THE VALUATION TRIBUNAL FOR ENGLAND

Summary of Decision: *council tax liability; exemption; student, Open University Course; whether qualifying hours met; requirements v recommended hours; appeal allowed.*

APPEAL NO: 5630M237894/281C

BETWEEN: *L V-S* Appellant

and

Royal Borough of Kingston Upon Thames Respondent

PANEL: Mr G Garland (President), Ms N Talbot-Hadley (senior member), Mr S Bamawo (member)

SITTING AT: The Tribunal Offices, 2nd Floor, 120 Leman Street, London, E1 8EU

ON: 21 March 2019

APPEARANCES:

The Appellant appeared in person (and was assisted by Mr P B).

The Respondent Billing Authority was represented by Mr Yusuf Siddiq.

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1. The appeal was allowed as the Appellant was a full-time student for the periods in dispute and the dwellings under appeal are to be treated as exempt in accordance with Class N of the Council Tax (Exempt Dwellings) Order 1992 as follows:

    a. 1 October 2016 to 30 June 2017 in respect of Dwelling A.

    b. 7 October 2017 to 30 June 2018 in respect of Dwelling B.

Introduction

2. This decision document is not and does not purport to be a full verbatim record of proceedings. However, the parties can be assured that the panel gave all of the evidence and arguments put forward proper judicial consideration.

3. On 14 May 2018 the Appellant wrote to the Respondent disputing their refusal to grant a student exemption from council tax (aggrieved person's notice). The Respondent replied that they were not prepared to change their decision as they believed the evidence provided by the Appellant '*...only confirms that there is a set number of study hours required for the* ***modules*** *which you are undertaking and not the* ***actual course*** *itself. The Open University have confirmed that they consider your course to be part-time and you are given 16 years to complete it. The number of modules you undertake in an academic year can be chosen by yourself and the Open University based on the flexible nature of your course'.* The Appellant at the hearing also clarified the periods in dispute:

    a. 01 October 2016 to 30 June 2017 in respect of Dwelling A;

    b. 7 October 2017 to 30 June 2018 in respect of Dwelling B.

    There was no application for exemption for the period in between the two academic years.

    Initially, for the first year of study the Billing Authority granted an exemption but removed it when the Appellant made application for exemption for the second year following moving property. This was due to the Billing Authority having reversed its view and decided the exemption criteria were not met.

4. On 9 August 2018 the Appellant appealed to this Tribunal the Respondent's decision not to award the exemption. On 15 November 2018 a panel of this Tribunal consisting of Ms N Talbot-Hadley and Mr S Bamawo, both lawyers, were unable to agree on a decision and the case was remitted back for a fresh hearing.

5. The President directed that the appeal be heard before a panel of three consisting of the President of the Tribunal plus the two lawyer members who were unable to agree. This step was taken because of the conflicting way panels had been deciding cases in relation to this issue and the President could assist in understanding the issues to be decided.

6. As the Tribunal has produced conflicting decisions, the President encourages panels to follow the approach taken in this decision when considering students on Open University Courses. This will require a careful scrutiny of in fact what arrangements any particular student is engaged in when trying to claim this type of exemption.

7. Furthermore, since the original hearing in this case the Court of Appeal had issued its decision in *Jagoo v. Bristol CC* [2019] EWCA Civ 19 which the President believed would assist the panel and the parties. A copy was provided to both parties prior to the latest hearing and they were invited to comment on its relevance.

Background

8. Council tax was introduced by the Local Government Finance Act 1992 and replaced the much criticised Community Charge (or Poll Tax). It is a tax based on the value of a dwelling placed in one of a number of Valuation Lists, with discounts and exemptions granted by the local authority where the liable person meets the relevant statutory criteria. The person responsible for entering properties into the Valuation List is known as the Listing Officer (LO) and is a member of the Valuation Office Agency (VOA).

9. This appeal concerns an application for an exemption from council tax. Section 4 (1) of the above Act states that council tax is payable in respect of any dwelling which is not exempt. An exempt dwelling is defined as one in a class prescribed by order of the Secretary of State. 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. That paragraph says that a student is to be defined by statutory instrument.

10. 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—

    (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) —

    (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.”

    It is clear that the mischief the Regulations seek to address is to confine the exemption to students who are actively engaged in full-time study, and it does not extend beyond that. In plain English therefore a student only qualifies if in full-time study as defined by regulation; a student in part-time study does not qualify.

11. The issue before the panel was whether the Appellant qualified as a student as she was undertaking an Open University course. Both parties submitted evidence and argument that the panel addressed below but at its most basic level the Respondent stated that the course was part-time, and the Appellant chose to study more hours than the course required, whereas the Appellant stated she was effectively a full-time student as a result of the study she had undertaken .

Case law

12. An important starting point in deciding the appeal was the recent decision in *Jagoo* which the panel considered most helpful as it reviewed earlier decisions and provided a clear steer as to the approach to take when deciding such matters. The panel has set out below those elements of that decision which are relevant to the proceedings before them.

13. The Court of Appeal agreed with the decision in *R (Hakeem) v Enfield LBC* [2013] EWHC 1026 (Admin) where 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."*

14. Lewison LJ observed in *Jagoo* that the Court of Appeal needed to find an interpretation in the appeal before them that advanced that purpose. In support, the Court of Appeal cited Carswell LCJ who 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."*

15. The Court of Appeal also reminded the reader 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
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> (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."

16. The Court of Appeal observed that 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".

17. Lewison LJ stated:

> *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.*
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> *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.*

18. There then followed some significant discussion on Ms Jagoo's disability and how it affected her study and whether the additional hours required were part of the course, Lewison LJ stated:

> *"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.*"*

19. This was an interesting point and indicated where this Tribunal and the High Court may have gone wrong in the past in trying to identify and distinguish a difference between the requirement of the course and the study recommendation. Looking at the actuality of what the student is doing in their study rather than some arbitrary distinction based on artificial classification may be more helpful and achieve the purpose of the legislation.

Facts

20. The parties agreed that the Appellant studied for the period in dispute (according to correspondence from The Open University) as follows:

    1 October 2016 to 30 June 2017 (academic year) – Law Concepts and Perspectives and An Introduction to Law. Both modules required 18 hours study per week and scored by the University at 60 points each.

    7 October 2017 to 30 June 2018 (academic year) - Contract Law and Tort Law and Public Law and Criminal Law. Both modules required 16 hours study per week from The Open University. Whilst the modules required less study each week they were also scored by the University at 60 points each.

    Both periods were part of the syllabus towards completing a Bachelor of Law (Honours).

    (In 2018 only one course, Equity, Trusts and Land worth 60 points was scheduled to be studied)

21. According to the University studying 120 points (per year) was equivalent to a full-time academic year.

22. The course the Appellant undertook was structured to allow part-time study by presenting modules worth 60 credits, each module ran from October until June and a 60 credit module would require approximately 18-20 hours study a week. The degree required 360 credits which would equate to six years although the University also accepted that students who were able to study at a full-time intensity would chose two modules per academic year and would complete in three years in line with traditional universities.

23. Students that choose to study 120 credits in one academic year were not required to continue at that intensity for the duration of the degree. It was also made clear by the OU in a warning that studying at this pace was in reality studying full-time, and a student taking this route had to indicate they understood that burden.

24. The OU recommends part-time study as most of the students are in full-time employment as it would be unrealistic to study full-time alongside full-time working hours or with other responsibilities that restrict time available to study. Students could also choose to study at a lower intensity and have up to 16 years to complete the degree although for those requiring a 'Qualifying Law Degree' the study had to be completed within a maximum of six years.

Decision

25. The panel decided that the appeal should be allowed. There was no dispute between the parties that for the two years in question the Appellant studied in each academic year (of at least 24 weeks) for periods of in excess of 21 hours a week. The question for the panel to decide was whether the course requirements were flexible and that the only fixed requirement or recommendation was to undertake one module a year, thus falling under the threshold of 21 hours.

26. There was no doubt from all the evidence provided that the Open University advertises and encourages part-time study of one module a year. However, for the first two years the Appellant signed up for two modules for each academic year. Once the Appellant had done this (having received a warning from the University that by doing so she was committing herself to full-time study), then the requirements of the course were 36 hours each week for year one and 32 hours a week for year two, thus meeting the statutory requirement. In fact, the OU "expected" a studying requirement of at least that amount.

27. In the past Tribunal panels and the Courts have distinguished between the requirements and recommendations of study, which the Court of Appeal criticised in *Jagoo*. It could have been an argument that in this appeal the panel should have followed the recommended hours study for a part-time student rather than focusing on the required hours for two modules, but the panel rejected this approach for a number of reasons:

    a. In *Jagoo* the Court of Appeal focused on 'what the student is receiving' and there was no doubt in the panel's opinion that in the appeal before them the Appellant's required study was in excess of 21 hours each week;

    b. To focus on the recommended hours for a part-time student rather than the actual University required hours for undertaking two modules would be to put 'form over substance', which was also rejected by the Court of Appeal;

    c. Whilst the course may have been promoted by the Open University as a part-time course, what had to be focused on was paragraph 4 (1) (a) – (c) of the legislation as a whole and the requirements of a full-time course. This was what occurred in *Jagoo* where the Court of Appeal focused on the hours of study undertaken by Ms Cecile Jagoo rather than the course being referred to as part-time;

    d. The Respondent concentrated on the differences between the information provided by the Open University and a student exemption certificate from a 'red brick' University. In *Jagoo* it was highlighted that a student certificate may not necessarily provide all the information required and that further enquires might need to be made. However, the Court of Appeal didn't want to place too heavy an administrative burden on the Billing Authority. In the appeal before the panel the Respondent conceded that the information provided by the Open University was relevant and the seeking of that information did not place an unnecessary administrative burden on them;

    e. The Government made changes to the legislation in 2011 which, according to their consultation paper, were to address the rise in distance and arguably more flexible learning which is what the Appellant had undertaken in this appeal; and

f. Following on from e. above, for the first two years of study the Appellant was undertaking full-time study to become a Bachelor of Law (Honours). The only distinction between the Appellant and someone studying the same course full-time at a 'red brick' university was the method of study, with the Appellant undertaking distance learning. If the Appellant was not treated the same as a 'red brick' university student, then it would appear to the panel to undermine Parliament's intention. Furthermore, it would mean that two students studying at least 21 hours each week to achieve the same result, would be treated differently. Carswell LCJ expressed reservation about interpreting the legislation in a way which excluded full-time students and Mr Nicholas Paines QC identified the difference between part-time and full-time students. Both parties accept the Appellant studied full-time for the two academic years in question, therefore to do anything other than treat the Appellant as full-time would undermine existing judicial observation.

28. The Appellant has not sought exemption for the period in between the two academic years as she conceded that her study was not on a full-time basis for that year.

29. Whilst the Billing Authority sought to argue that a full-time course would in fact be for 3 years, as most other undergraduate degrees are, the panel found that it could not accept that proposition. Whilst many courses are for three years there is a trend now to offer more flexible study where at the one end courses of 2 years or 4 years are on offer at differing institutions. The panel felt nothing turned on this point. However, the panel did note that the regulations refer to "… at least one academic year" in Paragraph 4 of that Schedule (as amended by the Council Tax (Discount Disregards) (Amendment) Order 2011). It therefore seems to be the case that any consideration must be on a year by year basis.

30. Therefore, the panel concluded that the combined modules taken together, studied by the Appellant for the two years in question were enough to bring her within the scope of the exemption, as in the panel's opinion, the amount of study fulfilled the criteria as set out above for study to be in reality full-time education and not a part-time course as the Billing Authority had argued.

31. As a consequence, we are satisfied that the Appellant has discharged the burden of proof and is entitled to the exemption for the two years which have been the subject of this appeal.

32. The President would expect panels to follow this decision and where Open University Students are able to provide compelling evidence from the University of their full-time studies meeting the legislative requirement they should be awarded the exemption.

Order

As a result of this decision the Billing Authority is required to reverse its decision and treat the dwellings under appeal as exempt in accordance with Class N of the Council Tax (Exempt Dwellings) Order 1992 as follows:

1 October 2016 to 30 June 2017 in respect of Dwelling A.

7 October 2017 to 30 June 2018 in respect of Dwelling B

The Billing Authority must comply with this Order within two weeks of the decision being issued.

APPEAL NO: 5630M237894/281C

Mr G Garland
President

Ms N Talbot-Hadley Senior member

Mr S Bamawo

Mr J Bestow
Registrar

member