to end the jurisdiction of university visitors over student complaints, in favour of a new scheme for reviewing student complaints which would be carried out by a new body corporate. It provides that the visitor of a qualifying institution has no jurisdiction in respect of specified complaints, which includes a complaint made by a person as a student or former student at the institution. However, the difficulty for Mr Nhembo in the present case is that neither this provision, nor the other provisions of the 2004 Act which remove or encroach upon the jurisdiction of university visitors, applies in this jurisdiction. They apply to England and Wales only: see section 53 of the 2004 Act which governs its territorial extent. The body which now generally considers complaints such as the applicant's in England and Wales is the Office of the

Independent Adjudicator for Higher Education. However, that system has no application in Northern Ireland.

[46] The 2004 Act demonstrates that visitorial jurisdiction can be removed, wholly or partially, by way of statute. In Northern Ireland, visitorial jurisdiction in universities has been excluded for some time in respect of disputes relating to a member of the academic staff of a qualifying institution which concerns the staff member's appointment or employment, or the termination of their appointment or employment: see article 7 of the Education (Academic Tenure) (Northern Ireland) Order 1988.

[47] In the context of student complaints, there has been a different encroachment on the jurisdiction of visitors in the universities in Northern Ireland through the provisions of the Public Services Ombudsman Act (Northern Ireland) 2016 ('the 2016 Act'). The 2016 Act established the office of the Northern Ireland Public Services Ombudsman (NIPSO), whose principal purpose is to investigate alleged maladministration. The University of Ulster is a listed authority for the purposes of the 2016 Act and, where a complaint about maladministration has been raised in relation to the University, section 18 of the Act applies. It provides, at section 18(2), that, NIPSO "*may investigate alleged maladministration through action taken by a university in the exercise of administrative functions, in respect of students enrolled in courses provided or validated by the university*". However, section 18(4) provides that "*the Ombudsman has no jurisdiction to investigate a matter to the extent that it relates to a matter of academic judgment*". Significantly, section 18(5) also provides that, "*If the Ombudsman has jurisdiction in respect of a complaint, the visitor of a university has no jurisdiction in respect of that complaint*".

[48] NIPSO can therefore consider a complaint about maladministration in the exercise of the University's administrative functions, except to the extent that the matter complained of relates to a matter of academic judgment. Where the Ombudsman has jurisdiction, the Visitor's jurisdiction is excluded. This represents a major incursion into the historic role of university visitors here and is likely, one imagines, to give rise to a significant reduction in cases which reach the Visitor (or in the case of Queen's University, the Board of Visitors), at least where academic judgment is not in issue. Much will depend on what is and is not determined to fall within the exercise of *administrative* functions. I return to the availability of a potential remedy in the present case by means of complaint to NIPSO below.

[49] Finally, in light of the protection which is now afforded to Convention rights under the Human Rights Act 1998, there is another area where the exclusivity of visitorial jurisdiction may have to give way in order that the courts can ensure effective protection of Convention rights. This was acknowledged to be a further exception to the principle of exclusivity by Horner J in *Re CS's Application* (see paragraphs [2](i) and [20]). The exclusivity of visitors' jurisdiction is a common law rule which is likely to have to yield in appropriate cases to the statutory requirement that universities, where acting as public authorities for the purposes of the 1998 Act,

must not act in violation of Convention rights. As the judgment in *CS* shows, the exercise of a visitor's jurisdiction may not, of itself, breach Convention rights (and, indeed, may be part of the university's provision of a dispute-resolution system which, in its totality, is Convention compliant); but there is a strong case that visitors cannot now have the final word on complaints which give rise to a claim of violation of Convention rights. Determination of those matters is ultimately for the courts. That is why there has been some further focus in more recent cases on the question of whether or not university complaints also engage Convention rights and, in particular, the 'right to education' under Article 2 of the First Protocol ECHR ('A2P1').

Challenges to the decision of the Visitor

[50] Assuming the proposed respondents are correct that any matters which are within the jurisdiction of the Visitor in this case are shielded from any further enquiry by the court, it is nonetheless clear that decisions of a university visitor themselves are not wholly immune from the court's supervisory jurisdiction. In *Thomas*, it was accepted that the visitor's decision was subject to the supervisory jurisdiction of the High Court. Similarly, in *Page*, it was held that judicial review lay to the visitor in cases where he had acted outside his jurisdiction (in the sense that he did not have the power under the regulating documents to enter into the adjudication of the dispute), or had abused his power, or had acted in breach of the rules of natural justice. The grounds on which such a challenge are available are restricted. So, unlike in most other areas of public law, the distinction between error of law within and without jurisdiction is maintained. The authorities referred to above hold that a visitor is immune from review for error of fact or law within their jurisdiction. If, however, a visitor has plainly abused his or her power, has acted in a way which is procedurally unfair so that they have failed to fairly adjudicate upon the dispute, or (I would add) has refused to act at all so that their jurisdiction was not exercised, the High Court would have power to grant appropriate relief. It is for this reason that, in respect of the applicant's challenge to the decision of the University Visitor in this case, the exclusivity of his jurisdiction could not be a complete answer.

Application of these principles to the present case

[51] Applying the above principles to the circumstances of the present case, I have little hesitation in finding that the applicant's complaints about the conduct of the University's authorities in relation to the setting, assessment and marking of his final project in 2015/16 are the type of matter which fall squarely within the internal rules and regulations which are within the jurisdiction of the Visitor and that, therefore, this court has no jurisdiction to enquire into them. This is not a matter of discretion. The present state of the law means that – subject to the applicant's argument about breach of his A2P1 rights – this court cannot enquire into these matters. They are to be left to the Visitor to resolve.

[52] The court can nonetheless supervise the exercise of the Visitor's jurisdiction – not in relation to the substance of the matters he has considered or any asserted error of fact (which is alleged in this case) or law – but on the limited grounds discussed at paragraph [50] above. In this regard, the applicant has two complaints about the decision of the Visitor which, in principle, *could* be subject to consideration by this court: first, that the Visitor wrongly failed to consider his claim of race discrimination; and, second, that the Visitor wrongly refused him an oral hearing.

[53] As to the first of these grounds, which is effectively conceded by the respondents (see paragraph [25] above), I nonetheless refuse leave to apply for judicial review for two reasons. Firstly, the applicant now has an alternative remedy in the form of his extant civil proceedings which allege race discrimination pursuant to the 1997 Order. Although the Visitor might well have considered a complaint of race discrimination in the context of the appeal to him about unfair treatment in the changes to the applicant's project more generally, insofar as the applicant alleges unlawful race discrimination, he has a legal avenue open to him, of which he has availed, to pursue that complaint. Secondly, more generally, the applicant has disavowed any intention or desire to pursue a further appeal before the Visitor, even if the (new) Visitor considers his claim afresh. In those circumstances, I accept the respondents' submission that, since judicial review is a discretionary remedy, it would be inappropriate to grant the applicant leave to apply for judicial review in circumstances where, at best, the court would grant a remedy giving rise to a further re-hearing which the applicant has expressly said that he does not want and has no intention of pursuing. To do so would therefore beat the air. Given the detailed factual disputes which were evident from the submissions to the former Visitor, the appeal could only properly be reconsidered with the applicant's input and cooperation. Requiring the new Visitor to conduct a reconsideration without the applicant's cooperation would either be pointless or, at any rate, an unreasonable burden on the Visitor and the University in light of the applicant's opposition to a further visitorial process.

[54] As to the second of these two grounds (procedural unfairness), I do consider this to surmount the modest hurdle for the grant of leave, namely that it is arguable. The University's procedures governing the visitorial process state that: "*The Visitor may reach his decision on the appeal wholly on the written record of submission, response and reply or he may invite the appellant to appear before him at an oral Hearing.*" The respondents contend that the Visitor was not obliged to convene an oral hearing in order to comply with the requirements of procedural fairness in this case, since he properly considered that he could conduct a full and fair process based upon the detailed papers before him. They also say that the applicant did not request an oral hearing, which may be highly material both to whether fairness required such a hearing in this case and to the issue of the relief which the court might grant. There may ultimately be force in those submissions. However, in light of the detailed factual disputes between the applicant and the academic staff about whom he was complaining, and the Visitor's acceptance of the staff's evidence over that of the

applicant, I consider it arguable that the Visitor should have afforded an oral hearing in this case.

[55] Nevertheless, I propose to refuse the grant of leave in relation to this ground for the same reason as above, namely that there would be no point in permitting the judicial review to proceed in circumstances where the only realistic remedy (quashing the original appeal determination and remittal to the Visitor for a fresh hearing) is not being pursued by the applicant and has been expressly rejected by him.

The applicant's Convention rights

[56] The applicant has raised a suggestion that his A2P1 rights have been violated in this case, although he has not outlined in precisely what manner. In *Re Croskery's Application* (*supra*) Treacy J considered the application of A2P1 – both in its own right and as a civil right potentially 'determined' by a visitorial decision for the purpose of Article 6 ECHR – where the classification of the applicant's university degree was in dispute. Treacy J did not accept that the determination of the applicant's degree classification, albeit important to him, engaged the applicant's right under A2P1 to access to education (or, more accurately, his right not to be *denied* an education): see paragraphs [16] and [18]-[21] of the judgment. In my view, the present case is comparable to the *Croskery* case. The applicant has not been denied a right to third level education. On the contrary, he has exercised it. The dispute in the present case is of a much more limited nature, concerning as it does a dispute about the change to the specification of his final year project. I conclude that there is no arguable breach of A2P1 and, further, that this case is not even within the ambit of A2P1 insofar as the applicant also seeks to mount a case of breach of Article 14 ECHR which is parasitic upon his A2P1 rights, since it is not a case about access to education. The applicant does not appear to allege a freestanding breach of Article 14 in these proceedings but contends that the Visitor ought to have considered this, as well as his race discrimination complaint. On the basis of the materials before me, it seems that any Article 14 complaint he may have entirely overlaps with the applicant's claim in race discrimination for which he has an available, and much more suitable, alternative remedy. This is not a case, therefore, where the applicant's reliance on Convention rights requires the court to intrude into matters which were within the Visitor's jurisdiction.

Section 75 of the Northern Ireland Act 1998

[57] Belatedly, the applicant raised a complaint that the Visitor had not complied with duties under section 75(1) and (2) of the Northern Ireland Act 1998 (NIA) in terms of having due regard to the need to promote equality of opportunity and having regard to the desirability of promoting good relations. This complaint, contained in the applicant's written response to the respondents' skeleton argument, was also not particularized. Nor was it contained in his application for removal which has been treated as his Order 53 statement in this case. Assuming the

applicant should be permitted to advance it at this late stage, since an applicant is generally entitled to amend their Order 53 statement without leave before leave to apply for judicial review has been granted, and notwithstanding the absence of proper particularization, it is nonetheless a further ground on which it is appropriate to refuse leave.

[58] Insofar as the kernel of this complaint can be discerned, it appears to be simply another recasting of Mr Nhembo's central contention that the Visitor reached the wrong result in failing to hold that he had been discriminated against as compared with the treatment of other students. Insofar as that overlaps with his complaints about the merits of his treatment by the university authorities, it is within the exclusive jurisdiction of the Visitor. Insofar as it overlaps with his complaint that the Visitor did not properly consider his claim of racial discrimination, that has been dealt with at paragraphs [24], [53] and [56] above.

[59] If the complaint is a more conventional section 75 complaint that the Visitor has not complied with the University's Equality Scheme, there are three possible objections to this ground. First, it is far from clear that the Visitor is a relevant public authority for the purpose of section 75. Section 75(3) provides that a public authority for the purposes of the section includes "*any authority (other than the Equality Commission, the board of governors of a grant-aided school, the Comptroller and Auditor General, a general health care provider or an independent provider of health and social care) listed in Schedule 3 to the Public Services Ombudsman Act (Northern Ireland) 2016 (listed authorities)*". The University of Ulster is such a listed authority; but it is unclear whether the Visitor is to be viewed as part of the University for this purpose or as standing apart from it. Section 18 of the 2016 Act does not provide the answer to the question and, whilst I consider it more likely than not that the Visitor is *not* included within the University for the purposes of section 75, the contrary is certainly arguable.

[60] The second and third objections are more problematic for the applicant. First, no provision of the University's Equality Scheme has been identified which the Visitor is alleged to have breached. I have significant doubts as to whether a decision on an appeal to him in an individual case would fall within the provisions of the scheme requiring policies to be equality screened. In any event, I accept Ms Doherty's submission that, even if an arguable case were to have been established in this regard, there is a consistent line of authority which holds that – in the absence of some exceptional reason to depart from the normal approach, which I do not find to exist in this case – any complaint of breach of section 75 should be pursued by means of complaint to the Equality Commission under Schedule 9 to the NIA and not by way of judicial review proceedings: see, for example, *Re Neill's Application* [2006] NI 278. For these reasons, even if I considered that an arguable case of breach of section 75 had been made out, I would in any event refuse leave on that ground.

Delay

[61] The proposed respondents also contend that the applicant should be refused leave to apply for judicial review on the ground of delay. RCJ Order 53, rule 4 provides that an application for leave to apply for judicial review "*shall be made within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made*".

[62] The actions of the University's academic authorities of which the applicant complains took place well over four years before the applicant made an attempt to invoke this court's supervisory jurisdiction. Even taking account of the fact that the applicant was required to pursue his complaint through the University's internal procedures, the decision of the Visitor which he now wishes to impugn was made on 11 October 2018, so that his application for judicial review was also made over two years after that decision. The respondents are therefore right to say that the application is grossly out of time.

[63] However, is there a good reason for this delay? The applicant relies strongly upon the indication given to him at the time of the Visitor's decision to the effect that there was no further appeal against that decision available. He contends that this indication misled him as to the availability of *any* further remedy, *i.e.* that it effectively led him to believe that he could not complain to a court by way of judicial review about the Visitor's decision or its subject matter.

[64] Although I have some sympathy for the applicant's case in this regard, I must ultimately reject it. Ms Doherty was right to observe that the indication given to the applicant as to the non-availability of any further appeal from the Visitor was strictly correct. There is no further right of appeal. The applicant was not told that there was no further means in law at all of challenging the Visitor's decision, much less specifically informed that there was no right to apply for judicial review. The applicant, although self-represented, was plainly alive to the (possible) availability of other avenues of recourse. He was in contact with the relevant Ombudsman and the Equality Commission; and, as discussed above, commenced proceedings in the Small Claims Court shortly after the Visitor's decision. The respondents also rely upon the fact that, in the course of those proceedings, a skeleton argument on their behalf dated 11 February 2019 expressly outlined examples of judicial review proceedings which were taken against visitorial decisions. It was open to the applicant to seek legal advice at that (or any) stage and, indeed, the respondents say that he was urged to do so in the course of the county court proceedings by Her Honour Judge Brownlie in March 2019. In any event, the respondents make the case that from February 2019 at the very latest the applicant was, or ought to have been, aware of the potential availability of judicial review and that there has been gross, unexplained delay since that time.

[65] Although courts will strive to ensure that litigants in person such as the applicant are appropriately assisted in the presentation of their case and not unduly disadvantaged by their lack of legal representation (as I have sought to do in this case), it is equally clear that an absence of legal representation cannot entitle a litigant to greater procedural rights under the rules of court than are accorded to represented parties. I accept that the applicant may not have become aware of the availability of judicial review until that possibility was mentioned to him by the judge in the course of his county court proceedings. Nonetheless, viewed objectively, he does not have a good reason for the substantial delay in seeking to invoke this court's supervisory jurisdiction by way of judicial review. To hold otherwise would be a disproportionate sacrifice of the interests of legal certainty in favour of judicial sympathy for the applicant's lack of assistance.

[66] Accordingly, I also refuse the applicant leave to apply for judicial review on the freestanding ground of delay. Had I considered the applicant's application to be otherwise meritorious, I might have been persuaded to exercise residual discretion in the applicant's favour in terms of the extension of time, notwithstanding the objective absence of good reason for the delay. However, in the event, that does not arise.

Alternative remedy

[67] It is well established that judicial review is a remedy of last resort and that leave to apply for judicial review will ordinarily be refused where the applicant has failed to invoke or exhaust an effective alternative remedy. The leading authority in this jurisdiction setting out the relevant principles remains that of *Re DPP's Application* [2000] NI 174.

[68] I have already held that the applicant's existing private law proceedings provide an effective alternative remedy for, and are the correct forum in which he ought to pursue, the determination of his private law claims (see paragraphs [23]-[24] above); and that his refusal of the respondents' offer of remittal to the new Visitor represents a failure to avail of a further remedy which would be as good as the Judicial Review Court could provide (see paragraphs [32] above) both in terms of his complaints about the University authorities and about the fairness of the Visitor's procedure.

[69] For completeness, I also address below an additional argument raised by the proposed respondents, which is that the applicant had a further alternative remedy by means of complaint to NIPSO ('the Ombudsman'). This contention raises interesting issues, which are not straightforward, about the inter-relationship between the functions of the Visitor and the functions of the Ombudsman in relation to universities. The respondents relied on *JR95's Application* [2020] NIQB 8 as an example of a case in which a complaint to NIPSO was held to represent an effective alternative remedy for the applicant, who was complaining about the conduct of a school principal. I did not find this case of particular assistance since, although the

possibility of recourse to the Ombudsman was mentioned (see paragraph [12](i)), Keegan J's dismissal of the application was founded on the availability of another alternative remedy, namely a further appeal in the case (see paragraphs [6] and [13](ii)).

[70] In light of my conclusion below, I do not need to consider in detail the effectiveness of the remedy which the Ombudsman might offer. It is clear that there will be benefits to an individual pursuing a complaint to the Ombudsman, most notably her powers of investigation which are not available to the court. However, the remedies she is able to provide are largely vindicatory (upholding the complaint) and recommendatory in nature (see section 11 of the 2016 Act); albeit that a complainant armed with an Ombudsman's report substantiating their complaint can go on to seek monetary compensation for certain heads of loss or mandatory directions from the county court (see sections 52-53 of the 2016 Act). Whether or not the Ombudsman's regime offers an adequate or effective alternative remedy in any case is likely to turn on its particular facts.

[71] As discussed above (see paragraphs [47]-[48]), the Ombudsman can now consider complaints from students or former students of the University of Ulster (or The Queen's University of Belfast) in relation to alleged maladministration in the exercise of administrative functions under section 18 of the 2016 Act. As also discussed above, where the Ombudsman "*has jurisdiction in respect of a complaint*" made about a university under section 18(2), the relevant visitor "*has no jurisdiction in respect of that complaint*". It is unclear whether the Ombudsman 'having jurisdiction' for this purpose means simply that the Ombudsman *could* consider the complaint if it was properly made to her (which is probably the most natural meaning of the words used) or whether it means that the Ombudsman has assumed jurisdiction by *accepting* the complaint, since there are a variety of bases upon which the Ombudsman must or might decline to investigate (including non-exhaustion of an internal complaints-handling regime, the existence of another legal remedy, or the timing of the complaint being made). It is unnecessary to determine this issue in the present case but it may arise for determination in some other case, and further argument upon it would be required.

[72] Section 18(6) of the 2016 Act provides that, "*Where, before this section has come into operation, a complaint has been made to the visitor but has not been resolved by the visitor, the visitor has jurisdiction to deal with that complaint as if the other provisions of this section had not come into operation.*" Section 18 of the 2016 Act came into operation on 1 October 2016 (see section 64(3)). In the present case, the applicant's complaint to the Visitor appears to have been made on 5 January 2017. It does not therefore benefit from the transitional saving provision as to the Visitor's jurisdiction contained in section 18(6).

[73] The applicant's schedule of key dates which has been provided to me in the course of these proceedings notes that he referred the matter to NIPSO on 3 November 2016; and that he received a response dated 5 January 2017 drawing his

attention to section 24 of the 2016 Act (which provides that, in the absence of special circumstances, the Ombudsman may investigate a complaint under section 5 of that Act only if satisfied that the person aggrieved has invoked and exhausted the authority's complaints handling procedure). It seems that NIPSO wished the applicant to exhaust the visitorial process before investigating his complaint. Once the Visitor had provided his decision in October 2018, there appears to have been further interaction with NIPSO which ran aground because NIPSO sought written confirmation that the University's internal complaints procedure had been exhausted; the applicant contends that the University would not provide him with such confirmation; and the University took the view that the Visitor's decision itself was sufficient indication of the completion of its internal complaints procedure. In any event, the applicant lodged his application with the Small Claims Court shortly after the Visitor's decision was provided.

[74] There is an uneasy relationship between section 18 of the 2016 Act (which provides that the Visitor does not have jurisdiction where the Ombudsman does) and section 24 of that Act (which provides that, absent special reason, the Ombudsman does not have jurisdiction until an internal complaints process is exhausted). One can add into the mix that, pursuant to section 18(4) of the Act, the Ombudsman has no jurisdiction to investigate a matter relating to academic judgment. One reading of these provisions is that, by the time the applicant made his application to the Visitor in early January 2017, section 18 of the 2016 Act had removed the Visitor's jurisdiction at least as far as the case involved alleged maladministration in the exercise of *administrative* functions. It is clear that the applicant (at least now) alleges some form of maladministration; but the extent to which this arose in the course of administrative functions is much less clear. Since the 2016 Act draws a distinction between administrative functions and academic judgment, it is clear that issues of academic judgment cannot be cast or dressed up as administrative functions. At least part of the complaint in this case – indeed, most if not all of it – related to issues which involved or "*related to a matter of*" academic judgment (and so fell outside the Ombudsman's jurisdiction and clearly within the Visitor's jurisdiction, albeit in an area where he may be slow to interfere).

[75] The result of all of this – which was not argued out in detail before me – seems to me to be as follows. There were aspects of the applicant's complaint in respect of which the Visitor retained jurisdiction, notwithstanding the introduction into force of section 18(5) of the 2016 Act. Since aspects of the complaint involved or were related to academic judgment, the Ombudsman had no jurisdiction in relation to them. Accordingly, her jurisdiction could not displace that of the Visitor under the University's Charter. Since the Visitor was considering an appeal in respect of which he had (at least some) jurisdiction, it was open to the Ombudsman to decline jurisdiction to consider any aspect of the applicant's complaint under section 24 of the 2016 Act, since a resolution of the appeal to the Visitor which was to the applicant's satisfaction may have removed any cause for complaint. If and insofar as the Visitor was dealing purely with allegations amounting to maladministration in relation to administrative functions, he would have had no jurisdiction. However,

no elements of the complaint or appeal to the Visitor have been contended by either party to fall within that category; nor has any ground of challenge been raised in respect of the Visitor's decision-making based on lack of jurisdiction by reason of section 18(5) of the 2016 Act.

[76] Returning to the question of alternative remedy, I would not consider failure to have recourse to NIPSO to represent a failure to invoke or exhaust an adequate alternative remedy in this case which ought to lead to the refusal of leave to apply for judicial review. I am satisfied that the applicant made efforts to avail of the service offered by NIPSO and was discouraged from pursuing those efforts pending the outcome of the Visitor's determination. Once the Visitor had given his determination, although NIPSO might have had jurisdiction to consider at least *some* aspects of the applicant's case, there is insufficient information before me to determine that his failure to do so was a culpable failure on his part. In any event, once he had issued proceedings, the Ombudsman was highly unlikely to commence an investigation as a result of the provisions of section 21 of the 2016 Act. I therefore reject the proposed respondents' reliance on this remedy as a reason for refusing leave.

[77] Before leaving this topic, I would add that it seems to me that, if this has not already occurred, there may be merit in the Ombudsman and the respective visitorial authorities of the two universities mentioned in section 18 of the 2016 Act liaising with a view to agreeing a protocol or memorandum of understanding between the respective organisations addressing issues of mutual interest. These might include: the division of responsibilities between the visitors and the Ombudsman; an agreed approach to what should or should not be considered to be maladministration through action taken by a university in the exercise of administrative functions; what advice should be given to students seeking to pursue a complaint as to the correct authority to consider it; a means of ensuring that the respective visitor and Ombudsman know that a student has raised a complaint which might fall within the jurisdiction of the other; and, in particular, how it should be determined in a particular case whether or not a matter falls within the Ombudsman's jurisdiction (so extinguishing the jurisdiction the Visitor might otherwise have). In my view, it would plainly be in the interests of good administration to avoid confusion in respect of the basic question of which authority ought to consider a particular complaint which has arisen.

Conclusion

[78] For the reasons given above, I refuse the applicant's application for leave to apply for judicial review of the decisions of both the university authorities and the University Visitor. In particular:

(1) Insofar as the applicant's grounds relate to the actions of academic staff in 2015/16:

(a) where these raise private law issues, they should be litigated in the applicant's private law proceedings which have already been issued (see paragraphs [23]-[24] above) and which are the appropriate forum for the award of damages which is now essentially the only remedy the applicant seeks (see paragraph [30] above); and

(b) where they raise public law issues, these fall within the exclusive jurisdiction of the Visitor and not within the jurisdiction of the court (see paragraph [51] above) or they are not arguable (see paragraph [56] above).

(2) Insofar as the applicant's grounds relate to the process adopted by the previous Visitor, I refuse to grant leave in respect of them since:

(a) some of them do not surmount the threshold for the grant of leave, since they are not arguable grounds with a reasonable prospect of success (see paragraphs [56] and [60] above); but

(b) in any event, the only appropriate remedy would be to remit the matter for reconsideration by the Visitor – a remedy which the applicant has expressly and unequivocally disavowed (see paragraphs [32], [53] and [55] above).

(3) Further, in respect of both aspects of the challenge, the applicant's proceedings have been brought well outside the time when the grounds of challenge first arose and without an objectively good reason for the delay having been shown which would justify the extension of time by the court (see paragraph [60] above).

[79] In light of the fact that the applicant is unrepresented in these proceedings, and of the complexity of some of the issues raised above, I also set out in a short appendix to this judgment a brief summary of what I have decided and why, in non-technical terms, for the benefit of Mr Nhembo. This may be unnecessary given the level of understanding shown by the applicant in the presentation of his case, and is obviously subject to the more detailed reasoning set out in full in the judgment above, but is designed to be of assistance to him.

[80] For the reasons set out above, I dismiss the applicant's application for leave to apply for judicial review. I will hear the parties on the issue of costs but, provisionally, see no reason to depart from the court's normal practice where leave to apply for judicial review is refused, namely to make no order for costs between the parties.

Appendix

Non-technical summary for the benefit of the unrepresented applicant

(a) I am refusing to let your case go forward to a full hearing in the Judicial Review Court for a number of reasons. Firstly, several of your claims about what happened to you in the course of your final year of study can be considered and ruled upon in the legal proceedings which you have already issued. They are a better forum for resolving many of your complaints, because they will involve oral testimony and questioning witnesses, which the Judicial Review Court rarely does. In particular, since you are now only seeking damages from the University, those proceedings are a better forum to resolve that claim.

(b) In the course of the civil proceedings, there is likely to be an argument about when, and how far, the courts can go behind the decision of the Visitor about what the university authorities have done. In this case, however, the law says that it is not open to me to look into that. I do not consider that any of the limited exceptions to that rule apply in your case. All I can do, therefore, is decide whether the Visitor has followed a proper procedure.

(c) I also do not agree with you that this is a case which would be a good opportunity to try to set new, or more detailed, rules for universities when they are assessing students' projects, even if I was able to go behind the Visitor's decision on these issues.

(d) Although you have an argument that the University Visitor should have had an oral hearing in your case to help him determine who was right and who was wrong about disputed facts, realistically the best I could do for you would be to send your case back to the (new) Visitor to look at again. And you have told me that you are not interested in that. That being so, it would not be a proper use of the court's time and resources – or of yours or the University's – to let this case go ahead.

(e) Finally, although I accept that you may not have known about the possibility of judicial review for some time after the Visitor's decision, you have still not brought this case quickly enough after that decision, or after the time when you should have been aware of the possibility of bringing a judicial review, to comply with the time limit in the Court Rules; and I am not persuaded that there is a good reason to extend that time limit.

(f) You can appeal this decision to the Court of Appeal but, if you do so and lose, you are more likely to have to pay the University's legal costs than you are at this stage. You may therefore wish to focus your energies on pursuing the civil proceedings in the County Court (or in the High Court, if you have them moved to this court level to be dealt with here).