SUPREME COURT OF QUEENSLAND

CITATION:	*Alskeini v Queensland University of Technology* [2020] QCA 285
PARTIES:	**NEAMAH ALSKEINI** **(appellant)** **v** **QUEENSLAND UNIVERSITY OF TECHNOLOGY** (respondent)
FILE NOS:	Appeal No 8901 of 2020 SC No 5883 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 23 July 2020 (Jackson J)
DELIVERED ON:	11 December 2020
DELIVERED AT:	Brisbane
HEARING DATE:	16 November 2020
JUDGES:	Sofronoff P and Fraser and McMurdo JJA
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DECISIONS TO WHICH JUDICIAL REVIEW LEGISLATION APPLIES – EXCLUDED DECISIONS – OTHER DECISIONS – where the appellant became a PhD candidate at the Queensland University of Technology – where the appellant's PhD candidature was terminated – where the appellant issued proceedings as plaintiff seeking judicial review of the decision – where the respondent University applied for summary judgment – where the learned primary judge dismissed the claim pursuant to s 48 of the *Judicial Review Act* 1991 (Qld) – where the appellant submits on this appeal that he also seeks "judicial review under common law" – where the appellant submits that the learned primary judge did not consider evidence that showed "strong materials" concerning the merits of his case – where the appellant submits that there is a contract between himself and the University – whether the University's termination of the appellant's PhD candidature is amenable to judicial review – whether the learned primary judge erred in dismissing the claim *Judicial Review Act* 1991 (Qld), s 4(a), s 20, s 48

Clark v University of Lincolnshire and Humberside [2000] 1 WLR 1988, cited
Griffith University v Tang (2005) 221 CLR 99; [2005] HCA 7, applied
Hines v Birkbeck College [1986] Ch 524; [1985] 3 All ER 156, cited
R v University of Cambridge; Ex parte Persaud [2001] ELR 480; [2001] EWCA Civ 534, cited
Re Paine and University of Toronto (1981) 131 DLR (3d) 325; [1981] CanLII 1921 (ON CA), cited
Re Polten and Governing Council of the University of Toronto (1975) 59 DLR (3d) 197; [1975] CanLII 709 (ON SC), cited
Thorne v University of London [1966] 2 QB 237, cited

COUNSEL: The appellant appeared on his own behalf
B Heath (*sol*) for the respondent

SOLICITORS: The appellant appeared on his own behalf
Carter Newell for the respondent

[1] **SOFRONOFF P:** The following facts are drawn from the appellant's statement of claim. The appellant became a PhD candidate at the Queensland University of Technology on 22 November 2015 and presented his "final seminar" on 13 September 2019, after which the Head of School informed the applicant that he would not approve the appellant's thesis for delivery to the external reviewers. The appellant submitted that the academic panel which attended the seminar "reported only negative points in the final seminar report, and they ignored all my hard efforts over the last five years of my PhD journey!" The "PhD Final Seminar Report", produced by the panel members who attended the seminar, was unfavourable. It contained serious criticisms about the quality of the appellant's thesis. The matter was then referred to the "Research Degrees Committee" which informed the appellant by a letter dated 7 April 2020 that his candidature was to be terminated. The letter said:

> "The termination of candidature with academic exclusion has been decided on the grounds that you have failed to demonstrate satisfactory progress and that there is no reasonable expectation of the degree being successfully completed."

[2] The appellant issued proceedings as plaintiff seeking:

> "1. I want from Supreme Court to place me in the process of Queensland University of Technology (QUT) and to let me to modify my PhD thesis and to submit it to the external reviewers. I have the required experience and skills, and I have achieved hard work to improve my PhD thesis. QUT terminated me from my study and did not allow me to submit my PhD thesis to the external reviewers. They even did not consider the circumstances of my study due to placing many sanctions on my account when I was doing my PhD.
>
> 2. I want to compensate me for the wasting time, and health and moral damage to me and my family due to the termination of

> my study I have an offer from QUT for PhD (23 November 2015 to 22 November 2019), but the University broke the offer and terminated me from my study."

[3] The respondent University applied for summary judgment. On 23 July 2020, Jackson J concluded that the appellant's claim was misconceived because it lacked any legal basis. Treating the proceeding as one seeking judicial review, his Honour dismissed the claim pursuant to s 48 of the *Judicial Review Act* 1991 (Qld).[1]

[4] Judicial review under the *Judicial Review Act* is available to a person "who is aggrieved by a decision to which this Act applies".[2] The latter expression is defined, relevantly, in s 4(a) of the Act to mean:

> "a decision of an administrative character made … under an enactment …".

[5] *Griffith University v Tang*[3] was also a case in which a student who had been excluded from a PhD program by a university sought relief by way of judicial review under the Act. The Court accepted the submission that there subsisted between the student and the University no legal rights and obligations under private law and that the relationship between the parties was one which was "at best a consensual relationship, the continuation of which was dependent upon the presence of mutuality".[4] The Court held that the decision to exclude the appellant was not a decision made under an enactment so as to render it amenable to judicial review. In the present case, although the decision to exclude the appellant depended for its effectiveness upon the establishment of the University under the *Queensland University of Technology Act* 1998 (Qld), for the same reasons as those given in *Tang*, it was not a "decision made under an enactment"[5] and, in my view, it was not a decision "of an administrative character" either.

[6] The appellant submits on this appeal that he also seeks "judicial review under common law". Section 41(1) of the Act states that writs of mandamus, prohibition or certiorari are no longer to be issued by the Court.

[7] The appellant also complained that Jackson J did not consider evidence that showed "strong materials" concerning the merits of his case and that his Honour also did not consider the appellant's personal circumstances. He submitted that Jackson J did not consider "many errors in the process of QUT". These are arguments that would have gone to the merits of the appellant's case if there had been a case.

[8] It follows that the appellant's claim has no basis so far as it is one for judicial review of the decision to exclude him. This was the conclusion to which Jackson J came and, in my respectful opinion, that was the correct conclusion.

[9] At first instance the applicant did not seek to support his case by reference to the existence of a contract between himself and the University. On this appeal the

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1 Section 48(1)(b) provides that the court may dismiss an application for relief if the court considers that no reasonable basis for the claim is disclosed.

2 Section 20.

3 (2005) 221 CLR 99.

4 *Tang*, *supra*, at [91].

5 *Tang*, *supra*, at [96].

appellant submitted that there was such a contract and that, by excluding him, the University has breached it.

[10] The appellant was self-represented at first instance and is self-represented on this appeal. For that reason, because this is an application for summary judgment, it is appropriate to consider this contractual case.

[11] The appellant submitted that the existence of a contract is apparent from the terms upon which he was admitted as a student. The University made an offer to the appellant which, relevantly, included the following:

> "Your application to study at *Queensland University of Technology* is approved and I am pleased to offer you the following Pathway Study Program:
>
> - QC05 University Certificate in Tertiary Preparation
> - IF49 Doctor of Philosophy
>
> …
>
> ***Financial Capacity***
>
> You are required to have access to sufficient funds to cover the full cost of your stay in Australia for the duration of your studies. Full cost includes tuition fees, study costs and living expenses. Please refer to the following QUT websites for more information to help you estimate your full study costs and the cost of living in Brisbane."

[12] In reliance upon this offer, which the appellant accepted, he was awarded a sponsorship which would defray his expenses upon the condition, among others, that if he failed to obtain his degree he would repay the sums advanced. These expenses have been substantial. The appellant submitted that his need to submit to this binding financial arrangement, and the terms of that arrangement, arose directly from the terms upon which the University was prepared to accept him as a student. The arrangement between the University and the appellant also supported a grant of a visa to the appellant to permit him to stay in Australia to pursue his studies. The appellant submitted that the sponsorship and the visa were arrangements carrying legally binding obligations and that it would be anomalous if the relationship that supported and justified those legal arrangements was not also a legally binding relationship. For this reason, the appellant submitted, the relationship between him and the University should be regarded as a contractual one.

[13] For the purpose of considering the appellant's case it may be assumed, without deciding the issue, that the relationship between the parties was contractual.[6] If there was a contract then, Mr Heath, who appeared for the respondent, accepted that the assumed contract obliged the University to provide the appellant with the necessary services so that he could study for his degree and that those services would include an assessment of his work. Mr Heath also accepted that the assumed contract would oblige the University to act towards the appellant in good faith and

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[6] There is support for this view in *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988, at [12].

to afford him procedural fairness.[7] However, Mr Heath submitted that such a contract would not oblige the University to confer a degree upon the appellant just because he had worked hard. More importantly, he also submitted that such a contract, if it existed, would not render justiciable an academic judgment that the appellant had failed to earn his degree. Mr Heath's submission should be accepted.

[14] In *Re Polten and Governing Council of the University of Toronto*[8] it was held that a court has no power to intervene so as to inquire into the standards for a degree and the assessment of a student's work. There have been many other cases to the same effect[9] and in *Tang* Kirby J, who was in dissent but not on this point, cited with approval[10] a *dictum* in an English case[11] that such matters are not justiciable for adjudication in the courts because they are issues of academic judgment which the university is equipped to consider in breadth and in depth but on which any judgment of the courts would be jejune and inappropriate.

[15] The appellant's case, as it appears from the documents which he tendered before Jackson J and from the additional documents which he tendered on this appeal, seeks to controvert the merits of an academic judgment made by academic staff who were qualified to make it and whose duty it was to make it. Such a challenge does not raise a justiciable issue. Otherwise, the evidence tendered below and on appeal does not raise an arguable case that the University has breached any of the contractual obligations which, for the purpose of deciding this appeal, have been assumed to exist.

[16] For these reasons the appeal should be dismissed with costs.

[17] **FRASER JA:** I agree with the reasons for judgment of Sofronoff P and the order proposed by his Honour.

[18] **McMURDO JA:** I agree with Sofronoff P.

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7 *cf. R v University of Cambridge; Ex parte Persaud* [2001] EWCA Civ 534 at [41]; *Re Paine* (1981) 131 DLR (3d) 325 at 331-333 per Weatherston JA (Ontario Court of Appeal).

8 (1975) 59 DLR (3d) 197 at 206 (Ontario High Court, Lerner, Goodman and Weatherston JJ).

9 *Thorne v University of London* [1966] 2 QB 237 at 242 (Court of Appeal); *Hines v Birkbeck College* [1986] Ch 524 at 542; *Clark*, *supra*, at [12] (Court of Appeal).

10 *Tang*, *supra*, at [165]; in *Tang* it was not alleged that there was a contract and so the Court did not decide any issues about what such a contract might contain. Gummow, Callinan and Heydon JJ said that there was a real question whether issues pertaining to academic judgment are justiciable, citing *Clark*: [58].

11 *Clark*, *supra*, at 1992.