

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

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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**O'Kane's (Nadine) Application [2014] NIQB 41**

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

**AND**

**IN THE MATTER OF A DECISION OF THE LEGAL AID ASSESSMENT OFFICE**

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**TREACY J**

**Introduction**

[1] This is a challenge to a decision of the Legal Aid Assessment Office (LAAO) by which it required the Applicant to make a contribution of up to £1,557.00 towards the cost of her case. In arriving at this decision it considered her student loan as income.

**Order 53 Statement**

[2] The applicant sought the following relief in her Order 53 Statement:

- (a) An order of certiorari quashing the decision;
- (b) A declaration that the LAAO practice of treating the applicant's student loan is unlawful.
- (c) Costs.

[3] The grounds on which the relief was sought included:

(a) That the inclusion of the applicant's student support payments in her legal aid assessment constitutes a breach of the The Education (Student Support) (NI) Order 1998 in that it purports to treat student loan debts as disposable income. Instead the loan should properly be considered as a liability which should be deducted from the Applicant's means rather than included in them for the purposes of assessment.

(b) In the same vein interest payable on the loan should be included as a liability.

(c) The LAAO did not consider the loan which went to tuition fees which constitutes a further liability and which therefore should be included in any assessment of the Applicant's means.

### **Factual Background**

[4] The applicant is a student at the University of Ulster currently undertaking a four year BSc degree at that institution. On 8 August 2011 she was injured in a fall as a result of which she applied for legal aid to commence High Court proceedings.

[5] The applicant is in receipt of student finance under the provisions of The Education (Student Support) (NI) Order 1998 ("the 1998 Order") and the associated regulations. In the relevant year (2011/2012) the breakdown of supports received was as follows:

(a) £3375.00 'Tuition Fee Loan'

(b) £1918.00 'Maintenance Loan'

(c) £3475.00 'Maintenance Grant'

[6] The applicant was also in receipt of earnings in the sum of £3,326.00 from her part time employment. In assessing her application for Legal Aid, the LAAO considered the applicant's Maintenance Loan and Maintenance Grant (as well as her earnings from her part time work) as income. Based on this assessment of income the

LAAO then required that the Applicant should make a contribution of £1557.00 to her legal costs.

### **Statutory Framework & Relevant Guidance**

[7] The relevant provisions of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (“the 1981 Order”) are as follows:

Assessment of disposable capital and income and of maximum contribution

S14.-(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-
  - a. The maintenance of dependants;
  - b. Interest on loans;
  - c. Income Tax;
  - d. Rates;
  - e. Rent; and
  - f. 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 regulations may also include, in relation to advice and assistance, provision as to the cases in which a person is

for the purposes of Articles 3 and 7 to be taken (directly or indirectly) in receipt of income support, and income-based jobseeker's allowance ... or an income-related allowance...

(6) Subject to the provisions of this Article, the disposable income and disposable capital of a person applying for legal aid, and the maximum amount of his contribution to the legal aid fund in respect of any proceedings, shall be determined in accordance with regulations...

### **Schedule 1 of the Regulations**

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 lieu) 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.

...

(a)-(1) In computing the disposable income of the person concerned there shall be deducted the total amount of tax which it is estimated would be payable by the person concerned if his income, as computed in accordance with the foregoing rules of this Schedule... were his income for a fiscal year and his liability for tax in that year were to be ascertained by reference to that income and not by reference to his income in any other year or period.

(2) For the purposes of this rule, the tax shall be estimated at the rate provided by and after making all appropriate allowances, deductions or reliefs in accordance with the provisions of the Income Tax Acts in force for the fiscal year current at the date of the application for a certificate.

5. Where the person concerned... is in receipt of income support paid under the Social Security Contributions and Benefits (Northern Ireland) Act 1992, income-based jobseekers allowance or income-related employment and support allowance, the person concerned shall, for the period

during which income support, income-based jobseeker's allowance or income-related employment and support allowance is received, be deemed to have a disposable income which does not exceed the figure for the time being specified in Article 12(1) of the Order.

### **Guide to LAAO Assessors - Disposable Income - What Income Includes**

#### **116: Student Income**

##### **1) Student Grants / Loans for Further Education**

These grants/loans are paid to University or College students

...

Loans are paid in addition to other forms of financial support for day to day living expenses.

The student is free to decide whether to take the loan.

The reasons for a student refusing a loan could be:

- Part time employment
- Parental contribution being paid towards their keep
- Capital held

...

2) Take into account in the assessment all grants/loans which are received including all of the above and any other income, declared in the form CLA4.

NOTE: An allowance can be made if the repayments for student loans are being made within the computation period.

##### **3) Parental Contribution**

(a) A parental contribution should be classed as income and regarded as being paid for 39 weeks unless it is known

otherwise. Considering the student loan this seems appropriate.

(b) If there has been a lump sum payment it can be assumed that this is a yearly payment and classed as income/capital even though it may be outside the computation period.

(c) If in doubt or the pattern of payment seems unusual consult a supervisor.

...

#### 186. **Informal Loans**

If the loan being considered for an allowance is an informal loan that is not legally binding, DO NOT allow the repayments. This is because informal loans can normally be postponed or extended as friends or relatives usually make them.

If the applicant states that the loan cannot be postponed or extended ask for documentary evidence.

Proceed by referring to the following: -

- (a) Obtain receipts or cashed cheques as proof of payments.
- (b) Obtain a written agreement of repayment.

If there is no written agreement ask for evidence that the loan cannot be postponed or extended. (This might be a letter from the lender or evidence that the lender is undergoing hardship.)

In any event do not prompt the applicant as to what form the evidence may take. Look out for recent letters written to the LAAG for the sole purpose of gaining an allowance in the assessment.

187. **Student Loans**

These loans are available to University, or College students. They are paid in addition to other forms of financial support for day to day living expenses. The student is free to decide whether to take out a loan. Ascertain whether the loan repayments are being made from income in the computation period and make an allowance under Rule 13.

NOTE: As most loans are repaid when the student is in employment it will be rare if they are repaid within the computation period whilst the student is still at college.

194. **Student Disregards for further/higher education**

- 1) A proportion of a full time student's income will be used to cover the cost of:
  - a. Books materials and equipment
  - b. Travel Expenses

Make the following allowances for students under Rule 13

Travel Expenses	Apr 09/10		Apr 10 /11
Books, Equipment and Travel	£675	Books and travel	£693

... The amounts regarding books and Equipment and Travel are allowed irrespective of the applicant's income although most students will have a student loan, parental contribution or are employed in a part-time capacity, which will be deemed and assessed, as income...

- 2) The following special amounts are disregarded if it is known that they are being paid

- a. Excess travelling expenses which the Local Education Authority has reimbursed.
  - b. Supplement for a disabled student.
  - c. Special Equipment grant paid for some courses.
- 3) Student fees are calculated based on parent's income and are means-tested accordingly. Therefore, they are not included for Legal Aid purposes as an eligible allowance.

## Arguments

### *Applicant's Arguments*

[8] The applicant notes that the key question for decision is the meaning of the word 'income' as used in the 1981 Order and in the Legal Aid (Assessment of Resources) Regulations (NI) 1981 ("the 1981 Regulations"). Having undertaken an assessment of relevant case law, the applicant suggests the following basic proposals:

- (a) The context for construing a particular phrase or word is that statute, not some other statute.
- (b) Trawling through 'analogous' cases concerning 'analogous' legislation can produce conflicting results.
- (c) There is case law suggesting that in relation to assessment of means for legal aid it is 'difficult to visualise a basis for the periodically recurrent receipt of loans to qualify as income'.
- (d) Case law suggests that funding in the form of 'soft loans' might not be construed as income in the specific context of eligibility for legal aid.
- (e) It is necessary to examine the nature of the repayment obligation in determining, for certain purposes, whether a loan may be treated as income.
- (f) Monies received by way of grant towards maintenance which are not repayable are in the nature of income.
- (g) Monies accruing under a certain obligation for immediate payment do not amount to income.



[9] Based on this analysis of the case law, in relation to the instant case the applicant submitted:

- (a) The legal aid assessment of resources should not be confused or conflated with some other test, for example a test for benefits such as income support;
- (b) The applicant is in periodic recurrent receipt of a loan.
- (c) This loan is subject to strict requirements concerning repayment with compound interest.
- (d) The fact that repayment is contingent on a recipient achieving a basic earnings threshold does not deprive the loan of the characteristic of a certain obligation to immediately repay as once that earnings threshold is reached the requirement to repay is certain and immediate.

### *Respondent's Arguments*

[10] The respondent argued that as the applicant is in receipt of a periodically recurrent payment in the form of a maintenance loan, a strong presumption in favour of finding that same equates to 'income' is created. It further argues that in order to escape this presumption the applicant will have to persuade the court that the loan received was received under a certain obligation of immediate repayment and would not therefore amount to 'income'.

[11] The respondent submitted that this was not the case and instead argued that the obligation to repay is in the first instance a future obligation and in the second instance is an uncertain obligation as the repayments will only fall due if and when the applicant crosses the income threshold.

[12] The respondent argued that the key question is whether the loan payments now at this stage are in the nature of income.

### **Discussion**

[13] The stated aim of the Legal Services Commission in the provision of legal aid is to provide 'fair and equal access to justice' by providing financial assistance for legal fees. The scheme is structured in a way that should you have less than £234 disposable income per week you will be entitled to legal aid. If you have between £100 and £234 disposable income per week you will be required to make a personal contribution to the cost of your case from that disposable income. The scheme also takes into account any

capital that you have available. Overall, the scheme seeks to establish your net financial position before assessing if any contribution is due.

[14] To fulfil the LSC aim of 'equal access' the assessment of what constitutes 'disposable income' (or net financial position) must be the same for all applicants regardless of what form their income takes. The following definitions from the Oxford English Dictionary are instructive:

- (a) Income: Money received, especially on a regular basis, from work or through investment.
- (b) Capital: Wealth in the form of money or other assets owned by a person or organisation or available for a purpose such as starting a company or investing.
- (c) Debt: A sum of money that is owed or due; the state of owing money.
- (d) Liability: The state of being legally responsible for something.

[15] The applicant does not currently owe money on her student loan. No monies are currently due. As a result there is no current liability for any such debt. The student loan payments fall squarely within the ordinary construction of the term 'income'.

[16] To disregard the present status of the applicant's student loan as 'income' and to construe it instead as a current liability, would put her in a better position than other applicants when having their net financial position assessed under the scheme and would therefore undermine the scheme's stated aim. The LAAO is thus not entitled to do other than regard it as income.

[17] If the cut off point for personal financial contribution from disposable income is set at a level which creates hardship, then that is another matter for another forum on another day. In the instant case however, there has been no unlawfulness on the part of the respondent.

### **Conclusion**

[18] For the above reasons I would deny the relief sought.