



OUTER HOUSE, COURT OF SESSION

[2025] CSOH 1

P742/24

OPINION OF LORD BRAID

In the Petition by

HK

Petitioner

for

Judicial Review of the decision by the Undergraduate Appeals Committee of the Senatus of the University of Dundee dated 30 May 2024 to reject the petitioner's appeal against the refusal to award him the degree of BSc in Applied Orthopaedic Technology

Petitioner: Cobb; Drummond Miller LLP

Respondent: McLean, Solicitor Advocate; Brodies LLP

9 January 2025

Introduction

[1] The petitioner is an undergraduate student at the University of Dundee. In 2018, he enrolled there to study for the degree of MBChB, and is due to graduate with that degree in May 2025. In September 2022, he also enrolled to study for the intercalated degree of BSc in applied orthopaedic technology, with a view to eventually pursuing a career as an orthopaedic surgeon, which he still hopes to achieve.

[2] However, although the petitioner has passed his MBChB exams to date, all did not go smoothly with his BSc. To adopt neutral technology for the moment (since the reason why is disputed), the petitioner did not sit the examinations in two modules which formed

part of his BSc course, biomechanics and orthopaedic medicine, either at the original diets in December 2022 or at the rearranged diets in January 2023. He received grades of AB-Absent for those modules, the consequence of which was that, despite passing all other modules, he had insufficient credits to attain his degree. At a meeting on 25 September 2023, the BSc Board of Examiners decided that the petitioner was not eligible for a degree, declining to condone his insufficiency of credits. Following an unsuccessful intervention by his MSP to the Dean of the School of Medicine, the petitioner appealed that decision under the Undergraduate Appeals Procedure Regulations. The procedure which the University followed is described more fully below but all that need be noted at this stage is that the Dean of the School of Medicine appointed an Appeals Panel to consider the appeal, which was refused. The petitioner then appealed to the Undergraduate Appeals Committee of the Senatus of the University of Dundee, which convened a hearing on 30 May 2024, the outcome of which was that that appeal, too, was refused.

[3] It is that second refusal (and only that refusal) which is challenged in this petition for judicial review, which proceeded to a substantive hearing before me. The petitioner asks the court to declare the committee's decision to be unlawful, unfair and irrational; thereafter to reduce (quash) the decision; and to order that the committee reconvene to consider anew the petitioner's appeal.

[4] The grounds of challenge (which to an extent overlap) are that the Appeals Committee (a) ignored one ground of appeal and failed to take account of evidence before it; (b) failed properly, fully and fairly to consider the petitioner's appeal, contrary both to natural justice and to the university's own procedures; (c) failed to identify the nature of the petitioner's appeal, in particular by failing to consider whether there were extenuating circumstances; and (d) failed to adjourn the appeal to invite the petitioner to respond to

new evidence which the committee had obtained. The third of those grounds was abandoned at the substantive hearing, and I need not mention it again. Although the petitioner's craves and pleas-in-law refer to irrationality, the petitioner did not pursue that argument. However, the breach of natural justice challenge evolved (perhaps mutated would be a better word) during the substantive hearing to include a challenge based on apparent bias. The only averment about bias in the petition appears at the end of statement 6.3 where it is averred that the Appeals Committee's failure to adjourn the hearing was unfair and irrational, and tends to indicate prejudice and bias.

[5] It is important to appreciate that permission to proceed with the petition was granted only in respect of the foregoing grounds (a) to (d). Had the petitioner wished to introduce a new ground of challenge at any stage, he would have required not only to introduce averments relating to that ground (whether by adjustment or amendment) but also to seek permission to proceed with that ground of challenge: *B v Secretary of State for the Home Department* 2016 SLT 1220, para [64]. As it happens, on 12 December 2024, I refused permission for a new ground of review which had found its way into the petition by way of adjustment (that the university had failed to comply with article 6 of ECHR), in large part because the averments in support of that ground, to the effect that the Appeals Committee was not an independent and impartial decision-maker, were wholly lacking in specification. At no stage has the petitioner sought to amend the petition to introduce a stand-alone case of bias or apparent bias at common law based upon the composition of the Appeals Committee, let alone sought permission to introduce such a ground. I revert to this issue below.

The facts

Introduction

[6] A long history is set out in the pleadings and productions, some of which is disputed, and much of which is not relevant to the issues before the court. In brief, it is clear that from an early stage the university staff took issue with the petitioner's approach to the BSc course, which was that all of the learning could be undertaken remotely and there was no requirement for him to attend in person at any time; whereas the teaching staff were of the view that he ought to attend at least some lectures. They perceived a lack of engagement on the petitioner's behalf, which he disputes.

The first mitigating circumstances application

[7] Early in semester one, the petitioner went overseas due to the illness and then death of his grandfather, which prevented him from undertaking any form of study while he was away. On 7 November 2022, following his return, he submitted a mitigating circumstances application, referring to that (and to the fact that he had twice contracted Covid-19) and requesting that the semester one exams in biomechanics and orthopaedic medicine, fixed for 13 and 14 December 2022, be postponed. Although the Mitigating Circumstances Committee informed the petitioner that his application was upheld, in fact (as the solicitor advocate for the university acknowledged), it is more accurate to say that it was upheld only in part, since the committee refused the petitioner's request that he sit his exams at a later date, instead ruling that he should sit them as planned in December 2022, and that if his performance was significantly different from his coursework assessments throughout the year, the Board of Examiners would have the authority to discuss and approve any adjustments.

The second mitigating circumstances application

[8] It is common ground that, notwithstanding the outcome of that first mitigating circumstances application, the petitioner did not sit his exams in December 2022. However, the reason why he did not do so is not agreed. The petitioner's position, as set out in his affidavit of 4 December 2022, is that he was beset by grief and financial worry following the sudden death of a close family friend on 3 December 2022; and that at a meeting on 3 December 2022 the course administrator, Dr Tim Drew, excused his attendance at the December exams, told him that he would be notified of a later date for the exams, and said that he should file a mitigating circumstances form which he did. That is not accepted by the university, nor for that matter is it borne out by the second mitigating circumstances application made by the petitioner, dated 12 December 2022, which made no reference to the death of a family friend, nor to any meeting with Dr Drew, but referred solely to his having (again) contracted Covid-19, which was said to be supported by photographs of two positive lateral flow tests. In that application the petitioner again asked that the upcoming semester one exams be "discounted" and that he be given the opportunity to undertake them as a first attempt at the earliest possibility during semester two.

[9] On any view, the university failed to cover itself with glory in the manner in which it dealt with that mitigating circumstances application, in that the petitioner was not advised of its outcome until a letter of 10 May 2023 from Jennifer Williams, on behalf of the Mitigating Circumstances Committee, stating that his application had been considered and supported by the committee, going on to say:

"As was confirmed to you at the time in an email from your course lead Dr Tim Drew, alternative arrangements were made for you to sit your exams at the earliest possible opportunity in Semester 2, in support of your scheduling request."

If that was intended to convey to the petitioner that he had already been made aware by Dr Drew that his mitigating circumstances application had been approved, it was a trifle disingenuous, not least as the university was aware by this time that the petitioner did not accept ever having received an email from Dr Drew telling him that his exams had been rescheduled and in any event the university does not now contend that the petitioner was formally notified of the outcome of his application at any time before the letter of 10 May 2023, as he ought to have been.

The disputed email of 10 January 2023 and its aftermath

[10] This brings us to the disputed email of 10 January 2023 and its aftermath. The university maintains that on 10 January 2023 at 10.41am Dr Drew sent the petitioner an email in the following terms:

“Dear [H]

The examination arrangements for the two exams you will sit next week are detailed below.

Paper 1 BM40049 - Orthopaedic Medicine, 16th January, 9.30 am. Duration 113 mins (...)

Paper 2 BM40046 – Biomechanics, 17th January, 9.30 am. Duration 180 mins...

Both of these exams will be held online via Mydundee and you will be allowed to view the associated online module and lecture slides and consult any paper based notes you bring with you. Access to other resources (internet search engines, email etc) will not be permitted. A paper exam booklet will be available if you need to submit diagrams or equations and calculations. You are advised to bring a scientific calculator and a protractor and ruler...

The venue for both of the examinations is the small meeting room on level 6 TORT centre (the same room that you previously attended when meeting with Dr Gillian Smith and Dr Tim Drew). Please arrive at least 15 mins before the examination is due to start to allow for a pre-exam briefing and to ensure you can log into the exam system before 9.30. The examination venue is situated close to toilet facilities, and you can be shown these before the exam starts. Please confirm receipt

of this email and that you will be attending at the times stated, and that the exam adjustments described above are correct and appropriate...

If you have any questions or require further support before the exams please email me on T.drew@dundee.ac.uk."

[11] The email bore to have been addressed to "[the petitioner's name] (Student)" and to have been copied to "Andrew Murphy (Staff)". Mr Murphy received the email; the petitioner denies having received it.

[12] Whether or not the email was sent to, and received by the petitioner, some features of and surrounding it are worthy of comment. First, it makes no mention of the second mitigating circumstances application, although in fairness it was not within the province of Dr Drew either to grant or refuse that application; only the Mitigating Circumstances Committee could do that. Second, despite the request that the petitioner confirm receipt of the email, he did not do so. The university was therefore not in a position to know whether he had received (and, more importantly, read) it or not. Third, notwithstanding that no confirmation of receipt was received, nor confirmation that the proposed adjustments were correct and appropriate, Dr Drew made no attempt to follow it up, either by sending a "chaser" email or by contacting the petitioner by other means to check that he had indeed received it. Fourth, as is common ground, the university did not bring the dates of the exams to the petitioner's notice in any other way, and in particular, they did not enter the details of the exams on his personalised timetable on one of the online portals which were used to communicate information about exams to students.

[13] The petitioner's position is, and has always been, that he did not receive the email, which (he says) explains (a) why he neither responded to it nor turned up for the exams on 16 and 17 January 2023 and (b) why he sent an email to the university on 15 January 2023 expressing his concern regarding the outcome of his mitigating circumstances application,

stating that he had yet to receive any communication from the university regarding it (which was true), and pointing out that his course was due to start back next week.

[14] The petitioner's email of 15 January 2023 prompted an email response by Dr Kevin McConville, Associate Dean Learning and Teaching, on 16 January 2023, stating that the status of the mitigating circumstances application was made clear to the petitioner on 6 December 2022. However, whether deliberately or not, that was clearly at cross-purposes with the concern expressed by the petitioner, which was directed at his *second* mitigating circumstances application, whereas the notification given to him on 6 December was in response to his first. Dr McConville did not refer to the second application at all but he went on to say:

"Dr Drew contacted you on 10th January 2023 with specific details on how both of your exams had been rearranged. One was for today 16th January 2023 and the other for tomorrow 17th January 2023 (*sic*). You did not acknowledge these despite his specific request to do this. You did not attend your re-scheduled exam today 16th January 2023".

[15] Thereafter, the petitioner continued to submit coursework until summoned to a meeting with academic staff on 14 February 2023, when, according to his affidavit, he found out about the January diets for the first time, being informed at the meeting that an email had been sent to him on 9 January 2023. (However, the email of 16 January 2023 had already informed the petitioner of the dates of the rearranged exams: the petitioner does not comment on this in his affidavit.) The outcome of the meeting was notified to the petitioner in a letter dated 6 March 2023 from Kara Knight, Head of Teaching and Learning Support informing him that the university had decided that he should exit from the BMSc degree as he had not attended the semester one examinations. The letter stated:

"...it was noted that you did not attend your exams at the end of semester 1 due to the mitigating circumstances of Covid and did not respond to an email in respect of arrangements for a resit. There is no evidence to suggest that you did not receive

email communications from the University in respect of your exam diet. You have not provided any objective evidence to support your assertions that emails have not been received into your account.

On a balance of probabilities therefore we have to conclude that you were more likely than not to have received suitable notification from the School in respect of your engagement and exam diets (including resits). Also, we conclude that you have failed to submit coursework in a timely manner..."

[16] That prompted an angry response from the petitioner by email, on 13 March 2023.

He refuted the assertion that he had failed to submit coursework in a timely manner, which he backed up with documentary evidence proving that he had (and it now appears to be accepted by the university that in this regard, at least, the petitioner is correct, and it is unclear why the university made the erroneous suggestion that he had not). As regards his exams, the petitioner's chief complaint was that the university had not responded to his mitigating circumstances application timeously rather than, specifically, that he had not received the email of 10 January 2023.

[17] It is unnecessary to rehearse everything which took place thereafter. Suffice to say that the petitioner continued to submit course work which was (eventually) assessed by the university and which appears to have been, at the very least, satisfactory or better. On 19 May 2023, he submitted an appeal dated 18 May 2023, addressed to the "Committee of the Dean, Undergraduate Appeals Committee", although it is not clear which decision he was appealing against. That met with a response from the dean to the effect that he was unclear on what basis the petitioner had appealed to himself directly and that he had no authority to consider the substantive detail within the appeal letter. It appears that that "appeal" thereafter died a death.

The MSP intervention

[18] (I narrate this next section subject to the caveat that there are no supporting averments in the petition, but I do so because it arises from productions which were lodged by the petitioner, and which were referred to in the course of submissions at the substantive hearing, all without any objection by the university.) The next thing to happen was that the petitioner's MSP wrote on the petitioner's behalf to the Principal and Vice Chancellor of Dundee University on 22 August 2023, referring to the petitioner's "ongoing complaint/appeal regarding his BMSc", presumably a reference to the appeal of 18 May 2023. He complained that the petitioner's appeal had not been formally considered and that the Dean of School of Medicine had declined to acknowledge or deal with his appeal (the first part of which was correct, not so the second, at least to the extent that the dean had acknowledged the appeal). He complained also about the allegations of lack of engagement by the petitioner, and aspersions on his academic performance, which the petitioner disputed, and the Medical School's failure to fulfil its obligation to provide timely and effective communication regarding the petitioner's semester 1 exams.

[19] That met with a response, not from the Principal and Vice Chancellor, but from Professor Blair Grubb, Vice-Principal (Education), dated 9 October 2023. Insofar as material, his letter was in the following terms:

"Unfortunately, in this instance, we find no evidence to support Mr [K] being awarded any degree qualification based on our academic standards and policies and procedures which are subject to external audit by the QAA. Therefore the terms of our previous reply still hold true.

The University of Dundee must be allowed academic freedom in the award of its degrees. The fact of the matter remains that Mr K has failed to attain satisfactory attendance during the year, not engaged with his studies to any adequate standard and not attained sufficient credits for any discretionary award to be made.

Again, this is a sad situation for Mr K. However, as you will understand, the University must adhere to its quality and academic standards in its awarding of degrees. This is to allow fairness to all our students.

The University is of the considered view that Mr K has been afforded ample opportunity and support to pass his BSc (Hons) degree but unfortunately his not being awarded the opportunity to progress is primarily due to his demonstrable lack of engagement with the programme and the School..."

The meeting of the Board of Examiners on 25 September 2023

[20] In the meantime, the Board of Examiners held a meeting on 25 September 2023, resulting in the decision not to condone the petitioner's lack of credits, and the non-award of a degree to him. The factual basis on which the board reached that decision included that the petitioner was notified of the January 2023 exams, the board observing that he had been sent (and, by implication, had received) details of those exams, and that "condonement should not normally be used if repeat opportunities have been provided, which in this case they had" (see the Minutes of the Board of Examiners for Monday 25 September 2023).

[21] That decision triggered a further appeal by the petitioner. To understand (or attempt to understand) the process which was followed, it is first necessary to take note of the applicable regulations.

The appeal process

Undergraduate Appeals Procedure Regulations

[22] The university's Undergraduate Appeals Procedure Regulations, as updated on 14 February 2023, and in so far as material, provide as follows. Regulation 1 provides that there shall be a Committee of the Senatus entitled the "Undergraduate Appeals Committee" which shall be empowered to receive and determine appeals by undergraduate degree candidates. Regulation 2 provides that the members of the committee shall be: a deputy

principal or a vice-principal or equivalent *ex officio* as convener, one representative of each school board and the students' assessor on the *senatus ex officio*.

[23] Regulation 6 provides:

- “(1) The Committee shall determine
- (i) appeals by candidates on failing to pass assessments;
 - (ii) appeals by candidates concerning the grade or grades awarded for assessments including final Honours Degree Classifications.
- (2) In the first instance the student shall seek to resolve the appeal with the Dean of School. Only if such resolution is unsuccessful shall referral be made to the Secretary of the University as required in Regulation 7(1) below.
- (3) Such appeals shall not be considered unless they are based upon allegations of
- (a) extenuating circumstances affecting the candidate's performance and of which the examiners were unaware when their decision was taken, or
 - (b) procedural irregularities (including administrative error) in the conduct of a written or oral examination of such a nature as to give rise to reasonable doubt whether the examiners would have reached the same conclusion had they not occurred, or
 - (c) prejudice or bias on the part of one or more of the examiners.”

[24] Regulation 7 provides:

- “(1) Every appeal shall be in writing and shall be lodged with the Secretary of the University within four weeks of the date on which the candidate received intimation of the decision against which the appeal is directed.
- (2) The letter of appeal must state all the grounds on which the student considers that the decision should be changed, the remedy which the student seeks and whether the student wishes to make oral representation at a hearing.”

[25] Regulation 8 provides:

- “(1) The Secretary, in consultation with the Convener of the Committee, shall determine whether the grounds of appeal come within the provisions of Regulation 6(3). Extenuating circumstances under Regulation 6(3)(a) shall not include a candidate's illness at the time of the examination unless a medical certificate has been submitted to the head of the department either before the examination or within seven days thereafter.
- (2) If the grounds of appeal do not satisfy the provisions of Regulation 6(3), the Secretary shall inform the candidate accordingly.
- (3) If a *prima facie* case is established the Secretary shall cause written notification to be sent to the candidate by recorded delivery or registered post, intimating:
- (i) the date on which the Committee will meet to consider the appeal which shall not be less than fourteen days from the date of despatch of the intimation, and

- (ii) the candidate's right, if giving oral evidence, to be accompanied or represented by a lawyer or friend."

[26] Regulation 9 provides:

"The Committee shall be empowered to obtain all such information or opinions it may consider desirable which shall include an account of the student's progress and of the procedures already carried out in the matter. This shall include the grounds on which the decision appealed against was reached and should make clear the evidence that was available."

[27] Regulation 10 provides:

- "(1) After consideration of all the submissions made to it, the Committee may:
- (i) reject the appeal;
 - (ii) notwithstanding that the point raised in the appeal might be decided in favour of the student, dismiss the appeal if they consider that the student has suffered no material prejudice;
 - (iii) uphold the appeal and order whatever remedy it deems fair in the circumstances.
- (2) The Committee's decision shall be reported to the Senatus and may include any recommendations related to the matter which has given rise to the appeal."

[28] Regulation 11 provides:

"In the event that any issue involving disability, race or other equal opportunities issue arises, any Committee or University officer has discretion to adjourn proceedings to seek a report from any University external adviser and/or to consider such a report or any related submission by any person, and to consider the promotion of good race relations and racial harmony. This may be at any stage, but is at the sole discretion of the Committee or member(s) of staff involved."

The petitioner's appeal

[29] It is hard to fit the procedure which the university adopted in relation to the petitioner's appeal into the framework of the regulations. In the first place, the appeal was not lodged within 4 weeks, which was at least in part because the dates on the university's portal by which any appeal should be lodged were wrong, never having been updated following a strike by university staff. Second, it is unclear how regulation 6(2) is intended to operate, and how that regulation interacts with regulation 7. What is meant by the

requirement that “the student shall seek to resolve *the* appeal (emphasis added) with the Dean of School”? Seeking to resolve an appeal with the dean, appears to be something different from appealing to the dean, but how is the student to go about resolving it? Does that process require to be completed within the 4 week period referred to in regulation 7? Is it the same appeal which the dean must attempt to resolve as should then be considered by the committee? What procedure is the dean to follow? How is the provision that:

“only if such resolution is unsuccessful (which process may or may not be completed within four weeks: it was not in the present case) shall referral be made to the Secretary of the University as required in Regulation 7(1)”

to be reconciled with regulation 7(1), which provides that every appeal shall be in writing and must be lodged within 4 weeks of the date on which the candidate received intimation of the decision against which the appeal is directed? I did not hear full (or indeed, any) submissions on how those provisions fall properly to be interpreted. Subject to that caveat, it seems to me that the regulations contemplate a student having only one right of appeal, that being the appeal to the Undergraduate Appeals Committee. It is that appeal which the student must seek to resolve (whatever that means, and however it is to be attempted) with the dean, that interpretation being reinforced by the reference to resolution of “the” appeal, and the complete absence of any provision within the regulations regulating the formation and constitution of any appeals panel constituted by the dean to consider an appeal. There is no suggestion within the regulations that a student is to have two rights of appeal, one to the dean and thereafter a different right of appeal to the Undergraduate Appeals Committee. The solicitor advocate for the university told me that there was a separate appeals procedure, or at least guidance, covering appeals to the dean, but that was not produced and it is difficult to see how that fits into the regulations themselves. It appears that my difficulty in construing the regulations was, initially at any rate, shared by

Professor McCrimmon, the Dean of the School of Medicine, when he said that he was powerless to deal with the appeal submitted to him by the petitioner in May 2023.

[30] That all said, it also appears that the petitioner himself was under the impression that his first right of appeal lay to a committee formed by the dean. At all events, he intimated such an appeal on 8 January 2024, which the university accepted. Having previously been told by the university that this was to be the revised 4-week deadline for submission of his appeal, one might have thought that this was, or at least ought to have been, the appeal which ought to have been considered by the Undergraduate Appeals Committee, although the petitioner's letter of appeal asked that his appeal be considered by the "Deanery Appeal Panel" (ie, the same panel of which Professor McCrimmon had previously denied all knowledge). The grounds of appeal were framed by reference to regulation 6(3) and were (a) extenuating circumstances affecting the petitioner's performance of which the board of examiners was unaware when its decision was made and (b) procedural irregularities. In support of those grounds the petitioner referred, among other things, to: (i) the university's failure timeously to deal with the second mitigating circumstances application; (ii) its failure to schedule the exams on his university timetable on the online portal; and (iii) his repeated assertion, to an extent supported by the university's IT department, that he had not received the email of 10 January 2023.

[31] That appeal was never considered by the Undergraduate Appeals Committee, nor was there any attempt to resolve it with the Dean of the School of Medicine, at least insofar as the word "resolve" connotes a degree of two-way communication or, perhaps, mediation. Rather, on this occasion, contrary to his approach in May 2023, the dean did assemble an "Appeals Panel", which in due course refused the appeal. The composition of that panel, and the process it followed, is unclear although I was informed by the solicitor advocate for

the university that the panel included Dr McConville, even though he had been involved at an earlier stage by writing the email of 16 January 2023, and had clearly already formed the view that the petitioner had received Dr Drew's email of 10 January 2023. In refusing the petitioner's appeal, by letter dated 22 February 2024, the university wrote:

"I note your appeal is based on the following grounds:

- a) Extenuating circumstances affecting your performance, of which the board of examiners were unaware when their decision was made.
- b) Procedural irregularities (including administrative errors) in the conduct of a written or oral examination, of such a nature as to give rise to reasonable doubt regarding whether the board of examiners would have reached the same conclusion had these irregularities not occurred.

The Appeals Panel considered whether your appeal satisfied the above grounds of appeal. After careful consideration it was decided by the Appeals Panel that you did not satisfy the grounds and therefore, your appeal is **not upheld**.

In making their decision, the Appeals Panel took into account your letter of appeal and appendices. They also considered evidence from the programme leads, Disability Services, IT Services and minutes from the examination board, which included the external examiner's comments.

The Appeals Panel were satisfied of the following:

- i. your extenuating circumstances were assessed and an outcome was provided to you on in or around December 2022;
- ii. the School had considered your extenuating circumstances appropriately and in line with the relevant procedures;
- iii. the School communicated the outcome to you on more than one occasion. The outcome was communicated clearly and in full and provided you with flexible options regarding your examinations; and
- iv. there was no procedural irregularity that arose in dealing with your extenuating circumstances.

I appreciate this may be disappointing news to you. You do have a further right of appeal to the University Senate Appeals Committee, and if you wish to avail yourself of this option, you should do that directly through StudentAppeals@dundee.ac.uk. Further information about the appeals process can be found at <https://www.dundee.ac.uk/corporateinformation/undergraduate-appeals-procedure-regulations>."

[32] The petitioner does not himself take any issue with that decision, nor with the process that was followed in reaching it. However, in passing, I would observe that the

reference to the petitioner's extenuating circumstances having been assessed and notified to him in December 2022 was clearly a reference to his first, not his second, mitigating circumstances application, perpetuating the error previously made by Dr McConville in his email of 16 January 2023 (perhaps, not totally surprising given his involvement on the panel). There also appears to have been no consideration of the petitioner's complaint that the January 2023 exams were not posted on the university's online portal.

[33] Be all that as it may, the petitioner then lodged a further appeal, dated 21 March 2024, addressed to the Senate Appeals Committee, in the following terms:

"I am writing this letter following the release of BMSc exam results which determined that I am not eligible for a degree award, and, consequently, I will not be able to graduate with a BMSc (Hons) degree. In challenging the decision, I am formally submitting this letter of appeal for independent consideration by the Senate Appeals Committee. This appeal is in relation to my intercalated BMSc (Hons) in Applied Orthopaedic Technology exam modules BM400436 and BM40049.

On my results transcript for exam modules BM400436 and BM40049, my grade is recorded 'AB-Absent'.

The school claims there was an exam scheduled for 16 January 2023. They say they sent me an email on 9 January 2023, regarding the exam arrangements, supposedly from Tim Drew. However, I never received such an email in my inbox. Because of this, I had no idea about any exams being arranged.

I conducted a thorough search of my mailbox from January 2023 and the screenshots of my email inbox below clearly show that I did not receive any emails from Tim Drew between 09/01/2023 – 15/01/2023.

[There followed the screenshots referred to]

Additionally, below is my communication with the University IT department who also checked my Outlook mailbox independently. Based on their investigation, **they concluded that, on a balance of probabilities I never received any emails from Tim Drew between the 9th and 13th of January 2023.**

[There followed copies of the communications in question]

Additionally, the screenshots of my empty university timetable below are evidence that there was also no exam scheduling documented on my university exam timetable in January 2023. Therefore, I remained completely unaware of any potential running of exams as I have no information about any apparent scheduled

exams or the conditions under which they would be conducted under as no such information was registered on my university exam timetable on 16 January 2023.

As a result, it is impossible for me to attend an exam I had no knowledge of being scheduled and my timetable was completely empty in all of January 2023 with no schedule of any exams. This is evident from the screenshot of my university timetable below for week of 16 – 22 January 2023

[There followed evidence of those screenshots]

[There followed a complaint about the scheduling of an exam in January, which the petitioner asserted was inappropriate as it fell outside the designated examination period, but that forms no part of the present challenge.]

[34] The outcome of the appeal was notified to the petitioner by letter dated 3 June 2024 in the following terms:

“I am writing to inform you of the Committee’s decision, that under the terms of Regulation 10.1(i) of the Undergraduate Appeals Procedure (‘the Procedure’) your appeal is rejected.

Decision

You advised on Wednesday 29 May that you would not be attending the hearing and would not be making oral representation. You advised you were content for the Committee to consider your appeal in your absence and the Committee convened accordingly.

For the detailed reasons set out below, the Committee decided that you have not demonstrated grounds for overturning decisions of the Board and that therefore your appeal must be rejected.

Reason

Under the terms of the Procedure... appeals can be made only based on the following three grounds:

1. Extenuating circumstances affecting the candidate’s performance and of which the examiners were unaware when their decision was taken; or
2. Procedural irregularities (including administrative error) in the conduct of a written or oral examination of such a nature as to give rise to reasonable doubt whether the examiners would have reached the same conclusion had they not occurred; or
3. Prejudice or bias on the part of one or more of the examiners.

You made your appeal based on ground 2 above: procedural irregularities. Your appeal seeks to argue that as you were not informed about the examinations you were prevented from completing the examinations, amounting to a procedural irregularity that calls into question the decision of the Board. You ask in your

written appeal for the Committee to overturn the decision of the Board and to award you the BSc Degree with honours.

Having reviewed your appeal and supporting evidence and taking into account testimony from the Associate Dean Learning & Teaching from the School it was clear to the Committee that:

- (i) the School had made an appropriate response to your absence from the Semester 1 (December 2022) examinations by arranging examinations in January 2023, informing you by email on 9 January 2023.
- (ii) you had earlier requested postponement of the December examinations until January 2023 due to mitigating circumstances, but this had not been allowed by the Mitigating Circumstances Committee.
- (iii) you were provided with full information about the required classes and assessments for the two modules in question.
- (iv) the School does not accept your contention that you were not sent details of the examinations in January 2023, it is certain that you were sent the necessary information and noted that the email was copied to another member of staff within the School on 9 January 2023.

The Committee considered the evidence that you submitted in support of your appeal, in the form of screen shots of emails with staff on the University's Help4U helpdesk but decided that this was, at best, inconclusive, given that full records are kept for just 90 days.

The Committee decided therefore to reject the appeal and to confirm the decisions of the Board.

This decision, which is final, will be reported to Senate at its next meeting in October 2024.

...

Yours sincerely

**Professor Blair Grubb, Vice-Principal (Education)
Convener, Undergraduate Appeals Committee"**

[35] This letter also merits comment. First, since (regrettably, as the university's solicitor advocate conceded) no minutes of the meeting were kept, it is unclear what discussion took place, or what testimony of the associate dean was given, or taken into account. That was Dr McConville, who had expressed a desire to be present, although it is not clear from the regulations that he had any right to insist on being present; regulation 9 merely confers a power on the committee to obtain information, meaning that it is for the committee to decide which individuals, if any, to obtain information from. However, no issue is taken by the

petitioner with that aspect of the procedure. It can be inferred that Dr McConville was the source of the school's "certainty" that the email of 10 January 2023 had been sent to the petitioner. It also appears from what I was told at the substantive hearing that Dr McConville produced additional correspondence from the university's IT department to the effect that logs showing whether an email had been received or not were kept for only 90 days, and that they could not say one way or the other whether Dr Drew's email had been received into the petitioner's inbox; information which the petitioner had not volunteered. Second, the reference to a previous postponement would have made sense had the petitioner sought a postponement of the January 2023 exams, but is less clearly relevant to the petitioner's claim that he had not received any notice of those exams. Third, contrary to aspects of the petitioner's written note of arguments, it was not the *committee* which was "certain" that the petitioner had been sent details of the exams in January; rather, it was simply recording the *school's* certainty of that fact. The actual decision was that the evidence submitted by the petitioner in support of his claim that he had not received notification of the exams was inconclusive, because full records were kept for just 90 days (whereas the petitioner's evidence post-dated that period). Fourth, it was correct that the petitioner had been given the opportunity to attend the hearing (and had been made aware that a representative from the school would attend) but had declined to do so. Fifth, it would have been plain to the petitioner from the time he received the letter (and to his advisers, when they first saw the letter) that the convener of the committee was Professor Grubb, the author of the response to the petitioner's MSP. Sixth, the letter did not deal with the petitioner's complaint about the lack of scheduling on his university exam timetable (on the online portal). Finally, and for completeness, it is perhaps unfortunate given its seminal

importance that the letter referred to the crucial email as having been sent on 9 January 2023 but no point is made by the petitioner in relation to that error by the committee.

Submissions

Petitioner

[36] Counsel for the petitioner submitted that the fundamental test was that set out in *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345. Applying that test, the Appeals Committee improperly exercised the discretion vested in it under the regulations by failing to take into account relevant considerations and determining a fact, namely whether the petitioner had received notification of the January exam dates, on an incorrect evidential basis. It failed to give proper consideration to the petitioner's ground of appeal that the university had failed to update his personalised timetable of exams by uploading the January exams and overlooked the evidence he had submitted in support of that assertion. Further it failed to take account of the evidence submitted by the petitioner in support of his claim that he had not received the email of 10 January 2023. Separately, the committee had exercised its discretion unreasonably by failing to seek further evidence in exercise of the power conferred on it by regulation 9. Having formed the view, on the evidence led before it, that the petitioner's evidence was inconclusive given that full records were kept for just 90 days, the committee ought to have given the petitioner the opportunity to comment on that evidence, and made further inquiries into whether an email could be retrieved outwith the 90 days. Reference was made to *Shaffar-Roggeveen, Petitioner* 2023 SLT 782, a decision of Lord Lake, in which the failure to afford a student the opportunity to comment on certain information had led to unfairness. Had the committee carried out further investigation, it would have learned that there were many reasons which might

explain why an email which had been sent was not received into the recipient's inbox. In support of that submission, counsel made reference to a report by one Findlay Whitelaw, an IT expert, which the petitioner had instructed for the purposes of this litigation, although he did not take me to its terms in any detail. Separately, the failure to adjourn using the power in regulation 11 was an unreasonable exercise of discretion. For all these reasons, the appeal procedure was improperly conducted and there was a failure to apply the procedure correctly. While it was accepted that for a procedural error to amount to a breach of natural justice, material prejudice must be established (*The Mayor of London v The Secretary of State for Housing, Communities and Local Government and Others* [2020] EWHC 1176 (Admin), Holgate J at [76]), such prejudice here lay in the impact on the petitioner of not obtaining his BMSc degree.

[37] Further, in all the circumstances, applying the test in *Porter v Magill* [2002] 2 AC 357, per Lord Hope at [103], a fair-minded observer might conclude that there was a real possibility that the errors in law committed by the committee resulted from bias on their part against the representations made by the petitioner which challenged the efficacy of the means of communication with students. Further, standing that the committee was chaired by Professor Grubb, who had written the letter to the petitioner's MSP dated 9 October 2023, the fair-minded observer might conclude that there was a real possibility of bias on his part.

The university

[38] The solicitor advocate for the university agreed that the test was that set out in *Wordie*, above. Applying that test, there was no basis for the court to intervene. It was for the committee as the decision-maker to decide how much weight to attach to individual factors. While it would have been better had minutes been taken of the committee's

meeting, the reasoning was clear from the decision. There had been no breach of natural justice. The procedure had been fair and the petitioner had been given every opportunity to put his case. There had been no material before the committee such as to require it to give the petitioner any further opportunity to be heard. Fairness required a real and effective opportunity to take part in and influence the outcome of the proceedings (*SM, Petitioner* [2023] CSOH 52, Lord Sandison at [48] and [49]). The petitioner had been given such an opportunity. The facts of *Shaffar-Roggeveen* were plainly distinguishable. Here, the petitioner had understood the only issue he had placed before the committee - whether he had received notification of the diet of exams in January 2023 - and had presented his case; the fact that the committee had not been persuaded by his arguments did not mean that there had been procedural unfairness. As regards the online portal, the university's position was that it had not uploaded the January exams on to it because they were bespoke exams, created solely for the petitioner. Bias could not be inferred from the failure to adjourn. Finally, as regards apparent bias arising from Professor Grubb's involvement, that had not been raised in the petition nor in the note of arguments, and the solicitor advocate was not in a position to meet that argument.

Apparent bias

[39] On that last point, I had some sympathy with the university's position, since the apparent bias argument had effectively arisen out of the ether during the substantive hearing. Nonetheless, at the time I considered that it might be of some importance. To afford the respondent more time to consider its position (and, for that matter, to allow the petitioner time to consider the implications of the argument first being raised at this late

stage) I allowed both parties the opportunity to submit further written submissions on this issue, which both did.

The petitioner's argument re bias

[40] In his additional submissions, the petitioner submitted that it could be inferred that Professor Grubb had participated in some capacity in the committee's deliberations. Having regard to the letter earlier written by him the fair-minded observer might conclude that there was a real possibility of bias. Reference was made not only to *Porter v McGill* (above) but also to *Poor Sisters of Nazareth v Scottish Ministers* 2015 CSOH 87, paras [30], [31]; *Helow v Advocate General for Scotland* [2008] SC(HL) 1 at para [39]; and *Millar v Dickson* 2002 SC (PC) 30, in which Lord Hope of Craighead had said:

“If there are grounds which would be sufficient to create in the mind of a reasonable man a doubt about the judge's impartiality, the inevitable result is that the judge is disqualified from taking any further part in the case.”

The university's argument re bias

[41] In response, the university submitted that the apparent bias argument should not be allowed to be advanced at all, because there was no basis for it in the petition, nor had permission been granted in respect of it. If permission were sought, it should be refused as out of time. The petitioner and his advisers had had notice of Professor Grubb's involvement for some time. It was not equitable to allow the argument to be introduced at this late stage. The petitioner had the benefit of legal advice throughout. The university had been given no fair opportunity to consider the issue of apparent bias nor to respond to it. As regards the merits of the argument, if allowed to be advanced, there was no suggestion of actual bias. As for apparent bias, there was no automatic prohibition on a decision-maker

being involved in different stages of a multi-stage process. An informed observer would not conclude that the convenor, being an elected person with responsibility for conducting proceedings of this nature, was biased.

Decision

Apparent bias

[42] I shall deal with apparent bias first. It is unfortunate that the petitioner, if he wished to make anything of that argument, did not attempt to introduce it into his pleadings. Had there been timely averments about it, I would have been inclined to grant permission. However, as things stand, the fact of the matter is that there is no foundation in the pleadings for this ground of challenge, nor, *a fortiori*, has the petitioner been granted permission for it. Although abbreviated pleadings are acceptable in judicial review petitions, our rules of pleading and procedure nonetheless require fair notice to be given of all grounds of challenge, and as noted above, permission requires to be sought for any new ground of challenge not covered by the original permission. It follows that the petitioner is unable, at this stage, to challenge the decision on the ground of apparent bias, and it is therefore both unnecessary and inappropriate for me to comment on what the merits of such a challenge might have been, although in fairness to Professor Grubb I should make clear that there is no suggestion in the petitioner's argument of any *actual* bias on his part.

The surviving grounds of challenge

[43] Turning to consider the grounds of challenge for which the petitioner does have permission, three remain, namely: failure to consider one of his grounds of appeal and a failure to consider all the evidence before the committee; failure to properly, fully and fairly

consider the petitioner's appeal, contrary both to natural justice and to the university's own procedures; and failure to adjourn to obtain more evidence and to hear further from the petitioner.

[44] By way of general introduction, it is important to bear in mind three things: first, that the only decision under challenge is that of the Appeals Committee to refuse the petitioner's appeal against the decision of the Board of Examiners not to award him the degree of BMSc; second, that the sole issue before the Appeals Committee was whether a failure to inform the petitioner of his exams amounted to a procedural irregularity; central to that issue were the dual questions of whether the petitioner had received the email of 10 January 2023, and whether the times and dates of the exams had been uploaded to the online portal; the significance of all this being that if the petitioner had been unaware of the January 2023 exams the decision of the Board of Examiners would have been reached on an incorrect factual basis; and third, that it is not for this court to substitute its own view for that of the Appeals Committee, even if the court might itself have reached a different view.

[45] As both parties agree, a convenient starting point for the general approach to judicial review of decisions taken by a body such as the Appeals Committee is *Wordie Property Co Ltd*, above. Not all of the grounds for interfering with a decision listed there are pertinent to this case, but, insofar as relevant, a decision will be susceptible to challenge if the decision-maker has failed to take into account a relevant material consideration, or there is no proper basis in fact to support the factual basis upon which the decision relied, or it is a decision which no reasonable decision-maker could have reached. A decision may also be reduced if it is tainted by procedural unfairness, for example, by failing to afford a person a full opportunity to state his or her case: see, for example, *SM, Petitioner*, above, and the

summary by Lord Sandison at para [48]. With these principles in mind, I now turn to the three grounds of challenge advanced by the petitioner.

Failure to consider a ground of appeal, or to consider all the evidence before the committee

[46] Although the focus of the argument before me (and seemingly the focus of the discussion before the committee, although in the absence of minutes, we cannot know that) was largely on whether or not the petitioner had received the email of 10 January 2023, the *gravamen* of his complaint to the Appeals Committee was that he was unaware of the January 2023 exams because he had neither received an email nor had the exams been notified to him *via* his personalised timetable on the university's online portal. The latter is significant in that if it be the case, as the petitioner maintains, that that is the primary means of communicating exam dates to students, the failure to do so might amount to a procedural irregularity. At the very least, one might have expected the committee to consider whether a student is entitled to assume that if an exam does not appear on that timetable, there is no exam. It should also be noted that while the petitioner submitted evidence in support of his contention that the exams had not been uploaded to the portal, the university agrees that they were not.

[47] There is ample material before me which shows that the committee did consider all evidence placed before it in relation to the sending of the email of 10 January 2023, including the screenshots submitted by the petitioner in support of his contention that he had not received it. It is, of course, difficult to prove a negative, but the petitioner submitted some evidence which *ex facie* supported his claim that he had not received the email, essentially comprising *ex post facto* screen shots of his inbox, showing that at a later date, his inbox did not contain an email from Dr Drew dated 10 January. He also produced some

correspondence he had had with the university's IT department in which they had confirmed that they, too, had been unable to find such an email. As noted above, it appears that Dr McConville put before the committee additional correspondence from the IT department to the effect that because more than 90 days had elapsed since the email had been sent, it was not possible to tell one way or the other whether it had been received and deleted, or not received at all. Although it is hard to see the underlying basis for what seems to have been Dr McConville's *ipse dixit* assertion that he was "certain" that Dr Drew's email had been received, it is within ordinary day to day knowledge that most emails which are sent to a valid email address are, generally, received (as distinct from being read).

[48] Faced with that evidence, it was then for the committee to decide what to make of it. It was entirely a matter for it as to what weight to attach to the evidence submitted by the petitioner in support of his assertion that he had not received the email; and plainly it was entitled to conclude that the evidence was inconclusive. Insofar as the petitioner's note of argument complains that the committee was not entitled to conclude that it was certain that the email had been received, that complaint is misdirected since, as already pointed out, that is not what the committee said.

[49] However, that the committee failed to have regard to the petitioner's complaint about the university's admitted failure to post the details of his exams on the online portal can reasonably be inferred from the decision letter, which made no mention of that aspect of the petitioner's appeal. On any view, that was relevant to the core question of whether the petitioner had been properly notified of the exams in January 2023, particularly in light of the committee's finding that the evidence surrounding the email was inconclusive. In other words, where there were two potential means - email and online portal - of notifying the petitioner of the exams, and one of those had admittedly not been used, and the evidence

about the other was disputed and inconclusive (as opposed to showing, definitively, that the petitioner had received the email), that necessarily ought to have led to an evaluation which the committee ought to have carried out as to whether or not, in all those circumstances, the petitioner could be taken to have been aware of the exams. By failing to consider the online portal point, the committee failed to take a material consideration into account, and in that regard, I consider that it erred. Further, the error was material, in that it cannot be said that the committee would not have reached a different decision had it taken the failure to upload the exams to the portal into account. As such, the petitioner has sustained the necessary degree of prejudice.

[50] Additionally, although this was not a ground prayed in aid by the petitioner, it seems that the committee may have taken into account an irrelevant consideration, insofar as it referred to the previous refusal to defer the December 2022 exams (in response to the first mitigating circumstances application), which had no relevance to whether the petitioner had been made aware of the January 2023 exams. If nothing else, this serves to confirm that the committee was not properly focussed on the issue before it.

[51] For these reasons, this ground of challenge succeeds, to the extent that the committee failed to have regard to a relevant consideration and, in so failing, erred in law.

Failure to follow procedures/failure to adjourn

[52] I shall deal with these two grounds of challenge together since they overlap to a significant extent. The argument that there was a failure to follow the university's procedures is based primarily upon regulation 9, which *empowers* (my emphasis), rather than requires, the committee to obtain all such information or opinions it may consider desirable. Insofar as the petitioner also relies on the power to adjourn under regulation 11,

no equal opportunities issue is raised by this case and it is hard to see what relevance that regulation has. It is in any event not disputed by the university that the committee had the power to adjourn. The essence of the petitioner's argument is that the committee ought to have exercised that power in order both to make further inquiries into the significance of the 90 day period beyond which the university claimed that no data could be recovered, and to afford the petitioner the opportunity to comment on the case against him.

[53] This brings us on to Findlay Whitelaw's report, upon which the petitioner relies, as I understand it, to show that there are many reasons why the email of 10 January 2023 might not have been received by the petitioner. The petition contains detailed averments as to Ms Whitelaw's expertise and experience, the questions upon which she was invited to comment, and her conclusions, which can be summarised as being that it was plausible that the petitioner did not receive the email of 10 January 2023. Counsel for the petitioner submitted, under reference to the principles set out in *R (on the application of the Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), paras [36] to [38] that the court could have regard to expert evidence, even in a judicial review. While not disputing that in some, limited, circumstances, the court may have regard to expert evidence, the solicitor advocate for the university submitted that none of those circumstances applied here. The report amounted to no more than evidence which might have been, but was not, before the committee and so the court could have no regard to it.

[54] As was stated by Carr J in *R (on the application of the Law Society) v Lord Chancellor*, at [36], the very nature of a claim for judicial review is such that it is seldom necessary or appropriate to consider any evidence which goes beyond the material which was before the decision-maker, let alone any expert evidence. That said, evidence may be admissible in a judicial review where it is (a) evidence showing what material was before or available to the

decision-maker; (b) evidence relevant to the determination of a question of fact on which the jurisdiction of the decision-maker depended; (c) evidence relevant in determining whether a proper procedure was followed; and (d) evidence relied on to prove an allegation of bias or other misconduct on the part of the decision-maker.

[55] Of these, counsel for the petitioner hung his hat on (b). However, as the solicitor advocate for university submitted, the report by Ms Whitelaw has nothing to do with the jurisdiction of the committee. Rather, it is no more than evidence going to the heart of a factual question before the committee, namely, whether or not the petitioner had received the email in question. The fact is that the committee did not have Ms Whitelaw's report before it when it made its decision. I therefore cannot, and do not, have regard to the report. Additionally, none of the averments about the report are of any relevance. There was a suggestion, made more forcibly at a by order hearing the week before the substantive hearing, that the report was to be referred to only to illustrate the sort of evidence which the committee might have received had it adjourned, rather than for its content, although I am not sure I fully grasp the distinction. In any event, the petitioner's argument does not withstand scrutiny: a decision not to adjourn to commission an expert report (at what would no doubt have been great expense) cannot possibly be categorised as unreasonable or unfair.

[56] As regards the argument that the committee ought to have adjourned to afford the petitioner a further opportunity to comment on the school's case against him, it fails on a number of levels. First, there was no case against the petitioner in that sense. The issue was whether the evidence submitted by him supported his case that he had not received an email. Second, as the solicitor advocate for the university submitted, the facts here are very different from those in *Shaffar-Roggeveen*. There, material information had been obtained

following an interview with the petitioner, on which the petitioner had not been given any opportunity to comment (and it was the Appeal Committee's failure to consider that point which led to its decision being reduced). Here, the petitioner had already presented his case, with supporting evidence, that the email was not to be found within his inbox, and the committee was entitled to hear testimony about the limitations of the investigations carried out by the university's IT department. In the words of Lord Sandison in *SM, Petitioner*, the petitioner did have a real and effective opportunity to take part in and influence the outcome of the proceedings. Third, having been given the opportunity to attend the meeting, but declined, the petitioner could hardly expect to be given a further opportunity to be heard to answer anything put forward in refutation of his own case, particularly when he had been made aware that a representative of the school would attend the hearing. Fourth, it is difficult to see what more the petitioner could have said. It is not suggested that the information before the committee that the IT department could not go back more than 90 days was erroneous in some way. For all these reasons, the non-exercise by the committee of its power to adjourn the meeting so as to hear from the petitioner was not procedurally improper, nor was it unfair, nor did it result in any prejudice to the petitioner. Prejudice in this context entails asking whether any procedural irregularity has placed the petitioner in a worse position than he would have been in had there been no such irregularity, rather than whether the decision itself resulted in prejudice to the petitioner. Thus the petitioner's argument that he was prejudiced because of the impact of the decision not to award him his BSc degree was misconceived.

[57] For completeness, the very vague suggestion in the petition that the decision itself is indicative of bias does not withstand scrutiny. The pursuer has not averred any facts from which bias might be inferred.

Disposal

[58] For all of the foregoing reasons, the petitioner must succeed on his first ground of challenge only. I will sustain the petitioner's third plea-in-law to the extent that the Appeals Committee acted unlawfully, otherwise repelling it and all other extant pleas-in-law. As a result, I will grant declarator that the decision of 30 May 2024, of the Undergraduate Appeals Committee of the Senatus of the University of Dundee, was unlawful. I will reduce that decision, and I will grant an order requiring that the committee reconvene in order to consider anew the petitioner's appeal against the decision of the University's Board of Examiners of 25 September 2023 to discontinue his place on the course of studies for the degree of BSc (Hons); and that it do so as soon as reasonably practicable. (The petitioner's crave that I ordain the committee to reconvene by 13 January 2025 was plainly unrealistic, and there is no particular significance in that date in any event, it simply being the start of the next semester.) I have not been asked to make any order as regards the composition of the committee. I will reserve all questions of expenses.