Neutral Citation Number: [2021] EWHC 2653 (Admin)

Case No: CO/13/2021

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

Leeds Combined Court Centre
1 Oxford Row Leeds LS1 3BY

Date: 04/10/2021

Before :

HH JUDGE DAVIS-WHITE QC
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

Between :

THE QUEEN ON THE APPLICATION OF LYNDSEY JAYNE GOUGH	**Claimant**
- and -	
UNIVERSITY OF LEEDS	**Defendant**

- -
- -

The Claimant appeared in person
The Defendant did not appear and was not represented

Hearing date: 28 September 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HH JUDGE DAVIS-WHITE QC (SITTING AS A JUDGE OF THE HIGH COURT)

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The time and date for hand-down is deemed to be 10:30am on 4 October 2021

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

HH Judge Davis-White QC :

1. This is a renewed application for permission to apply for judicial review. Permission was refused on the papers by HH Judge Kramer (sitting as a Judge of the High Court) by order dated 24 May 2021.

2. Ms Gough appeared before me in person. The defendant (the "University") did not appear and was not represented. However, by letter dated 17 August 2021, it indicated that it would be taking this course, with no disrespect to the court intended, and, among other things, that it considered that the Order of HH Judge Kramer and the reasons that he had given were correct. I am grateful to Ms Gough for the assistance that she gave me.

3. Ms Gough seeks to challenge a number of decisions made by the University which, she says, have resulted in her being unable to take enter the relevant programme of the University with a view to attaining and graduating with an MPsyc, BSc Advanced Psychology, or, in other words, what Ms Gough described as an advanced degree in psychology, (the "BSc Programme"). As well as challenges to the decision not to allow her to enter onto the BSc Programme, she also challenges certain matters relating to a prior course that she completed at the University with a view to attaining the academic requirements for admission on the BSc Programme. She did not reach the level of success on that programme required to meet the entry requirements for the BSc Programme. As a generality, she says that proper allowances have not been made for her personal disabilities and situation in life and that, in broad terms, the University has unlawfully discriminated against her, provided inadequate services under the Consumer Rights Act 2015 and breached her human rights as conferred or confirmed by the combination of the European Convention on Human Rights and the Human Rights Act 1998. On her renewal application, she also relies upon the Higher Education and Research Act 2017. She told me (and made the point in the papers several time, not least by stickers saying "Please hear me") that she felt that her voice had not been, and was not being, heard. I tried to explain to her that I could only operate within the parameters of the applicable law. It is not for me to enter into an examination of the issue as to whether, on the merits, I think that she should be admitted to the BSc Programme.

4. Ms Gough's aim is to be accepted onto the BSc Programme. In effect, she says that the refusal to let her embark on the BSc Programme (together with certain other connected decisions and or conduct of the University with regard to the course that she took with a view to qualifying to enter the BSc programme), is an illegal decision which should be reversed and/or she should receive compensation.

5. In broad terms, HH Judge Kramer decided that it is difficult to identify the particular decisions that are being challenged, that any challenge by judicial review now seems woefully out of time, that there are (or were) alternative remedies available in respect of a number of her complaints and that other grounds were simply not made out. Sensibly and understandably, in her written and oral submissions, Ms Gough sought to address the points made by HH Judge Kramer in refusing permission on the papers. I should stress that it is against that background that the focus has been upon the reasons for refusing permission given by HH Judge Kramer. Nevertheless, I have well in mind that this is a renewal application in which I consider the matter wholly afresh and that

the process before me is not a review of the decision of HH Judge Kramer, still less an appeal from that decision.

6. It is first necessary to set out the facts. In doing so I identify the decision so the University which Ms Gough identified in her renewal grounds as being ones that she was challenging. This arises because, as HH Judge Kramer said in his brief written reasons for refusing permission, it is difficult to identify from the papers initially lodged which decisions are being challenged. This probably reflects the fact that Ms Gough, as she states in her claim form, would like the court to "examine the activities of my claim to determine whether the University..were lawful and the court to make a final decision regarding this situation between ourselves".

The Facts and the matters challenged

7. In 2016 Ms Gough applied for a place on the BSc Programme starting in September 2017. She was rejected.

8. It was then suggested that she undertake a one year foundation course to qualify for a place on the BSc Programme. In summary, Ms Gough obtained a place at the University to do a one-year foundation course which was a potential gateway to the BSc Programme. The foundation course in question was the Interdisciplinary Studies with Preparation for Higher Education (PHE) programme (the "PHE Programme") with the Lifelong Learning Centre at the University. She received an offer, by letter dated 14 December 2017, of a place on the BSc Programme for 2018, conditional upon her achieving a 70% pass mark on the PHE Programme and a Grade 4 (rather than the usual Grade 5) pass in GSCE Mathematics. In fact, in due course she obtained a 58% pass figure on the PHE Programme and a grade 3 pass in GCSE Mathematics. The latter was obtained from Shipley College. Because she had not met the relevant academic conditions her place on the BSc Programme was not confirmed.

9. Following her failure to meet the academic requirements to receive a place on the BSc Programme starting in September 2018, she had discussions with the University School of Psychology about other possible programmes of study that she could follow to enter the BSc Programme in 2019. She decided that she would take an Access to HE Health Science Professions (level 3) (the "Level 3 Course") alongside trying to achieve a Grade 5 in GCSE Mathematics. She received an offer from the University for a place on the BSc Programme conditional on meeting these conditions. She did not meet them. In fact she did noy enrol upon the Level 3 Course. She told me that this was because she had by then got caught up in researching and furthering her case that the University had acted unlawfully regarding the refusal to allow her to embark upon the BSc Programme in 2018 and because she had been busy carrying out renovation works on her property. She also had difficulty in achieving a Grade 5 pass at GSCE Mathematics.

10. Ms Gough made a further application for a place on the BSc Programme for 2020. That application only listed that she was taking GCSE Mathematics and not the Access to HE Course. She was told that she would not able to meet the level 3 qualification requirements in order to be accepted onto the degree and therefore she would receive a further rejection.

11. The above is taken largely from a letter dated 5 June 2020, from the University to Ms Gough, setting out its response to a complaint that she had submitted in February 2020. Ms Gough confirmed to me that the basic facts stated in the letter were true.

12. The complaint as recorded in that letter reflects some of the complaints made by Ms Gough about the University in these proceedings and especially that she was discriminated against owing to her disability and background and that she should have received better advice from the Lifelong Learning Centre, which was the relevant part of the University that ran the PHE Course and on which she had attained the 58% pass whereas the relevant condition for entry onto the BSc Programme had been a 70% pass.

13. I turn now to the history in more detail, to identify the decisions said by MS Gough to be ones that she would like to challenge. Essentially, following the decision of HH Judge Kramer, Ms Gough identifies eight "decisions" that she says that she is challenging.

14. Ms Gough provided me with a document entitled "Description of Self. Brief Description of my parents, my relocations & my educational providers". This document sets out her life history from an early age and the difficulties that she had encountered. For example, it appears that, as her father was a member of the armed forces, she was the subject of relocations during her childhood which disrupted her education, attending five different schools and moving home six times before the age of 14. This she considers was a contributory factor to preventing her attaining her true potential in attaining academic credentials.

15. Shortly before commencing her PHE course at the Leeds Lifelong Learning Centre at the University, Ms Gough was assessed on 1 August 2017 by Alison Shorrock PGDip (SpLD/dyslexia) OCR AMBDA. I was told by Ms Gough that this referral was made with the assistance of the University, Indeed, in the papers before me there is a document on which she says that she is thankful that the University "discovered my learning disability". The resulting report identified that the assessment and background information "revealed a clear picture of a specific learning disability-dyslexia". Various recommendations were made to address this problem, including, by way of example, allowing Ms Gough 25% extra time in examinations, specialist support, making tutors aware of the challenges facing her and an application by Ms Gough for the Disabled Students Allowance.

16. Ms Gough told me that she did indeed receive assistance in line with the recommendations in the report, for example, of extra exam time and assistance by way of the well-known voice dictation system "Dragon" and other electronic programmes. Since then, Ms Gough has also been pursuing assistance on the autism front from which she apparently suffers as confirmed by a letter from Leeds Autism Diagnostic Service dated 12 April 2021.

17. The first (the "First Decision") that Ms Gough identifies as one that she would like to challenge is a decision that a place on the BSc Programme could not be offered to Ms Gough, because she had not met the conditions of the offer. This decision is contained in two communications from the University dated 16 August 2018 and 4 July 2018. Those communications followed Ms Gough writing to the School of Psychology and offering explanations as to why she had been unable to meet the conditions of the offer

made to her, resulting from events that occurred during her study for the PHE . Among other matters relied upon she set out the following: (a) sexual harassment that she experienced; (b) health issues with her eldest daughter; (c) operations undergone by her parents (mother: hip operation; father: spinal cord operation); (d) anxiety and depression that she suffered; (e) influenza that she suffered; (f) bullying experienced on the course; (g) dyslexia; (h) disrupted education as a child and during school education.

18. The second decision identified as subject to challenge (the "Second Decision") is one said to be contained in a document dated 18 August 2018. There seems to have been some confusion within or generated by the University as to whether Ms Gough had been accepted on the Programme because of what appears to have been an automatically generated letter welcoming people back tot h University and their course on the basis that Ms Gough would be progressing to the Programme. That confusion was sorted out very quickly. The end result was an email again confirming that a place on the Programme could not be confirmed because the conditions for entry had not been met. In substance, the proposed challenge appears to be to the confirmation of the First Decision.

19. The third decision identified as subject to challenge (the "Third Decision") is one said to be contained in documents dated between 16 August 2018 and 4 September 2018. The documents referred include a request by Ms Gough to the Lifelong Learning Department of the University to re-take two modules of the PHE course contained in her email of 23 August 2018. This request is not, of course, a decision of the University which is open to challenge, but rather is the genesis of a decision by the University that two modules of the PHE course could not be re-taken.

20. As regards the question of re-taking modules, Ms Gough referred to the fact that two students which were on the PHE Programme with her were repeating the Programme and says that she was unfairly discriminated against in not being permitted to re-take. However, she fairly accepted before me that she dopes not know the circumstances in which these two persons were enabled to re-take the PHE Programme. Significantly, it is unclear whether they had originally failed the PHE Programme, as contrasted with Ms Gough who passed it with a 58% mark, or were allowed to re-take the PHE Programme to improve pass results (which is one course that Ms Gough would have liked, and would still like, to follow)

21. The fourth decision identified as subject to challenge (the "Fourth Decision") is a decision said to have been made at a meeting on 18 September 2018 between Ms Gough and her personal tutor. M Morgan) at the Lifelong Learning Centre. The relevant meeting note refers to Actions agreed as including "checking the mitigating circumstances issue". It is unclear from the document itself whether this was checking these mitigating circumstances with a view to one or more of revisiting the actual grades achieved by her on the PHE Programme or with a view to considering whether to permit her to re-take certain modules of the PHE Programme or whether it was thought the mitigating circumstances might affect the admission test for the BSc Programme. The other actions agreed refer to checking the entry requirements for the Programme and checking colleges for other courses (apparently as a gateway to meeting the admissions requirement for the BSc Programme). It is difficult to see that there is (or can be) any challenge to the actual decision to investigate these matters

further, as was apparently agreed at the time. The challenge appears to be to the result of the "action plan".

22. In fact the meeting of 18 September 2018 resulted in an email from Mr Morgan to Ms Gough dated 20 September 2018. In that email he says that he checked on the issues that they had spoken about. The outcomes were as follows. She would not be able to progress directly to the BSC Programme but would need to meet the admission requirements in another way. One suggestion was an Access to Higher Education Diploma with the "required marks". Ms Gough was told to check what passmarks were required as they might change over time. In addition she would need a Grade 5 pass in GCSE mathematics. As I understood Ms Gough, she seeks to challenge this decision as being a decision not to review her marks as achieved on the PHE Programme and/or as being a decision to refuse to allow her to re-take modules of the PHE Programme so as to improve her overall 58% pass mark and/or as being a decision to refuse her entry to the BSc Programme, in each case notwithstanding the mitigation that I have earlier referred to as her having put forward. She also seeks to challenge the decision that she would need to obtain a Grade 5 GCSE in Mathematics. I will refer to this collection of decisions as "Decision 4A".

23. As regards the decision to require a pass at Grade 5 rather than Grade 4 GCSE Mathematics, this was in fact part of the standard academic entry requirement for entry onto the BSc Programme. I deal with the University's explanation of this point later in this judgment. The concession that a Grade 4 pass would be sufficient only applied where the other academic requirement was met by passing a course such as the PHE Programme (to the required mark). The question of Ms Gough being required to obtain a Grade 5 rather than Grade 4 in Mathematics is a decision as to which I can see no specific grounds for judicial review other than the general ground put forward of unlawful disability discrimination on the basis that the requirement should have been lowered to Grade 4 because of her personal disability circumstances.

24. By email dated 3 October 2018, Ms Gough wrote to Alison Tindall at the University's School of Psychology seeking further advice and assistance about the entry requirements for the BSc Programme. In the course of the email she mentioned that she had only obtained A Grade 3 in her GSCE mathematics but that she would be re-sitting the exam in November. If she did not achieve a Grade 5 she would carry studying and attempt the exam again in 2019.

25. By email dated 5 October 2018, Ms Gough confirmed to Ms Tindall that she, Ms Gough, had applied to Leeds City College to undertake a Level 3 Access to Higher Education Diploma. Once she had successfully completed this course and her Grade 5 GSCE in Mathematics, she would re-submit her UCAS application form for the BSc Programme in 2020.

26. In January 2019, Ms Gough contacted her local doctor's surgery asking if she could be examined to see if she suffered from a number of conditions including ADHD and ASD as she was having difficulties with her studies. She also speculated as to whether she was being discriminated against in that she was now being required to achieve a Grade 5 in Maths to qualify for a place on the course that she wished to undertake.

27. By letter dated 21 February 2019, Leeds City College acknowledged Ms Gough's acceptance of their offer of a place on the CERTA Level 3 Access to Higher Education Diploma: Health Science Professions (DAY) course in September 2019. In February and March 2019 she corresponded by email with Ms Tindall about her acceptance on the Leeds City College Course and mentioned that she might have to re-take her Maths GCSE again in September 2019 but that she was determined and passionate about achieving the qualifications required to obtain a place on the BSc Programme.

28. In May 2019, Ms Gough took her Maths GCSE at Shipley College. Although she was given extra time to complete her exam, it appears that her disability and need for the extra time had to be validated. When she returned to the examination hall she had her phone with her in her cardigan which she placed on the back of her chair. This led, she told me, to her being disqualified. Although Ms Gough considers this another example of discrimination and a matter of complaint obviously it has nothing to do with the University. Ms Gough did not suggest that it did. I mention the incident purely for completeness.

29. In September 2019, Ms Gough did not commence the course at Leeds City College. She told me (and it is stated in the bundle that she had lodged) that this was because of house renovation works that she was carrying out in 2019. She told me that it was also because she was beginning to investigate her relevant legal rights in relation to the BSc programme.

30. The fifth decision that Ms Gough identifies as being one that she challenges is a letter of complaint by her dated 25 February 2020 addressed to the University (the "Fifth Decision). This of course is not a decision of the University. She says that she is awaiting a reply to her complaint. As I understand her, what she really seeks is a reply satisfactory to her. However the University did reply to her complaint. I refer to the response to her complaint which is contained in the letter that I have referred to dated 5 June 2020. I treat the decision in that letter as falling within (or in fact being) the Fifth Decision.

31. The letter of 5 June 2020 effectively dismissed or did not uphold Ms Gough's complaints. The following is a very broad summary only.

    (1) As regards the move in requirement from a Grade 4 GCSE in Maths to a Grade 5 GCSE in Maths it was explained that the standard requirement is Grade 5. Grade 4 was acceptable for students who had achieved the PHE programme requirement to the required level. When she applied for a place on the BSc Programme starting in 2020 she was no longer meeting the PHE admission requirement but instead received the standard Grade 5 offer.
    (2) The admissions policy is that decisions are made on the basis of merit and the ability of applicant's to meet the academic and non academic criteria.
    (3) Information about disability is not used when considering academic eligibility, It is reviewed in order to identify potential study-related support requirements and funding so that the University can ensure adequate support once accepted on a course.

(4) When a student has mitigating circumstances that have affected their studies the normal process would be for the candidate to notify the relevant exam board of the circumstances. In Ms Gough's case that would have been the Lifelong Learning Centre when they were confirming her results on the course she had undertaken. Given the time that had passed it was not possible to investigate in detail what had happened but there was no formal complaint at the time and no appeal against the grades awarded.

(5) The School of Psychology did consider Ms Gough's circumstances, despite what was stated in the applicable policy, but the mark achieved in the PHE (58%) was too far off the offer of 70% to be able to admit Ms Gough to the BSc Programme.

32. Ms Gough was not satisfied with the answer to her complaint. She asked for it to be escalated. However, she also sought assistance from her MP, Mr Philip Davies, who wrote on her behalf to the University. Again, the response was not what Ms Gough hoped for. In effect, by letter dated 27 July 2020, the University confirmed that its investigation had revealed that Ms Gough's application had been considered fairly and in accordance with the University's admissions policy. The University has an obligation to apply its admission criteria consistently to help ensure students are able to engage fully with and attain the academic requirements of any programme to which they are admitted. This is an academic matter and Ms Gough had not achieved the academic threshold required. Ms Gough relies upon this letter as containing the sixth decision that she challenges (the "Sixth Decision").

33. On 20 August 2020, Ms Gough received confirmation from Shipley College that she had achieved Grade 4 in her Maths GCSE.

34. In August 2020, Ms Gough referred the matter to the Office of the Independent Adjudicator for Higher Education (the "OIA"). The OIA was initially unclear as to the position because of the references to the admission position regarding the BSc Programme but also to the PHE Programme. They pointed out, in an email dated 5 August 2020, that access to the scheme that they run is only available to former or current students studying on the course in relation to which the complaint is made. In effect they do not deal with admissions complaints but complaints from students (or former students) regarding a course to which they have been admitted. They also indicated that they needed a "Completion of Procedures Letter" ("COP Letter") from the University indicating that the internal complaints system had been exhausted.

35. Ms Gough wrote to the University seeking such a COP Letter. The University explained, by email dated 24 August 2020, that the complaint she had made was an admissions complaint and that COP Letters are not issued in relation to such complaints.

36. Ms Gough complains about this email (the "Seventh Decision"). She says that her complaint is not an admissions complaint but a human rights complaint involving also breaches of the Equality Act 2010, the Consumer Rights Act 2015 and the Human Rights Act 1998.

37. By email dated 29 September 2020 the OIA sent Ms Gough a letter containing their decision and confirming that the complaint to the OIA had been closed but explaining

options regarding review and appeal. In effect, the complaint was held not to fall within the Scheme because it related to a complaint about non-admission to a degree course (the BSc Programme) rather than a complaint about Ms Gough's time as a student.

38. The correspondence before me is far from complete. It appears that the OIA subsequently explained to Ms Gough, by email dated 28 October 2020, that insofar as she was complaining about things that occurred (or did not occur) in connection with her time as a student on the PHE Programme, then she would need to go through the internal complaints procedure of the Lifelong Learning Department. She should then obtain a COP Letter in that regard and then the OAI could investigate. However, if the decision was that the complaint was out of time under the relevant complaints rules of the Lifelong Learning Department then only that decision could be reviewed by the OIA.

39. Insofar as Ms Gough complains about decisions of the University taken by the Lifelong Learning Centre in relation to her PHE Programme or events that took place (or did not take place) on that Programme, it appears that there is (or was) an alternative remedy in terms of an internal complaint system followed by the possibility of complaint to the OIA.

40. In October 2020, Ms Gough emailed the University asking how she could commence a course to help her enter the BSc Programme. This appears to have been a freestanding request made without reference to her previous involvement and contacts with the University. The PHE Programme was suggested by the relevant Student Experience Assistant. Ms Gough asked what steps were needed to be taken to enrol on that course commencing in September 2021. The University then clearly checked its records.

41. By email dated 6 November 2020, the University confirmed that according to their records Ms Gough had successfully (by which they meant she had a 58% pass mark) completed the PHE Programme in 2017/18 and was therefore ineligible to study the course again. Ms Gough relies upon this letter as containing the eight decision that she challenges (the "Eighth Decision").

42. By email dated 5 November 2020 the OIA confirmed that their service complaints procedure only looked at issues with the service provided with the OIA and not at the merits of the case itself.

43. By email dated 20 November 2020, the Equality Advisory and Support Service gave Ms Gough advice regarding the Equality Act and the Human Rights Act. It pointed out that there might be problems in her then advancing a case of Disability Discrimination regarding her experiences with the University because of a 6month deadline for bringing such claims in the Equality Act 2010.

44. The current proceedings before me were commenced by claim form issued on 30 December 2020.

The test for permission

45. The test for permission to apply for judicial review is helpfully summarised in the Administrative Court Guide Judicial Review Guide 2021 (the "Guide"), paragraph 9.1.3:

> "*The Judge will refuse permission to apply for judicial review unless satisfied that there is an arguable ground for judicial review which has a realistic prospect of success*". A number of well-known cases are cited in support of this paragraph.

46. Paragraph 9.1.4 of the Guide deals with circumstances where, even if a claim is arguable, the Judge must refuse permission.

47. Paragraph 9.1.5 of the Guide points out that if there has been undue delay in bringing the claim, the court may refuse permission. Paragraph 6.4 of the Guide cites CPR 54.5(1) to the effect that claims for judicial review must be started promptly and in any event not later than 3 months after the grounds for making the claim first arose. There is power to seek an extension of time under CPR r3.1(2)(a) (see also paragraph 6.4.4 of the Guide. No such application was made in this case.

48. As regards alternative remedies, paragraph 6.3 of the Guide deals with situations in which judicial review will not be appropriate or possible. It then deals with a number of such cases "in outline". One such example is "Adequate Alternative Remedy". The Guide goes on in paragraph 6.3.3 as follows (leaving out the footnotes):

> "6.3.3.1. Judicial review is often said to be a remedy of last resort. If there is another route by which the decision in issue can be challenged, which provides an adequate remedy for the claimant, that alternative remedy should generally be used before applying for judicial review. 6.3.3.2. The alternative remedy may come in various forms. Examples include an internal complaints procedure, review mechanism or appeal (whether statutory or non-statutory).
> 6.3.3.3. If the Court finds that the claimant has (or had) an adequate alternative remedy, it will generally refuse permission to apply for judicial review."

Delay

49. The Claim Form was issued well outside the maximum three month period permitted after each of the First to Seventh Decisions. The need for speedy action in the Education field is confirmed by the 6 month limitation set out in s119 Equality Act 2010, to which I refer later in this judgment.

50. There is no application to extend time. There are no sufficient circumstances to raise an arguable case to extend time. As did Judge Kramer I would refuse permission on this ground alone in relation to these Decisions. I note that, following further assistance from Ms Goudie, I have been able to identify the decisions that she challenges with more precision than did Judge Kramer.

51. As regards the Eighth Decision, in my judgment this simply re-iterated the decision already communicated to Ms Gough that she could not repeat the PHE Programme (though in terms this was originally put in terms of not repeating modules rather than not repeating the whole course). I do not consider that the Eight Decision was in fact a

new decision which, for judicial review purposes, started time running again and therefore the time for bringing judicial review proceedings in relation to the decision which was made much earlier had also expired by the time the claim form in this case was issued.

52. There are other grounds for refusing permission, even if the delay reason is not reason in itself.

Alternative remedy

53. To the extent that Ms Gough relies upon the receiving of an inadequate service and on rights as a consequence arising under the Consumer Rights Act 2015 (including the right to repeat performance), then those rights can (or could) be pursued by ordinary claim in the courts. Judicial review is neither necessary nor appropriate. There is an adequate alternative remedy to judicial review. This encompasses, in particular, any complaints in relation to the PHE Programme.

54. The same is true insofar as she asserts any breach of contact, in relation to the PHE Programme, arising from a failure to meet statements that the University "works to support all students to fulfil their potential" and offers "support for students at every stage and in all respects on that journey".

55. Further, as I have already identified, there is (or was) an adequate alternative remedy by way of utilisation of the internal complaints procedure of the Lifelong Learning Centre, with the ability thereafter to involve the OIA if the complaint was not resolved satisfactorily.

56. As regards complaints about unlawful discrimination under the Equalities Act 2010, Ms Gough had an adequate alternative remedy by way of ordinary claims (as opposed to judicial review claims) in the courts. It may be that the right to bring such claims has now expired by effluxion of time (see the 6 month limit in s118 Equality Act 2010), but the alternative remedy does not have to be available at the time the judicial review claim is being considered. It is sufficient if the right existed at an earlier stage and was adequate.

57. In this respect too, I therefore agree with HH Judge Kramer.

Human Rights Claims

58. The Human Rights claims raised by Ms Gough relate both to her experiences on the PHE Programme, the result she achieved on such programme and the failure to review it and the insistence of the University in applying the academic entry requirements that it did for entry onto the BSc Programme.

59. Ms Gough relies first upon Article 2 of the First Protocol to the European Convention on Human Rights. So far as relevant that provides that "No Person shall be denied the right to education". I leave out the following words dealing with respect for parental religious and philosophical convictions.

60. This right is a limited one. It encompasses a number of interrelated. but separate rights (all of which are qualified or limited- see *The Belgian Linguistics Case* [(1979-80) I EHRR 252]):
(1) a right of access to such educational establishments as exist at a given time;
(2) a right to an effective (but not the most effective possible) education;
(3) a right to official recognition of academic qualifications; and
(4) a right, when read with the freedom from discrimination guaranteed by Article 14 of the Convention, not to be disadvantaged in the provision of education on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status without reasonable and objective justification.

61. So far as the right is one of access to education, that does not preclude the imposition of entry requirements for access to educational establishments, in particular in relation to higher education establishments (see Application 8840/80: *X v United Kingdom* 23 DR 228 (1980), E Com HR; Application 6598/74 5 Digest 783). As the Commission said in that case: "where certain, limited, higher education facilities are provided by a State in principle it is not incompatible with Article 2 of Protocol No. I to restrict access thereto to those students who have attained the academic level required to most benefit from the courses offered." The setting of an entry level to the BSc programme does not therefore constitute an arguable breach of Article 2 of the First Protocol.

62. The real complaint appears to be one of discrimination, both in terms of the admission requirements for the BSc Programme not being relaxed for the claimant (but not generally) and in the manner in which the PHE Programme was run in relation to Ms Gough and/or her results not upgraded to reflect her mitigation. However, as I have already decided, any claims to discrimination based on a disability are capable of being brought by ordinary court proceedings under the Equalities Act 2010. As regards any alleged breach of Article 2 of the First Protocol and Article 14 of the European Convention based upon disability discrimination there is therefore an adequate alternative remedy and a case for judicial review is not arguable.

63. Reliance is also placed upon a breach of article 3 of the European Convention on Human Rights which provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

64. In *Regina (AB) v Secretary of State for Justice (Equality and Human Rights Commission intervening)* [2021] UKSC 28, the Supreme Court re-stated the orthodox position:

> "[40] In order for treatment to constitute a violation of article 3, the European court has consistently held that it must attain a minimum level of severity, which normally has to be assessed in the light of all the circumstances of the case. The position was explained by the plenary court in the early case of *Ireland v United Kingdom* (1978) 2 EHRR 25, para 162: ill-treatment must attain a minimum level of severity if it is to fall within the scope of article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc. That

formulation, emphasising the need to consider all the circumstances of the case, has been repeated in the subsequent case law.

[41] The range of relevant circumstances was discussed in *Ramirez Sanchez* (2006) 45 EHRR 49, where the Grand Chamber stated at para 118: The court has considered treatment to be inhuman because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be degrading because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. In considering whether a punishment or treatment is degrading within the meaning of article 3, the court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely a›ected his or her personality in a manner incompatible with article 3. However, the absence of any such purpose cannot conclusively rule out a finding of a violation of article 3.

[42] A somewhat fuller catalogue of relevant factors was provided in *Ahmad v United Kingdom* 56 EHRR 1, para 178: in the context of ill-treatment of prisoners, the following factors, among others, have been decisive in the courts conclusion that there has been a violation of article 3:

- the presence of premeditation;
- that the measure may have been calculated to break the applicants resistance or will;
- an intention to debase or humiliate an applicant, or, if there was no such intention, the fact that the measure was implemented in a manner which nonetheless caused feelings of fear, anguish or inferiority;
- the absence of any specific justification for the measure imposed;
- the arbitrary punitive nature of the measure;
- the length of time for which the measure was imposed; and
- the fact that there has been a degree of distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.

The court would observe that all of these elements depend closely upon the facts of the case . . ."

65. I appreciate that this case does not involve treatment of Ms Gough as a prisoner but in my judgment, and without in any way wishing to minimise or underestimate the anguish and suffering that Ms Gough has experienced, I agree with HH Judge Kramer's assessment that this is not a case which even arguably approaches the minimum level to start engaging article 3 of the European Convention.

66. A further complaint is that there has been a breach of article 6 of the European Convention dealing with rights to a fair trial in the determination of civil rights and obligations. So far as there is a complaint about the PHE Programme there is a right under article 6 by reference to the courts that can determine the complaints of breach of contract, breach of consumer legislation and or breach of disability discrimination law that I have identified. So far as the issue of admission on the BSC Programme is concerned, the relevant case law provides that the "right to a school place" is not a civil right within the meaning of article 6 (see *Simpson v United Kingdom* 64 DR 188 (1989)). In my judgment the same must be true of the any right to admission on the BSc Programme. In any event, however, if the admission to the BSc Programme (or rather the non-admission of Ms Gough to it) is itself unlawful because of disability

discrimination prohibited by the Equality Act 2010 then there is an alternative remedy available, as I have discussed and article 6 would thus be complied with at that stage.

67. Accordingly I do not consider that there is any arguable case in relation to breach of article 6.

68. Article 14 of the European Convention confers a right to enjoy the other convention rights without discrimination. I have dealt with the other articles above. There is no scope for article 14 to apply regarding articles 3 and 6 because those articles do not apply. As regards Article 2 of the First Protocol whether alone or taken in conjunction with Article 14 I have held that there is an adequate alternative remedy.

Higher Education and Research Act 2017

69. In her renewal papers, Ms Gough relies upon sections 79 and 83 of the Higher Education and Research Act 2017 (the "2017 Act"). As I understand it, she changes her reliance on Article 2 of the First Protocol to the European Convention and Articles 6 and 14 of the European Convention to rely on these sections.
70. In my judgment, these provisions do not assist in her judicial review claim.
71. The provisions of ss79 and 83 are as follows:

> "**79. Power to require application-to-acceptance information**
>
> (1) The Secretary of State may, by notice, require a body within subsection (2) to provide such application-to-acceptance information as may be described in the notice for use for qualifying research.
>
> (2) A body is within this subsection if it provides services to one or more English higher education providers relating to applications for admission on to higher education courses provided by them.
>
> (3) "Application-to-acceptance information" means information relating to—
>
> (a)applying for admission on to higher education courses provided by an English higher education providers (including predicted grades),
>
> (b)offers and rejections regarding which individuals are admitted on to those courses, or
>
> (c)the acceptance of such offers.
>
> (4)"Qualifying research" means—
>
> (a)research into the choices available to individuals who are—
>
> (i)applying for admission on to higher education courses provided by English higher education providers, or
>
> (ii)considering whether to accept an offer for admission on such a course from such a provider;
>
> (b)research into equality of opportunity;
>
> (c)research into any other topic approved by the Secretary of State.
>
> (5)The notice under subsection (1) may require the information to be provided—

(a)by a time specified in the notice, and

(b)in a form and manner specified in the notice.

(6)If a body fails to comply with a notice under subsection (1) and does not satisfy the Secretary of State that it is unable to provide the information, the Secretary of State may enforce the duty to comply with the notice in civil proceedings for an injunction or (in Scotland) an interdict.

(7)In this section, "equality of opportunity" means equality of opportunity in connection with access to and participation in higher education provided by English higher education providers.

(8)See section 80 regarding the use of information obtained under this section.

83 Meaning of "English higher education provider" etc

(1)In this Part—

- English higher education provider" means a higher education provider whose activities are carried on, or principally carried on, in England;
- "higher education provider" means an institution which provides higher education;
- "institution" includes any training provider (whether or not the training provider would otherwise be regarded as an institution);
- "higher education" means education provided by means of a higher education course;
- "higher education course" means a course of any description mentioned in Schedule 6 to the Education Reform Act 1988;
- "training provider" means a person who provides training for members of the school workforce within the meaning of Part 3 of the Education Act 2005 (see section 100 of that Act).

(2)In this Part—

(a)"English further education provider" means an institution in England within the further education sector, and

(b)references to an institution within the further education sector have the same meaning as in the Further and Higher Education Act 1992 (see section 91(3) of that Act).

(3)In this Part references to a higher education course provided in England are to a higher education course which is provided wholly, or principally, in England.

(4)In this Part references to an institution in a part of the United Kingdom are to an institution whose activities are carried on, or principally carried on, in that part.

(5)Subsection (1) is subject to express provision to the contrary, see—

(a)section 10(9) (mandatory fee limit condition for certain providers),

(b)section 25(4) (rating the quality of, and the standards applied to, higher education),

(c)section 32(5)(b) (content of an access and participation plan: equality of opportunity), and

(d)section 38(5) and (6) (duty to monitor etc the provision of arrangements for student transfers).

72. Section 79 of the 2107 Act confers powers on the Secretary of State to obtain information. As such it appears irrelevant to Ms Gough's claim in these proceedings.

73. Section 83 is a definition section and therefore equally irrelevant to Ms Gough's claim.

Grounds general

74. For completeness, I should add that some of the "decisions" challenged are, in any event, ones that I cannot see as possibly being subject to challenge by judicial review. These include the Third Decision (which was a request by Ms Gough, not a decision by the University); the Fourth Decision (which was a decision of the University to review things and find out more about the options open to Ms Gough), the Fifth Decision (so far as it relates solely to a complaint by her, though I have widened this "decision" to include the response to her complaint); the Seventh Decision (which is simply an accurate statement, in context, to the matter the University was replying to and not a decision as such).

Conclusion

75. There is no arguable ground with a realistic prospect of success for a judicial review claim. Accordingly, permission to apply for judicial review must be refused.