Academic Judgement and the Force of Law

Patricia Tuitt

Degree Algorithms and the Law

2017 saw the publication of two major reports on UK higher education degree classification systems. The jointly authored report by Universities UK and Guild HE explored the policies and guidance which provide the framework against which degree classification decisions are arrived at by the 120 institutions which participated in their survey (2017a). The Universities UK/Guild HE report was complemented by David Allen's analysis of the effects on student degree outcomes of varying polices and guidance relating to degree classification decisions across the higher education sector (2017b).

This article is concerned with an aspect of the degree classification process which appears, at best, in the form of marginal notes in both reports. Through these passing references, each report confirms what academics, in all disciplines, have long come to realise. Their expert judgement plays a limited (or non-existent) role in degree classification decisions. Such was not always the case. The judgement of expert examiners used to be decisive in cases where a student performance was on the 'borderline' of two possible degree results. Today, this traditional space of academic judgement in the degree classification process is fast disappearing, and it is now "expected that the number of institutions using an automatic algorithm to decide on borderline cases will increase (2017a: 39). Degree algorithms are the means through which higher education institutions design the "process or set of rules that...determine the final classification of a course or programme" (2017a:1), Degree algorithms are inherently biassed against academic judgement.

The principal argument of this article is that a degree classification process which does not permit the exercise of academic judgement in 'borderline' cases is incompatible with administrative law.

According to the Universities UK/Guild HE report, 65 out of the 120 higher education institutions surveyed dealt with "cases in which it is not obvious which class of degree should be awarded" (*Tuitt v Birkbeck*, 2016a: para.1) by "automatically" applying the degree algorithm, or by simply not considering borderline cases (2017a: 38). As I hope to show, these institutions' degree algorithms, and degree classification decisions based upon the model the algorithms provide, are unlikely to withstand the scrutiny of the UK Administrative Court, Even those institutions who submit borderline cases to the judgement of members of an academic board may prove to be vulnerable in administrative law terms if judgement is constrained by inflexible rules pertaining to when and how that judgement is exercised.

An example of when an algorithm design which factors in academic judgement may nevertheless contravene the law is provided by Sinclair, Wright, Edwards and Keane in their study of how different degree algorithm designs affect degree awards. They note that a common practice across the sector in borderline instances is to limit academic judgement to cases where a student is "within 1% or 2% of the next band" and only "on the basis of specific criteria such as requiring in excess of 50% of the final year marks to be in the upper band, or specific modules to be included in the final calculation" (2017c). Provided that rules of this kind retain for the decision maker a residual discretion to actively set them aside in favour of a decision based on the particular circumstances of the case in hand, the rules will be safe from administrative law challenge.

The Universities UK/Guild HE report is silent on the question of how tightly bound by an algorithm academic judgement is in those institutions in which it is permitted. However, its overall findings and observations – not least the implication that academic judgement is inimical to "fair" and "transparent" decisions (2007a: 4) - make it doubtful that such residual discretion exists.

It is hoped that this article will be of interest to academics across the range of disciplines. Its aim is to provide no more detail about UK administrative law than is necessary to position degree classification algorithms and related decisions within its scope. For present purposes, it is sufficient to understand UK administrative law as the "body of legal standards that...imposes duties on public authorities"., and the "frameworks that govern...public education...". Administrative law comprises of "processes and techniques for controlling the decisions of public authorities..." (Endicott, 2015: xv).

To draw in the case more precisely, this article is concerned with the obligations administrative law imposes on a public authority on whom is conferred the power to make binding decisions which alter an individual's position. Arguably, the most important of these principles is that the authority in question must not fetter its discretion through the rigid and inflexible application of the rules and policies operating on the authority's decision making processes. The principle that a public authority must not fetter its discretion when exercising its public functions has been affirmed time and time again at the highest levels of the UK courts, most notably in R v Secretary of State for the Home Department e*x parte V and T* [1998].

There is no more compelling an example of an individual whose position is altered by the binding decision of a public authority than that of a university degree candidate, whose life chances often turn on the decision of where along the degree classification scale an examining body (which is a constituent part of the public authority) will assess the outcome of his/her years of study. Degree classification decisions are made by algorithms which increasingly accord a decisive role to a mathematical calculation of the percentage scores gained by students in the modules studied. In nine cases out of ten, the mathematical calculation coincides exactly with the judgement of the expert examiners on the question of what degree classification an individual has earned.

The concerns of this article lie with the percentage of cases in which academic judgement and mathematical calculation are at odds. In such a situation, administrative law decrees that academic judgement must prevail. In such a situation, the higher education administration mandates that the mathematical outcome prevails. One might conclude, therefore, that the administrative courts and higher education examination boards would be in conflict. Paradoxically, however, although no court would deny that the principles as espoused in cases like e*x parte V and T* apply to university examination boards when making degree classifications decisions, the UK Administrative Court has consciously interpreted its rules on standing in such a way as to preclude any chance of the principle being applied in any concrete degree classification dispute.

The article reflects on how and why higher education institutions are among the few (if not the only) public authorities which are insulated from the effects of the rule against fettering of discretion when exercising their primary public function of awarding degrees.

The argument is arranged in four parts. *The primacy of public law*, explores the legal implications of the fact that the award of a degree is the oldest and most entrenched public function of higher education institutions, especially universities. *Academic judgement framed as a legal right*, explores three ways in which academic judgement can be said to be justiciable. *The Judicial Review action*, examines how the Administrative Court at once retains the integrity of the rule against fettering of discretion, whilst giving higher education institutions free reign to implement the most restrictive of degree algorithms. Finally, *a question of vigilance*? argues the case for legislative intervention in order to ensure appropriate levels of vigilance over the degree award process.

As I work through the four stages of the argument, the reader is asked to keep in mind Allen's analysis of degree algorithm models, which he assesses against student outcomes, His findings attracted the attention of the mainstream media. According to Allen, there is a "real risk that different algorithms could result in different classifications given on a student's mark profile"(2017b: 8). As illustration, Allen informs us that "in the case of the individual set of marks, the degree outcome ranges from an upper second (66.69%) to a 1st (70.72%)" (2017b: 1).

Although Allen sees potential inequities in the current degree classification system, he does not attend to the question of whether those potential inequities, (as well as other perceived problems, such as 'degree inflation') might be addressed by an exercise of academic judgement. For instance, expert judgement might conclude that, in relation to a particular student profile, a 66.69% aggregate score merits a first class degree award, Conversely, a particular student profile might indicate to subject experts that a 70.72% aggregate score merits an upper second class degree award. None of the institutions who responded to the Universities UK/Guild HE survey appear to have degree algorithms which would permit a judgement so far away from the mathematical outcomes used in Allen's example. I suggest that Allen's example reveals why administrative law is right to insist, as it does, that a realm of discretion must always be preserved in connection with decisions as momentous as those attending the degree classification process.

The Primacy of Public Law

How is the marginalisation of academic judgement in the degree classification process justified? How are Universities UK/Guild HE able to assert with such confidence that in the not to distant future all borderline degree classification decisions will be determined automatically by an algorithm? It would seem that higher education institutions fear that affording academic judgement a decisive role in the degree classification process would bring the institution into conflict with consumer protection law.

It is suggested that "consumer rights regulations" demand the "fair, transparent and consistent" (2017a: 4) approach to decisions on the borderline, which, we are left to conclude, can only be secured through a "rules-based approach (2017a: 4). Consistently with the focus on consumer protection as the underlying justification for the "move away from wide-ranging discretionary powers of an examination board or equivalent" (2017a: 38), we are invited to accept that the exercise of academic judgement in determining borderline decisions would not stand the "scrutiny of grade classification boundaries by students who have paid more for university and are entering into an increasingly competitive jobs market (2017a: 4).

The one note of caution to be found in the Universities UK/Guild HE report in respect to the use of degree algorithms in borderline cases is also driven by concerns over the consumer rights of students, and not by concerns over maintenance of academic standards which the exercise of academic judgement assures. Their report advised that "care should be taken to ensure that these rules should...not have the unintended effect of lowering the effective threshold for degree classifications for all borderline students" (2017a: 38).

Aside from some fairly imprecise references to concepts like "fairness" "transparency" and "consistency" (2017a: 4), the Universities UK/Guild HE report does not specify just how and why consumer protection for students in terms of degree outcome is best protected through what the authors refer to as a "rule based" system (2017a: 4).

I do not intend to remedy any omissions in the report by embarking upon an examination of consumer regulation principles as they pertain to students studying at higher education institutions. I will simply concede that consumer law brings students within its scope, and that higher education institutions are bound to give effect to the protections the legislation affords. I will also take on trust reports which indicate that higher education institutions are genuinely concerned about the conformity of their degree award policies and guidance with consumer law. That such concerns have driven higher education institutions along the road toward "rule based" decision making in borderline degree classification cases appears not to be in doubt.

I can concede so much without undermining the force of my argument about the necessity of higher education institutions paying due regard to administrative law principles when designing degree algorithms. For whatever may be the extent of a higher education institution's obligations under private (consumer) law, that same higher education institution will have obligations under public (administrative) law.

The omission of the important framework which administrative law provides in the Universities UK/Guild HE's analysis is striking. It is hard to avoid the conclusion that higher education institutions are overly preoccupied with their role as actors within the private sphere of economic exchange (and with the consumer protection rules which regulate such exchanges) and considerably less preoccupied with their public duties (and with the administrative law principles which determine the manner in which those duties are conducted). It is doubtful that 65 institutions taking part in the survey would have been so candid about the fact that they have orchestrated the design of degree algorithms which exclude or fetter academic judgement had proper attention been given to their public role.

Does the foregoing simply provide higher education institutions with a strong defence to any claim that their degree classification processes are open to legal challenge? Might it be said that higher education institutions are caught between the incommensurable demands of public and private law?

I do not believe that there exists a true conflict between the demands of consumer regulation and good administration, but even if there were, there could be no uncertainty over which sphere of law should prevail. However much one may be able to commercialise elements of higher education delivery – including classroom teaching and supervision, for example - there is now absolutely no doubt that the award of a degree is a public function.

If higher education institutions see themselves as torn between two competing sets of legal principles, they have quite evidently made the wrong choice in prioritising consumer law which is not oriented to the performance of public functions at the expense of administrative law which is. In reality however, higher education institutions are not left with a stark choice between two competing laws, rather, they have simply forgotten that the conferment of a degree upon a student is a public function, and have thus excluded public law from their collective minds.

Once public law makes its re-appearance in the scope of things to be considered in the degree algorithm design, a proportionate response to the reality that higher education institutions must comply with consumer law principles and administrative law principles would be to establish firm rules around the borderline area in which academic judgement is to be exercised, but to ensure that the rules do not – as they currently do in most cases – automatically determine the outcome of the degree classification decision.

I must admit that so far I have asserted, rather than reasoned, the case for the primacy of public (administrative) law in the degree classification process. Further elaboration is required. We know that higher education institutions fall within the category of public authorities, but the mere fact that an entity is a public authority does not mean that any specific act or omission of that public authority is subject to the supervisory jurisdiction of administrative law. For administrative law to be engaged, the act or omission must take place in the performance of the public authority's specific public duties. Public law principles apply to entities that are listed as such in whatever legislation imposes the legal obligation, Increasingly, public law principles are being applied to a private entity "when it is carrying out a public function" (e.g. Equality Act 2010, Schedule 19). This, no doubt, to take account of the increasing tendency of public authorities to outsource aspects of its primary functions to private bodies.

Along with many other public authorities, higher education establishments carry out a diverse range of activities. It is by no means the case that all of these activities are considered to amount to public functions, thus:

> To mount a public law challenge in respect of the award of an academic degree requires...first that it is properly the subject of a public law challenge, not merely a matter for the internal regulation of a valid institution...merely because the grounds of challenge mirror those of a public law challenge does not mean that the decision is amenable to public law…" (*Tuitt v Birkbeck*, 2016b: 6).

It follows that before we can even begin to pray in aid of administrative law principles in our discussion of academic judgement in the degree classification process, we must first establish that in making decisions on degree classifications the higher education authority is carrying out a public function.

One can now confidently answer this question in the affirmative, but for a time it was thought that the public element of the degree award process was engaged only once the Office of Independent Adjudicator had made a decision on a student dispute about degree classifications. Whether the decision on the degree classification itself was gathered in with the higher education institution's other public functions, or was simply a matter "for the internal regulation of a valid institution" (*Tuitt v Birkbeck*, 2016b: 6) has not always been a question that elicited a straightforward answer. However, the position of the Administrative Court has now been clarified and is that "the agreed classification is amenable to public law challenge" and thus it logically follows that "procedural errors leading to an erroneous award (are) themselves subject to public law challenge" (*Tuitt v Birkbeck*, 2016b: 23).

If it can be said that consumer law justifies the decision of the majority of higher education institutions to adopt rules which ensure that where academic judgement is permitted at all, it is "permissible only when set conditions are met" (2017a: 30), administrative law principles decidedly veer toward the exercise of academic judgement, and would render unlawful algorithms which require that the 66.69% performances of Allen's example are <u>invariably</u> ruled out of consideration for first class honours.

Higher education institutions dislike and hold in suspicion the very mode of judgement which administrative law decrees is indispensable to good administration: judgements "that do not have to be consistently applied to students across multiple academic boards comprised of different individuals (2017a:39).

Academic Judgement Framed as a Legal Right

This part explores the issue of whether the processes and practices of academic judgement are justiciable? To what extent can we frame academic judgement as a legal right, exercisable by a single academic or group of academics concerned over the fact that he/she/they have not been allowed to exercise academic judgement in the case of a student profile with a 66.69% or 70.72% aggregate score?

What would be the purpose of any challenge to a degree algorithm design, or to a decision made pursuant to a degree algorithm design which does not permit academic judgement to be exercised against such aggregate scores? One objective might be to ensure that future degree classification decisions allow academic judgement to play its proper part. Another objective may be to compel the higher education institution to revisit a decision which has been made as a result of an alleged fettering of academic judgement. A subject expert who feels that his/her judgement has been wrongfully constrained may suffer a sense of grievance, and may wish to deploy the law as a means of vindicating that grievance. Each of these possible objectives, and other objectives not articulated here, presuppose that in some manner or other the processes and practices of academic judgement can be formulated in terms of concrete rights which will be recognised as such by the courts.

There are three justiciable categories of academic judgement. A legal right to exercise academic judgement in the degree classification process can be construed from administrative law principles governing the fettering of discretion. On the authority of *Buckland v Bournemouth University Higher Education Corporation [2010]*, subject expert examiners have contractual rights enforceable against an employer who deliberately undermines that expertise. Finally, academic judgement is used as a defensive right by higher education institutions when confronted with claims by students which challenge a particular exercise of academic judgement. *Kwao v University of Keele (2013)* EWHC 56 (Admin) is a case which illustrates the defensive use of academic judgement. Here the claimant sought judicial review against the decision of the university not to award him a PhD. The claimant argued that in light of his performance and attainments throughout his research degree studies, the decision not to award him the PhD was irrational. The Court accepted the university's defence that Kwao was asking it to "undertake an academic evaluation" which it is not "equipped...to do" (2013: para. 43).

Since this article is about the operation of administrative law principles in the degree classification process, the greater proportion of the argument will be devoted to an examination of the case law on fettering of discretion. However, I begin with some brief comments on the two alternate ways in which academic judgement can be framed as a legal right. I do this mainly in order to point to their limitations in confronting and challenging what seems to be a fast solidifying consensus among higher education institutions over the role of academic judgement in the design of degree algorithms.

Readers are no doubt familiar with the defensive use of academic judgement by higher education institutions. This defensive use is most manifested in clauses contained in higher education appeals processes, which carefully state that grounds of appeal which attempt to challenge academic judgement will not be considered. Although there is some suggestion in the academic literature that this 'immunity' is slowly being eroded, as confirmed by *Kwao v University of Keele*, higher education institutions can, for now, rely upon the courts to support their stance – in the event that a student seeks to pursue a challenge against a higher education's academic judgement in the courts.

A challenge to academic judgement will suffer a similar fate at the Office of Independent Adjudicator (OIA) as it will in the courts, and internally within the higher education institution. Section 12 of the Education Act 2004, which removed student complaints from the purview of the visitor of universities to the then newly established OIA, expressly excludes from its jurisdiction complaints over academic judgement.

For reasons which will be obvious, the defensive use of academic judgement cannot aid a challenge to a degree algorithm which excludes academic judgement or is overly rigid in terms of the conditions under which it will permit the exercise of academic judgement. Rather ironically, at the same time that higher education institutions are openly taking steps to ensure that academic judgement does not influence a degree classification outcome, academic judgement is being deployed by them as a powerful defensive weapon against student complaints.

A more promising avenue of challenge was opened up by the Court of Appeal in *Buckland v Bournemouth University Higher Education Corporation* [2010]. The case established that an employer owes contractual obligations toward an employee in respect to the latter's expertise as an examiner.

In *Buckland* the lower Tribunal, Employment Appeal Tribunal and Court of Appeal all agreed that the re-marking of a subject expert's examination scripts, after these had already gone through a process of first and second marking and after the marks had been approved by the university board of examiners was "calculated to destroy the relationship of trust and confidence which is implicit in all contracts of employment" (para.12). Sympathising with the sense of grievance felt by the academic member of staff whose papers had been subjected to this level of scrutiny, the Court of Appeal stated that the re-marking process was "...an unequivocal affront to his integrity..." (para.12). The process went "beyond what could be regarded as one of those incidences of professional life that a person must accept and move on" (para.12).

The university's defence to the effect that the re-marking process was necessary to "ensure that students were fairly dealt with" (para.12) was rejected by the court. So grave was the breach of contract that the affected academic member of staff was entitled to treat the re-marking of his papers as a constructive dismissal. Despite the fact that a university internal panel had eventually vindicated the academic member's position, the court concluded that the original breach could not be cured by the subsequent appeal panel, for "...a repudiatory breach cannot be cured unilaterally by the party in default" (2010: paras.38 & 42).

Even if we were to contemplate a situation in which a board comprised of academic subject experts acted in defiance of a degree algorithm which did not accommodate academic judgement and proceeded to make a degree classification decision based on their judgement, it is unlikely that the *Buckland* decision could be effectively deployed by the subject experts in the event of the university responding to what it would consider to be an excess of authority on the part of the subject experts by substituting the mathematical outcome for the exercise of academic judgement. Employment contracts are "inherently personal" (*Buckland*, 2010: para.42). As in *Buckland*, the claim in contract would have to be made by a single academic whose "integrity" had been assaulted by the substitution of the mathematical outcome for the outcome arrived at through the exercise of academic judgement.

We would have to envisage a situation in which each and every member of the subject expert board were able to establish that they were personally and individually "affronted" by the decision to refute a collective judgement. I think such a scenario unlikely. From among the group of subject experts, the Chair of a specialist board may be able to advance a convincing argument to the effect that his/her status accords him/her rights above and beyond those of the other subject experts. However, even in the case of the Chair, I consider the prospects of a successful *Buckland* claim in a case where academic judgement is not permitted to operate in a degree classification decision to be weak.

What is clear is that even in the most favourable case where an individual (perhaps the Chair) can show that he or she has been singled out in a manner "calculated to destroy the relationship of trust and confidence" between employer and employee, any remedy for breach of contract would have no direct bearing on the degree classification decision made in respect to an individual student; nor would it have any direct bearing on how academic judgement is used in future degree classification decisions. As with the claimant in *Buckland,* the only outcome of such a claim would be a monetary remedy for breach of contract.

If the exercise of legal right is intended to bring about a review of a particular degree classification decision, or a review of a degree classification algorithm, the claim must be brought within a field of law which is not confined to the remedying of individual harms and grievances. However, there is a final note to be made about the *Buckland* decision before we move to consider administrative law principles. A breach of contract analogous to that found in *Buckland* might persuade a court that a single academic has a sufficient interest in a degree classification decision, such as to enable him or her to assert standing in Judicial Review proceedings, Judicial Review is the process by which challenges to the exercise of a public authority's functions are brought before the administrative court, and is explored in the next section of this article.

So, how can a legal right to the exercise of academic judgement be deduced from administrative law principles governing the fettering of a public authority's discretion in the exercise of its public functions? As the reader will have gathered, the rules which prohibit fettering of discretion are not particular to the case of academic judgement. Indeed, there is as yet no definitive ruling to the effect that the rules apply to boards of examiners when making decisions about degree classifications.

The following sets out the purposes behind the rule against fettering of discretion:

> The underlying rationale of the principle against fettering discretion is to ensure that two perfectly legitimate values of public law, those of legal certainty and consistency (qualities at the heart of the principle of the rule of law) may be balanced by another equally legitimate public law value, namely, that of responsiveness. While allowing rules and policies to promote the former values, it insists that the full rigour of certainty and consistency be tempered by the willingness to make exceptions, to respond flexibly to unusual situations, and to apply justice in the individual case" (De Smith, 2007. Cited in Mellon, 2014: 12).

Let us then be clear that there is no legal barrier to higher education institutions developing and implementing degree algorithms. There is no legal barrier to higher education institutions insisting that the degree algorithms they design must form a firm framework against which the majority of degree classification decisions are to be made. Indeed, administrative law principles make plain that a public body which "decided one case after another with no discernible rationale or consistency between cases"(R v Hampshire CC ex parte W [1994]) would not be displaying good administration – in the legal sense. Administrative law therefore "recognises the wisdom and acceptability of having a policy..."(R v Hampshire CC ex parte W [1994]).

In an early authority on the rule against fettering of discretion, it was said that

> A Ministry or large authority may have had to deal already with a multitude of similar applications and they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always will to listen to anyone with something new to say…" (*British Oxygen Co. Ltd. V Ministry of Pension* [1971]).

The case of R v Hampshire CC ex parte W [1994] contains several statements which assist our understanding of how administrative law principles impact on borderline degree classification decisions. Here it was said that "...public law is...jealous to guard the discretion which a permissive power carries with it, and discretion is negated if any inflexible rule is adopted for the exercise of the power...

What is required by the law is that, without falling into arbitrariness, decision makers must remember that a policy is a means of ensuring a consistent approach to individual cases, each of which is likely to differ from others. Each case must be considered, therefore, in light of the policy but not so that the policy automatically determines the outcome (paras. 475E-476D).

A leading case on the question of when a public authority will be said to have unlawfully fettered its discretion is *R v Secretary of State for the Home Department ex parte V v T* [1998], the salient parts of which are quoted in full:

When Parliament confers a discretionary power exercisable from time to time over a period, such power must be exercised on each occasion in the light of the circumstances at that time. In consequence, the person on whom the power is conferred cannot fetter the future exercise of his discretion by committing himself now as to the way in which he will exercise his power in the future. He cannot exercise the power nunc pro tunc. By the same token, the person on whom the power has been conferred cannot fetter the way he will use that power by ruling out of consideration on the future exercise of that power factors which may then be relevant to such exercise.

These considerations do not preclude the person on whom the power is conferred from developing and applying a policy as to the approach which he will adopt in the generality of cases:... But the position is different if the policy adopted is such as to preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case in relation to which the discretion is being exercised. If such an inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful..(para. 496H).

With the administrative law rules on fettering of discretion now firmly in mind, we can return to Allen's case of the varying student outcomes caused by varying degree algorithms to see if administrative law could, in principle, intervene so as to enable the exercise of academic judgement to correct any anomalies caused by the automatic use of degree algorithms in borderline cases.

It is to be recalled that Allen offered the example of a student who performs at the level of at least 66.69 average across all modules studied. According to Allen, such a student will graduate with either an upper second class degree or a first class degree, depending on whether that student studied at Oxford Brookes university or at the university of Kent (2017b: 8).

Under the current degree classification arrangements as outlined in the Universities UK/Guild HE survey, subject experts would not be permitted to decide on (or recommend) a first class honours where the mathematical calculation of 66.9 indicates an upper second. Even if the subject experts were unanimously of the view that the mathematical average produced by the degree algorithm does not truly represent the student's achievements throughout the degree, such an option will not be available. The reason for this is obvious in the

case of the 65 higher education providers (which took part in the Universities UK/Guild HE survey) which simply do not allow any scope in the algorithm for academic judgement – or, to put it in administrative law terms, do not allow scope for the exercise of discretion.

The reason is not so obvious in relation to the remaining 44 – where some discretion through academic boards is allowed.

The answer to the 44 lies in the findings of Sinclair et al (2017c) who show that even when discretion is allowed, degree classification algorithms do not empower subject experts to exercise academic judgement for students whose calculated average falls beyond 2% away from the desired classification. Thus, Allen's example 66.69 average student could not be considered for a first class award even by the 44 institutions who permit some level of academic judgement simply because his/her average falls below the 68% allowance.

I would hope the reader will resist the temptation to dismiss all of this because of an intuitive feeling that a 66.69 average score should not result in an award of a first class degree. What I think we can all accept is that although a mathematical calculation might appropriately determine most degree awards, there will always be the small sample that defies precise calculation – for example because of one low subject mark which does not represent the student's normal performance, and which then distorts his/her attainments as represented by the average arithmetical score,

Returning to the place where this article began-with the Universities UK/Guild HE report-we are bound to conclude that the policies of **all** of the institutions out of the 120 who provided conclusive responses to the question about how they deal with borderline degree classification decisions would be open to challenge on administrative law grounds. In the case of the 65, because no discretion at all is permitted. In the more complex case of the 44 because they will be deemed to have fettered discretion by over-rigid policies addressed to the question of <u>when</u> discretion is triggered. If it is invariably the case that even where discretion is, in principle, permitted, it cannot <u>actually</u> be exercised unless, for example, "in excess of 50% of the final year marks" are "in the upper band" (Sinclair et al, 2017c), the 50% requirement becomes an "automatic" answer to the question of the exercise of discretion for a student who has only 49% of final year marks in the upper band.

For the avoidance of doubt, I do not suggest that there is anything unreasonable about the requirement that a student must have (among other things) 50% in the upper band if he/she is to be considered for a degree award which is at a higher level than the mathematical outcome indicated by the degree algorithm. Legal problems arise when this reasonable requirement works to exclude or weaken other equally reasonable considerations.

Lord Brown-Wilkinson in e*x parte V v T* [1998] puts the case best when he says, in effect, that one cannot decide today all of the considerations that might be relevant to a decision which is to be made tomorrow. I conclude this part in a paraphrasing of a paragraph of Lord Brown-Wilkinson's judgement in that case. Whenever a degree classification algorithm automatically determines the outcome of the degree classification decision, both the algorithm and the decisions taken pursuant to it will be unlawful.

The judicial review action

If, as is claimed, so many degree classification policies and guidance (algorithms) are *prima facie* unlawful in administrative law terms, how do they continue to be applied? Why are they not challenged? How can they be challenged in court?

We quickly find that the conceptualisation of academic judgement as a legal right is the first and easiest stage of a difficult journey, which may never lead to a conclusive court decision, much less to a desired outcome. The first obstacle, and for many an insurmountable one, is that any potential challenger would necessarily be a subject expert employed by the higher education institution which deploys the maligned degree algorithm. The right to initiate any legal action is limited to legal (e.g. companies) or natural (human) persons. A legal person, such as a higher education institution, is comprised of many elements, including its academic departments, which are not divisible from the higher education entity for the purposes of the Judicial Review (or any legal) action.

Thus, any attempt by the department of Art History based in the fictional university of Pigraw to bring Judicial Review proceedings against the university of Pigraw will fail at the outset. The Art History department of the university of Pigraw is a constituent part of the university of Pigraw, and a legal entity cannot sue itself! From this it follows that the only way that a Judicial Review claim can be brought by an academic concerned at Pigraw's degree classification arrangements is for that academic to take action as a natural person, relying upon

his or her status as an employee of the university of Pigraw.

It need hardly be said that the decision to bring any legal action against an employer brings with it potentially grave consequences. I have already remarked the fact that higher education institutions appear to have forgotten that degree classification decisions lie within the realm of their public duties. It is unlikely, therefore, that they will be able to make the reasoned distinction between the public law, Judicial Review, challenge, and an ordinary private civil law action. Both would be treated with hostility and possible aggression.

The unattractive prospect of taking action against a higher education employer is intensified in the mind of the employee once he or she gains understanding of the other hurdles attendant on any attempted Judicial Review challenge.

Judicial Review is the process by which a legal challenge against the acts or omissions of a public authority-in our case a higher education institution-is brought before a judge in the Administrative Court, who will then determine whether the acts or omissions comply with administrative law.

It is important to understand the limits of the Judicial Review action, the most significant for our purposes being that a judge is not empowered to substitute his/her decision for that of the public authority's.

So, returning once again to the Allen example, let us suppose that subject experts faced with a student aggregate of 70.72 unanimously form the view that the student attainment in reality is of upper second class standard. Let's further assume that the academics are employed in one of the institutions in which borderline cases are automatically determined by degree algorithm. Based on the analysis in part two of the rules against fettering of discretion, it is likely that a court will find that the outcome of the case-the first class degree award based on the automatic operation of the degree algorithm-was reached as a result of an unlawful fettering of discretion. However, such a finding would not result in a court order compelling the higher education institution to award the student an upper second class honours degree. What the judge is empowered to do is to force a review of the degree classification decision by issuing an order which nullifies the original decision (a quashing order) and instructing (by mandatory order) that a new decision is made by the higher education authority-now following a correct process, which would necessarily then allow for academic judgement.

Our hypothetical subject experts may be more intrigued by the power of the judge to provide a remedy by way of declaratory judgement. This is, in effect, a legal determination of the lawfulness or otherwise of a particular decision. The declaration would not lead to a review of any particular degree classification decision but would act as an extremely powerful remedy where it is alleged that the degree algorithm *per se* is unlawful-irrespective of any outcome.

However, the foregoing presupposes that the challenge to the degree algorithm goes to a full hearing at the Administrative Court. Unfortunately, a full hearing can never be guaranteed. Unlike all other legal actions, a Judicial Review action cannot be commenced as of right. In all cases, permission must be sought from a High Court judge to commence an action. Only once permission is granted will a case proceed – allowing the court for the first time the chance to hear full submissions as to the lawfulness or otherwise of the degree classification algorithm, and any degree classification decision made on the basis of it. It is not unusual for a case to be entirely exhausted at the permission stage – often after several months, even years, have elapsed.

There are a number of reasons why applications for permission may be refused – most of which are not directly relevant to this article. For instance, Judicial Review actions are subject to rather curious rules relating to limitation periods – the point beyond which it is no longer possible to bring an action – whatever may be its merits. A Judicial Review action must be lodged "promptly" and, in any event, no later than three months from the date of the decision which is to be challenged. A claimant who not unnaturally assumes that he or she has three months within which to bring a claim may be wrong footed. Case law reveals that claims have been bought within the three month period and have been refused permission on the sole ground that they were not brought "promptly."

But let us focus on those reasons for refusing permission which have proved difficult in terms of challenges to degree classification decisions. Permission may be refused because the decision that is being challenged did not relate to the exercise by the public authority of its public functions, and, therefore the claim falls outside the jurisdiction of the administrative court. We explored this issue in the first substantive part of this article, *the primacy of public law*, The second reason justifying a refusal of permission is that the person who seeks to to bring the Judicial Review challenge does not have a 'sufficient interest' in the matter under review. He/she is nothing but an "interfering busybody", and there being no acceptable purpose behind his/her challenge, she/he will be deemed to lack 'standing' to bring the Judicial Review challenge.

It is on the question of standing that our perfectly constructed case concerning the unlawfulness, in administrative law terms, of degree classification processes which do not permit the exercise of academic judgement in borderline degree classification cases is likely to flounder. It is truly a case of being dressed up with nowhere to go!

Standing may indeed prove to be an insurmountable hurdle when the objective of the Judicial Review challenge by an academic subject expert is to prompt a review of the degree classification decision, In such cases, it is doubtful whether the subject expert will be deemed by the court to have a sufficient interest in the degree classification decision.

It is repeatedly stated that a degree classification decision affects only the student recipient of the disputed degree award. The conclusion that students acquire standing because they are personally affected by the degree award decision, leads to the conclusion that "given the availability of the alternative remedy for those who are actually personally affected by the decision, judicial review is not an appropriate remedy..." (*Tuitt v Birkbeck*, 2016b: 7). The alternative remedy referenced in the quotation lies with the Office of Independent Adjudicator, and is discussed in the final section of this article.

The undeniable fact that it is the subject expert's academic judgement which has been sidelined in the degree classification process does not appear to be sufficient to place him or her in:

"...circumstances in which...do-gooding organisations and individuals can bring claims in the public interest whose aim is to benefit people who are not themselves involved in the litigation...in a case of this kind, where the individuals know perfectly well what degree they have been awarded and do not seek to challenge the award of that degree in Judicial Review proceedings or by any other means then different questions arise. And the extent to which a third party can bring a claim whose purpose is to benefit them is open to question. (Tuitt v Birkbeck, 2016b: 17).

In the previous section, I briefly alluded to the possibility that the Court of Appeal decision in *Buckland v Bournemouth University Higher Education Corporation* [2010] might be relied upon to assert standing in Judicial Review proceedings on the basis that an undermining of subject expertise amounting to a breach of contract might constitute a sufficient interest for administrative law purposes. There is no direct authority on the question, but what exists indicate that the best a subject expert can hope for is a form of standing which is parasitical upon a student who is actively challenging a degree classification decision.

Accordingly, a student would "at least have to be interested parties in respect of the claim and preferably...claimants themselves (*Tuitt v Birkbeck*, 2016:a: para. 6).

One might consider that these are entirely reasonable stipulations for the generality of alleged unlawful acts or omissions of higher education authorities. but in cases of alleged fettering of discretion they operate to effectively ensure that no challenge can be made, even in the most extreme case.

Directly and personally affected as they might be, students would not be in a position to know how tightly the exercise of academic judgement is, in fact, constrained. Moreover, if we are to accept the Universities UK/Guild HE report at face value, the interests of students are not aligned with the exercise by subject experts of academic judgement in degree classification decisions. It is time for administrative law to acknowledges that a subject expert whose judgement is constrained during a decision making process is, in truth, personally and directly affected by a decision made pursuant to that process.

I conclude this part on a more optimistic note. Whilst there is no decided case on the point, it may be that the complexities of asserting standing would be eased if the subject expert's challenge is made against the degree algorithm *per se*- irrespective of whether or not an actual adverse outcome has resulted from its application. If this route is adopted, the argument that Judicial Review is not an appropriate claim because of an alternative remedy for students will be circumvented.

A question of vigilance?

It seems likely that the position we have arrived at in which academic members of staff have effective recourse neither to the administrative court, nor to an equivalent body to the Office of Independent Adjudicator, nor to the old university visitor's jurisdiction, was not the result of careful plotting. However, I am far from convinced that there is an appetite for reform of the current system. What may stimulate a hunger for reform is the possibility that some pressing issues within the UK higher education system – such as degree inflation and disproportionately low attainments of black and minority ethnic students- might be eased through the restoration of academic judgement as a means toward correcting discrepancies such as those evidenced in Allen's example of the 66.69-70.72 variance.

To understand why we appear to have arrived at the truly astonishing conclusion that a subject expert has no special interest in degree classification decisions which influence the life chances of his/her students and are directly addressed to his/ her area expertise, we need to go back in time to about 15 years or so-just at the time of the introduction of the Higher Education Act 2004.

The preamble to the Higher Education Act2004 sets out one of the key objectives, which was to "...make provision about...complaints by students against institutions providing higher education", and further to "limit the jurisdiction of visitors of institutions providing higher education; and for connected purposes."

The Act's substantive provisions are to be found in part 2, titled *review of student complaints*. Section 11 (a) & (c) make clear that the new arrangements extend to higher education institutions possessing degree awarding powers. Section 12 brings within the Act's scope decisions relating to degree awards, which will constitute an "act" of an institution defined within section 11. Subsection (a) & (b) of section 12 further support the claim that complaints over degree classifications were expected by extending jurisdiction to 'former students', who may well have graduated at the time their complaint over degree classifications is made. Sections 13-19 set out the provisions under which the Office of Independent Adjudicator was eventually established. Finally section 20 provides that:

(1)The visitor of a qualifying institution has no jurisdiction in respect of any complaint which falls within subsection (2) or (3). (3) A complaint falls within this subsection if it is made by... (a) as a student or former student at the qualifying institution, or (b) as a student or former student at another institution (whether or not a qualifying institution) undertaking a course of study, or programme of research, leading to the grant of one of the qualifying institution's awards.

The Office of Independent Adjudicator assumed the powers previously held by the university visitor. Higher education institutions are expected to support the OIA in its regulatory objectives.

As can be seen from this brief summary, the 2004 Act does not appear to envisage that a non-student, including an academic member of staff, may have a legitimate complaint about a degree classification decision and eventual award made in respect of a student in the institution at which the non-student is employed.

The mischief here lies in the removal of complaints previously dealt with by the visitor of universities to place at which academic staff have no standing, the Office of Independent Adjudicator framework being for students only. The obvious solution would have been to establish an equivalent to the OIA for academic members of the university. I can find no evidence that such a proposition was even mooted during the passage toward the Higher Education Act 2004.

This rather unfortunate state of affairs is compounded by the position of the Administrative Court, which recently confirmed that:

> It is now settled practice in this court that if a student seeks to challenge the award of a degree then although the challenge may, in principle, be a decision that is amenable to judicial review, he or she must, unless there are extraordinary circumstances which prevent her from doing so, bring her complaint to the Office of the Independent Adjudicator, a body which replaced the visitors of universities and which is by statute the body to resolve arguments about classification of degrees. Only if the Office of Independent Adjudicator itself makes a decision which is open to challenge on public law grounds do the courts become involved (*Tuitt v Birkbeck*, 2016a: para.5).

The equally settled principle of administrative law that a potential wrong should not be left without an effective challenger does not appear to be strong enough to prevent higher education institutions from exempting themselves from one of the core tenets of administrative law.

At the end of this exploration into academic judgement and the law, we are left to conclude that an adequate regime of rights exist for students, but that academic experts have no effective recourse beyond the higher education institution that will have decided to put in place the disputed degree algorithm. Students and academic staff together make up the core components of a higher education institution. Best practice demands that a system of dual vigilance is established around the degree award framework, with students and academic subject experts having effective recourse to an external judicial or quasi judicial body in the event that a degree classification process gives cause for concern.

For the reasons explored in this article, it is doubtful that a system of *dual* vigilance in respect to degree classification decisions of higher education institutions can be restored/created within the existing framework of the UK Administrative Court's general supervisory jurisdiction.

In conclusion, the Higher Education Act 2004 conferred upon students the right to invoke the supervisory jurisdiction of the Office of Independent Adjudicator (and through it, the oversight of the Administrative Court) in disputes with their institutions over degree classifications. No equivalent right can be claimed by employed,, or otherwise contracted, subject experts. Thus, the option for challenge lies solely with the party (the student) with a purely personal interest in the degree classification outcome. Moreover, power lies with the party with an interest in degree inflation, since a student is not likely to appeal to a judicial or quasi judicial authority for a reduction in his/her degree award. I suggest that it is fundamentally in this imbalance of legal power that we can discover the source of current tensions over the degree classification system.

References

Allen, D.O. (2017b) Degree Algorithms, Grade Inflation and Equity: The UK Higher Education Sector. Economics Working Paper Series 1801.

British Oxygen Co. Ltd. V Ministry of Pensions [1971] AC 610.

Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121.

De Smith, Judicial Review, 6th edition (2007), cited in Mellon, G. Legal Advice, 6 October 2014.
Endicott, T. (2015) Administrative Law, Oxford University Press

Equality Act 2010 C.15

Higher Education Act 2004 C.8

Kwao v University of Keele (2013) EWHC 56 (Admin,

Mellon, G, Legal Advice, 6 October 2014.

Sinclair, N., Wright, C., Edwards, G. and Keane, P. (2017c) Degree Classification: Does the Calculation Model Affect the Award?, London South Bank University.

R v Hampshire CC Ex parte W [1994] ELR 460.

R v Secretary of State for the Home Department ex parte V and T [1998] AC 407,

Tuitt v Birkbeck [2016a] EWCH (Admin) 2164.

Tuitt v Birkbeck [2016b] CO/790/2015: Transcript of Proceedings.

Universities UK/Guild HE (2017a) Understanding Degree Algorithms.