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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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2013 No 67761/01

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**ON APPEAL FROM THE HIGH COURT OF JUSTICE IN
NORTHERN IRELAND**

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

O'Kane's (Nadine) Application [2014] NICA 80

**IN THE MATTER OF AN APPLICATION BY NADINE O'KANE
FOR JUDICIAL REVIEW**

Before: Morgan LCJ, Girvan LJ and Gillen LJ

GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal by Nadine O'Kane, a full-time university student, from the judgment and order of Treacy J given and made respectively on 1 April 2014 dismissing the appellant's application for judicial review of a decision of the Legal Aid Assessment Officer ("LAAO") who calculated the appellant's legal aid contribution towards the costs of proceedings brought by her on the basis that a student loan paid to the applicant represented part of her disposable income.

[2] The appellant, who suffered a scarring injury to her forehead in a fall on 8 August 2011, applied on 10 February 2012 to the Legal Services Commission for legal aid under the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 ("the 1981 Order") to fund legal proceedings in the High Court for damages for her personal injuries. At the material time the appellant was in receipt of funding under the Education (Student Support) (Northern Ireland) Order 1998. This comprised a tuition fee loan of £3,375; and maintenance payments which were paid, firstly, as a maintenance grant of £3,475 and, secondly, as a maintenance loan of £1,918 paid in

three equal instalments of £632.94 on 26 September 2011, 30 December 2011 and 16 April 2012.

[3] In calculating the appellant's disposable income, the LAAO disregarded the tuition fee loan as this was paid directly to the University rather than to the appellant. He determined that the 'maintenance loan' and the 'maintenance grant' elements (minus a notional figure of £693 for books and travel) were 'income' for the purpose of Article 14 of the 1981 Order. Given the level of the appellant's disposable income (which included some income from earnings) the LAAO assessed that the appellant should make a contribution of £1,557 towards the cost of funding the legal proceedings.

The relevant legislation

[4] Under the 1981 Order a person may qualify for legal aid in connection with court proceedings if his disposable income does not exceed the prescribed limit. Depending on the level of his disposable income the person may be required to pay a contribution towards his legal costs. Article 14 of the 1981 Order provides for the "assessment of disposable capital and income and of maximum contribution" for legal aid applications, stating, *inter alia*:

"(1) References in this Part to a person's disposable income or disposable capital shall be taken as referring to the rate of his income or amount of his capital after making-

(a) such deductions as may be prescribed in respect of-

- (i) the maintenance of dependants;
- (ii) interest on loans;
- (iii) income tax;
- (iv) rates;
- (v) rent; and
- (vi) other matters for which the person in question must or reasonably may provide; and

(b) such further allowances as may be prescribed to take account of the nature of his resources.

(2) Regulations may make provision as to the manner in which the rate of a person's income and the amount of his capital are to be computed for the purposes of paragraph (1), and in particular for-

- (a) determining whether any resources are to be treated as income or capital; and
- (b) taking into account fluctuations of income.”

[5] The Legal Aid (Assessment of Resources) Regulations 1981 (“the 1981 Regulations”) were made under Article 14 of the 1981 Order. Regulation 4 provides that the disposable income and disposable capital of the person concerned shall respectively be determined in accordance with the provisions of Schedules 1 and 2 to the Regulations. Regulation 2 defines “income” as including:

“benefits and privileges; the income of the person concerned includes any sum payable to that person for the purpose of the maintenance of a child including any sum so payable under the order of a court or under any instrument”.

[6] In so far as is relevant to the present proceedings, Schedule 1 to the 1981 Regulations provide:

“1. The income of the person concerned from any source shall be taken to be in the income which that person may reasonably expect to receive (in cash or in kind) during the period of computation, that income in the absence of other means of ascertaining it being taken to be the income received during the preceding year.

2. The income in respect of any emolument, benefit or privilege receivable otherwise than in cash shall be estimated at such a sum as in all the circumstances is just and equitable.

3.-(1) The income from a trade, business or gainful occupation other than an employment at a wage or salary shall be deemed to be the profits therefrom which have accrued or will accrue to the person concerned in respect of the period of computation ..

...

6. There shall be disregarded-

- (a) payments made under section 64 of, or paragraph 4(2) of Part II of Schedule 8 to, the Social Security Contributions and Benefits (Northern Ireland) Act 1992 in respect of attendance allowance;

- (b) payments made under section 104 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 in respect of constant attendance allowance paid as an increase to a disablement pension;
- (c) payments made under the Social Security Contributions and Benefits (Northern Ireland) Act 1992 in respect of:
 - (i) disability living allowance;
 - (ii) any payment made out of the social fund;
- (d) so much of any back to work bonus received under Article 28 of the Jobseekers (Northern Ireland) Order 1995 as is by virtue of that Article to be treated as payable by way of a jobseeker's allowance;
- (e) a payment made under Article 15A of the Health and Personal Social Services (NI) Order 1972;
- (f) armed forces independence payment under the Armed Forces and Reserve Forces (Compensation Scheme) Order SI 2011/517.

...

14. In computing the income from any source there shall be disregarded such amount, if any, as the assessment officer considers to be reasonable having regard to the nature of the income or to any other circumstances of the case."

[7] The Education (Student Support) Regulations (Northern Ireland) 2009 as amended make provision for the payment to eligible students of (a) sums for fee support by way of fee loans (b) maintenance grants for living and other costs and (c) loans for living costs under Part 6. Under Regulation 72 the loans for living costs are payable in respect of three-quarters of the academic year. The payments are all subject to the fulfilment of qualifying conditions. Loans for living costs are payable in accordance with Regulation 104. Regulation 104 provides that the Department may make payment of support loans under Part 6 by instalments and payments are made in such manner as the Department considers appropriate. It is clear that the payments effected pursuant to Part 6 are intended as support for the day to day living costs of the eligible student who seeks the loan.

[8] Payments effected by way of loans under the 2009 Regulations are repayable subject to the terms and conditions set out in the Education (Student Loans)

(Repayment) Regulations (Northern Ireland) 2009. Under Regulation 11(2) a borrower is not required to repay any part of the student loan before the start of the following tax year commencing on 6 April after a borrower ceases to be eligible for financial support under regulations whether by reason of having completed that course or otherwise. The Regulations contain detailed provisions for the way in which loans are to be repaid over time with interest. The liability ceases when the borrower dies; receives a disability related benefit and is unfit to work; and in the case of post 2006 student loans on the 25th anniversary of the date on which the borrower becomes liable to repay the student loan. The obligation to repay is dependent on the student's earnings exceeding the amount prescribed from time to time by regulations.

[9] The appellant submitted that periodical receipt of loans did not qualify as income. She contends that it is necessary to examine the nature of the repayment obligation which in the present case comprises a strict requirement to repay with compound interest. She argues the fact that repayment is contingent on her achieving a basic earning threshold does not deprive the loan of the characteristic of a certain obligation. Once the earnings threshold is reached the requirement to repay is certain and immediate. The respondent submitted that the periodically recurrent payment in the form of maintenance loan designed to meet the student's outgoings created a strong presumption in favour of it being income. He argues that in order for the appellant to overcome the authorities a loan can constitute income she must show that her loan was not received under a certain obligation of immediate repayment. However since the student loan debt only crystalizes when the appellant reaches the earnings threshold the obligation to repay does not become certain and immediate until that point in time.

[10] Treacy J rejected the appellant's argument. He held that, since the appellant, had no current liability for the student loan, it fell fairly within the ordinary construction of the term "income."

Discussion

[11] The Shorter English Dictionary definition of *income* is "the amount of money or other assets received or due to be received from employment, business, investments etc. especially periodically in the course of a year". The "etc" in that definition leaves open the width of the sources giving rise to what can be called income. The word *income* has been described as "as large a word as can be used to denote a person's receipts" (per Jessel MR in Re Huggins 51 LJ Chancery 938.) Selbourne C in Jones v Ogle 42 LJ Chancery 336 considered that "income signifies what comes in." Viscount Dilhorne in Lord Chetwoode v IRC [1977] 1 All ER 638 at 645 considered that:

"income is an ordinary word in the English language and unless the context otherwise requires it should be given its ordinary natural meaning in a statute."

Jordan CJ in the Australian case of Scott v Commissioner of Taxation [1935] 35 SR (NSW) 215 at 219 stated:

“The word income is not a term of art and what forms of receipts are comprehended within it and what principles are to be applied to ascertain how much those receipts ought to be treated as income must be determined in accordance with the ordinary concepts and usages of mankind except in so far as the statute states or indicates the intention that receipts which are not income in ordinary parlance are to be treated as income or that special rules are to be applied in assessing the tax or amount of such receipts.”

[12] Notwithstanding the proposition that the word *income* has an apparently ordinary and natural meaning, experience and decided case law shows that it is not always a straightforward task to determine whether a particular payment falls within or outside the definition of income. In Minter v Kingston Upon Hull City Council, Potter v Secretary of State for Work and Pensions [2011] EWCA Civ 1555 the court had to determine whether a lump sum payment made by local authorities to the appellants who were employees to settle claims for breach of equality pay legislation over several years constituted income which would as such fall to be taken into account in the retrospective calculation of the appellant’s past entitlement to means tested benefits (housing benefit and income based job seekers allowance). The appellants contended that the one-off payment did not have the characteristics of income and was thus capital. The respondents argued that the true characteristic of the payment was that it represented compensation for what should have been paid as income during the employees’ employment and thus it was to be characterised as income. The Court of Appeal accepted the latter argument. Thomas LJ stressed that the first task was to determine the true characteristic of the payment in the hand of the recipient and it was necessary to examine why the sum was being paid. On that approach in that case the sum in question was clearly compensation for past income and thus had the characteristics of income.

[13] In Morrell v Secretary of State [2003] EWCA Civ 1526 the question arose as to whether monies received by the appellant from her mother towards rent and other living expenses to help her out following her divorce fell to be considered as income even though it was not in dispute that the monies were made to her by way of loan to be repaid by the appellant when she was able to find employment. IOUs to that effect were signed annually. Richards LJ giving the judgment of the court stated at paragraphs [33] and [34]:

“[33] Subject to the effect of the repayment obligation, I think it clear that the sums received by the appellant from her mother, being regular monthly receipts towards her

rent and other living expenses, have the character of income. The fact that they were loans and therefore subject to a repayment obligation does not automatically give them a different character. As with the student grant in Leeves, so with the loan it is necessary to examine the nature of the repayment obligation. I accept that, in accordance with the reasoning in Leeves a sum received under a certain obligation of immediate repayment would not amount to income. But it is difficult to envisage anything less certain or immediate than the repayment obligation in the present case. On the basis of the mother's evidence, the sums will be repayable by the daughter either "gradually as her problems decrease" or "when she is able to find employment". In reality they might never be repayable at all since the conditions for repayment might not arise or the mother might convert the loans into gifts at some future date (which given the family relationship must be viewed as a realistic possibility). In any event the obligation to repay is an uncertain and future obligation. In my view that is not sufficient to deprive the receipts of their character as income.

[34] If there were otherwise any doubt about the matter, then in my view reference to the statutory scheme would strongly favour the conclusion that these receipts were income. Income support is a means tested benefit designed to meet a person's essential needs on a weekly basis. These monies were provided to the appellant and were used by her, for the specific purpose of meeting her recurrent needs throughout the relevant period. It will be contrary to the purpose of the legislative scheme if such payments fell to be excluded from the calculation of income when determining entitlement to benefit."

[14] In the case of Leeves v Chief Adjudication Officer [1998] All ER (D) 558 the claimant was awarded income support. Subsequently she received a cheque from the council's local education department as his student grant to cover the summer term. He immediately spent the money to pay off debts. He then abandoned the course and asked the benefit agency to review his award on the ground that he was no longer a student. The Adjudication Officer reviewed the award and held that his income from the local Education Department fell to be taken into account. The court concluded that, when considering the position as it stood before 24 May the date when the money was called in, the Adjudication Officer was correct in deciding that the grant fell to be treated as income of the claimant. The potential obligation to repay in the event of abandonment of the course did not give rise to an immediate

liability. However, following the demand made by the council on 24 May the claimant came under an obligation to make an immediate repayment in respect of the grant and that part of the claimant's grant required to be taken into account over the weeks which followed. It lost its character of income on the ordinary understanding of the word. The decision in Leeves recognised that the grant initially fell to be treated as income but when the debt arose from the giving of a notice to repay the sum immediately it lost its character as income. The Leeves decision did not address the question arising in the present case, namely whether the money paid as student loan to the appellant student for her support fell to be treated as income during the period of its receipt and use before there was any obligation to repay the money under the Repayment Regulations.

[15] As posed by Thomas LJ in Minter, the question arises as to what was the true characteristic of the money paid by way of support to the appellant under Part 6 of the 2009 Regulations when received. It is clear that no immediate debt arose as a result of the money being paid under Part 6 of the 2009 Regulations. The recoverability of the loan is subject to conditions which, why likely to be fulfilled, are not inevitable. Death, incapacity, low income or bankruptcy may result in the monies being irrecoverable. While the student is an eligible student no question of recoverability arises. The appellant student is free to use the monies paid as she chooses whether it be to provide monies to meet living expenses and rent; or to buy an asset such as a car; or to discharge outgoings like legal fees in pursuing a claim. The money advanced to the appellant student as an eligible student is irrecoverable during her studentship. It represents money coming in which the appellant is as free to use as any other source of income. Accordingly we conclude that the judge below reached the right conclusion and we must dismiss the appeal.

[16] Although on the basis of her income as assessed by the LAAO the appellant was required to make a contribution in the personal injury litigation that she wished to pursue, it appears that as a matter of policy the Legal Services Commission does not demand a contribution where legal aid is granted to a party to challenge by the Legal Services Commission in respect of legal aid. This is a somewhat surprising approach and has resulted in this case in judicial review proceedings which were fully funded by the Legal Services Commission at first instance and on appeal in respect of a case where the net amount in dispute was only £917. The cost of this unsuccessful judicial review and the appeal will greatly exceed the net amount in dispute. Against the background of the limited funds available to the Legal Services Commission and the competing demands and interests of other litigants, the Legal Services Commission policy in such cases may merit reconsideration.