

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Upper Tribunal case No. CG/838/2015

Before: Mr E Mitchell, Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal (2nd December 2014, Middlesbrough, file reference SC 227/14/00641) involved the making of an error on a point of law. It is **SET ASIDE** under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and under section 12(2)(b)(ii) of that Act the decision of the First-tier Tribunal is re-made as follows:

1. The Secretary of State's decision of 24th September 2013 to refuse Mrs M's claim for carer's allowance is set aside.
2. Mrs M was not receiving full-time education when she claimed carer's allowance, nor was she receiving full-time education at the date of the Secretary of State's decision.

The Secretary of State is directed to re-decide Mrs M's claim for carer's allowance on the basis that she was not receiving full-time education neither when she claimed that benefit nor when he originally decided her claim.

REASONS FOR DECISION

Introduction

1. This appeal concerns the entitlement of students to carer's allowance during an interruption in their full-time studies.
2. Regulation 5 of the Social Security (Carer's Allowance) Regulations 1976 specifies circumstances in which a person shall be treated as receiving full-time education. The regulation also deems a period of full-time education to continue throughout any "temporary interruption" in a student's attendance at a course of full-time education. The question in this appeal is whether a student who deferred her full-time course for a year was undergoing a temporary interruption in attendance. If so, she would remain disentitled to carer's allowance.
3. During the course of these proceedings, the Secretary of State for Work & Pensions changed his position concerning the legal meaning of "temporary interruption" in the 1976 Regulations. He concedes the appellant's interruption to her studies was more than temporary. I agree with the Secretary of State that the First-tier Tribunal misdirected itself in law in deciding that regulation 5 of the 1976 Regulations deemed Mrs M to be receiving full-time education during her period of deferral. The parties invite me to find that she was not receiving full-time education. I agree she was not and this is reflected in my above decision.

4. A hearing was held at North Shields on 24th February 2016. The Secretary of State was represented by Mr J Cooper, solicitor, of the Government Legal Department, and Mrs M by Mr M McCrosan, a volunteer adviser for Age UK Teeside. With the parties' agreement, I issued directions for further written submissions after the hearing and the appeal then took an unexpected course. The Secretary of State's supplementary submission was drafted by Mr T Buley of counsel who informed the Upper Tribunal that the Secretary of State now supported the appeal and the DWP was considering revising its guidance about temporary interruptions to a course of full-time education.

Background

5. Mrs M had enrolled on a B.Sc. degree course in occupational therapy at Teesside University. On 25th June 2013, an administrator at the University wrote to Mrs M stating "I write to confirm you have been interrupted from your studies as of 21 June 2013" and went on:

"You will need to contact me at least 8 weeks prior to your proposed resumption date stating that you still wish to resume your studies. Once I have received this confirmation I will notify your Pathway Leader who will arrange a resumption meeting for you. This will enable you to discuss your return and provide you with information regarding for example, the timetable and placement information."

6. The University's letter does not state that a year's deferral had been agreed but Mrs M's evidence that it had was not disputed.

7. On 14th September 2013, Mrs M claimed carer's allowance in respect of her disabled son. In her claim form, she wrote she wished to claim from 30th July 2013. Mrs M gave the following information about her degree course:

(a) it was full-time;

(b) she would spend 30 hours per week on work included in the curriculum of the course;

(c) she started the course on 29th September 2011 and expected to complete it on 30th May 2015;

(d) she was on a "one year deferment" to care for her disabled son and expected to return to her studies in April 2014.

8. On 24th September 2013, the Secretary of State refused Mrs M's claim because she was "in full-time education".

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9. Mrs M appealed to the First-tier Tribunal (FtT). Dated 10th May 2014, Mrs M's notice of appeal argued her deferment was not a mere temporary interruption in her studies. She had deferred the whole of academic year 2013/14 and that was not a temporary interruption. Mrs M went to say that, since she made her claim, she had further extended her period of deferral and intended to return to University in April 2015 but this was dependent on her son's care needs. Mrs M said she had "kept her name" on the course to avoid making a fresh application for admission to her degree course.

10. Mrs M's then representative, Stockton & District Advice & Information Service, also supplied the FtT with written submissions which argued her year-long deferment could not be considered a temporary interruption in attendance, an argument which was supported by reference to the meaning of "temporary" in the residence and presence provisions of the Social Security (Carer's Allowance) Regulations 1976 ("1976 Regulations"). The representative also submitted that denying Mrs M carer's allowance was a "disproportionate interference" with her rights under Article 8(1) of the European Convention on Human Rights because it would require her to seek employment rather than care for her severely disabled son. The representative did not rely on the anti-discrimination provisions of Article 14 of the Convention.

Carer's Allowance legislative framework

11. Section 70(3) of the Social Security Contributions and Benefits Act 1992 ("1992 Act") provides that "a person shall not be entitled to [a carer's allowance] if he is...receiving full-time education". Section 70(8) confers power on the Secretary of State by regulations to "prescribe the circumstances in which a person is or is not to be treated for the purposes of this section as...receiving full-time education". These powers are exercised in the Social Security (Carer's Allowance) Regulations 1976.

12. Regulation 5(1) of the 1976 Regulations provides that "a person shall be treated as receiving full-time education for any period during which he attends a course of education at a university...for twenty-one hours or more a week". Regulation 5(2) contains rules for calculating hours of attendance but I need not mention these because Mrs M accepted that, while attending her course, she was doing so for more than twenty one hours a week.

13. Regulation 5(3) is the focal point of this appeal. It provides:

"In determining the duration of a period of full-time education under paragraph (1) of this regulation, a person who has started on a course of education shall be treated as attending it for the usual number of hours per week throughout any vacation or any temporary interruption of his attendance until the end of the course or such earlier date as he abandons it or is dismissed from it."

14. It can be seen that :

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- (a) section 70(8) permits regulations to prescribe circumstances in which a person is, or is not, to be treated as receiving full-time education;
- (b) regulation 5(1) prescribes circumstances in which a person is to be treated as receiving full-time education (and hence disentitled to carers allowance). Regulation 5 does not expressly prescribe circumstances in which a person is not to be treated as receiving full-time education (and hence entitled to carer's allowance, if the other entitlement conditions are met);
- (c) in order for regulation 5(1) to apply, there must be a period during which a person attends a course of education for the prescribed minimum weekly hours;
- (d) regulation 5(3) does not operate independently. It plays a supporting role to regulation 5(1) (in determining the duration of a period of full-time education under regulation 5(1));
- (e) regulation 5(3) applies once a person has "started" a course;
- (f) regulation 5(3) is a deeming provision. It deems a person to be attending a course for the usual number of weekly hours throughout a vacation or "temporary interruption". The legislator was obviously concerned that, without this provision, student carers might be able to obtain carer's allowance during vacations and temporary interruptions in attendance;
- (g) regulation 5(3) continues to apply "until" one of three things happens: the course ends, the person abandons the course or is dismissed from it. The last two are expressly limited to cases where abandonment or dismissal precedes the course ending but I doubt that was necessary. Since regulation 5(1) only applies in the first place while a student attends a course, it is difficult to see why the legislator thought it necessary to specify that the deemed period of attendance ended if, before the course itself ended, the person abandoned the course or was dismissed from it (which must mean the person has ceased to attend the course of education).

The First-tier Tribunal's decision

15. The FtT dismissed Mrs M's appeal and decided that she was not entitled to carer's allowance because she was treated as receiving full-time education. The crux of its reasoning is found in the following paragraphs of its statement of reasons (the emphasis is the FtT's):

"7. A person who has *started* on a course of education...shall be treated as attending it for the usual number of hours per week (for [Mrs M] this was 30 hours) throughout any vacation or any temporary interruption of his/her attendance *until the end* of the course or such earlier date as s/he abandons it or is dismissed.

8. The words "temporary interruption" are not defined in the legislation and have to be given their ordinary, everyday meaning. A duration of a period of full-time education culminates at the end of the course or such earlier date as when a course is abandoned or the relevant person is dismissed from it. In the opinion of the Tribunal a temporary interruption is an interruption which is encompassed between the start of the course and the occurrence of one of the 3 eventualities mentioned at the end of Regulation

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5(3) of [the Regulations] i.e. the end of the course, or if earlier, the date a course is abandoned, or when the relevant person is dismissed from the course.

...12. In the opinion of the Tribunal at the date of the decision the course had not come to an end, nor had it been abandoned, nor had [Mrs M] been dismissed from it i.e. none of the 3 eventualities in Regulation 5(3)...had been satisfied, accordingly, [Mrs M] fell to be treated as being in receipt of full-time education..."

16. So far as Mrs M's human rights argument was concerned, the FtT found that the carer's allowance legislation did not interfere with her Article 8 rights but, if it was wrong about that, any interference was "proportionate and justified". The Tribunal gave no reasons for those conclusions (but the human rights arguments put forward on Mrs M's behalf were not really supported by any reasoning either).

Proceedings before the Upper Tribunal

17. Mrs M sought the Upper Tribunal's permission to appeal to it against the FtT's decision. Her representative argued that the FtT misinterpreted regulation 5 of the 1976 Regulations. Its approach effectively drew no distinction between temporary and other interruptions to a person's attendance on a course. The FtT's interpretation meant that any person whose attendance was interrupted remained disentitled until the person abandoned or was dismissed from the course. That cannot have been Parliament's intention. I granted Mrs M permission to appeal on that ground and, more generally, so that the Upper Tribunal could address the legal meaning of regulation 5.

18. I refused Mrs M permission to appeal on the ground that the FtT gave inadequate reasons for rejecting her Article 8 arguments. I did not consider Mrs M had a realistic prospect of persuading the Upper Tribunal that Mrs M's Article 8 of the European Convention on Human Rights had been interfered with by denying her carer's allowance. At this stage, no argument had been advanced by reference to Article 14 of the Convention.

19. I conducted a hearing of Mrs M's appeal on 24th February 2016 at North Shields court centre. It seemed to me that the argument advanced at the hearing by Mrs M's representative was really a complaint of discrimination. Since Article 14 of the Convention had not previously featured in the proceedings, and I thought the arguments being presented were not fanciful, I adjourned so that further written submissions about the relevance of Article 14 could be supplied. Neither representative objected.

The further submissions

20. The Secretary of State's supplementary submission was drafted by Mr Tim Buley of counsel who had not previously been involved in the case. In this submission, the Secretary of State re-visited his interpretation of regulation 5. This change of position resulted in the

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Secretary of State inviting the Upper Tribunal to allow Mrs M's appeal and decide that she was not disentitled to carer's allowance by virtue of receiving full-time education.

21. I shall set out the relevant parts of Mr Buley's submission in full:

"First, [the FtT's approach] does not take full account of the reasoning of the Court of Appeal in *CAO v Clarke and Faul*, Court of Appeal, 14 February 1995, in which the Court of Appeal held that the *differently worded* provisions relating to income support did not prevent an intercalating student from claiming income support during the period of intercalation. The wording of the relevant provision in *Clarke* was different, and the Court of Appeal's judgment cannot be simply read over to the current case. There, instead of the words ["throughout any vacation or temporary interruption of his attendance"] one found the words "any period of term or vacation within it". The Court of Appeal held that those words did not apply to a situation where a student had undertaken a formal interruption of their studies at the start of an academic year, because in that case they would not be within a "period of term" nor a "period of vacation". That does not directly answer the different question of what is meant by a period of "temporary interruption" in reg. 5(3).

However, one of the reasons which the Court gave for taking the approach which it did was that, on the alternative approach, the quoted words performed no function. They could be deleted...

That point has force here too. If the words "throughout any vacation or temporary interruption of his attendance" were deleted from reg. 5(3), its meaning would be clear. It would exclude any student from claiming CA [carer's allowance] unless and until the course was finally concluded, including during any period of formal suspension of the course such as a year of intercalation.

As the Court of Appeal's judgment in *Clarke and Faul* shows, it is therefore a legitimate approach to the construction of reg. 5(3) to see whether the reference to vacation and temporary interruption can have some additional meaning or effect ascribed to it. There is no absolute rule that the words must be given some separate effect.

On reflection, and having regard to the overall purpose of the rule, the Secretary of State accepts that the phrase "temporary interruption" can indeed be given a more particular meaning than that adopted by the FTT in this case. Like many words of English, the word "temporary" is capable of having a range of meanings. It can, as the FTT held here, mean a period that is temporary in the sense simply of not being permanent, so that a temporary interruption occurs wherever there is an expectation that the activity in question will be resumed. However, it is also, especially in common parlance, capable of having a more circumscribed meaning, as being of relatively short

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duration (as the Appellant points out by reference to *Ford v Warwickshire CC* [1983]). It may also have a range of meanings between those extremes.

A “temporary interruption”, such as may occur where a person’s studies are interrupted by something during the course of the academic year, may be distinguished from a formal period of intercalation at the start of an academic year, where that has been agreed with and ratified by the university authorities in advance of the commencement of that academic year. Thus, in the context of this regulation, the Secretary of State takes the view that where the following criteria are met, an interruption in studies will not properly be described as temporary, and accordingly nothing in reg. 5(3) will exclude the person from claiming CA:

- (i) There must be a formal agreement with the education provider that the person can defer the start of a particular academic year to some later academic year, so that they defer the whole of that academic year to a later date;
- (ii) That agreement must be ratified and accepted by the education provider, and agreed in advance of the start of the academic year in question;
- (iii) The period of interruption must be for a period of 1, or more, full academic years;
- (iv) The student must take no part in academic or vocational activities relevant to their course during the period of deferral, including by carrying out field work, course work or work experience relevant to the completion of the course during the period in question.

The Secretary of State accept that where these criteria are met (as they appear to be in this case), the person would not be undertaking a merely “temporary interruption” of their studies, and hence that reg. 5(3) would not require them to be treated as a full-time student. The Secretary will review, and amend as appropriate, the CA guidance to clarify the circumstances in which an interruption is or is not temporary for the purposes of reg. 5(3).”

22. Mr Buley also drew my attention to the Court of Appeal’s decision in *Secretary of State v Deane* [2011] 1 WLR 743 in which the Court held regulation 5(1) was not exhaustive so that a person who fell outside regulation 5(1) might nevertheless be found to be in full-time education.

23. Mr McCrossan did not dispute the Secretary of State’s concession that regulation 5 did not apply to Mrs M. However, he argued for a wider interpretation of “temporary interruption” to encompass, in the case of carers, any interruption in attendance during which the student had been unable to arrange for another person to care for the disabled person.

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24. I hope I do not cause Mr McCrosan offence by not dealing with his human rights arguments. In the light of the Secretary of State's change of position, it is not necessary to decide the Article 14 point. In any event, if the Secretary of State's interpretation of regulation 5(3) is correct, that significantly alters the legal backdrop to the application of Article 14 whereas Mr McCrosan's submissions are premised on a carer in Mrs M's being disentitled to carer's allowance.

Conclusion

25. I decide that the FtT erred in law in its interpretation of regulation 5(3) of the 1976 Regulations. I should, however, record that I agreed with Mr Buley's when he referred to the "clarity and apparent force of the reasoning" of the FtT's statement of reasons.

26. I point out that I do not consider it is appropriate for me to authorise or approve the Secretary of State's proposed criteria for deciding whether a temporary interruption exists. I shall restrict myself to considering whether, in Mrs M's case, the FtT erred in law. It follows that I shall not be accepting Mr McCrosan's invitation to recommend changes to those criteria. That is something he will need to take up with the Department for Work & Pensions.

27. In considering whether a student is disentitled to carer's allowance, the starting point is regulation 5 of the 1976 Regulations. If a person falls within its terms that is the end of the matter. If not, the student might nevertheless be disentitled by section 70(3) of the 1992 Act (*Deane*).

28. Regulation 5(3) is not a straightforward provision to interpret. But it does have a context and a purpose. Its aim is to prevent certain student carers from obtaining carer's allowance during vacations and temporary interruptions of course attendance.

29. At the hearing, I suggested to the parties that the underlying rationale for regulation 5 might be two-fold: (a) full-time education was considered by the legislator to be incompatible with full-time caring responsibilities; and (b) students can access a separate state-devised scheme in order to obtain an income while studying so they should not also be able to obtain carer's allowance. In my post-hearing directions, I required the parties' written submissions to address the rationale for section 70(3) of the 1992 Act and regulation 5. The Secretary of State submitted that the rationale was that "persons in full-time education have access to a system of grants and loans which are provided for the benefit of persons in full-time education, and that they have taken a voluntary decision to further their education and long term prospects". This was not disputed by Mr McCrosan for Mrs M.

30. The legislator could have simply referred to an "interruption" in attendance but chose not to do so. That suggests a legislative assumption that a temporary interruption differs from other types of interruption. But that raises its own complications in this context.

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31. The Oxford English Dictionary (OED) defines “temporary” as “lasting for only a limited period of time; not permanent”. The OED defines the verb “interrupt”, from which “interruption” is of course derived, as “stop the continuous progress of an activity or process”. If something is permanently interrupted, one expects it never to resume. If a person’s attendance on a course is permanently interrupted, that must mean they no longer attend the course and so clearly cannot be in full-time education. But if the legislator’s purpose, in choosing the term “temporary interruption”, was to draw a distinction between permanent and non-permanent interruptions, what was the point of that? The same result could have been achieved by simply referring to an “interruption” in attendance on a course (since a permanent interruption would mean attendance has ceased).

32. If it is possible to do so, every legislative word should be given a meaning. It should not lightly be assumed that a word or term is superfluous. As the sixth edition of *Bennion on Statutory Interpretation* (Lexis Nexis) says, at p.1031, “on the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment”.

33. In the light of the purpose of regulation 5, in my view the legislator, in selecting the term “temporary interruption”, intended to draw a distinction between different types of (non-permanent) interruptions. I accept that this does not flow neatly from the statutory wording used but nor is regulation 5 particularly neatly drafted. As I have already mentioned, it is difficult, for example, to see why the legislator thought it was necessary to specify that abandonments or dismissals only counted, in determining the period of deemed attendance, if they occurred before the course had ended.

34. I have decided that the legislator used the term “temporary interruption” to draw a distinction between cases where (a) an interruption in attendance, by its nature, means a person can no longer fairly be considered in fact to be actively pursuing a full-time course of study and (b) other interruptions the nature of which means the person can fairly be said still to pursue a full-time course of study. These other interruptions are temporary interruptions for the purposes of regulation 5.

35. This interpretation avoids construing regulation 5(3) so that the adjective “temporary” serves no purpose. It also accords with – or at least does not undermine – the legislative purpose in disentitling full-time students from carer’s allowance. It does not promote potentially unstable caring arrangements where the carer tries to juggle full-time study with full-time care. And I suspect this interpretation may have some symmetry with the student funding rules. While I have not had any submissions on this, in Mrs M’s case at any rate I note that her deferral meant she could no longer access the special funding arrangements for her degree course. As mentioned above, the parties agreed that one purpose of the legislation was to prevent student carers from accessing dual funding regimes.

Disposal

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36. I allow this appeal and decide that the First-tier Tribunal misdirected itself in law. Its interpretation of “temporary interruption” was incorrect. I set aside its decision for an error on a point of law.

37. Both parties submit that I should re-make the First-tier Tribunal’s decision and, in so doing, find that, at the date of the decision on Mrs M’s claim, she was not a full-time student. I do so decide. When Mrs M claimed carer’s allowance, she had arranged a year long deferral with her University. At that point, she could not fairly be considered to be actively pursuing a course of full-time education. I therefore find that she was not receiving full-time education and this is reflected in the decision at the beginning of these reasons.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
7th September 2016