Neutral Citation Number: [2019] EWCA Civ 19

Case No: C1/2017/1683

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM High Court of Justice
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
BEFORE MR JUSTICE HOLROYDE
[2017] EWHC 926 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2019

Before:

LORD JUSTICE LEWISON
LORD JUSTICE FLOYD
and
SIR RUPERT JACKSON

- -

Between:

MS CECILE JAGOO	**Appellant**
- and -	
BRISTOL CITY COUNCIL	**Respondent**

- -
- -

Mr Christopher Milsom (instructed by **Avon and Bristol Law Centre**) for the **Appellant**
Mr George Mackenzie (instructed by **Bristol City Council Legal Department**) for the **Respondent**

Hearing date: 15 January 2019

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Approved Judgment

Lord Justice Lewison:

1. Ms Cecile Jagoo is a student of the University of Exeter, studying for an MSc in Educational Research as a precursor to a PhD. She lives in Bristol. The question on this appeal is whether she is entitled to a student's exemption from liability to council tax. Bristol City Council is the billing authority for council tax purposes in that city. Section 1 (1) of the Local Government Finance Act 1992 imposes upon it the statutory duty "in accordance with this Part, [to] levy and collect a tax, to be called council tax, which shall be payable in respect of dwellings in its area."

2. Section 4 (1) of the 1992 Act provides that council tax "shall be payable in respect of any dwelling that is not an exempt dwelling." A dwelling occupied by one or more residents all of whom are students is within Class N of the Council Tax (Exempt Dwellings) Order 1992. Such a dwelling is therefore exempt. Article 2 (1) of that order defines "student" as a person within the definition in Schedule 4 paragraph 1 of the 1992 Act. In its turn that paragraph says that a student is to be defined by statutory instrument.

3. Article 4 of the Council Tax (Discount Disregards) Order 1992 defines a "student" as a person undertaking "a full-time course of education", which is defined by paragraphs 3 and 4 of Schedule 1 to that order. Paragraph 4 of that Schedule (as amended by the Council Tax (Discount Disregards) (Amendment) Order 2011) provides:

> "4. (1) A full-time course of education is, subject to subparagraphs (2) and (3), one—
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> (a) which subsists for at least one academic year of the educational establishment concerned or, in the case of an educational establishment which does not have academic years, for at least one calendar year;
>
> (b) which persons undertaking it are normally required by the educational establishment concerned to undertake periods of study, tuition or work experience (whether at premises of the establishment or otherwise) —
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> (i) of at least 24 weeks in each academic or calendar year (as the case may be) during which it subsists, and
>
> (ii) which together amount in each such academic or calendar year to an average of at least 21 hours a week."

4. The problem is this. The University of Exeter certified that Ms Jagoo was registered as a part-time student studying PhD Education 4 year (Part Time), but that said nothing about the hours of study required. Ms Jagoo says that for students without any disabilities the course requires 20 hours of study per week, which is less than the requirement of paragraph (b) (ii). But Ms Jagoo suffers from dyslexia, to such an extent that it is common ground that she has a disability within the meaning of the Equality Act 2010. That has two consequences. First, she takes longer than other students to complete the work required by the course. Second, the University provides

her, at its own expense, with additional support which is not provided to students without her disability. That support consists of one hour per week of study skills in addition to the standard hours of study for her programme; and she also receives assistance with proof reading, amounting to 30 hours per year. If either or both are counted, she would satisfy the requirement in paragraph (b) (ii). Both the Valuation Tribunal and Holroyde J held that they are not to be counted; with the result that Ms Jagoo was not entitled to the student exemption. The judge's judgment is at [2017] EWHC 926 (Admin), [2017] PTSR 888.

5. In essence, the ground of their decisions was that what mattered was what the educational establishment in question *required* of its students; and that what the students actually did was not relevant. There was also a distinction to be drawn between a *requirement* and a *recommendation*. Ms Jagoo was not *required* by the University to take up the additional study skills support available to her. Moreover, the question was what the educational establishment *normally* required, which underscored the point that the activities of a particular student were not relevant.

6. In *R (Hakeem) v Enfield LBC* [2013] EWHC 1026 (Admin) Mr Nicholas Paines QC, sitting as a deputy judge of the administrative court, said at [34]:

> "The Regulations are intended to distinguish between the full-time students who, by virtue of being full-time, do not have an opportunity to earn, and part-time students who do have such an opportunity."

7. I agree; and consider that we should try, if possible, to find an interpretation of the order which advances that purpose. As Carswell LCJ said of a different regulation in *Wright-Turner v Department for Social Development* [2002] NIJB 101 (approved in *Flemming v Work and Pensions Secretary* [2002] EWCA Civ 641, [2002] 1 WLR 2322):

> "If regulation 5 is interpreted in a way which excludes from its ambit the large majority of university students, who on any ordinary classification are regarded as full-time students, then it is unlikely that the interpretation is correct."

8. Mr Mackenzie, on behalf of the Council, made it clear that it was not disputed that Ms Jagoo was in fact studying or receiving tuition for at least 21 hours per week.

9. Perhaps because Ms Jagoo represented herself before the Valuation Tribunal, and presented her case in a piecemeal fashion, there are virtually no concrete findings of fact. The judge noted that at [49]; and said that had he determined the appeal in Ms Jagoo's favour he would have considered whether to remit the case to the Tribunal for further examination of the facts. However, we have been asked to decide the point of principle using the materials assembled by Ms Jagoo, without necessarily accepting that her factual case will ultimately succeed. Before us it was, I think, common ground that if we were to allow the appeal the sensible course would be to remit the case to the Tribunal for the purpose of considering her case on the facts.

10. The relevant support which the University gives Ms Jagoo falls into two categories. First, there are 30 hours per year one-to-one study skills support, for which the

University pays £56 per hour. Second, there are 24 hours per year proof reading support for which the University pays £22.57 per hour plus VAT. Both these forms of support are provided pursuant to the University's statutory duty to make "reasonable adjustments" to take account of Ms Jagoo's disability. In a letter of 27 June 2016 the University said that Ms Jagoo was "entitled" to the study skills support; and in a further undated e-mail stated that Ms Jagoo had been "recommended both Study Skills and proofreading support".

11. Before the amendment in 2011, paragraph 4 read:

> "(1) A full-time course of education is, subject to subparagraphs (2) and (3), one-
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> (a) which subsists for at least one academic year of the educational establishment concerned or, in the case of an educational establishment which does not have academic years, for at least one calendar year;
>
> (b) which persons undertaking it are normally required by the educational establishment concerned to attend (whether at premises of the establishment or otherwise) for periods of at least 24 weeks in each academic or calendar year (as the case may be) during which it subsists, and
>
> (c) the nature of which is such that a person undertaking it would normally require to undertake periods of study, tuition or work experience which together amount in each such academic or calendar year to an average of at least 21 hours a week during the periods of attendance mentioned in paragraph (b) above in the year."

12. The 2011 amendments were preceded by a public consultation in August 2010. The consultation was prompted by changes in the way that education was delivered since the introduction of council tax in 1992, and in particular the rise of distance learning; and to cater for students enrolled on courses in other member states of the EU. The immediate driver was the decision of the court in *R (Fayad) v London South East Valuation Tribunal* [2008] EWHC 2531 (Admin) in which it was held that "attendance" meant physical attendance. The change proposed was to enable distance learning students and students enrolled on courses in other member states to benefit from council tax exemption. Having considered the responses to the consultation the government's published response in April 2011 was that it would make the necessary legislative changes "as per the consultation document".

13. Under the original version of paragraph 4 the order drew a distinction between what the educational establishment required and what the course required. The requirement of the educational authority in paragraph (b) related to the number of weeks in a year during which the student was to attend. It said nothing about the number of hours in a week during which a student was required to study. That was governed by paragraph (c); and was founded on the nature of the course; not on the requirements of the educational authority. There is nothing in the consultation paper, or the government's response to it, which gives any reason for substantively changing that part of the

definition. In *Hakeem* Mr Paines QC noted the difference in wording between the old version and the new and said at [9] that the change in wording made no difference to the outcome of the appeal before him. Neither counsel in the present case suggested that the change in wording made any difference in this case. Indeed, Mr Mackenzie submitted that there was no distinction between the requirements of the educational establishment and the requirements of the course.

14. In deciding the correct interpretation of paragraph 4 there are two competing factors to be borne in mind. The first is the need to find an interpretation which makes sense in the context of the way in which tertiary education (and beyond) is in fact organised and delivered. The second is to find an interpretation which does not impose undue administrative or investigative burdens on billing authorities. But in addition, it is in my judgment necessary to take account of Ms Jagoo's disability in so far as it impacts on how she is able to meet the requirements of the course.

15. Some matters can be dealt with at the outset, so as to clear the decks. As billing authority, the Council has a statutory obligation to levy and collect council tax in accordance with Part I of the 1992 Act. It has no discretionary power to remit tax. If that Part requires tax to be collected, the council must collect it. It follows that, in the levying and collection of council tax, the Council cannot be guilty of unlawful discrimination on the ground of disability. That is because Chapter 2 of the Equality Act 2010 (which contains the key provisions outlawing both direct and indirect discrimination; as well as a duty to make reasonable adjustments in favour of the disabled) is not contravened by a person who does anything he must do pursuant to an enactment: Equality Act 2010 Sched 22 para 1. For this purpose, an enactment includes subordinate legislation: Equality Act s 212 (1).

16. In those circumstances, arguments based on analogies with the grant of discretionary payments; and arguments based on alleged discrimination by *the Council* cannot succeed. It is not suggested that *the University* has discriminated against Ms Jagoo. On the contrary, it has recognised her disability by enabling her to have the additional study support and proof reading that she enjoys.

17. Second, some of the arguments advanced on Ms Jagoo's behalf were based on The Charter of Fundamental Rights of the European Union. Article 51 (1) of the Charter states that it applies to member states "only when they are implementing Union law". The levying and collection of local tax is not within the scope of EU law; and thus the Charter cannot apply. For the same reason I do not consider that Council Directive 2000/78/EC (the Framework Directive) applies either. Moreover, article 5 of the directive imposes duties on employers which, in this case, have been discharged.

18. Third, we are asked, admittedly as a measure of last resort, to declare under section 3 of the Human Rights Act 1998 that the Order in its current form is incompatible with Ms Jagoo's convention rights. If the court is considering the making of a declaration of incompatibility, then section 4 entitles the Crown to be given notice in accordance with rules of court. CPR Part 19.4A (1) provides:

> "The court may not make a declaration of incompatibility in accordance with section 4 of the Human Rights Act 1998 unless 21 days' notice, or such other period of notice as the court directs, has been given to the Crown."

19. The Crown has not been given any notice in this case; so a declaration of incompatibility is not an available remedy on this appeal. But the Human Rights Act is a legitimate aid to the proper interpretation of the 1992 Order.

20. Fourth, although the amendment to the 1992 Order, which substituted the paragraph with which we are concerned, was made after the coming into force of section 149 of the Equality Act 2010 (the public sector equality duty), it was not suggested that the Minister who made the amending order had failed to comply with that duty.

21. Although there is precious little evidence before the court, I think that we are entitled to draw on our general knowledge about university courses. As Carswell LCJ explained in *Wright-Turner*:

> "It is common for students in many universities to carry out their private study in a variety of places, in libraries, halls of residence, flats or other accommodation off campus or their own homes. The study being carried out by each may be exactly the same, but it would be productive of undesirable distinctions to treat these students differently for the purpose of entitlement to benefits. Unlike the case of schools, for which the definition is much more apt, study is not physically overseen at universities, and the commonest arrangement is for the tutor to give the students a reading list for them to cover in their own time, with possibly an essay or other assignment to complete by a stated time. Even where a course is largely taught by a series of lectures rather than tutorials or seminars, much the greater part of the student's time is typically spent in reading, before or after the lectures, the material on which they are based."

22. In many cases all that the educational establishment expressly *requires* is the production of a weekly essay, a termly dissertation, or attendance at a weekly seminar; leaving it up to the student to allocate sufficient time to writing or preparation. It would be difficult to say that in such a case the educational establishment *required* the student to devote a particular number of hours to the assigned task, particularly if the distinction between a requirement and a recommendation is maintained; yet no one would doubt that such a student is following a full-time course.

23. I turn, then, to consider the meaning of paragraph 4. The first question is: what is meant by "required by the educational establishment". In considering that question we must, in my judgment, take into account the context is which those words are used, and typical factual situations to which they will apply. Taking those factors into account, I do not consider that the phrase necessarily entails an express enumeration by the educational establishment concerned of the number of hours per week that every student must spend in study. Given the different capabilities of individual students, and more or less efficiency in time-management, that would be a quite unreasonable and unworkable interpretation. It follows, in my judgment, that a requirement may be implicit. If a student is, say, required to submit a weekly essay I consider that it is implicit in that requirement that the student devotes whatever time is needed to the reading, research and writing in order to fulfil the requirement. Mr

Mackenzie accepted that a requirement can be implicit in a requirement to produce a particular piece of work. But Mr Mackenzie forcefully submitted that a "requirement" entailed an instruction by the educational establishment, whether or not accompanied by a sanction for non-compliance. That, he said, was to be distinguished from a recommendation or an expectation. The student exemption applies, as Mr Mackenzie accepted, predominantly to students in tertiary education or beyond. It is unlikely that the only residents in a dwelling are schoolchildren; and in any event those who are under 18 are not liable to pay council tax. Students in tertiary education are young (or sometimes not so young) adults. It is unrealistic to expect the educational establishments in which they are enrolled to behave as martinets. To hold that exemption from council tax depends on whether an educational establishment expressly *requires* attendance at a particular study session, or merely *recommends* it in the confident expectation that the recommendation will be followed, is to elevate form over substance. As Mr Mackenzie accepted, the practical reality is that Ms Jagoo needs to take up the study skills support in order to deal with the exigencies of the MSc. The fact that the support is provided at the University's own expense; and to fulfil its legal obligation to make reasonable adjustments, reinforces the point.

24. That approach is, in my judgment, consistent with earlier decisions of this court in considering entitlement to carer's allowance. Before coming to the particular passages which bear on the question, it is important to stress two things. First, the words of the regulation under consideration were different. The courts were concerned with whether the applicant was "receiving full-time education." That was defined as a period during which the person "attends a course of education" for 21 hours a week or more, including time spent "undertaking supervised study". Second, the arguments in those cases were the opposite to the arguments in this appeal. In those cases it was the applicant's argument that she was *not* receiving full-time education, in order that the payment of carer's allowance could continue.

25. Thus, in *Flemming* Pill LJ said:

> "[17] I would construe the expression "attends a course of education at a university" in the sense of being enrolled upon such a course at the university. In ordinary language the student who says he attends a course of education at Glamorgan University is saying no more than that he is enrolled upon and pursuing such a course offered by the university. The expression does not have the locational connotation for which Mr Stagg argued. Some of the student's time will almost inevitably be spent in study upon the premises of a university but the hours during which he is attending the course of education are not confined to the hours on the premises. Hours of study away from the premises of the university are capable of coming within the period during which the student is attending the course of education. …
>
> [19] …Any course of education will have a curriculum, whether stated in very general terms or in detail, the requirements of which can be expected to be brought home to a student by a supervisor. Work done to meet the reasonable requirements of the course can usually be regarded as

> supervised study. The absence of an immediate sanction for failure to do a piece of work, for example prepare for a seminar or tutorial, does not, however, take work done outside the definition of supervised study.
>
> [21] … I also agree that ascertainment of the hours of attendance is a question of fact to be determined by the adjudicating officer or tribunal. Evidence from the university authorities as to the amount of time they expect students to undertake to complete the course is likely to be important evidence."

26. In so doing they should focus on "the standard amount of time which the university authorities expect students to devote to contact hours and supervised study in order to complete the course" (a phrase taken from *Wright-Turner*). In the same case Chadwick LJ said at [28]:

> "The phrase "receiving… education by attendance at", in the context of the regulation as first made, could not have been intended to mean only the receipt of education by physical attendance at classes, lectures and laboratories. It must have been recognised, for example, that the receipt of education at a university is not confined to hours spent in the lecture hall or the laboratory; on any ordinary meaning of the phrase it must be taken to include the private study which is a necessary adjunct to physical attendance at lectures and laboratory work."

27. At [37] he added:

> "It seems to me that the fact that the work has been "set"—in the sense that it is work which the student is expected or required, by the curriculum or by a supervising member of staff, to do—will (save in exceptional cases) bring it squarely within the concept of study which is supervised. I agree with Pill LJ that the test of what is "supervised study" does not depend on the period of time for which the supervisor is present with the student; and that the absence of an immediate sanction for failure to do a piece of work that has been set does not take that work out of that concept."

28. In *Deane v Secretary of State for Work and Pensions* [2010] EWCA Civ 699, [2011] 1 WLR 743 Ward LJ said at [51]:

> "To construe regulation 5 consistently with section 70(3) of the Act, the fundamental question is whether the applicant for CA "is receiving full-time education". A student will "receive" that which is provided. If in ordinary circumstances the course upon which the student is enrolled is one offered as a full-time university course, as opposed to a part-time university course, then there must be, as Pill LJ put it in the *Flemming* case [2002] 1 WLR 2322, para 14, "some presumption" that the recipient is

> in full-time education. There are always exceptions to the rule, for example, the student granted exemptions from part of the course, but the task of the fact-finding tribunal is, having balanced what is offered and what is expected of the student against the student's actual performance of the demands made by the course, to look at the matter in the round and ask, by way of testing the conclusion: "Is this applicant *receiving* full-time education?""

29. Accordingly, I accept Mr Milsom's submission on Ms Jagoo's behalf that the meaning of a "requirement" is those hours which a person must perform in order to meet the requirements of the course. Since the course itself will have been designed by the educational establishment, I further consider that to describe that as a requirement "by the educational establishment" gives effect to a rational and workable objective without undue strain on the natural meaning of the words. I do not, therefore, accept that there is a bright-line difference between a "requirement" and a "recommendation" as held in previous cases at first instance (see, for example, *R (Hakeem) v Enfield LBC* [2013] EWHC 1026 (Admin)) and by the judge in the present case.

30. But that is not the end of the road. The regulation also provides that the requirement must be that which is "normally" required by the educational establishment. Clearly the purpose of the adverb is to introduce a measure of objectivity, thus excluding the idiosyncrasies of the particular student. The indolent student should be treated in the same way as the diligent student. The student who spends their time playing sport and has a periodic essay crisis must be treated in the same way as the student who spends their days in the library. The judge put it as follows at [33]:

> "The focus must be on the study normally required of persons enrolled on the relevant course, and not on the study in fact undertaken by an individual student enrolled on that course. Mr Mackenzie accepted the possibility that there might in some circumstances be a need to focus on the study normally required of a particular sub-group of those enrolled on the course, though he emphasised that no such point arises in this case. He was in my view correct to acknowledge the possibility: the evidence in another case might show, for example, that the educational establishment concerned normally required X hours of study per week by those undertaking a particular course, but increased that requirement to X+ 5 hours per week for the sub-group of students who had not previously passed a particular examination, or had not attained a particular diploma."

31. I agree with this, although I would explain the point a little differently. In the case of a sub-group, as identified by the judge, the "course" whose requirements are to be considered is a different course from that which students not in that sub-group are following. Thus, for the particular sub-group what is "normally" required is those hours which a person must perform in order to meet the requirements of the modified course.

32. In the present case the University has decided that in order to meet the requirements of the MSc course Mr Jagoo must be provided with one additional hour of study support each week. Adapting Pill LJ's phrase in *Flemming*, Ms Jagoo is "enrolled upon and pursuing a course offered by the university". Although for the able-bodied student that course involves 20 hours study per week, in the case of Ms Jagoo it involves an additional hour of study skills support. As Ward LJ put it in *Deane*: "A student will "receive" that which is provided." If, as a practical matter, she must take advantage of that additional hour in order to meet the requirements of the MSc course, then I see no real difficulty in holding that in order to meet the requirements of the course, she is equally required to undertake that additional hour. As Sir Rupert Jackson put it in argument, the purpose of paragraph 4 (1) (b) (ii) is to convert into hours per week the requirements of the course. To put it another way, the course on which she is enrolled is not merely the MSc in Educational Research, but the MSc plus study support. The additional study skills support is an adjustment of the MSc course itself in order to mitigate the disadvantage arising from her disability. Undertaking both elements is a requirement in her case. The extent of the support is formally documented. That is sufficient to satisfy an objective test which, I accept, is a necessary part of the legislative scheme,

33. Mr Mackenzie stressed the potential administrative burden that such a conclusion would place upon a billing authority. At present, he said, all that the authority needed to examine was a certificate provided by the educational establishment under paragraph 5 of Schedule 1 to the 1992 Act. That requires an educational establishment to provide a certificate containing such information as may be prescribed. Article 5 of the Council Tax (Discount Disregards) Order prescribes that information. It consists of:

> "(a) the name and address of the prescribed educational establishment by whom the certificate is issued;
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> (b) the full name of the person to whom it is issued;
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> (c) his date of birth (where this is known to the establishment and where the person falls within paragraph (c) of the definition of student in article (4) above);
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> (d) a statement certifying that he is following or has followed a course of education as a student or, as the case may be, a student nurse;
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> (e) the date when the person became a student or a student nurse at the establishment and the date when his course has come or is expected to come to an end."

34. It does not include any information about the number of hours that the educational establishment requires the student to spend in study. However, Mr Mackenzie submitted, in my judgment correctly, that because of the definition of "student" an educational establishment was only required to provide a certificate in respect of a student undertaking a full-time course of education, as defined. Thus, the certificate provided by the University in the present case was not a statutory certificate as required by the Act. That in itself must mean that what the University has said is no

more than evidence of the hours required to undertake the MSc course, and is in no way conclusive. In addition the duty to provide a certificate applies only to educational establishments in England and Wales. The status of a student who undertakes a course at a Scottish or Northern Irish university, or at a university situated in another member state, will have to be investigated by the billing authority. So the submission that all the billing authority needs to look at is the certificate is not invariably true. In addition, I do not accept the underlying premise that to require modest further investigations by a billing authority entails an onerous burden. We are here concerned with additional study support which is the subject of formal documentation of a kind that the educational establishment can readily provide. While, therefore, I accept that the court must be wary of imposing onerous administrative and investigative burdens on billing authorities, I do not consider that such is this case. The guidance issued by the Department of Communities and Local Government in May 2011, following the amendment to the order, itself suggested a number of different avenues of investigation which a billing authority was encouraged to take. I wish to make it clear, however, that my conclusion applies only to a case in which the additional hours are formally documented by the educational establishment. I say nothing about other cases.

35. I would allow the appeal; and remit the case to the Valuation Tribunal to find the facts.

Lord Justice Floyd:

36. I agree.

Sir Rupert Jackson:

37. I also agree.