

The impact of Coronavirus on examinations

Alex Line

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Introduction

A Level results were published on 13th August 2020. GCSEs are due to be published soon after on 20th August 2020. As has been widely report, significant changes to the examination process have been implemented at short notice due to the impact of Coronavirus. This article considers what is known about the recent policy decisions affecting students this summer, and analyses their potential impact from a legal perspective.¹

What is Ofqual?

The Office of Qualifications and Examinations Regulation ('Ofqual') is a non-ministerial government department. It was created by section 127 of the Apprenticeships, Skills, Children and Learning Act 2009 ('ASCL 2009').² Its objectives are stipulated in section 128(1) as: (a) qualifications standards; (b) assessment standards; (c) public confidence; (d) awareness; and (e) efficiency. These objectives are subject to further definition under section 128, for example:

“(3) The assessments standards objective is to promote the development and implementation of regulated assessment arrangements which—

(a) give a reliable indication of achievement, and

(b) indicate a consistent level of attainment (including over time) between comparable assessments.

(4) The public confidence objective is to promote public confidence in regulated qualifications and regulated assessment arrangements”

Under section 129(1) Ofqual must perform its functions in a way that is compatible with its objectives “so far as is reasonably practicable” and in a way which it considers is most appropriate for the purposes of meeting the objectives.

What is different about public examinations this year compared with previous years?

The examination procedure has been changed drastically in response to the pandemic. Students have not been required to sit any examinations this summer. Qualifications will be awarded following a process of teacher-led and standardised assessment. This follows an announcement to close schools and colleges on 18th March 2020. In a joint press release from the DfE and the Secretary of State for Education on 20th March 2020 it was announced that:

“... [t]he Government’s priority is now to ensure affected students can move on as planned to the next stage of their lives, including going into employment, starting university, college or sixth form courses, or an apprenticeship in the autumn... Ofqual will develop and set out a process that will provide a

London Office

The Outer Temple
222 Strand
London, WC2R 1BA

Tel: +44 (0)20 7353 6381

Abu Dhabi Office

24th Floor, Al Sila Tower
Abu Dhabi Global Market Square
Al Maryah Island, Abu Dhabi, UAE

Tel: +971 2694 8596

Dubai Office

Level 15, The Gate Building
Dubai International Financial Centre
Dubai, UAE

Tel: +971 4401 9584

calculated grade to each student which reflects their performance as fairly as possible, and will work with the exam boards to ensure this is consistently applied for all students.”³

On 31st March the Secretary of State for Education wrote to the Chief Regulator of Ofqual directing her to devise and implement the examination process and appeal arrangements.⁴ The letter stated:

“... it is Government policy that the students should be issued with calculated results based on their exam centres’ judgements of their ability in the relevant subjects, supplemented by a range of other evidence... In order to mitigate the risk to standards as far as possible, the approach should be standardised across centres. Ofqual should also mandate the method of calculating final grades based on the evidence provided for each student. Ofqual should ensure, as far as is possible, that qualification standards are maintained and the distribution of grades follows a similar profile to that in previous years. It is important that students should have access to a right of appeal if they believe the process was not followed correctly in their case. Ofqual should therefore develop such an appeal process, focused on whether the process used the right data and was correctly applied, rather than seeking to overturn teachers’ professional judgement on individual students’ ability.”

On 3rd April 2020 Ofqual released information about how performance would be assessed and qualifications awarded this year. In summary the process was announced to be:

- (i) Schools and colleges would provide Ofqual with centre assessments (essentially a predicted grade) for each student by 29th May 2020. The assessments *“... should be fair, objective and carefully considered judgements of the grades schools and colleges believe their students would have been most likely to achieve if they had sat their exams, and should take into account the full range of available evidence.”*
- (ii) In addition to this, schools and colleges would be asked to provide *“... the rank order of students within each grade for each subject – for example, for all those students with a centre assessment grade of 5 in GCSE maths, a rank order where 1 is the most secure/highest attaining student, and so on. This information will be used in the statistical standardisation of centres’ judgements – allowing fine tuning of the standard applied across all schools and colleges”.*
- (iii) Following receipt of the above *“... to make sure that grades are as fair as possible across schools and colleges, exam boards will put all centre assessment grades through a process of standardisation using a model being developed with Ofqual. We will consult on the principles of our model shortly, but we expect it will look at evidence such as the expected national outcomes for this year’s students, the prior attainment of students at each school and college (at cohort, not individual level), and the results of the school or college in recent years. It will not change the rank order of students within each centre; nor will it assume that the distribution of grades in each subject or centre should be the same. The process will also recognise the past performance of schools and colleges. However, if grading judgements in*

London Office

The Outer Temple
222 Strand
London, WC2R 1BA

Tel: +44 (0)20 7353 6381

Abu Dhabi Office

24th Floor, Al Sila Tower
Abu Dhabi Global Market Square
Al Maryah Island, Abu Dhabi, UAE

Tel: +971 2694 8596

Dubai Office

Level 15, The Gate Building
Dubai International Financial Centre
Dubai, UAE

Tel: +971 4401 9584

some schools and colleges appear to be more severe or generous than others, exam boards will adjust the grades of some or all of those students upwards or downwards accordingly.”

Between 15th-29th April 2020 Ofqual consulted on its proposals for the exceptional examination arrangements. In its subsequently produced guidance to teachers, students, carers and parents ('the Guidance')⁵ Ofqual gave the following information about the standardised assessment model:

“For each centre, in every subject, exam boards will use historical performance data to determine the proportion of students who achieved each grade in previous years. They will check this against prior attainment data for this year’s students compared to the prior attainment of students making up the historical data. The predicted grade distribution for the centre in the subject might be adjusted upwards or downwards according to the prior attainment distribution of the 2020 students, compared to previous years. Exam boards will then overlay the centre’s rank order of students onto the predicted grade distribution and allocate grades to students, without changing the rank order. This will have the effect of amending the centre assessment grade in order to align it with the predicted grade distribution meaning that, for some students, the grade they are allocated will not be the same as the centre assessment grade that was submitted. Before results are issued, exam boards will compare national results with those in previous years – to check they are not too generous or too severe overall. The standardisation process ensures there is no national significant grade inflation and that everyone can have confidence in this year’s results. In designing the standardisation model, we have taken a number of decisions which work in students’ favour. As a consequence, national results this summer may be slightly higher than last year’s, approaching an increase of 1% GCSE and around 2% for A level, although we will make sure there is not any significant change in year on year results for any subject which would undermine the value of the qualifications for progression.”

Have there been any criticisms of Ofqual’s approach?

Even prior to the publication of A level results Ofqual attracted criticism on a number of fronts due to the potential for unfairness in individual cases which its process, in the eyes of some, arguably creates. It has been reported that bright students attending underperforming schools may be disadvantaged by having grades revised downwards at the standardisation stage.⁶ Concern has been expressed that the teacher assessment stage could be infected by subconscious bias which will negatively impact on students who hold protected characteristics.⁷ It has also been observed that for smaller schools with fluctuating and disparate performance data across subjects and between students (such as, in particular but not limited to, special schools) using historical information to benchmark current performance against will be inherently unreliable.

Ofqual has also been criticised on the basis that the information it has published about the standardised assessment model lacks transparency. In a recent article, Maxwell and Tomlinson argue that Ofqual is under a public law duty to disclose further detail about its standardisation model.⁸ They say:

London Office

The Outer Temple
222 Strand
London, WC2R 1BA

Tel: +44 (0)20 7353 6381

Abu Dhabi Office

24th Floor, Al Sila Tower
Abu Dhabi Global Market Square
Al Maryah Island, Abu Dhabi, UAE

Tel: +971 2694 8596

Dubai Office

Level 15, The Gate Building
Dubai International Financial Centre
Dubai, UAE

Tel: +971 4401 9584

“... without more detail on the Ofqual model, it is impossible for the public to know whether these concerns are valid, or to make informed representations to government about them ... The essence of the anxiety about Ofqual’s approach is not new. Models – simplified representations of some aspect of the world which seek to generate analytical insight for complex decision-making – have played an important role in public administration for some time, particularly in areas such as environmental regulation and competition enforcement. And governments are often reluctant to disclose the models they use, due to concerns about confidentiality or abuse and circumvention. Indeed, there can be good reasons to keep a model confidential. However, this sits uncomfortably with the basic presumption that public power should be exercised transparently, which finds expression in administrative law doctrines such as procedural fairness, the duty to give reasons, the emerging principle of transparency, and the duty of candour. In recent years, the courts have proven willing to adapt and apply these doctrines to ensure that the use of models in decision-making is transparent, fair, and intelligible.”

Can students challenge an award decision?

In its Guidance Ofqual provided initial information about appeal arrangements. It was said that: *“Students can ask their school or college to check whether it made an administrative error when submitting their centre assessment grade or position in the rank order and, if it agrees it did make an error, to submit an appeal to the exam board. Schools and colleges can appeal if they believe something has gone wrong in relation to their results – for example, if a centre believes it has made an error when submitting its information; or similarly, that an exam board made a mistake when calculating, assigning or communicating a grade.”* It will be noted from this that one of the fundamental features of the appeal process is that, in reality, a student does not have an automatic right of appeal - any appeal must be made by schools and colleges to Ofqual.

Ofqual also explained that, whilst an appeal can be made in response to administrative error, students may not challenge their centre assessment grades or their position in the centre’s rank order through the appeal process. More recently information about this was published by Ofqual on 6th August 2020.⁹ It was stated that appeals could also proceed on the basis that *“... grades are lower than expected because previous cohorts are not sufficiently representative of this year’s students”*. An example of where this might be appropriate, according to Ofqual, is when a single sex school had recently changed to co-educational. It was also recognised that students may wish to complain about discrimination or bias, but this would not be recognised as a ground of appeal:¹⁰

“If bias or discrimination affected your centre assessment grade(s) or rank order position(s) this summer, this could be a form of malpractice or maladministration. If you think malpractice or maladministration might have affected you then in the first instance you should discuss this directly with your school or college, and raise a complaint through its complaints policy. If you feel that your concerns have not been addressed, you could then consider raising your concerns about malpractice or maladministration with the exam board which issued your results. It is important to remember that this would not be an appeal, but rather an allegation that malpractice or maladministration occurred in relation to your centre assessment grade(s) or rank order position(s). Such allegations would be

London Office

The Outer Temple
222 Strand
London, WC2R 1BA

Tel: +44 (0)20 7353 6381

Abu Dhabi Office

24th Floor, Al Sila Tower
Abu Dhabi Global Market Square
Al Maryah Island, Abu Dhabi, UAE

Tel: +971 2694 8596

Dubai Office

Level 15, The Gate Building
Dubai International Financial Centre
Dubai, UAE

Tel: +971 4401 9584

serious, and taken seriously. As you would be making a malpractice/maladministration allegation you would not be subject to the same deadlines as those set for appeals.”

Recent developments prior to the publication of A Level results in England

Very recently in Scotland, where examination results were released last week, it has been seen that around a quarter of teacher assessed grades were marked downwards by the Scottish Qualifications Authority ('SQA'). This resulted a direction by Scotland's Education Secretary to the SQA to revise the grades for around 124,000 students upwards in order to align them with the centre assessments. Shortly afterwards, on 11th August 2020, the Secretary of State for Education in England announced that students will now be able to appeal on the basis that the grades they obtained in mock examinations should be used, provided that this was supported by their school or college. At the time of writing details about this are unclear and this is yet to be reflected in updated guidance from Ofqual. It has been reported that the announcement has caused annoyance amongst schools, some of which cancelled mock examinations earlier in the year in anticipation of a national lockdown. It is also questionable why performance in a mock examination should trump a more favourable teacher assessment submitted to Ofqual.¹¹ On 12th August 2020 the Minister for Education in Wales directed Qualifications Wales to ensure that students do not receive an A level qualification which is lower than their AS level results.¹²

Comment

Coronavirus has caused significant challenges for policy makers. The situation concerning public examinations is by no means unique in that sense. The intention of government to implement measures which will enable students to progress to the next stage of their academic or vocational pathway is laudable. The potential problems relate to the implementation of this objective.

If there was a legal challenge arising from the above, the first point to recognise is that the courts are likely to show a degree of deference towards decisions implemented within the context of extraordinary circumstances. As was noted by the High Court in a recent challenge against aspects of the Coronavirus Job Retention Scheme:¹³

“The Government had to respond, with almost unprecedented speed, to a national emergency which threatened the health and livelihoods of millions of workers, and the economic security of hundreds of thousands, if not millions, of businesses. It had to decide what to do, in relation to a very wide range of problems, and then to work out how to achieve what it had decided to do, within a very few days... Allowances must be made for the fact that it is for Government to make these political and economic choices, and for the speed with which the Government had to act.”

This approach is compounded by the fact that, under sections 128 and 129 of the ASCL 2009, Ofqual's duty to meet its objectives is subject to a 'reasonably practicable' standard which already affords decision making discretion on a statutory footing. The courts are also likely to recognise that there is force in the government's desire to maintain a standardised assessment model with the aim of

London Office

The Outer Temple
222 Strand
London, WC2R 1BA

Tel: +44 (0)20 7353 6381

Abu Dhabi Office

24th Floor, Al Sila Tower
Abu Dhabi Global Market Square
Al Maryah Island, Abu Dhabi, UAE

Tel: +971 2694 8596

Dubai Office

Level 15, The Gate Building
Dubai International Financial Centre
Dubai, UAE

Tel: +971 4401 9584

ensuring consistency and quality. In view of its statutory duties, Ofqual's professional experience and judgement in devising an examination process is also likely to be an important factor in any judicial consideration of the scheme. However, this alone is unlikely to insulate a public body from the court's scrutiny, especially where in the present context the future of many thousands of students could be at stake. Furthermore, the fact that Scotland and Wales have taken different approaches to counteract the possibility of prejudice to students will be a material consideration if no such action is taken in respect of England.

There are a number of valid concerns about the adequacy of the appeal arrangements, which are in principle an important procedural and substantive safeguard provided that they are effective. These can be summarised as follows:

- (i) The appeal grounds are narrow, with potentially important issues (such as a student's placement in the rank order) immune from challenge. At the time of writing (the day that A Level results have been released) there is uncertainty about the grounds on which a student may be able to appeal.
- (ii) A student cannot appeal independently. S/he will need the support of the school or college who then makes the appeal directly to Ofqual. If the student is refused support then they cannot access the appeal procedure which is likely to lead to discontent amongst those who are adversely affected. It is unclear how (or whether) a student will be able to challenge this further. Internal complaint or review procedures may be followed, which could elicit a different outcome from the school or college. For students in maintained and academy schools in theory there will be scope to challenge a refusal to support an appeal through judicial review, but this is likely to be difficult and may take too long to be of practical benefit to a student who wants to progress to a new course in the Autumn term. Further, students at independent schools would not have this option, it being well established that these institutions are not amenable to judicial review.
- (iii) The procedure to follow for an appeal lacks certainty in some respects. It is unclear whether schools, colleges or students will be able to request an oral hearing, but this is unlikely. It is also unclear how quickly or easily students will be able to access the information they need to persuade their school or college to advance an appeal. If a school or college makes an error in the information it has submitted to an examination board, this may be very difficult for a student to independently verify and bring to the institution's attention. Students may encounter a defensive attitude from institutions in some cases. The appeals process will also create a heavy administrative burden on schools and colleges at a very busy time of the year.
- (iv) The process for challenging bias or discrimination is outside of the scope of the appeals process, meaning that that such arguments will need to be advanced via alternative channels.

Against those criticisms, the courts are likely to recognise that there are legitimate interests in securing certainty in qualifications published this Summer. The existence of a route of appeal is an important

London Office

The Outer Temple
222 Strand
London, WC2R 1BA

Tel: +44 (0)20 7353 6381

Abu Dhabi Office

24th Floor, Al Sila Tower
Abu Dhabi Global Market Square
Al Maryah Island, Abu Dhabi, UAE

Tel: +971 2694 8596

Dubai Office

Level 15, The Gate Building
Dubai International Financial Centre
Dubai, UAE

Tel: +971 4401 9584

safeguard, but it must also be acceptable for its scope to be defined and limited within reasonable, fair and logical parameters. The question will be whether the scheme devised by Ofqual achieves this.

It is foreseeable that there will be a public law challenge against Ofqual's assessment scheme itself, particularly if it results in high numbers of students receiving grades which are lower than their centre assessments as a result of standardisation. At the time of writing it is being reported that nearly 40% of centre assessments have been downgraded through the standardisation process England for A Levels, with the outcome for GCSEs anticipated next week. There has already been criticism regarding transparency of the scheme, that certain groups may be disproportionately impacted, and that students' ability and effort will not be fairly reflected through the standardised model. Whilst there will be a strong public interest in such litigation, it should be recalled that (under very different circumstances) in 2013 a judicial review application was made against Ofqual arising from changes to the GCSE examination system affecting grade boundaries (amongst other things) in which it was argued that there was an adverse impact on students. The High Court upheld Ofqual's defence to the claim, and its decision demonstrates the difficulties that would be inherent in a challenge against Ofqual.¹⁴

The contention that groups holding a protected characteristic will be disproportionately impacted could foreseeably give rise to a challenge based on the public sector equality duty, as to both the centre assessment and standardisation stages of Ofqual's process. The importance of assessing the possibility of inbuilt bias in the use of algorithmic data for the purposes of section 149 of the Equality Act 2010 has recently been considered in a different context by the Court of Appeal in relation to the use of facial recognition technology by the police.¹⁵ It is reasonable to suggest that the courts would expect Ofqual to have genuinely, effectively and demonstrably taken into account such considerations when discharging the section 149 duty in relation to its standardised assessment model, even in light of the time pressures created by the pandemic.

There may also be individual challenges against alleged discrimination at the centre assessment stage made against schools and colleges directly, or even potentially against qualification bodies, under Part 6 of the Equality Act 2010 (particularly given the apparent restrictions in the appeal process envisaged by Ofqual).

Conclusion

It is perhaps inevitable that, in light of the difficulties caused by the pandemic, any system devised by the government and Ofqual for examinations this year would be imperfect. Ultimately, much will now depend on the impact on students once results are known and individuals have had the opportunity to assess how they have been affected. It should not be forgotten that, as Ofqual has been keen to emphasise, some students may benefit from the examination arrangements this Summer.

Based on recent experiences in Scotland, if there is major discontent then it is not inconceivable that a political intervention will occur in an attempt to create a more equitable outcome for students and address public dissatisfaction before any legal challenge makes its way to the courts. Failing that, any

London Office

The Outer Temple
222 Strand
London, WC2R 1BA

Tel: +44 (0)20 7353 6381

Abu Dhabi Office

24th Floor, Al Sila Tower
Abu Dhabi Global Market Square
Al Maryah Island, Abu Dhabi, UAE

Tel: +971 2694 8596

Dubai Office

Level 15, The Gate Building
Dubai International Financial Centre
Dubai, UAE

Tel: +971 4401 9584

legal challenge is likely to be advanced on an expedited basis given the urgent need for those affected to know where they stand in light of the proximity of the new academic year.

ALEXANDER LINE
Outer Temple Chambers
13th August

London Office

The Outer Temple
222 Strand
London, WC2R 1BA

Tel: +44 (0)20 7353 6381

Abu Dhabi Office

24th Floor, Al Sila Tower
Abu Dhabi Global Market Square
Al Maryah Island, Abu Dhabi, UAE

Tel: +971 2694 8596

Dubai Office

Level 15, The Gate Building
Dubai International Financial Centre
Dubai, UAE

Tel: +971 4401 9584

¹ It should be noted that those taking vocational and technical courses will also be affected.

² <https://www.gov.uk/government/organisations/ofqual/about>.

³ <https://www.gov.uk/government/news/further-details-on-exams-and-grades-announced>.

⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877611/Letter_from_Secretary_of_State_for_Education_to_Sally_Collier.pdf. Guidance was produced on the same date, accessible via this hyperlink.

⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/908368/Summer_2020_grades_for_GCSE_AS_and_A_level_110820.pdf.

⁶ In relation to which one family is already contemplating legal action:

<https://www.theguardian.com/education/2020/jun/20/against-natural-justice-father-to-sue-exams-regulator-over-a-level-grades-system>.

⁷ Inbuilt prejudice affecting decisions relating to children in schools is a real issue. It is noteworthy that in its guidance relating to school exclusions the DfE explicitly recognises that students with SEN and from particular ethnic and social backgrounds are disproportionately impacted by exclusion:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/641418/20170831_Exclusion_Stat_guidance_Web_version.pdf.

⁸ Maxwell and J. Tomlinson, 'Model students: why Ofqual has a legal duty to disclose the details of its model for calculating GCSE and A level grades', U.K. Const. L. Blog (28th July 2020) (available at <https://ukconstitutionallaw.org/>).

⁹ <https://www.gov.uk/government/news/appeal-arrangements-for-as-a-levels-and-gcse>. See also guidance aimed at students:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907925/Information_for_students_about_malpractice-7-8-2020.pdf.

¹⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907925/Information_for_students_about_malpractice-7-8-2020.pdf.

¹¹ <https://www.theguardian.com/education/2020/aug/11/keir-starmer-england-must-alter-course-on-a-level-grades>.

¹² <https://qualificationswales.org/english/coronavirus---covid-19/qualifications-wales-statements/a-level-grades---qualifications-wales-statement/>.

¹³ *Adiatu v HM Treasury* [2020] EWHC 1554 (Admin), paras. 178-176. This was said in the context of a challenge under EU law.

¹⁴ *R (Lewisham) v AQA, EDEXCEL & OFQUAL* [2013] EWHC 211 (Admin).

¹⁵ *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058, para 199.

London Office

The Outer Temple
222 Strand
London, WC2R 1BA

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Tel: +971 2694 8596

Dubai Office

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Dubai International Financial Centre
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Tel: +971 4401 9584