

IS THE OFFA GUIDANCE (03/11) TO BE CHALLENGED BY JUDICIAL REVIEW?

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1. Following on from our Paper 39 (www.oxcheps.new.ox.ac.uk , Papers page) this Paper assesses whether the OFFA guidance of March 2011 is challengeable under public law as ultra vires in paying too much regard to the Government guidance to OFFA in February 2011, which, we argued, risked pushing OFFA into exceeding its remit re *applications* within HE generally and towards intervention in *admissions* (or recruitment) at specific HEIs in the name of achieving a more diverse, balanced, and representative *student body* locally rather than nationally – and, in so doing, possibly causing OFFA to neglect the legal duty upon it to protect HEI’s admissions criteria from such external political interference (as clearly imposed under s32(2)(b) HEA 2004). Has OFFA successfully steered a very difficult course between the Scylla and the Charybdis?

2. This Paper considers the OFFA March guidance and the accompanying press-release of 8/3/11. The latter does clearly state that OFFA is now moving on, wanting to see ‘outcomes’ at ‘the most selective universities’ improve (a shift indeed from applications to admissions, from the sector-wide to the institution-specific). This is all about ‘achieving a representative student body’ and may well involve ‘setting targets re student intakes’. Thus, OFFA seems to have indeed allowed itself to have been pushed too far by Government; but any judicial review of OFFA would be based more on its formal guidance document than on a press-release.

3. What then of the 128 paragraph actual guidance document (OFFA, March 2011/01) to HEIs on ‘how to produce an access agreement for 2012-13’?

4. Let us start at the end of the 40 page document...

5. ('Glossary') The 'under-represented groups' of interest in achieving a representative student body are: 'people from lower socio-economic groups'; 'people from low income backgrounds' (up to £42,600 pa family income); 'some ethnic groups or sub-groups'; 'people who have been in care'; and 'disabled people'. And 'widening participation' is about improving under-representation in HE 'at a national level'.

6. ('Sanctions') There will be sanctions upon an HEI if there has been 'a serious and wilful breach' of the access agreement (eg 'failure to deliver the outreach and retention measures' agreed to – note no reference to a target or measures re admissions or re the resultant student mix...). This breach or failure, the document suggests, could involve being 'seriously negligent' in the HEI's 'interpretation' of its access agreement, OFFA's guidance, related legislation and regulations. Such a breach may include failure to make adequate progress towards 'targets and milestones' (the dangerous word 'quotas' is, wisely, never used in the 40 pages) as set by the HEI in respect of, say, 'applicants and entrants' – the last two words are perhaps significant, and potentially unfortunate/unwise. Could an HEI lawfully refuse to make any reference at all in its OFFA access agreement to anything other than setting itself targets (or benchmarks or milestones) for achieving a wider range of applications (and perhaps also concerning retention rates), and simply not even enter into discussion over any such targets or benchmarks or milestones for actual admissions arising from such applications and still less whether the end result is then a more representative student body? We suggest the answer is YES; and that OFFA could not lawfully refuse to agree such an access plan and could not impose any sanctions (despite the questionable two words cited above, which we also suggest, would take OFFA beyond its lawful remit if ever to be relied upon). This assessment also matches the fact that the 'Checklist' makes no reference to targets or benchmarks or

milestones relating to admissions or to the proportions of this or that kind of student within the student body. We even propose that, in fact, an HEI should not engage with OFFA over its admissions targets, benchmarks, milestones, or whatever it may or may not have as aspirations and expectations concerning its admissions and student body, since OFFA has no lawful remit in relation to the admissions numbers, process, or criteria at individual HEIs, and hence an HEI would merely be properly interpreting the ‘related legislation and regulations’ referred to in para 6 above and in ‘Sanctions’ section of the OFFA document (especially since, as already stressed, OFFA has a positive legal duty, under s32(2)(b) of the legislation creating it, to respect and indeed protect institutional autonomy over admissions criteria).

7. And so diving into the full text, paragraph by paragraph... First, however, we must note the Foreword, where OFFA prudently stresses that it is ‘respecting institutional autonomy’ (as indeed in Law it must); and then it emphasises that now OFFA will be more concerned with ‘outcomes’ without explicitly stating that this could perhaps mean an interest by OFFA in whether HEI X or Y is successfully converting applications from under-represented groups into achievable offers and thence to actual admissions and so on towards a more representative student body. It also notes that the Government letter to OFFA ‘explicitly endorses the use of contextual data by those selective institutions who wish to do, in order to admit more students with high potential from disadvantaged backgrounds’. Thus, OFFA discharges its legal duty (merely) ‘to have regard to’ the guidance it receives from Government and (note well) then, wisely, just passes on to HEIs this thought about the possible use of ‘contextual data’ as simply that, as an idea and suggestion: not as something that an HEI needs to incorporate into its access plan. That said, there is throughout the rest of the document a constant stress on ‘outcomes’ with an implication that a desirable (or, in fact, an implicitly expected if not required?) such outcome for a selective HEI might be enhancing actual admissions, and not only applications, from under-

represented groups – which might best be achieved by ‘the use of contextual data’ as part of the newly changed admissions criteria?

8. Certainly, para 28 proposes that ‘an institution with low proportions of students from under-represented backgrounds will wish to concentrate on increasing those proportions’ (but, carefully, it does not go further and suggest doing so by adjusting admissions criteria; and, sensibly, nor does it say there will be any sanction if, having concentrated in this way, the HEI still is unable to alter the outcome by increasing the proportion of entrants from under-represented backgrounds). As noted in para 6 above, it would probably be unlawful if OFFA refused to sign-off a proposed access agreement where an individual HEI, having had due regard to the this suggestion in para 28 as to what it might ‘concentrate on’ with respect to its admissions and so also the resultant proportions or mix within its student body, decided simply to ignore the steer and instead pretty well re-iterated whatever is the content of its current access plan that, presumably, concentrates on increasing widening participation by encouraging more applications from under-represented groups. It would almost certainly be unlawful if in due course OFFA sought to impose sanctions upon this HEI for not addressing such matters within its access plan – or indeed upon any other HEI which, for whatever reason, had within its access plan elected to set itself some sort of target or milestone for admissions that it then failed to achieve or decided subsequently to abandon as impracticable or undesirable.

9. In paras 61/62, the document at last grapples with the concept of ‘contextual data’ as flagged in the Foreword. It begins with a firm statement: ‘The freedom to admit your own students is an important part of academic freedom. The law puts admissions criteria outside our remit and it is right that it should do so.’ – but it then repeats the bit as above about Government guidance to OFFA having mentioned the possibility of certain HEIs taking ‘into account contextual data in their admissions process’ (which may then involve the making of ‘slightly lower offers’). The OFFA guidance is next very clear that it

does not require any HEI to use such contextual data even if OFFA agrees (with Government) that to do so 'is good practice and a valid and appropriate way' to 'broaden access' while at the same time being able to 'maintain excellence'. If such data is used, the HEI should, of course, 'consider individuals on their merits' using 'fair, transparent and evidence-based' procedures. The OFFA document does not explain why the use of contextual data is seen as 'good practice'.

10. And, incidentally, the benchmark data for use in assessing the success or otherwise is 'the range of HESA's widening participation performance indicators and benchmarks' (para 46) – except that para 84 states that there is 'no expectation' that an HEI needs to use these WP PIs ('we are happy for you to use other statistical measures'). Indeed, para 85 notes that there can be conflict arising from the simplistic use of ill-considered benchmarks and targets: 'For example, it is conceivable that you could improve your proportion of state school students without recruiting greater proportions of students from disadvantaged groups.' – yes, indeed, if the state schools concerned are posh comps serving expensive housing areas, or the remaining state grammar schools so successfully monopolised by the middle classes, or those sixth-form colleges trendy enough to be attracting escapees from the local independent schools.

11. So, B++ (perhaps even A-) for OFFA's attempt to steer an impossibly difficult course, and a 75%+ chance it might survive a judicial review challenge - and a less than 50% chance if it ever tried to impose any sanctions based on 'outcomes' in relation to 'targets' or 'milestones' to do with admissions or 'entrants' or 'recruitment' at any single HEI, selective or not. HEIs should be brave in their response to this guidance and when negotiating their access agreements with OFFA: they should not needlessly and cravenly build in hostages to fortune by, say, setting themselves 'targets' or 'milestones' (based on whatever 'benchmarks' and 'WP PIs') re 'outcomes' by way of 'entrants' or 'recruitment' (still less go

down the road of quotas in relation to admissions across the HEI, let alone adjusting the admissions criteria overall or at the level of particular degree courses). Unless, of course, they wish to do so on a purely voluntary basis because they happen to want a more 'diverse', 'balanced', and 'representative' student body in terms of its socio-economic and/or its ethnic mix, and may also then agree with both OFFA and the Government that the use of contextual data as a tool in the admissions process was 'valid and appropriate' - and, of course, were sure that neither adjusting admissions criteria with such a purpose in mind (a 'balanced' student body) and nor that using contextual data as a tool to achieve the purpose were unlawful in terms of discrimination legislation, the HRA and the ECHR, and charity law.

12. So, despite the hype of the OFFA 8/3/11 press-release, the OFFA March 2011 guidance does not really push HEIs further along any road than the earlier guidance from OFFA has already directed them. OFFA is on thin legal ice in being able to do anything more than to incorporate the concept of HEIs reviewing their 'retention' figures and also to hint at how desirable it would be for some selective HEIs to 'concentrate on' this or that, and at the same time perhaps to think about 'the use of contextual data' as part of their admissions processes. OFFA has indeed had what little regard to its suspect guidance from the Government was legally appropriate, and in essence not much has changed. And this is unsurprising since the Law empowering OFFA remains the same as it was in 2004 - whatever Government may have hoped it was - and HEIs are still private corporations whose autonomy concerning their admissions criteria is sacrosanct. But watch this space: the OFFA document notes that 2012-13 is 'a transitional year' and that there may be 'further development of Government policy in the forthcoming White Paper on higher education'. As we stressed in Paper 39, if the Government really wants to control admissions at (selective) HEIs, it will need to grant itself new and draconian legislative powers grossly detrimental to the internationally recognised standard of university autonomy and academic freedom. The Government's

February 2011 letter of guidance to OFFA went so far as to, for example, talk of the subjects required and the grades in them for offers relating to particular courses at specific HEIs, but the OFFA March guidance judiciously ignores such a possible intervention in the detail of the admissions criteria at individual HEIs (OFFA has clearly had 'regard to' to this aspect of the Government guidance and rejected it as improperly inviting OFFA seriously and wilfully to breach s32(2)(b) HEA 2004). This is the kind of egregious interference in university autonomy that the Government would have to legislate for and which one trusts will not be floated in the forthcoming White Paper...

(12/3/11)

ADDED 8/4/11:

a) With reference to para 11 above, a recent Opinion from an eminent barrister specialising in education law sees the Secretary of State's letter to OFFA as 'probably unlawful' (as indeed we also assess it in Paper 39) and furthermore sees the OFFA guidance to HEIs as having a lesser chance of surviving judicial review than we assess in this Paper (mainly because of its references to 'outcomes' as noted in para 11 and elsewhere above – in short, the guidance does not give sufficient stress to the duty upon OFFA under s32). The Opinion also warns that failure to challenge OFFA now may mean it would be more difficult to do so down the line if and when an HEI, having seemingly complied (the point about 'hostages to fortune' made in para 11), moaned on being fined in due course by OFFA for not making adequate progress re 'outcomes'.

b) So, perhaps the brave HEI should merely send in its previous access plan focussed on applications and as made in accordance with the prior OFFA guidance (and do so with the date changed!), and not refer at all to the wider issues now being (unlawfully?)

flagged in the latest OFFA guidance (whether or not the OFFA guidance to HEIs has indeed toned down the ‘probably unlawful’ steer to OFFA from the Government for it to be more bold in pushing HEIs re admissions/retention outcomes/targets). If OFFA then refuses to sign-off on the new plan because it does not go far enough, the HEI (according to the Opinion) would have a greater than 50% chance of winning at judicial review.

c) There is, in fact, another interesting dimension raised in the Opinion: were an HEI to use the contextual data approach as suggested by OFFA, it may well risk contravening Article 14 ECHR in that it could be argued it was thereby discriminating against an applicant whose parents had, allegedly, ‘bought’ good qualifications/grades for the child by financing independent school fees (the sins of the parents as being from the higher socio-economic groups should not be visited upon the offspring when applying to university in that Art 14 outlaws discrimination on the basis of, inter alia, ‘birth or other status’). The HEI may find it difficult to use the potential defence that it can justify such discrimination as being proportional to a reasonable policy objective (achieving a socially ‘balanced’ student intake) unless it can point towards a solid body of credible research on such use of contextual data (at present some argue that there is not, or at least not yet, that kind of material...) – and also such a policy objective can’t be imposed upon the HEI by OFFA’s guidance if that is itself unlawful by contravening s32! And nor does the Equality Act 2010 help the HEI since there is no positive duty upon the HEI under the Act to review its admissions process against criteria based on the socio-economic background of applicants (as opposed to other characteristics to do with race, ethnicity, gender, disability, etc) and hence also no protection as there is where the public body undertakes affirmative action in, say, awarding a job to a lesser qualified candidate on the basis of such a review and assessment of

those other characteristics in terms of the diversity of its workforce.