SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Starred Decision No: *13/00

(Northern Ireland Commissioner's File No.: C5/98(JSA))

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Mrs M Alayande
Office of the Social Security and Child Support Commissioners
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

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but note that the Commissioner has given leave to appeal to the Court of Appeal in Northern Ireland.

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

Decision No: C5/98(JSA)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (CONSEQUENTIAL PROVISIONS) (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

JOBSEEKERS ALLOWANCE

Appeal to the Social Security Commissioner
on a question of law from a Tribunal's decision
dated 8 April 1998

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Introductory sections common to the cases of Mr McC , Mr M and Mr C

1. Each of the claimants is represented by Mr Allamby of the Law Centre (NI) and the Adjudication Officer is represented by Mrs McRory of Central Adjudication Services. In the cases of Mr McC and Mr M the application for leave to appeal is by the claimant and in the case of Mr C the application for leave is by the Adjudication Officer. In the cases of Messrs McC and C , leave to appeal was granted by the Tribunal Chairman. In the case of Mr M leave was granted by myself and with the consent of both representatives I proceed to treat the application as an appeal and to deal with all matters arising thereon as though they arose on appeal.

2. I held an oral hearing of this matter at which Mr Allamby and Mrs McRory attended.

3. The decisions being appealed against were in the cases of Messrs McC and M , decisions to disallow the respective claimant's Jobseekers Allowance on the basis that each was a full-time student during a period of study. In the case of Mr C the decision was to allow the claim for Jobseekers Allowance on the grounds that Mr C was not a full-time student during the period of study.

4. In Mr McC 's case the grounds of appeal were set out on the OSSC1 (NI) form dated 3 June 1998, in the case of Mr M the grounds were set out on an OSSC1 (NI) form dated 23 September 1998 and in the case of Mr C the grounds were set out in a letter dated 5 August 1998 from Central Adjudication Services to the Tribunal Chairman.

5. In all the cases the grounds were amplified by correspondence and at the oral hearing.

6. There was a substantial degree of commonality in the background situation. All the claimant's were students at Queen's University, Belfast. All were on "modular" courses. All had initially been studying full-time and all had, for a variety of reasons, either not taken or failed to complete or to pass examinations in or to complete various modules. None had abandoned or been dismissed from the courses which they had started. At the material times ie the periods covered by the claim for Jobseekers Allowance the claimants were all registered with the University as what is classed as "part-time students" having initially been registered as what the University classed as "full-time students" ie in earlier years.

MR McC

7. In Mr McC 's case the grounds of appeal were twofold as follows:-

   1. The Tribunal erred in law in holding that the decision of the Court of Appeal in England in the case of the *Secretary of State for Social Security -v- Anthony Webber ([1997] 4 All ER 274)* should be restricted to the specific legislative provisions with which it was dealing and that "relevant" passages in that decision amounted to a series of generalised comments on the purpose and intention of the relevant legislative provisions rather than their strict construction and meaning.

   2. That the Tribunal erred in law in giving insufficient weight to the *Webber* decision and undue weight to Commissioners' decisions delivered prior to the *Webber* decision.

8. The relevant legislation is contained in the Jobseekers (NI) Order 1995 Articles 3 and 8 and in the Jobseekers Allowance Regulations (NI) 1996 and in particular regulations 1, 4, 15 and 130.

9. In essence the legislative scheme is that a person who otherwise satisfies the conditions for Jobseekers Allowance can only be entitled to the allowance if he is available for employment (Article 3). Article 8(4) provides that Regulations may prescribe circumstances in which for the purposes of the Order a person is or is not to be treated as available for employment.

10. Regulation 15 provides that a person is not to be regarded as available for employment "if he is a full-time student during the period of study". There are certain exceptions to this for students with partners none of which are relevant to this case. Regulation 130 defines student as "a full-time student" and regulation 4 defines "period of study" to mean:-

> "... the period beginning with the start of the course of study and ending with the last day of the course or such earlier date as the student abandons it or is dismissed from it; but any period of attendance by the student at his educational establishment, or any period of study undertaken by the student, in connection with the course which occurs before or after the period of the course, shall be treated as part of the period of study".

Regulation 1 (in so far as relevant to this case) defines a "full-time student" as a person "aged 19 or over but under pensionable age and attending or undertaking a full-time course of study". It defines "course of study" as:-

> "... any course of study, including a course of advanced education and an employment-related course, whether or not it is a sandwich course and whether or not a grant is made for attending or undertaking it and for the purposes of this definition a person who has started a course of study shall be treated as attending or undertaking it, as the case may be, until the last day of the course or such earlier date as he abandons it or is dismissed from it."

11. The Tribunal's findings of fact in Mr McC 's case were as set out hereunder and were not disputed (though Mr Allamby submitted that they were inadequate):-

> "1. The appellant is a single man aged 24. On 19 September 1997 he made a claim for Jobseekers Allowance.
>
> 2. The appellant commenced a full-time undergraduate degree in architecture at Queen's University Belfast in October 1993.
>
> 3. During his initial academic years, the appellant received an education authority grant to support his full-time academic studies.

4. During his initial academic years, the appellant was required to attend his course on a full-time basis and was required to pass all of his examinations as a pre-condition of entry to the subsequent years of the degree course.

5. By the end of the academic year 1996-1997, the appellant had failed to complete the requirements of his final year of studies to allow him to graduate.

6. In September 1997, Queen's University, Belfast required the appellant to register as an "examination only" student for the academic year 1997-1998. The tribunal accept the letter, dated 30 March 1988, as evidence of the appellant's status as a student at Queen's University for the academic year 1997-1998. The tribunal has noted that the appellant has provided a further letter, dated 15 December 1997, from the Department of Architecture at Queen's University, Belfast, which indicates that he is regarded by his Adviser of Studies as a part-time student. The tribunal, however, prefer and accept the letter from the Student Records Office, and signed by the Senior Assistant Secretary, as more formal proof of his status as a student for the academic year 1997-1998.

7. The tribunal accept the evidence of the appellant that while he is permitted to use the University's facilities, he is not attending classes during the academic year 1997-1998, and is not receiving an educational authority grant to support his studies.

8. The tribunal accept as factual the excerpts from the 1997-1998 Calender *[sic]* and Prospectus provided for the tribunal by the appellant's representative and find that they accurately describe the academic structure of Queen's University, Belfast, the admission procedures for degree courses, the level and amount of fees payable by students, the relevant study regulations and the structure of degrees in the university."

The letter referred to at paragraph 6 of the findings of fact from the Students Records Office I take to be the letter dated 30 March 1998 signed by Mr J D which states that Mr McC has been required by the University to register as an "examination only" student for the academic year 1997-1998 for the Bachelor of Science (Architecture). The letter further states that Mr McC was not required to be in attendance at the University during that period.

12. As the Tribunal accepted that letter as evidence of the appellant's status as a student it is apparent that it classed him as an examination only student for the academic year 1997-1998.

13. The Tribunal's reasons are very fully recorded in its decision and in essence were as follows:-

(a) The Tribunal declined to follow the various cases mentioned on the 5th paragraph on the section headed "Reasons for decision" and in particular declined to follow *Webber* as being decided under a different form of the legislative provisions. The provisions relating to Income Support under which *Webber* was decided have been changed with effect from August 1995 to remove the phrase "throughout any period of term or vacation within it" in relation to the definition of "course of study".
The Jobseekers Allowance Regulations under which this case was decided did not contain that phrase.

(b) The Tribunal considered and followed aspects of the decision in the *Chief Adjudication Officer -v- Clarke and Faul ([1995] ELR 259)* to the extent that those aspects were considered and followed by Commissioners in *CIS/15594/1996* and *CIS/13276/1996* (both decisions of Commissioners in Great Britain).

(c) That the decision in *Webber* should be restricted to its particular facts and the specific legislative provisions with which it was dealing.

(d) The Tribunal followed decisions *CIS/14477/1996* and *CIS/15594/1996* and *CIS/13276/1996* of Great Britain Commissioners. Specifically the Tribunal agreed with the view expressed in *CIS/15594/1996* that where a person who had commenced a full-time course of study left due to examination failure or illness and was re-admitted for essentially the same programme which would have been required if he had not been required to leave and to obtain the same qualification, he returned to the same course. The Tribunal, like the Commissioner in that case, could not see why in the circumstances of exclusion from normal progress because of examination failure or illness, the fact that a person could no longer obtain the originally aimed for qualification on the originally expected date meant that if re-admitted after an interval, the re-admission must be to a different course.

(e) All the Commissioners' decisions and indeed the Court decisions mentioned were based on the Income Support (General) Regulations 1987 but in essence the wording was the same and the Tribunal therefore followed the cases which it had followed as relevant also to the Jobseekers Allowance legislative provisions.

(f) The facts in the appeal were to all intents and purposes identical to those in *CIS/15594/1996* which the Tribunal accepted and followed.

The Tribunal therefore found the appellant to be a full-time student during the period of study and decided that he could not be regarded as available for employment.

14. No issue was raised before me that if the claimant was found to be a full-time student he could nonetheless be considered as available for employment or could otherwise be entitled to Jobseekers Allowance and it would appear that no issue was raised on this matter before the Tribunal.

15. On behalf of the claimant Mr Allamby submitted that there was nothing wrong with the findings made by the Tribunal but that they were not complete. Referring to the Queen's University's study regulations he said that a certain number of modules were required to be completed for the attainment of a degree. With three year degree courses, the three year degree required 18 modules to be taken over three years if it was undertaken on a full-time basis, and the four year degree required 24 modules to be taken if it was undertaken on a full-time basis. Normally 24 or 18 modules had to be completed for a degree and the degrees could be studied for on a full-time or a part-time basis. If a student enrolled to do six modules per year the student could not change within that year but could change from year to year. If a student registered for less than 3 modules he was treated as a part-time student. The course the student was following was not characterised as full-time. It was possible to have both full-time and part-time students studying the same module. Mr Allamby stated, though here he ventured into the evidential realm that so far as he knew almost all courses at Queen's University were modular, the only exceptions being the medical and dental students.

16. Mr Allamby reiterated Mr McC 's academic history on which there appeared no dispute. Mr McC had started in year one on a full-time basis and for a variety of reasons had to re-take some examinations in year two. He had not, due to illness been able to complete any module in year two, had come back in October 1995 and did some examinations from year one and some examinations from year two. His health problems had continued and he had completed and passed some examinations. By the academic year 1996-1997 he had completed most of year one and part of year two, but in that year he did no examinations again due to health problems. He completed one or two modules and did some project work. At the time when he claimed he was enrolled to do two modules where he did not have to attend classes though he could if he wished to do so on an informal basis, but did have to do the examinations. At the relevant time he was enrolled for three examinations and a piece of project work which he could complete at the University or elsewhere. He was an examination only student.

17. Mr Allamby submitted:-

(1) That the course on which Mr McC embarked was not characterised as full-time. The course was a flexible mixed-mode course. The Tribunal had erred in thinking the case was distinguishable from *Webber* as Mr McC was an examination only student.

(2) The Tribunal was of the view that the decision in *Webber* should be restricted to its particular facts - the switch from full-time to part-time status (penultimate page - first paragraph). In Mr Allamby's submission this meant that had the Tribunal considered Mr McC to be a part-time student it should have followed *Webber*.

(3) The Tribunal was of the view (penultimate page, paragraph 1) that the decision in *Webber* was on specific legislative provisions which had been amended. In fact much of *Webber*, in Mr Allamby's submission, survived the amendment.

(4) The Tribunal had erred in finding that the facts were the same as in *CIS/15594/1996* (which was appealed to the Court of Appeal in England in the case of *O'Connor v Chief Adjudication Officer and Another*)(reported in *The Times* on 11 March 1999). Mr Allamby submitted that the facts were different. Mr O'Connor was a person studying on a full-time course that could only be studied full-time. That was not the case here where the course could be undertaken on a full-time or part-time basis and the student could switch at the end of any year. The facts were no different in than in *Webber*.

18. In reply to my questions Mr Allamby indicated that a student who was enrolled in a part-time course would be set certain core modules in each year. The content of the year might not be the same as Mr McC 's but a part-time student would have to attend classes. An external student could attend classes but it was not compulsory and Mr McC did not attend.

19. Mr Allamby accepted that Mr McC had neither abandoned nor been dismissed from his course.

20. Mr Allamby accepted that the Jobseekers Allowance Regulations in relation to students were not *ultra vires* as decided in *O'Connor*.

21. Mr Allamby based his argument in *Webber* largely on the judgment of Hobhouse LJ. He submitted that was the "lead" judgment and that it was followed in the *O'Connor* case by Auld LJ. He conceded he got little help from Gibson LJ or Evans LJ. He submitted that Auld LJ's was the lead judgment in the *O'Connor* case. He submitted that if the only basis on which a course could be undertaken was full-time, then the deeming provision in the Jobseekers Allowance Regulations applied, but if the course permitted a switch from full-time to part-time then they did not. The issue was the arrangement which the University provided. The Tribunal had, Mr Allamby submitted, been wrong to follow Commissioner Mesher.

22. As regards the description of the course by the University Mr Allamby said that what the University said as to the nature of the course was persuasive but not conclusive though it did have to be fully taken into account.

23. In reply to my question as to why one student should be treated differently from another depending on the University's arrangements he said that the issue was the arrangement that the University provided and that was the key. When the University provided a course which was flexible at the outset it could not be described as a full-time course.

24. Mr Allamby submitted that in the *O'Connor* case Thorpe LJ giving a dissenting judgment, took and accepted the Evans LJ argument. Swinton Thomas LJ accepted the judgment of Hobhouse LJ in *Webber* and rejected that of Evans LJ.

25. Mrs McRory rejected the judgment of Hobhouse LJ in the *Webber* case submitting that it diluted the effect of regulation 61. She referred me to *R(SB) 40/83* as authority for the proposition that the relevant issue was whether the course was full-time, not whether the student attended it full-time. She stated that Hobhouse LJ had looked more at the attendance than at the course.

26. Mrs McRory submitted that *Webber* and indeed *O'Connor* and all the cases cited were decided under the Income Support Regulations. The Jobseekers Allowance Regulations were slightly different in that the relevant definition of "course of study" indicated that a person who had started a course was to be treated as "attending or undertaking it" not merely attending it (as in Income Support) "... until the last day of the course or such earlier date as he abandoned it or is dismissed from it;". Attendance therefore was not necessary at all - only undertaking.

27. Mrs McRory referred me to an earlier decision of a Northern Ireland Commissioner - *C2/89(IS)* where a claimant, having enrolled at University and failed examinations, had to register as a part-time student. The Commissioner decided that she was to be treated as attending her full-time course until she abandoned or was dismissed from it.

28. Mrs McRory submitted that there was no error in the Tribunal's decision in this respect.

29. As regards Mr Allamby's submission on the *O'Connor* decision, Mrs McRory submitted that the decision had to be read as a whole. She referred me to pages 12 and 13 of the judgment of Auld LJ where he stated:-

> "... I see no uncertainty in the words or purpose of the Regulation; they require that a person who has started a full-time course should be treated as attending it until its last day subject to his earlier abandonment of or dismissal from it, and are thus intended to cover periods of non-attendance for whatever reason so long as the person remains committed to finish the course. I also have difficulty, in the content of a provision which defines a student by reference to deemed attendance on a full-time course, with the distinction Evans LJ drew between a student who is not attending such a course and someone who "is not a student at all", unless the status has been brought to an

> end in one of the ways specified in and forming part of the definition of a student in the deeming provision itself.
>
> ...
>
> As to the "last day" argument, Mr Drabble's interpretation would negate the whole purpose of the deeming provision, which is to treat attendance on a course that started as full-time as continuing to be full-time even though there are breaks in it when the student does not follow the course full-time. In my view, the provision was concerned with one academic course leading to one qualification, not with two or more courses leading to the same qualification or different qualifications, variously full-time or part-time according to and depending on the student's pattern of attendance."

30. Mrs McRory submitted that following *O'Connor*, in this case as Mr McC had started full-time, the deeming provision would have to apply. The University may have allowed him to alter his attendance but he started a full-time course and had not completed it.

31. Referring to the said judgment and the passage beginning:-

> "If, at its start it may be followed full-time or part-time according to the student's preference as the course proceeds, the position is different.",

Mrs McRory submitted that no great weight should be given to that passage, in the context of this case. In this case Mr McC set out to do a full-time course.

32. Mrs McRory submitted that if students were to be treated differently according to whether their University or indeed their faculties did or did not offer modular courses, the outcome would be unfair.

33. In reply Mr Allamby argued that neither Hobhouse LJ in *Webber*, nor Auld LJ in *O'Connor* had focused on the attendance but on the nature of the course. In *Webber*, Hobhouse LJ accepted that a course had to be characterised at its outset but said that a course which was a flexible modular course at its outset could not be categorised as a full-time course. The only difference which Mr Allamby could see in the *Webber* case and the present one was that Queen's University did not have a classification of mixed mode course. Other than that the course was identical to the one in *Webber* who had also commenced study full-time.

34. Mr Allamby submitted that there was a consistent thread in the Court of Appeal decisions that the deeming applied to a course which was full-time not to one which from its outset was flexible.

35. At my request Mr Allamby made a written submission on the points made by him at hearing and covering the issue of the standing of the Tribunal's conclusion that the claimant was on a "full-time course" and whether there was evidence to support it. Mrs McRory relied on her written observations.

36. After the hearing Mrs McRory forwarded to me a decision of Commissioner Saunders in Great Britain - *CJSA/836/1998*. Both representatives commented thereon. Mrs McRory in a letter dated 24 August 1999 and Mr Allamby in a letter dated 15 September 1999.

37. I am grateful to both representatives for their thorough presentations.

38. Universities no doubt because of their fee and grant related issues will have their own classification of courses and descriptions of the status of students. The University's classification of a course must of course be given very considerable weight. The meaning of "course" is however one for interpretation by the adjudicating authorities.

39. I should state at the outset that I do not think the fact that a course is divided into modules is a matter of great importance in deciding whether or not the course is full-time. Modules are merely units of study and it is the course or programme of study undertaken which is relevant in this case. Certainly the modular system may make it easier to study on a part-time basis or to undertake a part-time course. It does not, however, of itself determine whether the course undertaken is full-time or not.

40. The central issue in this case appears to be whether or not the Tribunal erred in law in its finding that Mr McC was attending a full-time course. No one disputes that if he commenced such a course he was to be treated as remaining on it until he had abandoned it or been dismissed from it. No one alleges that he had abandoned the course he began or been dismissed from it. The main area where Mr Allamby submits that the Tribunal erred in law was that it concluded that Mr McC had started a full-time course.

41. Other issues were raised but I think they can be disposed of relatively easily.

42. Firstly the Tribunal was not in error *per se* in not considering itself bound by *Webber*. Adjudicating authorities in Northern Ireland are not bound by the decisions of either Commissioners in Great Britain or the Court of Appeal in England or its equivalent in Scotland unless specifically approved by the Northern Ireland Commissioners or Courts (which had not happened here in the case of *Webber* or *O'Connor*). They are of course obliged to take such decisions into account and the decisions are of strong persuasive authority. A Tribunal in Northern Ireland, distinguishing or differing from them should clearly set out why. That has been done in this case.

43. Secondly I consider that Mr Allamby is incorrect in so far as he appears to consider the judgment of Hobhouse LJ in *Webber* as the "lead" judgment in that case in the sense of containing the *ratio decidendi*. It is "lead" only in that it came first and set out the fact situation.

44. Unlike Mr Allamby I am not of the view that the judgment of Hobhouse LJ is the "lead" judgment in *Webber*. In terms of the reasons for the judgment given the three judges differ quite considerably. The reasons for Hobhouse LJ's judgment appears to be that the course of study had to be characterised at the beginning and that as the applicant could study for his degree either full-time or part-time or a mixture of both, his course could not be classed as a full-time course. He finds that Mr Webber enrolled for a course entitled "Modular degree Dip HE and Cert (FT)". FT apparently stood for full-time. Because the course did not at its outset require full-time attendance it could not in Hobhouse LJ's view be described as a full-time course. He appears to accept the University's classification on what was full-time or part-time study. Hobhouse LJ decided that the Regulations included no definition of what was to be treated as a full-time course and the Commissioner (whose decision was under appeal) was therefore in his decision justified in describing the course Mr Webber was following as a mixed mode course. The Judge stated that if the relevant course was not capable at its outset of being categorised as full-time, then the student was not at any time "attending a full-time course of study" and the problem posed by the deeming provision did not arise. The relevant person never was a student, within the definition in regulation 61.

45. Hobhouse LJ stated:-

> "The feature of the Regulations which gives rise to the problems in the present case is that the status of *student* depends upon the categorisation of the course on which the student is enrolled. The definition of *course of study* requires that the course shall be a "full-time" course of study. ... A course can be one which has a fixed and determined character as a full-time course for the whole of its duration. But on the other hand courses are offered which include a large element of flexibility. They may provide for part of the course to be full-time and pat [*sic*] part-time; they may give the student a choice which he may exercise from time to time during the course as to whether in any given period, be it a term or a year, he decides to study full-time or part-time; further the institution may have similar options to require a student to change from full-time to part-time study as, for example, if he fails to meet the requirements of the full-time course."

Later dealing with the facts of the available modes of study he states:-

> "... Mixed mode is described [in the University prospectus] in the following terms: "You attend the course on a full-time and part-time basis at different stages of the course." ...
>
> ...

> ... Following the approach in the Court of Appeal in *Clarke and Faul*, there are difficulties in saying that the relevant period fell within "any period of term or vacation within" the full-time course. They were periods of terms and vacation within what was at the material time a part-time course. If matters have to be considered in strict categories, the position at the material time was that Mr Webber was not on a full-time course but (on the hypothesis that he had been on a full-time course) had transferred to a part-time course.
>
> I recognise however that any such analysis could be said both to fail to give effect to what is, after all, an arbitrary deeming provision and to involve an element of artificiality since from the point of view of the University and Mr Webber he was still pursuing the same course albeit part-time not full-time. In my judgment the answer to be preferred is to accept the overall approach of Mr Rabinder Singh to the construction of the definition in Regulation 61 but to recognise that a course which does not require full-time attendance cannot properly be described as a full-time course."

He adopted the view that the course upon which Mr Webber was enrolled was not a full-time course and he never was a student within the definition of regulation 61.

46. Peter Gibson LJ based his decision on the phrase "throughout any period of term or vacation within it". He stated:-

> "Mr Singh argued that Clarke and Faul was distinguishable because unlike the academic annus non of Ms Clarke and Ms Faul during which they were expected to stay off the university campus, the Respondents' second year was unquestionably treated as an academic year by the university which required him to continue with his studies, albeit on a part-time basis, with a view to returning to the full-time course the following year. I am not persuaded by this distinction. The additional requirement recognised in Clarke and Faul was that the period in question must be a "period of term or vacation within it" that is to say, within the full-time course. Plainly, for the Respondents' second year there is no period of term or vacation within any full-time course. Mr Singh also sought to derive help from Driver, in which this court held that a person who had started the full-time course was to be treated as a student in a period in which she was intended to be having a period of professional experience but her placement had prematurely come to an end. He suggested that the present case in which the Respondent was studying part-time was stronger than Driver. But Driver turned on its own particular facts, the majority of this court holding that the period in question did not cease to be a period of term within a full-time course. That

cannot be said here.

For these reasons which are in substance those advanced by Mr Drabble QC, for Mr Webber, in his first argument I would hold that this appeal falls to be dismissed.

Mr Drabble, conscious of the limited effect that a victory on that ground would achieve by reason of the subsequent amendment of regulation 61, advanced a wider argument for the dismissal of the appeal. This argument was dependent on construing regulation 61 in such a way that the deeming provision of para. (a) is not allowed to cause what is in reality a period of part-time course to be treated as a period within a full-time course. In view of the conclusion which I have reached on the first argument, I prefer to say nothing on this or on the other points taken by my Lords in their judgments."

47. Evans LJ stated:-

"Whilst like Peter Gibson LJ I do not express a concluded view on Hobhouse LJ's first ground of decision, namely, that the respondent never embarked on a full-time course, nevertheless I would also hold that the respondent is entitled to succeed without relying on the words "throughout any period of term or vacation within it." ...

...

In my view, it is one thing to treat a person as a full-time student at times when, although such a student, he is not in fact attending the course, but quite another thing to rely upon the deeming provision to create a status of student which does not exist in fact. ...

...

In the present case, the claimant remained a student, but in fact a part-time student whom the regulations do not exclude from entitlement to income support. By parity of reasoning, I would hold that the deeming provision in Reg. 61(a) cannot be relied upon to create a status of full-time student which does not exist in fact. Ultimately this is a question of statutory interpretation. It is not necessary to say that there is a general principle that a deeming provision could never have such an effect. It is sufficient that in the present case the statute is sought to be interpreted in this way in order to create, for no apparent reason, "an anomalous class of people left to destitution without state support of any kind". I should

require express words of the utmost clarity to persuade me that Parliament intended to produce that disgraceful result."

48. It will thus be seen that both Peter Gibson LJ and Evans LJ declined to express a view as to whether or not the course was a full-time course. It will be seen also that each of the three Judges had different reasons for dismissing the appeal by the Secretary of State.

49. In such circumstances it cannot be said that the *ratio decidendi* of *Webber* was the reasoning of Hobhouse LJ. It is difficult to ascertain the *ratio decidendi* of the decision but, if anywhere, it appears to reside in the judgment of Peter Gibson LJ with whom Evans LJ specifically agreed. Gibson LJ based his decision on the words "throughout any period of term or vacation within" the full-time course. He specifically declined to comment on the point taken by Hobhouse LJ in relation to the course itself (see the final paragraph of the judgment of Peter Gibson LJ). Evans LJ specifically agreed with Peter Gibson LJ and again declined to express a concluded view of Hobhouse LJ's first ground of decision ie that the respondent never embarked on a full-time course. It therefore seems to me that the *ratio decidendi* of the decision is that set out by Peter Gibson LJ ie that the period when the claimant was studying part-time he was not on a period of term or vacation within a full-time course. The words "a period of term or vacation within it" have now been removed from the Income Support legislation under which *Webber* was decided and are not contained in the Jobseekers Allowance legislation which is relevant to this case.

50. I therefore consider that the Tribunal was correct in its view that *Webber* had been decided on different legislative provisions.

51. As regards the *O'Connor* case, Auld LJ in his judgment makes it clear that the nature of the course is to be determined at its outset. He states, referring to the course followed by the student:-

> "Mr McManus submitted that whether a course of study is full-time for the purpose of this deeming provision is determined at its start, as Hobhouse LJ clearly accepted in **Webber**, not according to later changes prompted by events. He said that where, as here, a claimant has clearly started a course which was intended to be full-time throughout, a change to part-time studying or a complete break from studying for a period after re-sitting examinations and while waiting to join the next part of the course, or, say, for health or other compassionate reasons, does not change the full-time character of the course. Put shortly and more specifically, Mr McManus submitted that Mr O'Connor is not entitled to re-characterise his course from full-time to part-time because he failed his examinations part way through it.
>
> In my view, Mr McManus's submission is correct."

52. Auld LJ clearly interpreted Hobhouse LJ as accepting that if a course was started which was intended to be full-time throughout, a change to part-time study or a break from study while awaiting to join the next part of the course did not change the full-time character of the course. Auld LJ therefore accepted that if a course is intended to be full-time at its outset it is treated as so until abandonment or dismissal the determination factor being whether the course was intended to be full-time throughout.

53. Commenting on the *Webber* situation where *at its start* [my italics] the course could be followed full-time or part-time according to the student's preference as the course proceeds, Auld LJ states:-

> "... Hobhouse LJ held that the critical matter was the form of the course to which the claimant had committed himself when he started it. He said that although the claimant had started on a full-time basis, it was a flexible "mixed mode" course which did not commit him to continuing it on such a basis. He said, at 281D - 282B:
>
> "... The course does not have a fixed and determined character at its outset. It has an uncertain length and composition. A student can start as a part-time student, convert to a full-time student and, maybe, convert back to part-time. ...
>
> ... a course which does not require full-time attendance cannot be described as a full-time course. ...""

It is apparent that Auld LJ considered like Hobhouse LJ that the course started was the relevant one and that periods of non-attendance and part-time attendance at the course were still included within it. I agree that Auld LJ's judgment is the lead judgment in *O'Connor*. Auld LJ clearly treats the nature of the course as being determined at its outset and is of the view that a change in attendance hours does not alter the course. He states:-

> "... I see no uncertainty in the words or purpose of the Regulation; they require that a person who has started a full-time course should be treated as attending it until its last day subject to his earlier abandonment of or dismissal from it and are thus intended to cover periods of non-attendance for whatever reason so long as the person remains committed to finish the course."

54. The course on which Mr McC enrolled was described by the University as "full-time", and the claimant due to failure to complete parts of the course was being permitted to study as an "examination only" student on the same course . There was no indication that the course had changed or that Mr McC had abandoned it or been dismissed from it. Indeed the letters dated 29 October 1997 and 15 December 1997 from Dr Wylie of the Department of Architecture, from Mr McC himself dated 3 October 1997 and his statement of 30 September 1997 all indicate he

continued on the full-time course. The reclassification of his student status made no difference to the course, he was repeating part of what the University described as a full-time course.

55. Was there any evidence that the course in question was mixed mode? It seems not; Queen's University does not have any classification of mixed mode courses and the evidence was that the claimant was registered as a part-time or examination only student on a full-time course. The qualification for which Mr McC was studying could be obtained by students following a part-time course but that was not what Mr McC enrolled on either at the start of his course or on any subsequent date. The course remained unchanged. Due to his not having completed various stages of the course he was permitted to study for it as a part-time or examination only student but it was the same course. On the evidence it is difficult to see how the Tribunal could have concluded that Mr McC was on anything other than a full-time course and I consider its conclusion was not merely sustainable but correct.

56. The evidence showed that -

(a) the University described the course as a full-time course;

(b) the University regulations do refer to full-time degree courses and contained no classification of mixed mode courses;

(c) there was no indication that the course on which Mr McC had embarked had altered as opposed to the fact that he was registered as an examination only student on that course;

(d) there was no indication that he had ever been dismissed from or abandoned the course for which he had originally enrolled;

(e) the registration in stages of the University referred to registration in stages for the full-time degree, not the full-time one year course nor the part-time course.

(f) there was no indication of application to enrol on a part-time course or a mixed mode course.

(g) Mr McC himself in his "Customer's Statement" dated 30 September 1997 described his course as a three year one.

Should the Tribunal have gone behind the University's classification of the course and initiated further enquiries? Decision R(SB) 40/83, a decision of a Commissioner in Great Britain is authority for the proposition that -

> "... whether a course is within the scope of the expression ["full-time course"] is a question of fact for determination by [the appropriate adjudicating authority] ... all the evidence has to be considered and I accept that evidence from the educational

establishment concerned is not necessarily conclusive. However, ... such evidence, unless on its face inconclusive, ought to be accepted as conclusive unless it is challenged by relevant evidence which at least raises the possibility that it should be rejected."

I agree with that proposition.

Was the University's evidence as to the course being followed inconclusive? No, it appears quite conclusive. Was there any factual evidence as to the course being wrongly classified? No evidence, merely argument about the ability to obtain the same qualification by undertaking a part-time course. The facts were not really disputed. It appears to me that there was no evidence or question raised which required the Tribunal to go behind the University's classification of the course. There was no real dispute on the primary facts. It was the classification of the course which was the issue; the Tribunal was entitled to decide on the matter relying on the University's evidence as to the nature of the course.

57. The fact that schemes of study could include different numbers of modules per year did not raise an issue that the particular scheme embarked on by Mr McC was not a full-time course of study. The evidence indicated he had embarked on a course which envisaged at its outset sufficient modules per year to be classed as full-time. I do not consider that the facts in this case are the same as in *Webber*. The course in this case was full-time, not mixed mode and there was no abandonment of or dismissal from it. The situation here appears much more similar to the *O'Connor* situation than to that in *Webber*. The course here, at its outset demanded full-time attendance. It had a fixed anticipated duration. Mr McC was permitted to study part-time or as an examination only student on the same course only because of lack of academic progress.

58. As the Commissioner stated in *R(SB) 41/83* (para 12) whether a course falls within the scope of the description of "full-time" is a question of fact for decision by the Tribunal. The Tribunal did not err in concluding that Mr McC had undertaken a full-time course. There having been no abandonment of or dismissal from such a course Mr McC must be taken to be still on the course until its completion.

59. I turn now to the decision of Commissioner Saunders in Great Britain - decision *CJSA/836/1998*. This decision issued after the Tribunal decision under appeal in this case and the Tribunal cannot be faulted for not having taken it into account though it does raise issues which I must deal with on appeal.

60. Commissioner Saunders at paragraph 7 alludes to a point on which, it appears, no argument was addressed to him. It is on this point that Mr Allamby and Mrs McRory addressed me in letters subsequent to the hearing. The point is the difference in formulation of the Jobseekers Allowance Regulations, which the present case is to be decided, and the Income Support Regulations under which *O'Connor* and *Webber* were decided. The Commissioner is correct that there is a difference. It relates to the duration or deemed duration of the course of study. Regulation 61 of

the Income Support (General) Regulations (NI) 1987 dealing with the definition of "student" defines a student as a person who is attending a full-time course of study and provides that for the purpose of that definition:-

> "a person who has started on such a course shall be treated as attending it until the last day of the course or such earlier date as he abandons it or is dismissed from it."

In the Jobseekers Allowance Regulations (NI) 1996 the definition of "student", as relevant to this case, contains no provision as to the meaning or duration of course of study. Regulation 130 defines a "student" as a "full-time student". Regulation 1 defines a "full-time student" as a person:-

> "aged 19 or over but under pensionable age and attending or undertaking a full-time course of study;"

61. Regulation 1 of the Jobseekers Allowance Regulations contains provisions as to the duration of the course of study. It provides that a "course of study" means -

> "any course of study ... and for the purposes of this definition a person who has started a course of study shall be treated as attending or undertaking it, as the case may be, until the last day of the course or such earlier date as he abandoned it or is dismissed from it."

62. The Jobseekers Allowance Regulations therefore define a full-time student as a person attending **or undertaking** a full-time course of study. Unlike the Income Support Regulations either attending or undertaking a full-time course of study will mean a person is to be considered as a student. Thus far the definition of "student" for Jobseekers Allowance purposes is similar to, but possibly more extensive than, the definition for Income Support purposes. It is a person attending or undertaking a full-time course of study.

63. I turn now to the provisions on the period for which the person is to be treated as attending the relevant course. The Income Support Regulations provide that he is to be treated as attending such a course until the last day of the course or earlier abandonment or dismissal. The Jobseekers Allowance Regulations say that a person who has started a course of study is to be treated as attending or undertaking <u>it</u> until the last day of the course or earlier abandonment or dismissal. The "it" refers to the course started.

64. All will therefore depend on whether the course started was full-time or not. If it was a full-time course, attendance or undertaking of that full-time course will be deemed to continue. Commissioner Saunders concludes in the case before him that a student had changed from a full-time to a part-time course. That does not alter the legislative provisions that if the course started was a full-time course and the person has not abandoned or been dismissed from <u>it</u>, he is to be deemed as still attending or undertaking <u>it</u> until its last day. The important things are the nature of the course

started and whether there was dismissal or abandonment of it.

65. I do not consider that a change in the mode of attendance is the determining factor. My reasons are the reasons set out by Auld LJ at page 15 of his judgment in the *O'Connor* case. It is the course undertaken not whether the student attends full-time or part-time which is determinative. I think the legislative provisions on Jobseekers Allowance means that a person whose course is classed as full-time at its outset is to be treated as attending or undertaking it ie the full-time course until the last day or earlier abandonment or dismissal. In this I differ from Commissioner Saunders views as expressed at paragraph 8 of *CJSA/836/1998*. I also differ from him in his analysis (at para 7) of the *Webber* case. It appears to me that the rationale of the judgment of Hobhouse LJ in *Webber* was that the course was mixed mode (ie not full-time) from its outset. It was the demands of the course, not the actual hours of attendance, that was relevant. The course in *Webber* could not be classed as full-time from its outset.

66. Unfortunately *CJSA/836/1998* contains no analysis of what is meant by "course of study". This must, I think, mean the programme of study offered by the university and which the student undertakes.

67. Commissioner Mesher in decision *CIS/15594/1996* (which was upheld in *O'Connor*) referred to the course at paragraph 23 as "the actual programme of attendance and study *to be followed* [my italics] by the individual person" and as "the general programme offered by the relevant institution", appearing to consider these as being interchangeable for purposes of the Income Support General Regulations. It is therefore the programme of study undertaken which is relevant.

68. It is quite apparent that it is the classification of the course as distinct from the hours spent studying which is important. The definition does not refer to attending full-time or undertaking full-time but to attending a full-time course.

69. In addition the course and the qualification to be obtained are two different things, the course being the route adopted or undertaken to obtain the qualification.

70. Similarly the course is separate from each academic year within it as the provisions as to duration of the course indicate.

71. If therefore a course is classed as a full-time course at its outset the fact that part of it is studied part-time for reasons of examination failure, health or otherwise does not mean that the person is on a different course.

72. In this case while it would have been possible for Mr McC to leave the course he was on and re-apply to obtain the same qualification by applying for and enroling on a part-time course, he did not do that. Mr Allamby agrees he neither abandoned nor was dismissed from the course he started. He only ever applied for and enrolled on the one course. The course structure or programme was not the same as for part-time courses. Mr McC was unable to complete various stages of the course and

so for a time was allowed to study part-time to enable him to do so and finally permitted to do examinations alone to enable him to complete that original course. His hours of study may have altered, the course never did. The Tribunal was entitled to classify the course as it did and was correct in so doing. The fact situation was different to that in *Webber* and similar to that in *O'Connor*. The Tribunal expressly followed *CIS/15594/1996* which was upheld in the *O'Connor* decision.

73. I therefore find there to be no error in the Tribunal's decision and I dismiss this appeal.

(Signed): COMMISSIONER

(Date): 19 October 1999

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