Decision No. [2018] NZSAAA 1

Reference No. SAA 4/16

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

AND

IN THE MATTER of an appeal 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 Limited Full-Time (LFT) status in 2016 so as to enable him to receive an allowance despite the fact that he was proposing to enrol in a less than full-time course.

The issues on appeal

[2] The issue on appeal is whether the appellant's training and other obligations as an elite athlete rendering it inadvisable for him to enrol in a full-time course in 2016 can amount to "*a sufficient cause that is outside* [his] *control*" so as to justify the approval of LFT status under reg 12A(2)(a)(ii) of the Student Allowances Regulations 1998.

Factual background

[3] The appellant has been engaged in university study since at least 2011. Over this time he has also been competing and training at an elite level with the view to representing New Zealand in international athletics events. In 2011 he was approved LFT status under the "*student's best interests"* criterion provided in what was then reg 12(2)(a)(iii). At that time the test of whether a part-time enrolment would be in the student's *"best interests"* was a wide one, enabling StudyLink to take account of a variety of non-academic factors – such as the competing demands on his time experienced by the appellant as a result of his status as an elite athlete and his consequent commitment to an intensive training programme. It is unclear from the file whether he continued with his studies in 2012 and 2013 but in any event he did not apply for financial assistance from StudyLink for either year. In 2014 he again applied for and was approved LFT

status on the same grounds as previously. However, as by this time the Regulations had been amended to limit the "*best interests"* category to students who needed to enrol part-time for genuinely academic reasons, this was only possible due to the transitional provisions of the amending legislation which continued the LFT status of students who had received an allowance under the "*best interests"* provisions prior to the end of 2012 up until the 1st January 2015.

[4] In 2015 he again applied for an allowance for part-time study, again citing the demands of his athletics career as the reason why he could not undertake full-time academic work. Unfortunately as a result of the 2013 changes to the "*best interests"* criteria and the exhaustion of his entitlement under the transitional provisions, he was no longer eligible on this ground and his application was declined. Since he appears to have lacked alternative means of financial support, his only alternative then was to enrol full-time and apply for an allowance under the usual criteria. This he duly did. In the event the attempt to combine full-time study with his ongoing athletics commitments was less than successful, and he ended up failing half of the papers that he was undertaking.

[5] In 2016 he again applied for an allowance and again sought LFT status on the basis of his training commitments. This application was also declined – not because it did not fit within the "*best interests"* justification that the appellant had previously relied on, but because the demands of the competition and training regime that he was required to follow did not satisfy the alternative justification of being unable to study full-time due to some "*cause outside his control"*. As a result he again enrolled for a full-time course and applied for an allowance to cover it. This application was also declined as his failure to pass more than half the course he had enrolled for in 2015 meant that his allowance entitlement was suspended under the provisions of reg 30.

[6] At the end of February 2016 he applied to review the decision to decline his LFT application. However at no point did he seek to challenge the subsequent decision to decline his allowance application as a consequence of his academic performance in 2015. Accordingly that decision formed no part of the review process and is not in issue in this appeal. Following the usual exchange of information/submissions between the parties the matter was dealt with by way of a Student Allowance Review (SAR) hearing in early June at which the appellant's agent and his solicitor attended and made submissions. On the 10th June the Secretary upheld the original decision, concluding that the appellant did not meet the statutory criteria and noting that, absent these criteria, there is no general discretionary power which would enable StudyLink to take account of his situation and the constraints that it put on his ability to study full-time successfully.

[7] On receipt of the Secretary's decision, the appellant's solicitor indicated that he wished to appeal. No grounds of appeal were specified however, but it was indicated that, as the appellant was overseas at the time, further submissions would be forthcoming in due course. Despite a number of subsequent reminders, both to the appellant's solicitor and to his agent, the grounds on which the appeal is based have never been specified and no submissions have been received either on the Review decision itself or on the Regulation 37(2) Report prepared by the Ministry, despite a fairly extensive correspondence with the appellant's agent during which a number of extensions of time were granted. At the end of December the appellant's agent was informed that, as the statutory deadlines were long past, the file would be sent to the Authority for decision. It is obviously unfortunate that the appellant has neither stated the grounds on which he wishes to dispute the Secretary's decision, nor provided the Authority with any submissions on that decision or on the Ministry's Report. In the

absence of such material I have no alternative but to endeavour to assess the Review decision simply on the basis of the submissions made by the appellant's agent and his solicitor prior to and at the hearing.

Relevant Legislation

[8] Regulation 12A(1) provides that the Chief Executive may approve a course of study for a student that is less than a full-time course where he or she considers this is appropriate either

(i) *Because of the student's illness; or*
(ii) *For any cause that is, in the opinion of the Chief Executive, a sufficient cause that is outside the student's control; or*
(iii) *Because the Chief Executive considers such a course to be in the student's academic best interests.*

The phrase "academic best interests" is defined in subcl (2) as meaning:

> *"That the student would be likely to fail, for academic reasons, if he or she undertook a full-time course but would be likely to pass more than half of the course if he or she studied part-time."*

[9] In order to be eligible for an allowance students must ordinarily be enrolled in a full-time course. Where a student is so enrolled and is in receipt of an allowance, reg 30(1) provides that that allowance must be suspended if he or she fails half or more of the work. Where this happens the student will only become eligible for an allowance again if he or she enrols for and passes "*work that is … equivalent to more than half of the work of a full-time course"* (reg 32(1)). While this provision is expressed in mandatory terms, cl (2) provides the chief executive with the discretion to "*direct that that allowance should not be suspended … where* [he or she] *is satisfied that the failure … is due to reasons beyond the recipient's control".*

The Grounds Advanced on Review and the Secretary's Decision

The grounds advanced by the appellant on Review
[10] Both prior to and at the review hearing the appellant's solicitor appears to have advanced his case on three reasonably distinct grounds. The first and main argument is that the discretion conferred by reg 12A(1)(a)(ii) is a wide one that should be exercised where "*there are reasons beyond the student's control that warrant him being permitted to study on a LFT basis"* and that in exercising this discretion StudyLink ignored relevant considerations and took into account irrelevant matters. In particular his solicitor argues that StudyLink should have taken into account both wider governmental priorities such as supporting New Zealand athletes to compete on the world stage, and the appellant's own abilities, dedication and needs as an elite athlete. Secondly he says that the decision to decline the appellant's application should be overturned because it is inconsistent with other decisions made by StudyLink in similar or identical cases. In support of this his solicitor asserts (without elaboration) that "*other Olympic athletes would be eligible"* and "*have been granted limited full-time status at other institutions".* Thirdly his solicitor says that the "*unacceptable and unexplained"* delay in processing the review application has "*allowed the Review process to become almost … nugatory".*

The Secretary's Decision

[11] On the appellant's central argument the Secretary concludes that the discretion granted by the Regulations is a limited one available only where the circumstances rendering full-time study either impossible or, at least, highly inadvisable are not of the student's own making. The question for StudyLink in any such case is whether the student has any power to *"influence or direct"* the situation in which they find themselves. And in exercising its discretion StudyLink is only required to assess whether the student has this control; it is not required to make any evaluation of the circumstances to determine whether there may nevertheless be good reasons, in terms of general public policy or otherwise, for providing an allowance for part-time study anyway. In this case, despite the undoubted demands of the competition and training regime he was subjected to and which he was required to comply with if he wished to remain part of the elite training programme, the situation was still ultimately within his control:

> *"While I accept that in order to train and compete as a high performance athlete the applicant must adhere to the strict requirements of the relevant sporting body if he wishes to continue with them he ultimately retains the right or ability to remove himself from that obligation and instead direct his time towards other activities including full-time study.*
>
> *I do not agree with the applicant's submission there is an obligation on the Ministry to consider wider government policy objectives when exercising its discretion … any discretion must be applied with the purpose of the particular Regulation and within the context of the Regulation as a whole in mind which is to provide a limited flexibility to treat students as studying full-time in specific circumstances.*
>
> *… I reach the conclusion that the Regulation requires the decision-maker to consider whether the cause is one that the student has no power to influence or direct; it does not ask the decision-maker to evaluate the relevant merits of the cause."*

And of the previous occasions on which the appellant had in fact been granted LFT status under the earlier version of the regulation, he says:

> *"The Applicant has a clear interest in pursuing both a talent in sports and an academic pathway. Both require a significant commitment from him and he has experienced that he cannot do both without compromising one or both of these activities. The grounds under which a person may be granted LFT status were deliberately narrowed since the Applicant was originally approved and the reason for that approval is no longer available to him."*

[12] In response to the argument on inconsistency, the Secretary rejects both the claim itself and the suggestion that, if inconsistency could be shown to exist, it would affect the decision in this case.

> *"The applicant noted that he was aware of other athletes who had been granted LFT status but submitted no evidence of this fact before me which limits the weight I can give his claim. The Ministry accepts that there may well be other elite athletes that have been approved LFT status but this would be due to that student having some other relevant factor as it considers each case on its individual merits and that the approval would not*

> *be the result of their status as an elite athlete alone. The Ministry's view is that if there was an instance of a person being approved in completely identical circumstances to that of the Applicant that the approval would be an error that it would seek to rectify.*
>
> *I do not consider that if the Ministry had erroneously granted LFT status to a person that this would somehow obligate it to compound that mistake by continuing it. The Ministry is a creature of statute and must adhere to the law for it has no power to make decisions other than what has been conferred upon it. It must make a decision based on its best view of the law at the time of making that decision."*

[13] Finally, on the question of delay, while acknowledging that the timely resolution of disputes is in the best interests of everyone involved, the Secretary notes the need to balance speed with the obligation to give all parties sufficient time to exchange and review information and make submissions. In the circumstances he does not accept that there was any undue or excessive delay in this case.

The Ministry's Regulation 37(2) Report

[14] In its report the Ministry makes two relevant points. First on the question of whether there is any *"sufficient cause that is outside the student's control"* justifying the approval of LFT status it simply says:

> *"The decision of the appellant to train and represent New Zealand is commendable. However it is a decision made by the appellant to pursue his dreams in the sporting arena and is not a situation outside his control. As a consequence of his decision to train as an elite [athlete] he is directed … to adhere to the prescribed training schedule."*

Accordingly the situation is not one that can be described as genuinely "*outside his control*".

[15] Secondly, although it was not raised at the time and was not considered by the Secretary on review and accordingly forms no part of this appeal, the Ministry says that the appellant was not in any event eligible for an allowance in 2016. Due to his failure to complete more than half his full-time course in 2015 while in receipt of an allowance, reg 30(1) renders him ineligible for any further allowance support until he has re-established his academic credentials by passing more than half of a full-time course at his own expense.

> *"Even if it was considered that the appellant could quality for LFT, he would be ineligible for Student Allowance as he did not pass more than half of his full-time course in 2015."*

With all due respect to the Ministry, this statement may be doubted. First, as a general proposition it is at least arguable that the suspension provision of reg 31(1) has no application where reg 12A(1) is in issue. Not only does reg 30(1) itself specifically provide that the power to suspend an allowance is subject to reg 12A, but also the redraft of reg 12 and the introduction of the new reg 12(A) in 2015 was accompanied by the removal of the previous requirement that to be accorded LFT status the student applying to study part-time must be *"otherwise … eligible for such an allowance"*. It is accordingly at least

arguable that applications under reg 12A must be seen as falling outside the purview of reg 30 entirely and are to be considered solely in terms of the criteria set out in subclauses (a) and (b). Whether such a result was intended is unclear. Secondly and more specifically, even if reg 30(1) does apply to applications under reg 12A, insofar as the facts in this appeal are concerned if the appellant could qualify for LFT status under reg12A(1)(a)(ii) on the ground that the competition and training commitments he has entered into do indeed constitute a *"sufficient cause beyond his control"* that would have at least two consequences. First, it means that the decision to refuse his LFT application in 2015 – which was based on exactly the same grounds – was wrong and should now be revisited at least to the extent of mitigating the consequences of the academic failure that everyone appears to accept flowed from his being obliged to undertake a full-time workload in order to obtain an allowance. Secondly, the suspension of his allowance under reg 30(1) is itself subject to a discretion framed in identical terms to reg 12A(1)(a)(ii) – the chief executive *"may direct that that allowance should not be suspended … where* [he or she] *is satisfied that the failure … is due to reasons beyond the recipient's control".* Accordingly a decision that the appellant could qualify for LFT status as a result of his sporting commitments would inevitably mean that the decision to suspend his allowance as a result of his academic performance in 2015 would have to be reversed. Any other result would be perverse.

Discussion

[16] While it is unfortunate that the appellant has not provided the Authority with any indication of the grounds on which his appeal is based or with any submissions on either the Secretary's Review Report or the Ministry's Regulation 37(2) Report, it is in fact difficult to see that there is much further that he could have said on this matter. With all due respect to the Secretary his reasoning in relation to the appellant's arguments both in his application for review and through his representatives at the review hearing are unanswerable. The only ground on which the appellant can conceivably justify LFT status is the *"sufficient cause that is outside the student's control"* one. While it is undoubtedly true that once the appellant embarked on his athletic career and entered the elite training arena his life was very largely no longer his own and was – and no doubt still is – dictated by the requirements of the relevant sporting body, his decision to both undertake and continue to pursue that career was a deliberate and conscious one untrammelled by outside constraints. Harsh as it may seem, the reality of his situation as regards the competition and training regime is exactly as the Secretary describes it – "*he ultimately retains the right or ability to remove himself from that obligation and instead direct his time towards other activities including full-time study".* There is no suggestion that he was unaware of the demands that would be likely to be placed him by such a commitment or that he was not in a position to assess its likely impact on his academic work. He has been forced to balance the competing demands of his athletic and academic ambitions since at least 2011 and it is no doubt clear to everyone that, as the Secretary puts it, he cannot train and study full-time "*without compromising one or both of these activities".* It may be that this sort of conflict is particularly acute in the area of elite sports, but it is one which in fact confronts students every day in a variety of ways. The circumstances that the appellant found himself in at the start of 2016 and the training commitment that he made in order to pursue his career as an athlete were entirely within his control. The fact that the competition and training regime he signed up for is essentially non-negotiable is neither here nor there – he chose to sign up for it, knowing the likely consequences of doing so. That being so, the requirements of subcl (ii) have clearly not been made out – the reasons why it would have been, as everyone appears

to agree, at the least inadvisable for the appellant to study full-time in 2016 are not beyond his control.

[17] I also accept the Secretary's view that in considering the discretion granted by the Regulations it is not open to StudyLink to take into account the social or other benefits – either international or domestic – of the course of action chosen by the appellant, or of his undoubted qualities as an athlete. His ambitions are obviously laudable and are no doubt of benefit to New Zealand in a number of ways. That is for recognition through incentives offered for sporting prowess, including the grant of scholarships where appropriate to enable students to study and compete at the same time, but it is not something that can be achieved by ignoring or glossing the wording of the regulations governing Student Allowances. The discretion granted by reg 12A(1)(a)(ii) is expressed in clear terms and is a limited one. It is available in those rare cases in which external events overtake students so as to render full-time study either impossible or at least strongly inadvisable.

[18] I also accept the Secretary's view that there is nothing in the alleged inconsistency and delay arguments advanced at the review hearing. I have little doubt that, at least immediately following the amendment to the legislation restricting the "*best interests*" provision to students with cognitive and other academic issues affecting their ability to study on a full-time basis, StudyLink staff would have approved allowances falling outside the new guidelines. And it may well be that errors continue to occur. That is the nature of any decision making process and it is precisely why review and appeal processes are important. But it is not a reason to strike down a decision that correctly applies the regulatory criteria. There is nothing in common sense, logic, or the law that would suggest for a moment that a government agency, having made an error, is obliged, as the Secretary puts it, to *"compound that mistake by continuing it"* in future cases. Rather the obligation is on the Ministry, where such errors are brought to light, to investigate and in appropriate circumstances reverse or at least mitigate offending decisions.

[19] Insofar as the argument from delay is concerned I share the Secretary's view that the delay that took place in this case between the application for review at the end of February 2016 and the review hearing itself in early June 2016 was not excessive. The appellant was sent a preliminary report in early March and was asked if he wished his application to be heard by the SAR panel. At the end of March it was confirmed that he wished to go to a hearing. In early April the appellant's solicitor submitted further submissions on his application. On the same day he was sent a copy of the Ministry's preliminary report for information/comment. In mid-May he was sent a copy of the final recommendation report and again told that he could comment on this if he wished. He duly did so at the end of May. The hearing then took place in early June. In the circumstances the Secretary's conclusion that the time taken was appropriate given the need to ensure that all parties to the dispute had ample opportunity to consider and make their views known is, in my view, correct.

[20] Before leaving the question of delay, however, it needs to be acknowledged that following the Review there was a considerable delay both in getting this appeal under way initially and in presenting the completed papers to the Authority for decision. The appeal was formally lodged at the end of June 2016. It was not until mid June 2017 that the appellant's agent finally confirmed that he wished to proceed with the appeal, and it was not until this was done that the Ministry could be required to compile and submit its Regulation 37(2) Report – which it duly did in mid July. Suffice it to say that between June 2016 and December 2017 there was considerable correspondence between the

parties concerning whether the appeal should proceed, the grounds on which it was being brought and what submissions, if any, the appellant might wish to make. Ultimately, although it was confirmed that the appellant wished his appeal to be heard, no submissions were forthcoming despite his apparent interest in doing so and a number of extensions of time specifically in order for him to have his say. No doubt the delays in this area were compounded by the fact that he appears to have been overseas for at least part of the time and was endeavouring to act through both an agent and his solicitor. While the delay and the lack of input from the appellant is unfortunate, in the circumstances it is difficult to apportion blame to any party and it is certainly not something that can affect the merits of the appellant's case.

The appeal is dismissed. The decision of the Secretary on review to confirm StudyLink's decision to decline the appellant's application for LFT status for the 2016 academic year is upheld.

DATED at WELLINGTON this 17th day of January 2018

Neil Cameron
Student Allowance Appeal Authority