The thought occurred to me this morning that the A level algorithm may be illegal under GDPR law, which I recalled having provisions on automated, data driven, decision making. This is what the Information Commissioner's Office say under the headline:

Rights related to automated decision making including profiling

At a glance

- The GDPR has provisions on:
  - automated individual decision-making (making a decision solely by automated means without any human involvement); and
  - profiling (automated processing of personal data to evaluate certain things about an individual). Profiling can be part of an automated decision-making process.
- The GDPR applies to all automated individual decision-making and profiling.
- Article 22 of the GDPR has additional rules to protect individuals if you are carrying out solely automated decision-making that has legal or similarly significant effects on them.
- You can only carry out this type of decision-making where the decision is:
  - necessary for the entry into or performance of a contract; or
  - authorised by Union or Member state law applicable to the controller; or
  - based on the individual's explicit consent.
- You must identify whether any of your processing falls under Article 22 and, if so, make sure that you:
  - give individuals information about the processing;
  - introduce simple ways for them to request human intervention or challenge a decision;
  - carry out regular checks to make sure that your systems are working as intended.

And they add this:

Checklists

All automated individual decision-making and profiling

To comply with the GDPR...

☐ We have a lawful basis to carry out profiling and/or automated decision-making and document this in our data protection policy.

☐ We send individuals a link to our privacy statement when we have obtained their personal data indirectly.

☐ We explain how people can access details of the information we used to create their profile.

☐ We tell people who provide us with their personal data how they can

They then elaborate, saying this:

To comply with the GDPR...

☐ We carry out a DPIA to identify the risks to individuals, show how we are going to deal with them and what measures we have in place to meet GDPR requirements.

☐ We carry out processing under Article 22(1) for contractual purposes and we can demonstrate why it's necessary.

OR

☐ We carry out processing under Article 22(1) because we have the individual's explicit consent recorded. We can show when and how we obtained consent. We tell individuals how they can withdraw consent and have a simple way for them to do this.

OR

☐ We carry out processing under Article 22(1) because we are authorised or required to do so. This is the most appropriate way to achieve our aims.

☐ We don't use special category data in our automated decision-making systems unless we have a lawful basis to do so, and we can demonstrate what that basis is. We delete any special category data accidentally created.

☐ We explain that we use automated decision-making processes, including profiling. We explain what information we use, why we use it and what the effects might be.

☐ We have a simple way for people to ask us to reconsider an automated decision.

☐ We have identified staff in our organisation who are authorised to carry out reviews and change decisions.

☐ We regularly check our systems for accuracy and bias and feed any changes back into the design process.

As a model of best practice...

☐ We use visuals to explain what information we collect/use and why this is relevant to the process.

☐ We have signed up to [standard] a set of ethical principles to build trust with our customers. This is available on our website and on paper.

All of this is open to interpretation, of course. Option 3 in the last box seems the most likely fall back for OfQual. But so far there is no personal appeal allowed for resulting errors. The process is then in breach of these rules. I would suggest for that reason alone that what is happening is likely to be illegal.

But there is also a complete failure to provide to all A level students information on how their decision was reached. That too is a failure.

And it can fairly be said that consent was never sought for this process.

In that case the chance that this algorithmic process was legal looks to be low to me.

If anyone is planning a legal challenge this seems like the way to go to me.