Decision No. [2019] NZSAAA 1

Reference No. SAA 2/18

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 upheld

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 Independent Circumstances Grant (ICG) for the 2017 academic year.

The issues on appeal

[2] The main issue on appeal is whether the appellant's ex-caregivers were "*acting in place"* of her biological parents at the time of her ICG application so as to bring them within the extended definition of "*parent*" in reg 2 of the Student Allowances Regulations 1998. If it is concluded that they were, a secondary issue then arises as to whether the "*exceptional circumstances*" discretion conferred by reg 8(1)(c) should have been exercised in her favour.

Factual background

[3] In late December 2016 the appellant applied for a Student Allowance to cover her first year of tertiary study in 2017. When she applied she was 19 years old, single and with no dependents. Her application did not include the required parental income details – basically because she had not lived with her biological parents since the age of 3 – and was accordingly incomplete. At the end of January when she queried this, she was advised by StudyLink that since she no longer had a relationship of any sort with her birth parents, she should submit an ICG application instead. This application was subsequently declined on the ground that it appeared that her ex-caregivers, Mr and Mrs M, were "*acting in place of*" her parents – and hence came within the definition of "*parent*" under the Regulations – and that, as there was no good reason why she could not live

with them and receive financial assistance from them, she was ineligible for an ICG. She was advised that the proper course was for her to proceed with her original allowance application and provide Mr and Mrs M's income details to be assessed under the parental income testing regime. At the end of November she applied, out of time, to review this decision and the matter eventually proceeded to a Student Allowance Review Panel hearing at the end of March 2018. At this hearing she was represented by her social worker acting as agent. On 28th March the Secretary upheld the original decision. At the end of April the appellant appealed to this Authority.

[4] The basic facts are not in dispute – although it has to be said that there is some confusion, both in original file and in the Secretary's decision and the Ministry's Regulation 37(2) Report, over the precise nature of the relationship between the appellant and Mr and Mrs M over the period she was in their care and subsequently. In 2001, at the age of 3, the appellant, together with her older brother, was removed from her biological parents and taken into the custody of the Ministry for Vulnerable Children, Oranga Tamariki. In 2002, aged $4^1/_2$, she was placed in the care of Mr and Mrs M and remained with them until she moved out to attend university at the end of January 2017. Mr and Mrs M never had formal custody of the appellant, which remained with the Ministry until she attained the age of 17, and, on legal advice, declined to be appointed as guardians when the caregiving arrangement was entered into. Guardianship remains jointly with the Ministry and her biological parents and is ongoing until she attains the age of 20.

[5] In September 2015 the appellant turned 17 and the formal caregiving arrangement came to an end. In order to enable her to complete her secondary schooling in a stable environment, Mr and Mrs M continued to provide her with accommodation and support and applied for an Unsupported Child's Benefit (UCB) to cover the costs involved. Under the provisions then in force (s 29 of the *Social Security Act 1964*) the UCB was available to any "*principal caregiver*", who is not "*the natural parent, adoptive parent, or step-parent of the child*", in respect of any "*dependent*" child. A "*dependent*" child is one whose care is primarily the responsibility of the person making the application and "*who is being maintained as a member of that person's family*" and is "*financially dependent*" on that person. The UCB payments ended in September 2016 when the appellant turned 18 and left school. From September 2016 until the end of January 2017 she remained living with Mr and Mrs M and supported herself for the vacation period with casual employment. In January 2017 she left home to start her tertiary course at an institution located one and a half hours' drive away and moved into a hostel, supporting herself through Student Loan living costs payments of just over $178 per week.

[6] In 2016, at the age of 18 when she was legally able to do so without her biological parents' consent, the appellant changed her surname from that given on her birth certificate – which due to an error in the system was not the name she was ever known by – to that of Mr and Mrs M. It is accepted that from quite early on in the caregiving arrangement both the appellant and Mr and Mrs M came to regard each other as "*family*" with the appellant describing them as "*practically my parents*". There is some confusion in the file over whether she knew Mr and Mrs M as "*Mum and Dad*" with some suggestion that that term was reserved for her biological parents.

[7] It is clear that up until the age of 17 the appellant lived as an ordinary member of her caregiver's family. On the other hand she and her brother remained in the custody of the Chief Executive and under the joint guardianship of the Chief Executive and their biological parents. As simple "*contract caregivers*" Mr and Mrs M had, in theory at least,

very little actual control over their charges' lives. Even simple things like haircuts, school trips, photographs and everyday out-of-town travel had to be approved by a social worker and/or run past the appellant's biological parents. By the same token as mere caregivers, they were not privy to basic medical information on the appellant or her brother. Similarly, while the appellant was clearly financially dependent on Mr and Mrs M in the sense that all her financial support came through them, all her expenses, including board, clothing, travel and school expenses were paid for by the Ministry. At no stage did the Ms take on any financial responsibility for her out of their own resources.

[8] When the appellant turned 17 this situation basically continued, although Mr and Mrs M ceased to be formally contracted as caregivers and the custody order in favour of the Ministry lapsed. She continued to live with them as part of the family and to receive the necessary financial support to complete her secondary schooling through them by way of the UCB. Under s 31 of the *Social Security Act 1964* the UCB is to "*be applied towards the maintenance or education of the child or otherwise for his [or her] benefit*". Again there is nothing in the file to suggest that Mr and Mrs M made any further financial contribution to her upkeep or education over this period from their own resources. When the UCB payments ceased at the end of September 2016 the appellant remained in the family home as a member of the family. Although she says she obtained some casual, part-time work over this period, there is no suggestion that she contributed financially to the household or her upkeep over the next four months while she was waiting to start her university study. Once she commenced study and had moved into the hostel it is clear that both she and Mr and Mrs M continued to see her as part of the family and she appears to have returned "*home*" during university vacations when her Student Loan payments were suspended. Again there is nothing in the file to suggest that she contributed financially to her upkeep over the few weeks that this would have involved. At no time does she appear to have received any direct financial assistance from Mr and Mrs M and, since she started study she seems to have been able to support herself, at what must have been a fairly reduced level, from her Student Loan.

[9] In summary, the appellant continues to regard Mr and Mrs M as her family and is clear that she wants to continue returning during vacations and at other times. The feeling is clearly mutual with Mr and Mrs M describing her as part of their family, both now and in the foreseeable future. On the other hand, apart from the "*assistance*" involved in putting her up when she comes to stay during vacations there is no suggestion that Mr and Mrs M have ever contributed financially to the costs/expenses of her study. Nor have Mr and Mrs M ever said that they would in fact do so if asked. The closest they have come to it is Mrs M's response in a telephone interview that while she would be "*cautious about being called a parent as she does not believe she has a legal right to this*", she would "*continue to support* [the appellant] *where she can".*

Relevant Legislation and Policy

[10] Under reg 4 a student in the appellant's position – ie single, childless and under 24 – who applies for a Student Allowance must ordinarily provide StudyLink with the details of their parent's income so that their eligibility and/or the rate at which they must be paid can be assessed. Broadly speaking if their parents' joint income is less than just over $1,000 per week they will be entitled to allowance payments at the full rate. Above that the rate payable decreases proportionate to the excess parental income, reaching zero at roughly $2,000 pw. Where a student is estranged from their parents or for some other reason does not wish to go through the parental income testing process, they can apply instead for an ICG under reg 8. Under this regulation a student undertaking a tertiary

qualification who is younger than 24 and is "*neither living in a parental home nor receiving financial assistance from any parent*" is eligible for an ICG if

> *"The chief executive considers that it would, by reason of exceptional circumstances, be unreasonable for the student to live with a parent and receive financial assistance from any parent of that student."*

[11] It appears to be accepted by both the Secretary and the Ministry that if, as the appellant assumed in her initial application, the reference to "*parent*" in this regulation is a reference only to her biological parents the "*exceptional circumstances"* discretion will apply and she will be eligible for the grant. She has not lived with her biological parents since the age of 3, has never received significant financial assistance from them, and it would clearly be grossly unreasonable – however the test is to be framed – to now expect her to do so. If, on the other hand, Mr and Mrs M can be regarded as her "*parents*" for the purposes of this provision the answer may well be different since although she is not living in their home and does not appear to be currently receiving any financial assistance from them, the circumstances may not be so "*exceptional*" as to make it unreasonable for her to be expected to do so.

[12] Regulation 2 defines "*parent*" for the purposes of the Regulations as "*including a step-parent, and any person acting in place of a parent of that student*". Although it is not relevant to this appeal, prior to 2012 the definition of "*parent*" included any person acting as a guardian. It is unclear to me why the reference to guardians was removed in 2012. It may be that it was intended to reflect the view of guardianship now taken by the Ministry in its own internal policies: see below at [13]. On the other hand it may have been removed simply because it was clearly redundant – guardians who are also acting as caregivers have all the "*duties, powers, rights, and responsibilities"* of the natural parents of the child and are accordingly clearly acting "*in place of"* those parents. See further below at [40]-[43].

[13] The Ministry guidelines on whether a person can be said to be "*acting in place of a parent*" provide that:

> *A person is considered to be "acting in place of a parent" if they are responsible for the student's well-being and financial support. This can include grandparents, other relatives (including whangai), and former and current foster parents, if they are acting in place of the student's parent(s), and they have not been appointed as guardians as discussed below.*
>
> *To help decide whether or not a "person is acting in place of a parent" involves the exercise of discretion to make an entitlement decision based on the purpose and intent of the regulation, the limitations of the wording of the regulation, and the facts of the particular situation.*
>
> *To determine whether a person is "acting in place of a parent" will include consideration of the following questions:*
>
> - *has the person made a deliberate decision to take on the support of this student?*
> - *does the person provide financial assistance and support to the student?*

- *if the student were in financial or 'other' trouble would the person intervene to provide support and assistance to the student?*

- *does the person provide accommodation to the student? If so, is the student required to pay for the accommodation? Would the person continue to provide accommodation if the student could not pay for it?*

- *does the person electively regard the student as a member of their family?*

- *does the person provide personal guidance, advice or direction to the student including on matters relating to their study?*

A caregiver who has previously received an Orphans Benefit or an Unsupported Childs Benefit for the student can be considered a "parent" for Student Allowance purposes if they are now acting in place of a parent for the student. …

The definition of "parent" does not include any person appointed as guardians by:

- *the Chief Executive of Oranga Tamariki or an agency recognised by the Oranga Tamariki Act 1989*

- *the family court under the Care of Children Act 2004*

These appointed guardians are not regarded as parents for the purposes of determining Student Allowance entitlement because the responsibility for the student has been assumed by the body that appointed them rather than the caregivers.

There may be circumstances where the order for appointed guardianship ends but the student still lives with or is supported by their former guardians.

In these circumstances, you will need to determine the relationship between the student and their former guardian(s) in order to confirm if the former guardian is acting in the place of a parent.

A guardian who receives "Home for Life" assistance from Oranga Tamariki will generally be a "parent" for Student Allowance purposes. In most cases Home for Life caregivers will become the legal guardians of the student outside of the situations described above and will therefore meet the definition of being a person acting in place of a parent of that student.

[14] The description in the guidelines of the decision whether or not a person can be said to be "*acting in place of a parent*" as involving "*the exercise of discretion to make an entitlement decision*", is both incorrect and potentially misleading. A decision as to whether or not a person falls within a statutory definition is not an exercise of "*discretion*" in any sense of the term. It is a determination of a person's status based on the statutory provision and it calls for a proper interpretation and application of that provision. If the term, properly interpreted, covers the facts, it must be applied whether in the circumstances the decision-maker regards it as appropriate to do so or not. If it doesn't, it must not be.

[15] Insofar as what the Ministry describes (correctly) as the "*discretion*" under reg 8(1)(c) to approve a grant where "*by reason of exceptional circumstances*" it would be

"*unreasonable"* for the student to "*live with a parent and receive financial assistance from any parent*" is concerned, the guidelines emphasise that exceptional circumstances means "*circumstances that are far beyond what is ordinary*" and that normally such circumstances "*will need to be beyond the student's control*". The focus of the guidelines and the examples given appears to be on the student and whether it would be unreasonable from the student's point of view to expect him or her to live with their parent or parents and receive financial assistance from them. The obvious example of where it would not be reasonable for the student to do so is in cases of severe family breakdown where, because of what has occurred within the family, it would be either impossible of at least likely to be harmful to the student to oblige them to live with and receive assistance from their parent or parents. Conversely the drafting of the guidelines makes it clear that under the Ministry's interpretation of the regulation whether or not the circumstances are such that it would be unreasonable, from the parent's point of view, for the student to have to live with them and for them to provide financial assistance is rarely, if ever, likely to be relevant. Finally, the guidelines specifically exclude from consideration cases where the student is obliged by their chosen place of study to live away from home – as in this case. Although the guidelines describe such cases as not meeting the "*exceptional circumstances*" threshold – presumably on the basis that they are both commonplace and at least capable of being seen as the result of student "*choice*" – a more defensible basis would be that while it may be unreasonable to expect a student studying medicine in Auckland, for example, to continue living with his or her parents in Hokitika, it is not unreasonable to expect the parents to contribute to the costs of their living and studying away from home if they are able to do so.

[16] It should be emphasised that, contrary to what seems to be the assumption of the appellant's agent in this case, the income testing regime and reg 8 do not impose any obligation on any parent to actually assist their child if it is judged that in terms of the income guidelines they can afford to do so. If they decline to submit their income details when requested or if they refuse to help out when it is concluded that they can afford to do so, the consequence is simply that the student will either not receive an allowance or only receive one at a reduced rate. In other words the pressure exerted by the income testing regime is only a moral one.

The Secretary's Decision

[17] In approaching the interpretation of "*parent"* in the context of the assessment of parental income under the Regulations, the Secretary emphasises that the Student Allowance is primarily intended "*to reduce the* [financial] *barriers to participating in tertiary education*". It is in essence a subsidy

> *targeted at those that need it most with the aim of the scheme to prevent cost being a barrier to full-time education for students from low-income and middle-income groups. This purpose is clearly reflected within the income thresholds and other eligibility and entitlement criteria. Parental income details are therefore a necessary and relevant aspect of determining entitlement to government assistance.*

Accordingly, where a student is under 24 and their parents are defined as high-middle or high income under the Regulations (ie currently as having a joint income of just over $1,000 pw), they are expected to meet part or all of the contribution to their children's study that would otherwise have to be made by the State through the provision of a Student Allowance. Although he does not put it quite this way, the Secretary sees this policy objective as justifying a wide definition of "*parent*", exempting students from

parental income testing only where "*a student does not have parents or no longer has any kind of relationship with their parents*".

[18] Specifically on the meaning of "*any person acting in place of a parent*", the Secretary describes the original decision as "*undoubtedly correct*":

> *Both parties agree that the caregivers have provided emotional support, care and affection for the applicant since she came into their care and will continue to do so. In recognition of the enduring bond between them the applicant chose to take their surname when she was legally able to do so. The caregivers have continued to provide the type of care ordinarily provided by parents and have by all accounts done so in an exemplary fashion.*

[19] In particular he says that although Mr and Mrs M *"were excluded from the definition of parent when they were appointed guardians … once the applicant turned 17 this was no longer the case and* [they] *continued voluntarily to act in the place of parents*". Furthermore the fact that Mr and Mrs M applied for and received an Unsupported Child's Benefit (UCB) to provide continued support for her over the period between the original caregiving arrangement coming to an end and her turning 18, shows that they were "*financially responsible*" for her. This is because in order to qualify for this benefit it had to be established that they were her primary caregiver and that she was a "*dependent child*" – ie one who, under the relevant legislation, was "*being maintained as a member of that person's family*" and was "*financially dependent*" on them. In reaching this conclusion the Secretary is at odds with the Ministry guidelines which, by providing that caregivers who have *"previously received …* [the UCB] *for the student can be considered a "parent" for Student Allowance purposes if they are now acting in place of a parent for the student",* necessarily imply that caregivers are not acting "*in place of a parent*" when they are actually receiving the UCB for a child (see [13] above).

[20] Although it does not affect the thrust of his argument, it should be noted that the Secretary is also in error in describing Mr and Mrs M as being the appellant's appointed guardians until she turned 17. They were not. Indeed, on legal advice, they specifically declined to be appointed as such when the caregiving arrangement was entered into. While there is nothing in the papers suggesting the reasons behind this advice/decision, it is a reasonable assumption that since at that time the definition of "*parent*" in the Regulations included guardians as well as persons acting in the place of parents, the reason they did not wish to become guardians was probably to maintain their caregiver status rather than take on all the rights, duties and obligations of parenthood that such an appointment would involve. It is also unfortunate that in dealing with Mr and Mrs M's receipt of the UCB in respect of the appellant the Secretary accepts the Ministry's clearly erroneous assertion that they received it over a period of $2^1/_2$ years from June 2014 – January 2017. In fact they received it for the minimum period of 1 year – from her turning 17 in September 2015 up until she ceased being a "*child*" on turning 18 a year later.

[21] The Secretary also addresses the argument raised by the appellant's agent that, in terms of the discretion conferred by reg 8(1)(c), it would be unreasonable for Mr and Mrs M to be expected to provide accommodation/financial support while she is studying. On this the Secretary is clear that the test of unreasonableness under reg 8(1)(c) is focused on the student rather than the interests of the parent:

> *With respect to the agent that* [argument] *grossly misstates the test. Rather the test is whether with regards to her circumstances it would be unreasonable to*

> *expect the applicant to receive financial assistance from her caregivers. Given the quality of the relationship that exists it is impossible to see how the applicant would be injured in any way by receiving financial support from her caregivers should they be able to do so.*

He accordingly concludes that since "*there has been no breakdown in that relationship and the quality of that relationship remains … there are no exceptional circumstances that would render that relationship void*".

The Basis for this Appeal

[22] On appeal the appellant's agent makes the same two basic arguments that have been made on her behalf throughout. Firstly that Mr and Mrs M cannot be said to have been acting in the place of a parent, either while the caregiving arrangement was in force or subsequently, basically because they have never been appointed guardians and have taken on no legal or financial responsibility for the appellant or her brother at any stage. And secondly that even if they can be classified as parents in some sense, it is unreasonable to now expect them to start providing accommodation and financial support for the appellant out of their own resources even if they are able to do so.

[23] On the first point the appellant's agent argues that while the children were in their care (ie up to the age of 17) they were simply "*agents receiving board payments … (and supplements) for the maintenance of* [the appellant and her brother]". They "*never held orders relating* [to the appellant or her brother]". Both custody and guardianship remained with the Chief Executive. This situation continued when she turned 17 and Mr and Mrs M applied for and received the UCB:

> *Unsupported child benefit is paid to any person willing to provide care for more than 12 months and while her education continued to provide for her support. That would apply to any friend, family or other person and also, as it did in this case her previous caregivers. There is no acceptance of parental or financial obligation in this. That she did receive this support is a clear indication that she had no other means of support.* [The appellant] *was an unsupported child. UCB is not payable to a parent.*

[24] In terms of the "*questions*" listed in the policy guidelines, the appellant's agent says that in response to the threshold question of whether Mr and Mrs M at any stage "*made a deliberate decision to take on the support of the child"*:

> *The answer is obviously and clearly that the caregivers deliberately decided not to. The child was supported by board payments and then unsupported child benefit and at no point did the caregivers agree to take on any legal status let alone any financial responsibility. The care has been state funded throughout. It has always been open to the caregivers to take the legal and parental role which they have declined to do. The answer to the first question therefore* [should have been] *no.*

Furthermore, the care and affection that Mr and Mrs M have provided and continue to provide, their expressed intention of continuing to "*support*" her in the future "*where* [they] *can*", and their willingness to put her up free of charge during university vacations do not imply any financial responsibility or obligation on their part. Rather they are simply doing what any decent person would do for anyone with whom they have had a supportive and productive relationship of the sort that Mr and Mrs M had during the appellant's early years. In short, her agent argues that the Ministry's "*determination to turn emotional*

connection into financial liability" has resulted in the creation of "*a fictional liability for the former foster parents who never assumed and/or committed to any such responsibility".*

[25] On the application of reg 8(1)(c) in the event that the Ministry persists in regarding Mr and Mrs M as her parents, her agent argues that since they have never provided financial support for her out of their own resources, it is unreasonable to suggest that they should now do so once she passed the age of 18 and is no longer receiving state support, simply because the previous relationship has continued on an entirely voluntary basis. Once the appellant turned 17 and the care agreement terminated it was open to them to simply turn the appellant out onto the street. Similarly once she turned 18 and was no longer supported through the UCB. It is to their credit – and it is to everybody's and society's benefit – that they did not do so. To "*penalise*" both them and the appellant now by imposing financial obligations/expectations on them that they never had before is both unreasonable and likely to lead to caregivers acting in less socially desirable ways in the future.

The Ministry's Regulation 37(2) Report

[26] In supporting both the original decision and the decision of the Secretary to uphold it, the Ministry simply cites and applies the policy guidelines governing the meaning of "*acting in place of a parent*". In particular it stresses that both Mr and Mrs M and the appellant herself accept that she is "*part of the family*" and clearly intend that she should remain so. Mrs M in interview said she would continue to support her "*where she can*" despite expressing some caution about being called a parent "*as she does not believe she has a legal right to this*". After she turned 17 Mr and Mrs M, as her primary caregivers on whom she was financially dependent, received a UCB to help maintain her "*as a member of* [their] *family*" while she completed her secondary study. Then, between the final UCB payment and the start of her university study – a period the Ministry (wrongly) suggests was about a month – they continued to support her "*both emotionally and financially*". Finally, once she started study in 2017, she still returned to the "*family home*" during vacations when she was not receiving Student Loan payments and was treated again as a member of the family and not charged for her accommodation.

> "… *it appears that there is an ongoing commitment on part of the caregiver to provide both emotional and financial support to the appellant. The appellant has a strong bond with her caregivers and considers them her parents. … the caregivers provide the appellant with a healthy and safe family environment. The appellant changing her family name to that of her caregivers after she turned 18 indicates the appellant's commitment to be part of the family unit. … They have contributed to her upbringing and wellbeing providing emotional and financial support* for *a long period and continue to voluntarily act as parents to the appellant."*

[27] On the secondary question of whether, if Mr and Mrs M can indeed be considered to be her "*parents*", it would nevertheless be unreasonable to expect the appellant to live with them and receive financial assistance from them under reg 8(1)(c), the Ministry says simply that "*there is no information in her application indicating exceptional circumstances where it could be considered unreasonable for the appellant to live with her caregivers*".

[28] In reaching these conclusions the Ministry places some weight on a decision of the Secretary on review in an analogous case dated the 23rd October 2012. That case also involved an application for an ICG and was based on very similar facts to the present one. The applicant had been taken into care and placed in the custody of her foster

parents at a very early age and her foster parents were appointed as her guardians jointly with her birth parents and the Chief Executive. The Chief Executive subsequently withdrew as guardian when she was 14. When they were appointed guardians the foster parents seem to have received a UCB to cover her living, educational, and other costs. Payments continued until she turned 18 when she became ineligible and the guardianship order in favour of her foster parents automatically terminated. At that point she moved out of her foster parents' home in order to study in another city but continued to visit and stay with them on the odd weekend and during vacations when she had no income of her own. She continued to regard her former foster parents as her family, calling them Mum and Dad and saying she would contact them first in any emergency. On these facts the Secretary concluded that the foster parents fell within the definition of "*parent*" in reg 2 as they "*have acted and continue to act in the place of parents with respect to the applicant*". While it is difficult to tell from the Secretary's report precisely what the key factors were that drove this decision, it appears to have been determined mainly by the fact that the parties continued to have an ongoing relationship as parent and child, with both parties accepting that this was the nature of their relationship, coupled with elements of financial support in the form of free accommodation and support during vacation periods, posting an accommodation bond on her behalf with the hostel she was living in, and her ex-foster father's self-fulfilling statement that he would be willing to help her financially with her course costs "*but for the fact that StudyLink would then define him as a parent"*. It should also be said that, although somewhat remarkably the Secretary does not rely on it, the Regulations in force at the time specifically included guardians in the definition of "*parent*" in reg 2. In other words there was never in fact any question but that at least up until she turned 18 her foster parents were in law her "*parents*" for allowance purposes. If that was the case there is clearly no great stretch involved in finding that the continuation of the relationship since she turned 18 on much the same terms amounted to continuing to act "*in the place of*" a parent.

[29] On the other hand, although the Ministry does not mention it in its Regulation 37(2) Report in this case, the Secretary in the 2012 decision went on, with the support of the MSD and NZUSA advisors who attended the hearing, to conclude that even though the foster parents had to be seen as "*parents*" under the Regulations, reg 8(1)(c) nevertheless applied. While the Secretary's finding that there were "*exceptional circumstances"* – which appears to be based on the early/unusual withdrawal of the Ministry from its guardianship role when the applicant was 14, coupled with the continuing caregiving contract – appears, with respect, to be a little dubious, her conclusion that it would now be unreasonable to expect the ex-foster parents to take her back into their home and provide her with financial support, is rather more persuasive:

> *"The Secretary considers that the circumstances surrounding the transition to sole guardianship and the contractual arrangement that existed are exceptional and therefore it would be unreasonable for the Applicant to either live with or receive financial assistance from the* [ex-foster parents]. *The applicant has moved out of the home and the submission given at the hearing showed that although she visits* [her ex-foster parents] *this is no longer her home. The Secretary agrees with the applicant's lawyer's argument that the State has provided financial support for the care of the applicant until she turned 18 years and to expect the* [ex-foster parents] *to now take joint financial responsibility for the applicant when they have never previously had financial responsibility for the applicant is unreasonable."*

This view of the test of unreasonableness in reg 8(1)(c), while arguably available on the wording of the provision, is at odds with both the thrust of the current policy guidelines and the clear view of the Secretary in the present case (see above at [21]) – both of

which confine the test to situations where it would be unreasonable/harmful from the student's point of view to expect them to live with and receive financial assistance from the parent(s).

Discussion

[30] The main issue in this appeal is whether, at the time the appellant applied for an ICG in January 2017, Mr and Mrs M fell within the extended definition of "*parents*" in reg 2 of the Student Allowances Regulations 1998 by virtue of being persons who, at that point, were "*acting in place of a parent*". If, as the Secretary concluded, they do indeed fall within this definition a subsidiary issue then arises as to whether the discretion conferred on the Chief Executive by reg 8(1)(c) to nevertheless approve the appellant's application on the basis of "*exceptional circumstances*" rendering it "*unreasonable*" for her to live with them and receive financial assistance from them should have been exercised in her favour.

[31] On the main issue the starting point is that the interpretation of the definition of "*parent*" in reg 2 must be done in the context of its operation as part of the parental means testing regime mandated by the Regulations. The policy behind this regime is clear – the Student Allowance is not a "*benefit"*, it is a state subsidy intended to assist those students who lack alternative sources of finance and who without it would either be unable to study or would at least struggle to support themselves to such an extent as to seriously interfere with their ability to get the full benefit from their study. Accordingly Parliament has decided that where an intending student is under the age of 24 parents who are deemed to be able to do so are expected to support their study – essentially by providing all or at least part of the financial assistance that would otherwise have to be provided by the state through a Student Allowance. Conceptually such assistance can be seen as a continuation into young adulthood of the sort of support parents are ordinarily required to provide for their children prior to the age of 17. In situations where the "*parents*" are the biological parents of the student or are in a legally recognised relationship with a biological parent (ie are step-parents), this expectation can be seen as arising naturally from that relationship. In the case of persons who are neither linked biologically to the student nor in a legally recognised relationship with a biological parent, the link arises instead from that person's assumption of the responsibilities of a biological parent – ie by their acting or continuing to act "*in place of a parent*". Views may well differ on precisely when a person who voluntarily provides a student with the sort of support and assistance normally provided by parents can be seen as "*acting in place of a parent*". Like all matters of interpretation it will depend on the context in which the phrase is used in the legislation. The context here is that of a parental income testing regime based on an expectation of ongoing financial assistance where the parent is able to provide it. It follows that in terms of who is to be regarded as acting as a parent for these purposes the provision of financial support – either currently or in the future – is the primary factor to be considered. In other words under the Regulations, while biological parents and step-parents, by virtue of that status alone, are expected to provide the necessary financial assistance if they can afford to do so – whether or not they have done so in the past and whether or not they accept that it is their responsibility to do so in the future – those who are "*parents*" by virtue of "*acting in place of a parent*" are defined as such by their provision of financial support or, failing that, at least a documented willingness to provide such support if necessary during the period of study the ICG application relates to.

[32] The significance of financial assistance to the meaning of "*acting in place of a parent*" is certainly recognised in the policy guidelines promulgated by the Ministry for the guidance of StudyLink staff (see [13] above). The basic test is described as being whether the person is "*responsible for the student's wellbeing and financial support*" and staff are directed to consider whether financial assistance is currently being provided and/or would be provided if the student should get into any financial "*trouble*". However the guidelines also appear to give equal weight to a range of other, non-financial matters indicative of family life in general – support in the event of non-financial *"trouble",* the provision of free "*accommodation"*, the continuing acceptance of the student "*as a member of the family"* and, rather oddly, the provision of *"personal guidance, advice or direction to the student including on matters relating to their study"* – which, as the appellant's agent points out, is scarcely the exclusive province of parents let alone a defining characteristic. Consistent with the interpretation of "*acting in place of a parent*" discussed above this equation of financial and emotional/social considerations is unfortunate. It conveys the impression to decision makers that despite the absence of at least a willingness to provide financial support to the student in the event of their needing it, a view of the student in some loose way as a member of the family, coupled with a willingness to provide general non-financial support – including occasional free board and lodging and personal advice – will suffice to establish a person as a *"parent"* for the purposes of the Regulations. While I do not accept that it was in fact the intention of the Ministry in drafting the guidelines to downgrade the significance of a commitment to ongoing financial support in this way, it is something which, in my view, needs clarification. While the central assumption of some financial responsibility need not be expressed, it must at least be implicit in the type of relationship any supposed "*person acting in place of a parent*" has with the student and this needs to be made clear. It also needs to be emphasised rather more clearly that basic test under the Regulations is whether the person supposedly acting in the place of a parent has taken on financial "*responsibility*" for the applicant – not simply whether they have made the occasional small financial "*contribution*" to their expenses.

[33] In this case it is evident that both the Secretary's decision and the Ministry's Regulation 37(2) Report rely very heavily on the non-financial aspects of the relationship between the parties to support the finding that Mr and Mrs M were, at the time the ICG application was made, "*acting in the place of parents"*. In its conclusion the Ministry simply emphasises the strong bonds between the parties, their intention to continue with their relationship in the long term, that "*the appellant considers* [Mr and Mrs M] *as her parents*" and that they "*have contributed to her upbringing and wellbeing providing emotional and financial support for a long period and continue to voluntarily act as parents*". Similarly the Secretary in his conclusion emphasises the ongoing provision of "*emotional support, care and affection"* and, more generally, "*the type of care ordinarily provided by parents".* In fact the only factors relevant to the issue of financial support at the time of her application for an allowance mentioned by either the Secretary or the Ministry are that she continued to live with them after she turned 18 and the UCB payments ceased in September 2016 until she commenced study at the end of January 2017 and appears to have returned "*home*" for at least one university vacation since then, all without being required to pay for her accommodation or food while there. In addition the Ministry quotes the somewhat ambiguous statement made by Mrs M in a telephone interview in which she said that she would continue to "*support*" the appellant "*where she can*". This appears to be at best a fairly qualified indication of general support rather than any sort of acknowledgement of a "*responsibility*" to provide specifically financial assistance should it become necessary to do so.

[34] Prior to the appellant turning 17 her relationship with Mr and Mrs M was, in terms of Mr and Mrs M's duties and responsibilities, one of caregiver and charge. Formal custody remained with the Ministry and Mr and Mrs M had, on legal advice, declined to be nominated as her guardians. All decisions of any significance as to her wellbeing, daily life and education had to be referred to both the Ministry as guardian and, in some instances, to her biological parents. Financial responsibility for her wellbeing remained with the Ministry as well who met all her reasonable needs. When the appellant turned 17 this arrangement came to an end. At that point Mr and Mrs M applied for and received the UCB to cover the ongoing costs of maintaining the appellant and to ensure that she completed her schooling. It is true, as both the Secretary and the Ministry emphasise, that in order to receive the UCB the child must be "*financially dependent*" on the person making the application. However this does not mean, as both he and the Ministry suggest, that the child must have been in receipt of financial support from that person or even that that person is financially responsible for them while they are in receipt of the UCB. Rather it simply means that the child must be dependent in the sense of not having any other source of financial support. The clue, with all due respect, is in the title of the benefit itself which is only available where a child is otherwise "*Unsupported*". As noted above (at [13], [19]) the Ministry's own guidelines appear to recognise that a person receiving the UCB is not thereby rendered a "*parent*" under the Regulations. This arrangement terminated when the appellant turned 18. While it is clear that between the ages of $4^1/_2$ and 18 the appellant had lived as a member of Mr and Mrs M's family and that they had, in a broad sense, clearly acted as her parents throughout the whole period, they were in fact simply her caregivers with none of the responsibilities or obligations of parents. Indeed she was not even formally in their custody and their obligations were either to the Ministry (up to the age of 17), or, after that, merely the statutory obligation to use the UCB payments for her "*maintenance or education … or otherwise for* [her] *benefit*": see s 31 of the *Social Security Act 1964*. Once she turned 18 and continued to live with them on a voluntary basis they had no obligations affecting her whatsoever. As her agent says, somewhat melodramatically, they were in fact free to simply turn her out onto the street if they had wanted to. In particular over this whole period they had no personal responsibility for her financial support. That remained throughout with the Ministry which provided all the basic financial support necessary to underpin the arrangement. And there is nothing in the file to suggest that StudyLink has any evidence to show otherwise. There is, in other words, precious little to support the Ministry's conclusion that as caregivers Mr and Mrs M have provided her with "*financial support* for *a long period"* and now have an "*ongoing commitment … to provide … financial support to* [her]".

[35] Once the appellant turned 18 the argument appears to be that Mr and Mrs M have voluntarily taken on the full obligations and responsibilities of parenthood including some commitment to the provision of accommodation and financial support. This appears to depend on two things. First there is Mrs M's statement of "*support*", and second there is the fact that since turning 18 the appellant remained at *"home"* free of charge prior to starting university at the end of January 2017 and returned *"home"* for at least the first vacation in 2017 when, in the absence of an Allowance, she had no income. With all due respect to the Ministry and to the Secretary neither factor is particularly convincing. The bald statement of continued support is not even a commitment to provide financial support, let alone the sort of financial assistance that would be expected under the Regulations of a "*parent*" who can afford to do so. It is certainly not an acceptance of any parental "*responsibility"* for her continued financial wellbeing. Nor is Mr and Mrs M's willingness to have her stay in the family home for short periods after she left school and during university breaks. As her ex-caregivers they were certainly happy to continue to

treat her, in a general sense, as part of the family and she was certainly welcome to live with them as part of the family during the university holidays, but the accommodation provided was essentially on a "*visiting"* basis rather than as part of any ongoing acceptance of a parental responsibility to provide one's children with somewhere to live. Furthermore StudyLink seems never to have even bothered to ask what, if anything, she contributed to the household in return for her board and lodging.

[36] It is not for me to comment on the decision of the Secretary in October 2012 referred to by the Ministry (see [28]-[29] above), but I would note that that case is different from the current one in at least two respects. First the caregivers in that case agreed to be appointed firstly as joint and later as sole guardians and, as such, both came within the definition of "*parents*" in the Regulations in force at the time. As guardians they voluntarily assumed all the duties, responsibilities and powers of natural parents. Secondly, again unlike in this case, they had in fact provided their ex-charge with some financial support in the course of her tertiary studies and expressed a willingness to do so in the future if they could afford it. In particular they had paid an accommodation bond on her behalf and her ex-foster father had indicated that he would have been willing to help her financially with some of her course costs "*but for the fact that StudyLink would then define him as a parent"*. On the facts of that case, therefore, it is no great surprise that the Secretary concluded that the ex-foster parents had simply continued the parental relationship on much the same terms as before and hence had to be seen as acting "*in the place"* of the applicant's parents for the purposes of reg 8.

[37] Accordingly I do not accept that in this case the nature of the relationship between the appellant and her ex-caregivers once she had turned 18 and at the time when she applied for the ICG was that of parent and child in the sense required by the Regulations. While her ex-caregivers clearly continued to fulfil the role of parents in a broad sense, providing emotional support and a safe, caring home that she could return to, at no stage did they take on her financial support in any realistic sense or commit to providing her with somewhere free to "*live in*". Up until the age of 18 they had not been responsible for her basic financial support and once she turned 18 she seems to have largely supported herself through vacation work and, while studying, Student Loan living expenses payments. Any free accommodation and food that she received over vacation periods and at other times when she might have visited were trivial and certainly do not amount to "*financial support*" or even the provision of "*accommodation*" to any significant extent. In my view both the Secretary and the Ministry, in reaching the opposite conclusion, have placed far too heavy an emphasis on the ephemera of family life – the emotional relationship between the parties, their acceptance that, in the broad sense, she was part of the family, and her treatment of her caregivers as her "*proper*" parents. As the Ministry's own guidelines make clear that sort of consideration alone is not determinative. Unlike with natural parents, there must also be an express or at least implied acceptance of an ongoing financial responsibility before an unrelated person can be said to have put themselves in "*in the place of a parent*" for the purposes of the income testing regime in the Student Allowances Regulations.

[38] On the secondary argument that if Mr and Mrs M are nevertheless to be seen as acting in the place of her parents, StudyLink should have exercised the "*exceptional circumstances*" discretion under reg 8(1)(c) in her favour, I somewhat reluctantly accept the Secretary's view that it was not open to StudyLink to do so. I have no doubt that in the circumstances of this case imposing an expectation on Mr and Mrs M to feed and house the appellant and provide her with financial support while she is studying – if necessary until she turns 24 – would be seen by all but the most hardened bureaucrat

as unreasonable in general terms. Most people would share the obvious discomfort of the Secretary in the October 2012 decision who concluded that where, as in this case, "*the State has provided financial support for the care of the applicant until she turned 18 years … to expect the* [ex-foster parents] *to now take joint financial responsibility for the applicant when they have never previously had financial responsibility for the applicant is unreasonable."* There are, however, two obvious problems with this. First, as the Secretary in this case makes clear, the test under reg 8(1)(c) is almost certainly limited to situations where it would be unreasonable for the student to have to rely on the support of their parent(s). The wording of the regulation is, on the face of it, clear. Would it be unreasonable "*for the student to live with a parent and receive financial assistance from any parent*"? Even if this could be seen as ambiguous it is clear that reg 8 is deliberately restricted to a very narrow range of "*exceptional*" situations. Permitting parents to avoid the Student Allowance income testing regime by arguing that it is unreasonable to expect them to support their adult child despite the fact that they may well be able to afford to do so, would arguably broaden the ambit of the ICG well beyond what was intended. Secondly, even if the unreasonableness test can be interpreted as also applying to the parent, for the discretion to arise at all reg 8(1)(c) requires first that the circumstances be "*exceptional*". The guidelines describe "*exceptional circumstances*", in my view correctly, as "*circumstances that are far beyond what is ordinary*". Whether or not you accept the Secretary's finding in the October 2012 decision that the circumstances in that case were "*exceptional"* – and insofar as I understand the reasoning behind it, I find it difficult to accept that they were – in this case there is nothing particularly out of the ordinary about the situation the parties are in. Continuing to provide parental contact and support into early adulthood after a lengthy period of foster care may only happen infrequently but when it does it is not exceptional. Rather it is the natural, human outcome of a successful placement. Accordingly I am satisfied that if Mr and Mrs M could be described as her parents in terms of the reg 2 definition the appellant's ICG application would have to fail.

[39] Once Mr and Mrs M are removed from the equation as "*parents*", the appellant's ICG application for 2017 and, unless her circumstances change significantly, any application she might make in succeeding years, must succeed. The requirements of reg 8 are clearly satisfied insofar as her biological parents are concerned. She has not lived with them since 2001 and has not received any significant financial support from them. And it appears to be accepted by both StudyLink and the Secretary that any suggestion that she should now live with and receive financial assistance from them would be totally unreasonable. She is accordingly eligible for an ICG.

The policy guidelines and guardianship

[40] Although it is not in issue in this appeal, the question of whether appointed guardians can be "*parents*" for allowance purposes appears to be a source of considerable confusion within both StudyLink and the Ministry. Prior to 2012 the definition of "*parent*" in reg 2 specifically included guardians as well as persons "*acting in place of a parent*". In 2012 the Regulations were amended to remove guardians from the definition. The precise reason for this amendment is unclear to me. However it appears to be the result of either a misconception about the nature and mechanics of guardianship within the Ministry or of a simple transposition of guardians for caregivers. In the current guidelines the Ministry states that people "*appointed as guardians by the Chief Executive of Oranga Tamariki or an agency recognised by the Oranga Tamariki Act 1989* [or] *the family court under the Care of Children Act 2004"* are not regarded as parents *"because the responsibility for the student has been assumed by the body that appointed them rather than the caregivers";* see [13] above. In addition to the fact that

this statement clearly conflates "*guardians*" with "*caregivers*", it is simply incorrect. Guardians can only be appointed by the Family Court, not the Ministry or any of its agencies, and in doing so the Court does not "*assume"* or "*retain*" any "*responsibility*" for the child over and above it's normal jurisdiction. Indeed, the whole point of guardianship (at least when it is coupled with a caregiving agreement and/or a custody/protection order) is precisely the opposite – it is to confer the responsibility for the child squarely on the person appointed by conferring on them all the "*duties, powers, rights, and responsibilities that a parent of the child has in relation to the upbringing of the child*": see s 15(1) of the *Care of Children Act 2004*. Where the guardianship is joint – as will generally be the case – this responsibility must certainly be exercised jointly in consultation with the other guardian(s) (usually the Ministry and the natural parents) where major decisions need to be made, but that is all. Decisions relating to the child's day-to-day living arrangements remain exclusively with the caregiving guardian: see s 16(5), (6) of the *Care of Children Act 2004*. It is not exaggerating to say that, given the nature and responsibilities of their role, guardians, and especially sole and/or caregiving guardians, are the archetypical "*persons acting in place of a parent".* That is what they do. On this basis the removal of guardians from the definition of "*parent*" in 2012, whatever the Ministry's motivation at the time, can perhaps be best seen as simply the removal of a redundant term, having no actual effect on the ambit of the definition.

[41] The incoherence of the current Ministry guidelines in this regard is nowhere better illustrated than in their treatment of the position of caregivers under the "*Home for Life*" initiative. The guidelines provide that:

> *A guardian who receives "Home for Life" assistance from Oranga Tamariki will generally be a "parent" for Student Allowance purposes. In most cases Home for Life caregivers will become the legal guardian of the student outside of the situations described above, and will therefore meet the definition of being a person acting in place of a parent of that student.*

It is entirely unclear what "*outside of the situations described above"* is referring to here. There are no situations "*outside"* of those described above. The only way caregivers can become guardians is if they are appointed as such by the Court in the same way as any other guardian – which is what happens in a successful "*Home for Life*" placement. However the statement that such caregivers will "*meet the definition of being a person acting in place of a parent*" and that this is because they have "*become the legal guardian"* of the child, while in blatant contradiction of the current guideline, is undoubtedly correct. At least where the Home for Life arrangement has proceeded to the "*Home for Life Achieved"* stage, the caregiver/guardian has exclusive day-to-day care of the child plus all the "*duties, powers, rights, and responsibilities"* of a natural parent. They are, in other words, as fully in the shoes of the natural parents as they can be short of adoption.

[42] On the other hand, people, like Mr and Mrs M, who were simply appointed/contracted as "*caregivers*" by the Ministry, with or without a formal custody/protection order, are in exactly the position that the current guidelines erroneously attribute to "*guardians*". They are required to provide everyday care but "*responsibility*" for the child remains with the appointing/employing agency which retains guardianship, meets all caregiving costs and, in theory at least, makes the basic parental decisions. As such they are neither "*parents*" nor "*persons acting in place of a parent*" – although clearly once the caregiving arrangement comes to an end the situation may change if they then deliberately take on full parental responsibility for the child. Similarly

if caregivers agree to be appointed as guardians at any stage. At that point they acquire all the "*duties, powers, rights, and responsibilities*" of a natural parent and will be "*acting in place of*" that parent. In this context I note that the Ministry's guidelines prior to the 2012 amendment excluded "*caregivers*" from the definition of "*parent*" in identical wording to the current exclusion of "*guardians*" – the definition "*does not include people appointed as caregivers*" by the Ministry or one of its agencies because "*the responsibility is assumed by* [the appointing agency] *rather than the caregivers*". This statement is, with all due respect, as correct today as it was before the unfortunate post-2012 substitution of "*guardians".* The current guidelines must be amended accordingly.

[43] While it is inarguable that the Chief Executive has sole responsibility for the day-to-day operation of StudyLink and for setting the policy guidelines that govern the decisions of its staff, those policies and guidelines must be sanctioned by the regulations. The current policy excluding guardians from the definition of "*parent*" is not only incoherent in its own terms, it is also clearly inconsistent with the requirements of reg 2. At the very least sole guardians and those responsible for the everyday care of the child are within the statutory definition of "*acting in place of a parent*". The policy excluding them from the definition is accordingly ultra vires and unlawful and needs to be addressed by the Ministry as a matter of urgency. At the same time, as noted at [32] above, the Ministry also needs to readdress the balance and wording of the guidelines as a whole, to take account of the proper interpretation of "*any person acting in place of a parent of that student"* and to give due weight to the central requirement of a demonstrated assumption of some financial "*responsibility*" on the part of the supposed parent.

The appeal is allowed. The decision of the Secretary on review to uphold StudyLink's decision to decline the appellant's application for an Independent Circumstances Grant for the 2017 academic year is quashed.

A decision to grant the appellant's application for an Independent Circumstances Grant for the study year 30 January 2017 to 24 November 2017 is substituted.

DATED at WELLINGTON this 4th day of February 2019

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Neil Cameron
Student Allowance Appeal Authority