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2016/91580/01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY AIMEE LIGGETT FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT FOR THE ECONOMY

AND IN THE MATTER OF A DECISION OF THE STUDENT LOANS COMPANY

AND IN THE MATTER OF THE DECISION OF THE EDUCATION AUTHORITY

MAGUIRE J

Introduction

[1] The applicant in this case is Aimee Rose Liggett. She currently is aged 20. There are several respondents. The first is the Department of the Economy; the second is the Student Loans Company; and the third is the Education Authority.

[2] These proceedings relate to events which occurred in August 2015. At that time the applicant had just completed her studies at school and was hoping to gain admission to study law at university level. She had applied for and had been accepted for a course at Queen's University, Belfast. The applicant was particularly keen to study in Ireland as at that time her grandfather was very unwell and was living with her mother in Northern Ireland.

[3] The results of the applicant's A Levels came out on 13 August 2015. Unfortunately, these were not as good as the applicant had hoped and were not good enough to enable her to take up the place at Queen's University which she had

been offered. This placed her in a position where she would either have to repeat her A Levels or seek access to a law course elsewhere in Ireland. She researched law courses in the Republic of Ireland. There she found a course which was attractive to her. This was at Griffith College ("Griffith") which is in Dublin.

[4] In connection with the possibility of making an application for a place at Griffiths the applicant made enquiries about student support to a body called the Student Loans Company ("SLC"). The applicant also made an application to re-sit her A Levels at Belfast Metropolitan College.

[5] This judicial review arises out of the applicant's enquiries to the SLC. The SLC have a website which is designed to provide guidance to those seeking a university place. It also contains relevant telephone numbers so that they can be contacted by persons seeking information.

The Applicant's Enquiries

[6] The sequence of events relating to the applicant's enquiries to the SLC is best dealt with chronologically.

[7] The chronology is as follows:

(a) On 18 August 2015 the applicant rang the SLC and spoke to one of its staff. This can be described as call 1. In the course of the call the applicant was advised that she was entitled to student support should she attend Griffith.

(b) On 19 August 2015 the applicant again rang SLC. This can be described as call 2. This call was made because the applicant was having difficulty finding Griffith online for the purpose of changing the details on her application for student support. The call was in two parts. At the end of the first part the applicant was placed on hold but during this time the call was cut-off. The applicant therefore had to call again which she did immediately afterwards. The applicant maintains that she was assured that Griffith was a designated university for funding purposes and that student support would be provided to her if she went there.

(c) The matter was left on the basis that the applicant would have to fill in on-line a change of circumstances form noting the developments in her case. On the same day – 19 August 2015 – the applicant made an application to be accepted for her chosen course – Law at Griffith.

(d) On 27 August 2015 the applicant was offered a place by Griffith. She replied to this offer, accepting it at 08:48 hrs on that day.

(e) Later on the same day the applicant rang the Education Authority ("EA"). She rang because at this stage she had not received a hard copy Change of

Circumstances form and had not been able to alter her existing form online. She was concerned to ensure that her change of circumstances *ie* that she was now planning to attend Griffith was properly recorded. She spoke on the phone to a person in the EA. She was told that Griffith was not covered by the student support arrangements in Northern Ireland. This came as a complete shock to her. The court will refer to this call as call 3.

(f) In the light of the last call the applicant on the same day telephoned the SLC again. She was then advised that she was not eligible for funding as Griffith was not an institution for which any funding was provided. The court will refer to this conversation as call 4.

The detail of the calls

[8] The court has been provided with transcripts of the applicant's calls to the SLC.

[9] In respect of Call 1 (which took place at 10:24 am on 18 August 2015) the applicant explained that she was seeking information about what funding she would be entitled to if she studied at Griffith. The adviser she spoke to indicated that:

> "Yes you can get funding for studying in the Republic of Ireland. Instead of the tuition fee loan, because that's not what you pay, it's called a student contribution loan. So it is like the registration fees. Even though you are going to a private university in the Republic of Ireland we will pay the tuition fees for you. So you will still be entitled to the full funding of the contribution loan, your maintenance grant and your maintenance loan. You will get the full funding for studying in the Republic of Ireland."

[10] The second call took place on 19 August 2015. The first part of the conversation began at 13:07 hrs. The applicant indicated to the adviser she was speaking to at that time that on the previous day she had asked the adviser she spoke to as to whether she would be covered if she went to Griffith. The adviser she spoke to was reassuring. The adviser appears to have checked her database and Griffith appeared on it. She said:

> "Right now, looking on the National Database it is designated. What that means is that we are able to fund it, now the amounts we are able to fund it up to is £6,000. Now when you are doing this on line is it just not appearing for you, is that right?"

[11] The adviser indicated shortly afterwards that she would need the applicant to hold for two minutes while she got information up on the screen. At this point the call is cut-off while the applicant was on hold. The applicant rang back at 13:18 hrs. A different adviser then dealt with her. The applicant explained what had occurred with the first adviser. The second adviser to whom she was speaking was reassuring. He said:

> "Ok, so, you're entitled to a student contribution loan which is a non-income assessed repayable loan introduced to cover the institution fees. So the amount that you will be charged, so it will be €3,000 which works out at £2,420.40. So what you do is you apply to your local Education Authority, ok, on the form and we assess the main application and then when you are approved you will be sent a student contribution loan form and cover letter, you then …"

In a succeeding part of the call the adviser repeats himself in the following way:

> "So basically what you need to do is if you are going to be studying in the Republic of Ireland what we need for you is to fill out a student contribution loan form, which we will send you out, which will help us cover the cost of the tuition fees for you. Once you return that form to us we will send you a letter confirming the amount of student contribution loan that will be required and then you take that to your university in the Republic of Ireland when you register in September and this will release any maintenance funding that you are due ok. So your maintenance loan and maintenance grant stay the same, we still pay that for you."

Thereafter the adviser checked some details of what she would be entitled to. There was then a discussion about her filling in the change of circumstances form. In a later passage the adviser stated:

> "What I am going to do is the change of circumstances would be performed by your Education and Library Board ok. I am going to send them the details of your change of course and university/college and what they will do they will change, they will do the change of circumstances for us and then they will send you automatically the student contribution loan form so that you fill that in, return that back to them then they will send out the letter, you take the letter to your college

> when your register and then get them to, let them just double check for you, so you get them to."

The adviser went on further to seek to sum up what would then happen. He indicated that the applicant would get a form from the local Education Authority which she would fill in and return. He went on:

> "Then you will get a letter sent out to you which will confirm the amount of student contribution loan required and you take that to your college and when you register and that will release any maintenance funding that you are due ok."

[12] There is no transcript of the third call *viz* the applicant's call to the Education Authority on 27 August 2015. What may be a later call, however, is dealt with in an affidavit filed on behalf of the EA. The applicant spoke to a Jennifer Robinson. At paragraph 11 of Ms Robinson's affidavit she states as follows:

> "On 27 August 2015 the applicant telephoned the EA's student finance office in Dundonald and spoke to me. She appeared to me to be in a very distressed state. She informed me that she had previously been advised that she could obtain funding for Griffith College and that she had paid deposits to the college based upon that advice. I explained to her at length that I could not authorise financial support for Griffith College as it was private and it was not an eligible institution. I advised her to contact the Student Loans Company to seek a complaints form …"

[13] There is a transcript of the fourth call, this being between the applicant and the SLC. However, there is no dispute that on this occasion – 27 August 2015 – it was confirmed to her that no funding was available in relation to Griffith.

Next Steps

[14] It would appear that notwithstanding the information the applicant had received she still hoped to attend Griffith. On 28 August 2015 both she and her mother made complaints about her treatment. These complaints were directed to the Department. They were followed up by a letter from the Department of 4 September 2015. This indicated that the Department could not provide financial support or funding for the applicant's attendance at Griffith.

[15] On 16 October 2015 the applicant personally met with the Minister at Parliament Buildings to discuss the matter. The applicant explained the position to the Minister. The Minister confirmed that the applicant was not eligible for funding

for her course at Griffith. The advice which had been provided by the SLC was incorrect, he said. The applicant's options were the subject of discussion.

[16] On 17 November 2015 the Department made to the applicant an offer of an *ex gratia* payment of £3,475. In the letter accompanying the offer the Department made clear that the applicant was ineligible for student support at Griffith College both in that and future years.

[17] In fact the applicant refused to accept the offer of an *ex gratia* payment which was made.

[18] On 4 February 2016 the applicant's solicitor wrote to the Department asking if there was a process by which the case could be appealed or reviewed. The response was that there was no such formal procedure but it was agreed that the Department would nonetheless undertake a review of the decision.

[19] This review was carried out by a Deputy Secretary in the Department. She considered the applicant's written submission and the papers in the case. On 25 May 2016 the Deputy Secretary wrote to the applicant's solicitors confirming that the decision which the Department had made was in accordance with the legislative provisions which govern student support. It was confirmed that the course the applicant wished to take at Griffith was not a designated course for the purpose of the legislation. The Deputy Secretary's conclusion was that:

> "There is no doubt that Ms Liggett was given incorrect information by the Student Loans Company representative due to the wrong information being on their system and that was most unfortunate. However, this was picked up and communicated clearly to Ms Liggett prior to the course commencing at Griffith College. This would have been on time for her to have commenced exploring other options at Belfast Met. I therefore do not accept that Ms Liggett had a legitimate expectation of funding."

[20] In the light of this further decision by the Department the applicant began these proceedings on 29 September 2016.

The Legal Proceedings

[21] The applicant's original Order 53 Statement, filed on 29 September 2016, encompassed a range of grounds of challenge.

[22] On 6 February 2017 the court granted leave to apply for judicial review in respect of a single issue. This issue relates to whether the applicant is legally entitled to be viewed as the holder of a substantive legitimate expectation for which the

Department and/or the SLC and/or the EA is not entitled to resile *viz* a legitimate expectation that she would receive student support and funding for her course at Griffith for the period of her degree studies there. The decision impugned is that of 25 May 2016 made by the Department.

The Statutory Framework

[23] The statutory framework which governs this case has not been the matter of dispute as between the parties to the proceedings. There was general agreement that the statutory framework was properly set out for counsel in the EA's skeleton argument.

[24] Thus the statutory position is governed by the terms of the Education (Student Support) (Northern Ireland) Order 1998 ("the 1998 Order") and Regulations made under it, in particular, the Education (Student Support) (No 2) Regulations (Northern Ireland) 2009 "(the 2009 Regulations").

[25] The 1998 Order, *inter alia*, provides:

> "**New arrangements for giving financial support to students**
>
> 3.(1) Regulations shall make provision authorising or requiring the Department to make grants or loans, for any prescribed purposes, to eligible students in connection with their attending—
>
> (a) higher education courses; or
>
> (b) further education courses,
>
> which are designated for the purposes of this Article by or under the regulations.
>
> …
>
> **Transfer or delegation of functions relating to student support**
>
> 4.(1) If the Department so determines, any function exercisable by it by virtue of regulations under Article 3 shall, to such extent as is specified in its determination, be exercisable instead by such body as is so specified which is either—
>
> (a) a board; or

> (b) the governing body of an institution at which eligible students … are attending courses."

[26] The 2009 Regulations provide in their interpretation provision that "eligible student" has the meaning given in paragraph (3) of Regulation 2. The paragraph then refers the reader to Regulation 5. A "designated course" means a course designated by the Department under Regulation 6.

[27] Regulation 5, which deals with eligible students, states that:

> "An eligible student qualifies for support in connection with a designated course subject to and in accordance with these regulations."

[28] Regulation 6, which deals with designated courses, indicates that subject to certain specific paragraphs (which are not relevant for present purposes):

> "A course is a designated course for the purpose of Article 3(1) of the [1998] Order and Regulation 5 if it is:
>
> (a) mentioned in Schedule 3;
>
> (b) …
>
> (c) …
>
> (d) …
>
> (e) wholly provided by a funded educational institution or institutions in the United Kingdom or by a relevant institution of higher education in the Republic of Ireland …"

[29] Schedule 3 contains a list of designated courses. The list includes first degree courses but the words found in Regulation 6(1)(e) "relevant institute of higher education in the Republic of Ireland" are defined in Regulation 2(1) as meaning an institution listed in Schedule 6. Schedule 6 contains a list of such relevant institutions by name. However, Griffith is not found in this list. It is, therefore, not a relevant institution of higher education in the Republic of Ireland.

[30] According to the affidavit of Jennifer Robinson, filed on behalf of the EA, there is in force a determination (dated 14 January 2010) under the terms of Article 4(1) of the 1998 Order. This determination has been made by the Department and is to the effect that certain of its functions under the 2009 Regulations were exercisable by Boards (now the Education Authority since April 2015). A copy of

this determination is exhibited to Ms Robinson's affidavit. Among the powers delegated are those of receiving, enquiring into and determining an application for student financial support.

[31] By way of summary of the above, the following can be stated with confidence and was common case at the hearing:

(a) Under the statutory scheme at no time was Griffith an institution which came within the scheme as it at no time was listed for the purpose of Schedule 6.

(b) Accordingly, no student financial support could be provided for an eligible student for the purpose of his/her attendance/support at Griffith.

(c) Any interpretation offered to the contrary was and is as a matter of law simply wrong and mistaken.

(d) The determination of applications for student support under the scheme described above legally lay with the EA. It, therefore, as a matter of the terms of the scheme, did not lie with either the Department or the SLC. This last proposition is supported not only on the basis of the terms of the determination under Article 4(1) of the 1998 Order but by the consistent and uncontroverted averments in the affidavits of Ms Robinson, on behalf of the EA, Ms Meldrum, on behalf of the Department (see, in particular, paragraph 6), and by the affidavit of Ms Chapman, on behalf of the SLC, (see, in particular, paragraph 7).

The role of the respective respondents

[32] It is convenient, having regard to the above, to allude to the role of the various respondents in this application as disclosed from the evidence before the court.

[33] As regards the position of the Department, Ms Meldrum described the roles of the various bodies in her affidavit at paragraph 4 *et seq*:

> "4. The Department is responsible for making the policy and the legislation in relation to student financial support for students from Northern Ireland who attend higher education courses. The Department is also responsible for managing the budgets.
>
> 5. The Student Loans Company Ltd ("SLC") provides functions for the Department such as providing a general guidance helpline for students, developing and maintaining the IT systems, issuing tuition fee payments to the universities and colleges, issuing maintenance

> payments to students and, collecting loan repayments, in conjunction with HMRC …
>
> 6. The Education Authority ("the EA") which replaced the 5 Education and Library Boards, is responsible for processing applications, including making the decision on an individual student's eligibility for student support.
>
> …
>
> 8. Only the EA makes the decision on whether or not student support will be granted to a student. It is not the function of the SLC to make this decision. It can only give advice and guidance to individual students as well as processing payments themselves. It does not have a decision making role."

[34] As regards the SLC, Ms Chapman's affidavit states that:

> "SLC's functions are to make student finance payments and to recover overpayments."

[35] At paragraph 6 of the same affidavit she goes on to state that:

> "In addition to these transferred functions, SLC also provides the central system to manage assessment and accept online applications and provides frontline telephone support for DfE."

[36] However, as already noted, Ms Chapman goes on to aver that:

> "The Education Authority … assesses student finance applications, as stated in the SFNI Website …".

[37] At paragraph 14 *et seq* of the same affidavit she further states:

> "14. I would like to reiterate that the advice provided by SLC's customer advisers was no more than advice and that all decisions in relation to eligibility and entitlement are made by the EA and not the SLC."

[38] As regards the EA itself, in addition to the passages in Ms Robinson's affidavit already referred to above, she states at paragraph 6 that:

> "The call centre is operated by the Student Loans Company. The Education authority did not therefore provide the advice to the applicant referred to in her affidavit."

[39] None of the above averments have been contradicted in the affidavit evidence filed on behalf of the applicant in respect of this matter. Nor have they been contradicted in the applicant's skeleton argument for the purpose of these proceedings. Rather it appears to be clear that the applicant was aware when she received the information she received on 18 and 19 August 2015 on the phone from the Student Loans Company that the source of that advice was the Student Loans Company whose number she had obtained from their website. Likewise, the applicant seems to have been aware that the EA was a different authority. It will be noted from the above that on 27 August 2015 the applicant contacted the EA and it was during this call that she was told that Griffith was not covered.

[40] In fairness to the applicant, however, the applicant's application for funding had been addressed to the SLC, which confirmed receipt of it, having set up for her an on line account.

[41] What seems to be the position is that the applicant was aware of and consulted the Student Finance Northern Ireland website (run by SLC). She consulted this website from time to time. However, she does not appear to have read extensively within the website as she appears to have been unaware that it was the EA which made decisions, notwithstanding that, as pointed out by Ms Meldrum, Ms Robinson and Ms Chapman, in their affidavits, the website provided this information. The applicant in her fourth affidavit maintains that she was unaware of the relationship between the respondents, notwithstanding the extensive documents containing reference to those relationships found now in the affidavits and exhibits filed in court of the deponents on behalf of the respondents.

The issues arising from the hearing

[42] In these proceedings the applicant was represented by Mr Fletcher BL; the Department and the SLC were represented by Mr Sands BL; and the EA was represented by Mr McLaughlin BL. The court is grateful to each of them for their helpful oral and written submissions.

[43] As a result of the legal argument, there has been a further crystallisation of the issues. It is now clear that there is no viable case which can be made against the EA. The mistakes which were made in this case plainly were those made by the SLC's advisers and, when the matter reached the EA, it acted consistently with its legal obligations. Its decision that the applicant was not able to receive funding for the course at Griffith, for legal reasons, is unimpeachable. In point of fact, what appears to have occurred is that as a result of the applicant's telephone contact with the SLC advisers on 19 August 2015, the SLC communicated an electronic "task" to the EA

which involved them providing the information that the applicant now wished to study law at Griffith. What happened within the EA is described in Ms Robinson's affidavit:

> "9. Upon receipt of the "task" from the SLC, the assessor within the EA referred the matter to me on the ground that he could not find a reference to Griffith College within the list of relevant institutions in the Republic of Ireland. He asked me to confirm whether support could be provided for this institution.
>
> 10. I considered the request and advised the assessor to issue a letter indicating that the applicant was not eligible for funding on the ground that the college is not one for which the Department was authorised to provide student support under the 2009 Regulations. In doing so, I did not consider that the Education Authority had any discretion to determine the request otherwise than in accordance with the 2009 Regulations."

[44] It is therefore the case that the EA had decided that the applicant would be unable to obtain funding for the course at Griffith. This appears to have been decided by the EA on 24 August 2015, though the letter confirming this to the applicant was not received by her until 27 August 2015.

[45] As the court is unable to identify any basis on which the EA has acted unlawfully in this case, the court is satisfied that it should be dismissed from the proceedings. When this was suggested at the hearing, there was no dissent from any party.

[46] As regards the SLC, it can be said that there has been no dispute that it made the mistakes which lie at the centre of this litigation. In particular, the mistakes were not those of Department officials. What appears to have occurred is that the fault lay in the information which was available on the SLC's computerised system, though how this came about is not clear on the papers before the court. However, a problem for the applicant is that it seems clear that the SLC did not, in law, perform any role greater than that of adviser and, in particular, was not the decision maker in relation to the grant of funding/student support. This was and is a function which fell to be performed by the EA.

[47] As regards the Department it, the court considers correctly, has maintained that its role in the matter was limited and it was also not the decision maker and the question whether the applicant qualified for student/funding for the course she wished to pursue at Griffith was one for the EA. It was not an official of the

Department who provided the applicant with the wrong information and at all times the Department has maintained that the EA was correct in its view that the course at Griffith fell outside the regulations with the consequence that funding for it could not be granted to the applicant. As already noted, the court accepts that that indeed was the true legal position.

[48] The applicant's counsel has made the argument that the Department could provide funding if it wished to do so. The funding would, he says, be funding outside the legislative scheme and could, he suggests, take the form of an ex gratia payment or a grant. In this regard, counsel relied on the case of *R(Theopilus) v Lewisham London Borough Council* [2002] 3 AER 851.

[49] On the face of it, this case appears strongly to support the applicant's general argument about legitimate expectation but, on closer scrutiny, the court considers it is not as helpful to the applicant's case as it first appears.

[50] In *Theopilus* the decision in respect of funding/student support rested with the local authority. Ms Theopilus applied for funding and was told she was eligible. She was asked for further information and she supplied it. A formal written offer was then made to her and she subsequently received confirmation of the level of fees she would receive. On this basis, Ms Theopilus commenced her studies (at Griffith) and she began receiving in instalments the support she was due. After a period on the course she was told she would also receive a dependant's allowance in respect of her daughter. However, in December of her first year of study, the local authority told her it had made an error and that she was not entitled to student support at all. The applicant was successful in her judicial review challenging this decision and the court made a declaration that the authority was obliged to reconsider her claim further in the light of the legitimate expectation the court held she had acquired.

[51] In the course of giving judgment, Silber J held that the Council did in fact have power to provide the applicant with student support. He also held that the applicant had been in receipt of a promise which was clear, unambiguous and devoid of relevant qualification. These were his key findings. As regards the former, it was held that the local authority had the power to provide funding under section 2(1) of the Local Government Act 2000. This power, the court notes, was not a power specifically to provide student financial support. Rather it took the form of a broad discretionary power conferred by statute under which the local authority could do anything which it considered likely to achieve one or more of the following objectives:

(a) the promotion or improvement of the economic well-being of their area;

(b) the promotion or improvement of the social well-being of their area; and

(c) the promotion or improvement of the environmental well-being of their area.

Where one or more of these objectives could be promoted, the power could be exercised in relation to or for the benefit of (*inter alia*) "all or any persons resident or present in a local authority's area".

[52] It is not clear that the judge's analysis on this aspect of the matter is available to this court. In *Theopilus*, the promise in question came from the local authority which, the judge held, had power to make it. But in the present case, the authority which made the promise was the SLC which, on the face of it, was not an entity which itself had power to make decisions on entitlement to student support. The *Theopilus* case is not therefore "on all fours" with the present case.

[53] In *Theopilus* Silber J also made the second finding above *viz* that the promise made was unqualified. Mr Sands, representing the Department and the SLC, suggested to the court that the same finding could not be made in this case for two principal reasons. Firstly, he argued that the language used by the advisors made it tolerably clear that the advice being offered to the applicant was qualified by reference to the process of decision making and the role of the Education Boards/EA. This was in contrast to the facts in *Theopilus* where it was the local authority (and not an adviser) which had been dealing with the affected student and where the local authority had made written commitments which held the field continuously until close to the end of the applicant's first term at Griffith. Here, the situation was different in that the applicant had received oral advice from the SLC at an early stage in the process and even at the time when she was informed by the EA that what she had been told was wrong (on 27 August 2015) there had been no irretrievable commitment on her part and the term had not yet begun. It is right to say that the applicant acknowledges that in fact (contrary to what appears in the EA documentation) she had not at the point when the advice was corrected paid over any money and she does not say that she could not have cancelled her acceptance of a place on the Griffith course and moved to consider other options again, such as re-sitting.

The Court's Assessment

[54] The court does not find this an easy case to resolve. This is because this case does not fall into the territory of policy reversal, with which most of the cases involving legitimate expectation deal. Rather it is about human error and a mistake made in the realm of public administration. In terms of the well-known decision of the Court of Appeal of England and Wales in R v North and East Devon Health Authority ex parte Coughlan [2001] QB 213, this is case which, in accordance with the applicant's submissions, arguably falls into the third category referred to by Lord Woolf *viz* unfairness consisting in a failure by a public body to give effect to a substantive legitimate expectation in circumstances where there is no overriding interest which would justify the public body in resiling from its representation that such a benefit would be forthcoming. However, even on this analysis, a question which arises, as indicated by the England and Wales Court of Appeal in R v Secretary of State for Education and Employment ex parte Begbie [2000] 1 WLR

1118, is whether the court, in the case of a representation by mistake, should fix the public authority with the consequence of its mistake: see, in particular the judgments of Peter Gibson LJ at page 1127 and Sedley LJ at page 1133.

[55] Undoubtedly, the applicant was placed in a difficult position by reason of the error which had been made by those she spoke to on 18/19 August in the SLC. None of this was her doing. The court has found the applicant, who at the time would have been 18 years of age, to be an honest witness. She has not tried to over-embroider her case and the court is satisfied that she was genuinely unaware of the exact status and role of the various agencies she was dealing with. It was not unreasonable in any way for the applicant, given her state of knowledge, to have understood that in calls 1 and 2 she was being told that she should receive the requisite student support/funding for the course she wished to begin at Griffith.

[56] The court also accepts that the language used by the SLC staff the applicant dealt with in calls 1 and 2 on a fair reading was intended to convey that funding would be provided. The court has carefully considered the transcript of the second part of call 2, which Mr Sands focussed on for his submission that at this point it can be seen that what was being said was subject to the qualification that the EA would later be involved in dealing with the issue of finalising the decision to be made. Reading this part as a whole, the court rejects this submission. The better view, to the court's mind, is that the adviser's posture to the applicant was that the funding was available and the process – insofar as he explained it, involved plain sailing. The adviser's approach was comforting to the applicant and, on a true analysis, was not concerned with highlighting that the determination of the issue had yet to take place.

[57] The court therefore is prepared to find that this was a case where what the applicant was being told in terms of funding by the SLC advisers was not ambiguous and was not subject to any qualification.

[58] This finding, however, does not mean that the expectation which will have arisen in the applicant's mind at that time was, for legal purposes, a substantive one now capable of being enforced.

[59] It is the court's view that the correct analysis in this particular case is that no substantive legitimate expectation capable now of being enforced arose. The court believes that this was so for a number of independent reasons. Firstly, for the expectation to be enforceable, it seems to the court it must derive from an agency or body which possesses the power to make the expectation good. Unfortunately, for the applicant, that is not the position here. The expectation arose from what was said by advisers within the SLC but neither they, nor the SLC itself, in law was the relevant decision maker in respect of the funding in this case. The relevant decision maker was the EA and the SLC did not speak for it. The facts of this case are not unlike those in the case of *R (Bloggs 61) v Secretary of State for the Home Department* [2003] EWCA Civ 686 where it was held that promises made by police officers to a

prisoner with protected witness status could not bind the Prison Service, even if the applicant thought that the police was speaking for the Prison Service: see paragraphs [38]–[46]. There is a distinction between subjectively having an expectation and that expectation being enforceable against a representor who has no actual authority to commit the public authority which has the power to decide.

[60] It seems to the court that this conclusion is not inconsistent with that of Silber J in *Theopilus*. In that case the promisor was the local authority but the court held it had the power to make good the promise. What was not in dispute in that case was what was stated at paragraph [17] of the judgment, where it is recorded that it was common ground that "the claim based on legitimate expectation must fail if Lewisham did not have the power to provide the claimant with student support". It was because of this situation that there was extensive consideration of the powers of the council. In the present case, in contrast, there has been no suggestion that the SLC itself had the power to grant the applicant student support.

[61] Mr Fletcher has tried to meet this point by submitting that the SLC was simply an emanation of the Department which itself had other powers it could use to provide to the applicant the student funding/support promised to her. The court is unable to accept this argument, as it runs against the grain of the legal provisions in this case in respect of funding/support. Far from having the determinative decision making role in this case, the Department had lawfully divested itself of that role and provided it to the EA. The EA was the designated decision maker, not the Department. It, therefore, was not the case that, even if the view was taken that the SLC was an agent of the Department, this would mean that its actions in creating the expectation leads to the conclusion that the applicant had acquired an enforceable right. Moreover, even if the SLC advisers could be taken to have been adopting the role of decision maker in respect of student support/funding, which in the court's view would be an unlikely finding, there is no evidence before the court that they would have been acting within the bounds of their own true authority. Finally, the court does not accept that the Department, having established the legislative framework, which plainly was intended to operate equally to all student applicants, would have been free to have ignored it and to have discriminated in favour of the applicant by granting her student support/funding to attend Griffith outside the four corners of the statutory scheme. While it may be that the Department could (as it did) offer a sum in the form of an *ex gratia* payment, the purpose of such a payment would be compensatory and would have arisen because of the mistake made[1]. Such a payment would be separate and detached from the statutory scheme and cannot properly be viewed as a means of providing student support/funding which subsists alongside the statutory scheme. Mr Fletcher also relied on the terms of section 2 of the Budget Act (Northern Ireland) 2015 "the 2015 Act"), which is the provision which authorises expenditure by Northern Ireland Departments. He

[1] This seems to have been the approach of the Department. It is not unlike what might occur if an Ombudsman, in the light of an act of maladministration, ordered a compensatory payment.

submitted that expenditure by the Department for Employment and Learning[2] was authorised in the context of "student support and other matters related to tertiary education, including grants-in-aid to certain bodies, [and] grants in respect of Educational Maintenance Allowance". In his submission, this meant that there was an alternative source of funding/support available to the Department over and above the statutory scheme which has been devised for this particular purpose. The court, however, is unable to accept this submission. The fact is there is no alternative scheme which the Department has put in place. There is only the statutory scheme. It is the exclusive scheme operating in this area and it is not displaced or altered by the authorisation provision in the 2015 Act. Indeed, the effect of the authorisation provision is simply that the Department can spend money in accordance with the scheme it has introduced. There is no parallel or competing alternative scheme.

[62] Secondly, the court is of the view that the expectation which the applicant had should not be viewed as enforceable in circumstances where it was falsified at a point prior to the applicant taking any irreversible step. On the facts of this case, there is no suggestion that, having been informed of the true position on the morning of 27 August 2015, the applicant could not have cancelled her acceptance of a place at Griffith which she had only confirmed earlier that morning. Unlike *Theopilus* this was not a case where the affected student was well into her first term of study when the funding problem emerged. Insofar as there is an implicit suggestion in this case that some authority must provide the funding for the applicant's attendance at the course over the next 3 years because of a mistake by the SLC, when it would not have been difficult on 27 August 2015 for the applicant to have changed course, this suggestion is unappealing. If the applicant had so acted to change her plans, this would not have placed her in a position which would have been substantially different from the position she had found herself in following the A Level results. There is no evidence before the court which shows that the applicant lost out on another option because of the events in this case. The court considers, in this context, that there is strength in Lord Griffiths' approach, in a different context, in *R v Inland Revenue Commissioners* [1994] 1 WLR 334 at 346 when he said:

> "It is part of the human condition that people will make mistakes, but they must not be held to mistaken decisions if the mistake is discovered in time to take effective remedial action."

[63] It seems to the court that this remark is apposite to the present case. But, of more importance, is the need to adhere to the fundamental structure of the legal framework in a case of this type. Neither the SLC nor the Department is entitled to ignore the legal framework or to distort it. To do either, will be to usurp the power to decide in respect of student support/funding which in law is that of the EA. While the court would not go so far as to say that it could not foresee any circumstance in

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[2] The pre-dessessor Department to the Department for the Economy

which it might enforce an expectation which is the product of an error of the type involved here, it is difficult to see that the case for doing so is compelling where the applicant had notice of the error in good enough time to have re-configured her plans.

[64] Finally, the court is mindful that the reason why Griffith cannot receive funding under the student support/funding arrangements arises from legislative choice. A definite decision has been made not to include Griffith in Schedule 6, as explained above. This is not a case where what has been denied has resulted from exercise of discretion which is adverse to the applicant. The basis for the denial lies in the terms of the scheme and everyone is bound by that. Another way of putting this is that as a matter of law the decision maker in the present context was bound not to fund the applicant's choice of Griffith as the college she wished to attend. This being so, there is a substantial volume of legal authority which supports the proposition that a legitimate expectation must give way to the performance of a statutory duty. Examples of this include *R v Secretary of State for Education and Employment ex p. Begbie* [2001] 1 WLR 1115 at 1125d; *R (Solvio Wines Limited) v Food Standards Agency and Another* [2009] EWHC 382 Admin at paragraph [95]; and *Re Thompson's Solicitors Application* [2002] NIQB 39 at paragraph [18].

[65] For the above reasons, the court does not consider that in law a substantive legitimate expectation capable now of being enforced arose in this case and can be relied on by the applicant.

Conclusion

[66] The judicial review application in all of the circumstances is dismissed.