Decision No. [2016] NZSAAA 01

Reference No. SAA 003/15

IN THE MATTER of the Education Act 1989 and the Student Allowances Regulations 1998

AND

IN THE MATTER of an appeal by **XXXX** of Auckland against a decision of the Chief Executive, Ministry of Social Development

BEFORE THE STUDENT ALLOWANCE APPEAL AUTHORITY

Neil Cameron

HEARING on the papers

DECISION

The appeal is dismissed

REASONS

Overview

[1] This is an appeal against the decision of the Secretary on review to uphold StudyLink's decision to decline the appellant's application for an extension to her allowance entitlement to enable her to receive a Student Allowance in 2015.

The issue on appeal

[2] This appeal raises two issues:

- The first concerns the proper interpretation of reg 20(1)(b) of the Student Allowances Regulations 1998. Specifically, the question is whether the reduced Student Allowance entitlement for students aged 40 and over introduced as from the 1st January 2014 applies to students who have commenced study towards the qualification they are seeking an allowance for prior to that date.

- The second issue is whether the appellant's inability to study in 2012 and her general circumstances then and since can amount to "*special circumstances*" under the Regulations so as to justify extending her allowance beyond the 120 week limit applicable to her.

Factual background

[3] The appellant is a 43 year old single student who came to New Zealand as a political refugee in 2003. From 2008−2011 she undertook a number of university courses which appear to have been intended to prepare her for further university study.

In 2012 she enrolled for a three year Bachelor of Design degree. Unfortunately, before the course commenced, ill health forced her to withdraw and place her intended study plans on hold. In March 2013 she returned to study, completing the first year of the Design degree. In 2014 she enrolled for the second year of the degree and, although she had turned 40 in 2013 and was thus subject to the reduced allowance entitlement which came into force on the 1st January 2014, she applied for and was granted an allowance for 2014 under the transitional provisions. In 2015 she applied again for an allowance to cover her final year of study. This application was declined as she had already exceeded her lifetime allowance entitlement of 120 weeks and was no longer covered by the transitional provisions.

[4] Since 2008 the appellant has received Student Allowance as follows:

Year of study	**Course studied**	**Allowance payment**
2008	Certificate in Social Sciences	22
2009	Certificate in English Language	37
2010	Certificate in English Language	17
2011	Certificate in English for Academic Study	17
2013	Bachelor of Design	37
2014	Bachelor of Design	37
TOTAL		**167**

[5] Prior to the 1st January 2014 all eligible students had a "*lifetime entitlement*" of up to 200 weeks of Student Allowance assistance. This was changed in 2013, reducing the entitlement of students aged 40 or over enrolling in any *"recognised course or courses of study … commencing on or after 1 January 2014*" to 120 weeks. Transitional provisions, however, permitted students in receipt of an allowance in 2013 to continue to receive an allowance in 2014 up to the old 200 week maximum. Accordingly, when the appellant applied for an allowance in 2014 the transitional provisions came into play and despite the fact that she was then over the age of 40 and therefore subject to the new 120 week limit, she was granted a further 37 weeks' assistance.

[6] In late 2014 she contacted StudyLink to enquire about an allowance for 2015. She was informed that as she had exceeded the 120 week limit she would not be eligible for an allowance and she was advised on alternate sources of assistance. Nevertheless, the following week she applied for an allowance for the 2015 academic year. This application was duly declined. In February 2015 she applied for her eligibility to be extended. This too was declined. At the end of March she applied to review this decision citing her ill health in 2012 as the reason why she could not commence her degree until 2013 and hence as the reason that she was now caught by the new 120 week limit. If she had studied in 2012 she would have completed her degree in 2014 – with the transitional provisions giving her 33 weeks additional entitlement before she hit the 200 week limit.

[7] Ultimately the matter came before the Secretary on the papers in mid May and the Secretary duly confirmed the StudyLink decision. Although the Secretary's report is far from clear, he appears to have found that the Regulation as amended applied to the appellant's situation and that her illness and consequent failure to study in 2012 could not constitute "*special circumstances*" for the purposes of considering an extension to her entitlement. As she was not studying at all in 2012 the Secretary's view was that her situation in that year was "*irrelevant to her not completing her Bachelor of Design"*. Unfortunately, the relevance of this conclusion – which is clearly, on one level at least,

factually incorrect in that her failure to study in 2012 obviously did mean that she was unable to complete her degree within the transition period and with the benefit of an extra 33 weeks entitlement – is not explained in the decision. At the end of June the appellant appealed to the Authority.

Relevant legislation and policy

[8] The appellant's Student Allowance entitlement is governed by reg 20(1) of the Student Allowances Regulations 1998.

> *"(1) No student is entitled … to receive for more than the following period allowances continued by regulation 3:*
>
> *(a) …*
>
> *(b) 200 weeks … but that 200-week period is reduced to 120 weeks if, or insofar as, the ... recognised course or courses of study are any course or courses commencing on or after 1 January 2014 and at the commencement of which the student is or over the age of 40 years."*

These limits are subject to reg 20(7) which gives the chief executive (ie StudyLink) a general discretion to extend any student's entitlement beyond the applicable limit where "*special circumstances exist*" justifying such an extension.

[9] While the Regulations do not give any general guidance on the assessment of such "*special circumstances"*, reg 20(7A) does specifically provide that "*special circumstances do not exist merely because a person has been affected by an amendment to these Regulations*". StudyLink's policy guidelines on the exercise of the discretion state simply that:

> *Special circumstances are very limited in scope and normally only apply to situations where personal circumstances do not allow a student to complete their study within the 92/120/200 week limit. These personal circumstances would generally not be able to be anticipated by the student and would be beyond their control. For example there has been an illness, injury, accident, bereavement, or personal difficulty that has prevented the student completing their study programme within the 92/120/200 week limit."*

The basis of this appeal

[10] The appellant has maintained throughout her submissions that the reduced entitlement limit imposed on students over the age of 40 enrolling in courses after the 1st January 2014 does not apply to her. She argues that the Regulation "*is based on the time of a student's enrolment for the first year of study, which clarify whether or not the student is eligible to receive Student Allowance".* Accordingly

> *"My question is that as to why this rule should apply to me when I had previously enrolled for my study. I started my study* [in 2013] *before my age of 40. In this Regulation it also states that, 'if you are under 40 you can get a Student Allowance for tertiary study for up to 200 weeks.'*
>
> *… I started my study before reaching my age of 40. If the reasoning here is because I started my study after I was 40 years of age and consequently being*

> *impacted by the change in the Regulation effective 1 January 2014, … I believe that this totally wrong."*

[11] In addition, she says that even if the new limit does apply to her there are special circumstances justifying an extension of her entitlement to enable her to complete her study in 2015. In particular, she cites her refugee status and the hardships and stress that this has entailed; her continuing medical problems which prevented her from commencing her design studies in 2012 and which have been ongoing; and her inability, largely as a result of this, to obtain proper work to earn extra income to support her studies. In her view these circumstances justify the continuation of her allowance for 2015.

The Ministry's Submissions

[12] First the Ministry says that the change implemented by reg 20 applies to any person applying for an allowance after the 1st January 2014 irrespective of when they commenced study for the qualification that the courses they wish to undertake form part of. In the Ministry's view the "*intent of the Regulations is that they apply immediately on a person attaining the age of 40 years*". When the appellant applied for an allowance to cover her courses in 2014 she was already over the age of 40. Accordingly, the new limit applied to her and her entitlement was restricted to 120 weeks – subject, of course, to the transitional provisions which, because she had been in receipt of an allowance in 2013, enabled her to receive what was in effect an extension of her entitlement for the whole 2014 year. However, these transitional provisions expired at the end of 2014 so that when she applied for an allowance in 2015 the 120 week entitlement limit was applied.

[13] Secondly, while expressing sympathy for her position and noting the other avenues for assistance that StudyLink advised her of when her application was declined, the Ministry says that nothing in her situation amounts to "*special circumstances*" for the purposes of reg 20(7). First, if she is arguing that her failure to study in 2012 due to illness is itself a special circumstance, the Ministry says

> *"It is noted in 2012, the appellant's decision to not enrol for full time studies and apply for sickness benefit instead did not impact her Student Allowance in any way. It was only subsequently that the change in the Regulations impacted her. From the evidence provided the appellant's medical condition cannot be considered as a reason for granting an extension to the 120 week limit. It lacks the sufficient causal link or proximity."*

More generally, insofar as her argument for special circumstances is based on her financial difficulties, ongoing medical problems and her experiences as a political refugee, the Ministry makes a similar argument, emphasising that she

> *"has not provided any evidence of circumstances which were beyond her control that resulted in her not being able to complete her studies in the relevant year or not being able to receive the full benefit of her course due to those circumstances while being in receipt of Student Allowance."*

Accordingly, the situation is one in which she needs an extension simply because she has been impacted adversely by the change in the Regulations in 2014 – and this is specifically ruled out as a justification for exercising the "*special circumstances*" discretion by reg 20(7A).

Discussion

[14] First, the Ministry is undoubtedly correct in its view that reg 20(1) applies to any student over the age of 40 seeking an allowance for any course or courses undertaken after the 1st January 2014 irrespective of when and at what age they commenced the qualification of which that course is a part. The 120 week limit applies to any student "*of or over the age of 40 years*" at the commencement of any "*course or courses*" commencing on or after the 1st January 2014. The phrase "*course or courses*" in this formula is not, as the appellant suggests, a reference to the "*course of study*" she embarked on in 2013 – ie the three year Bachelor of Design degree. The term used for that in the Regulations is a "*recognised programme*" – which is defined as "*any aggregation of courses, classes, and work required for the completion of a degree … or other qualification awarded by [a] provider*" – and if the regulation had been intended to apply only to programmes commenced at or after the age of 40, that is what it would have said. This distinction is made clear by the Ministry when it notes that "*the appellant enrolled for a three year programme to gain a qualification in Bachelor of Design. Each year she enrolled for courses to complete the qualification*". It is those courses that are the basis for any application for an allowance and it is accordingly those courses that are the basis of any entitlement calculation. There is accordingly no question that when the appellant applied for an allowance to cover the courses she intended to undertake in 2015 she was subject to the 120 week limit and, absent "*special circumstances*", was no longer eligible for assistance.

[15] The only question therefore is whether she nevertheless qualifies for special consideration on the basis of either her inability to commence her studies in 2012 as she had intended, or as a result the other personal circumstances that have impacted on her since she commenced study in 2008.

[16] Although the discretion to extend eligibility in reg 20(7) is expressed in general terms, the regulatory context in which it is framed makes it quite clear that the discretion is a limited one aimed at alleviating the strictness of a rigid eligibility rule where a student has been unable to receive the full benefit of their entitlement due to circumstances beyond their control. The typical case in which the exercise of the discretion would need to be considered would be where a student in receipt of an allowance is unable, due to some medical condition, to undertake a normal full-time workload or whose study patterns are disrupted by some medical or family emergency beyond their control. In such cases the student is, through no fault of their own, obviously unable to receive the same study benefit from their allowance entitlement as other students. Simple fairness requires that they be granted extra support to recognise that their entitlement has been, in some sense, wasted.

[17] That is not the case in relation to the appellant's situation. Her entitlement has, since the 1st January 2014, been fixed at 120 weeks. She has received the full benefit of this (reduced) entitlement. Her inability to study in 2012, which would have enabled her to complete her degree in 2014 within the transitional provisions and accordingly with full Student Allowance support is, as the Ministry has said throughout, irrelevant to this. While it certainly prevented her from completing her degree largely within her pre-2014 entitlement, as she was neither studying nor in receipt of an allowance in that year she was not deprived of the benefit of her allowance in any way. Nor has her illness in 2012 affected her ability to benefit from her current entitlement in any way. It is the reduction in entitlement for students over 40 years old that has deprived her of allowance support in 2015, not some special circumstance that has affected her ability

to make full use of her supported study time. And, as reg 20(7A)) makes clear, the fact that a student's eligibility has been affected by the 2014 changes cannot in itself constitute a special circumstance justifying an extension.

[18] On the appellant's more general argument that she should receive an extension because of her personal circumstances, the response is, I'm afraid the same. Her history as a political refugee, her continuing ill health, and her inability to work to support herself properly during her study are, I'm afraid not relevant to her entitlement to Student Allowance support and are not special circumstances justifying any extension of it. There is nothing in the appellant's submissions suggesting that, for example, she has lost significant amounts of allowance supported study time to illness or that she has been unable to use her study time to the same effect as other students due to her personal history and circumstances so as not to receive the full benefit of the allowance she was receiving for it. And absent such "*special circumstances*" she is, in the context of her ongoing difficulties, in exactly the same position as any other student who has exhausted their entitlement before the completion of their intended programme of study. Many such students will face personal and financial hardship as a result of their decision to nevertheless complete their studies. Once a student has exhausted their basic entitlement they will need to seek other forms of financial assistance.

[19] The only possible point of difference between her situation and that of many other students is that a significant proportion of her entitlement has clearly been used on achieving the basic language and other skills that were necessary in her situation to enable her to undertake tertiary study. Although neither the appellant nor the Ministry have focused on this point, it may be possible to make some sort of argument that the necessity to do this was itself a circumstance beyond her control that has led her to use her allowance entitlement in a way that other students would not have to do and has therefore meant that she has not received the same benefit from that entitlement as other students. Such an argument is, however, misconceived. The appellant's situation in this regard is far from unique or "*special*". Many students need, for various reasons, to undertake bridging studies before embarking on tertiary education. To suggest that the undertaking of such studies results in the student not getting the "*full benefit*" of any allowance received for doing so would be ludicrous. If it is thought that students in the appellant's situation need special assistance then that is a matter for the Government to consider in the context of the Regulations. It is certainly not a matter that should be dealt with by the exercise of a limited discretion of the sort that is incorporated in reg 20.

[20] Insofar as the working policy developed by StudyLink to guide the exercise of this discretion appears to be based on an assessment of whether some special circumstance "*has prevented the student completing their study programme within the 92/120/200 week limit"* that policy is, with all due respect, at odds with the intent of the regulation. While in a loose sense the entitlement limit is certainly intended to ensure that students can complete basic undergraduate programmes with allowance support, it is not predicated on enrolment in any particular programmes and it is certainly not expressed in terms of such enrolment. Rather it is an absolute entitlement that students are free to use for whatever recognised programmes and in whatever combination that they see fit. Given that such programmes and combinations of programmes will vary considerably in length it would be a nonsense for the Regulations to link the entitlement limit in any way to the completion of any chosen programme or programmes and they certainly do not do so. Contrary to the way in which the StudyLink guidelines are currently drawn, the question therefore is not whether the student has been prevented from completing their study programme within their

entitlement, it is simply whether they have been prevented from receiving the full benefit of that entitlement in terms of their study. As the Ministry, somewhat circuitously puts it in its submissions, the question is whether the circumstances are such as to lead to the student "*not being able to receive the full benefit of her course … while being in receipt of Student Allowance".* In my view, the Ministry should review the existing policy guidelines on the exercise of the reg 20(7) discretion in order to at least clarify that the basic question is not whether a student has been prevented from completing any particular "*study programme*" within their entitlement.

The appeal is dismissed. The decision of the Secretary on Review to confirm StudyLink's decision to decline the appellant's application for an extension to her allowance entitlement for her study in 2015 is upheld.

DATED at WELLINGTON this 14th day of March 2016

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Neil Cameron
Student Allowance Appeal Authority