Commissioner's file: CIS/13276/1996

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992 SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. The adjudication officer's appeal is allowed. The decision of the Sheffield social security appeal tribunal dated 26 January 1996 is erroneous in point of law, for the reasons given below, and I set it aside. It is expedient for me to substitute my decision having made further findings of fact (Social Security Administration Act 1992, section 23(7)(a)(ii)). My decision is that the claimant (1) is not entitled to income support for the period from 29 September 1995 to the day before the expiry of 196 days from the beginning of her incapacity for work on 3 July 1995; (2) is entitled to income support at a rate to be calculated by the adjudication officer from the 196th day of her incapacity for work until the day on which she was found no longer to be incapable of work; (3) is not entitled to income support for the remainder of the period up to and including 22 September 1996. See paragraphs 28 and 29 below for the conditions on which my decision is made.

2. The appeal tribunal was concerned with the claim for income support made on the form received on 10 October 1995, but treated as made on 29 September 1995. The claimant had begun a full-time four-year degree course at the University of Sheffield in 1992. On 3 July 1995 she had the misfortune to be injured in a car accident, seriously enough to render her incapable of work. When it became clear that she would not be fit to return to her studies in September 1995, she was given leave of absence for the academic year by the University. The letter of 6 October 1995 from the School of Medicine recorded that she was, "on leave of absence with effect from 25th September 1995 and will return to the fourth year of the BMedSci Speech Science course on 23rd September 1996". A claim for incapacity benefit was refused because the claimant had insufficient contributions. On 10 October 1995, the adjudication officer decided that the claimant was not entitled to income support from 29 September 1995 because she was a student during the period of study and so was required

to be available for employment and was deemed not to be available. The claimant appealed, saying that as she was incapable of work she would not be required to sign on to receive income support.

3. The appeal tribunal allowed the appeal by a majority and decided that the claimant was not a student for income support purposes from 29 September 1995. The reasoning of the majority and of the chairman, who was the dissenting member, was recorded as follows, after referring to the definitions of "student" and "period of study":

> "The Tribunal allows the appeal because it is satisfied that from 29 September 1995 [the claimant] is not a student during the period of study.

In reaching this decision, the majority of the Tribunal found that factually [the claimant] was not, from 29 September 1995, attending a full-time course of study and that, in fact, she was physically not capable of doing so.

> The majority considered that, though at some point in the future she might be physically capable of resuming her studies, that future prospect did not materially affect the fact that from 29 September 1995 she was not attending a full-time course of study.
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> The majority considered that it was quite inappropriate to classify [the claimant] as a "student", because she was not attending lectures, she was not registered as a student with the university, she had no access to university facilities, she did not qualify as a student for either an education maintenance grant or a student loan and she was not regarded as a student by other public bodies such as the inland revenue.
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> The majority considered that, on the facts, [the claimant] had abandoned her course in consequence of the injuries she had received in the accident.
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> The Chairman of the Tribunal dissenting considered that [the claimant] was, at the material time, still to be treated as a student by virtue of regulation 61, because she had started a full-time course of study at an educational establishment and had not reached the last day of the course (which would be in the Summer 1997), nor had she abandoned or been dismissed from it. Although she was not actually attending lectures or registered as a student at the university or having access to the facilities of the university, she could not be said to have abandoned her course, because she fully intended to resume it and had arranged with the university to recommence on 23 September 1996 ((C) 7/89 (IS) and Hof fmann LJ in CAO v Clarke and Faul followed).

There was no suggestion that [the claimant] had been dismissed from her course. The period of study would run until the last day of her final year. The Chairman considered that CIS/576/94 did not help [the claimant] because what had changed in that case was the status of the course as a full-time course. The course in that case was a hybrid, modular course which might be either full-time or part-time. On choosing to switch to the part-time version the student in that case ceased to be a student as defined in regulation 61 because that definition related to a person attending a full-time course of study.

[The claimants] course, on the other hand, did not change its status. It has always been a full-time course.

That other Government Departments, such as the inland revenue, might not regard [the claimant] for their purposes as a student did not strike the Tribunal Chairman as relevant to her status as a student for the particular purposes of Income Support..

The Tribunal was invited by [the claimants] representative to rule that, if the effect of SI 1995 No 1742 was to exclude persons in situations like [the claimant] from Income Support and leave them outside both Income Support and educational financial regimes, then that Statutory Instrument was ultra vires on grounds of irrationality.

The majority of the Tribunal, having determined that [the claimant] was not a student, did not feel obliged to address the vires point.

In Clarke and Faul, the Court of Appeal had looked behind the words of the relevant Statutory Instrument in order to resolve an ambiguity of construction in the definition of the term "student". Since Clarke and Faul, SI 1995 No 1742 had been introduced (and there was no evidence before the Tribunal to show that it had been introduced through procedural irregularity) to remove, quite bluntly, the ambiguity, notwithstanding that the consequences of excluding a section of the population from the safety net of Income Support had been clearly set out by the Court of Appeal.

Addressing the vires point, the Chairman considered that there was, accordingly, no evidence to show that it was not Parliament's intention to produce the effect of removing a section of the population from the protection of Income Support."

4. The adjudication officer now appeals from that decision, with leave granted by the appeal tribunal chairman. There was an oral hearing of the appeal, at the same time as the appeal on Commissioner's file CIS/15594/1996. The adjudication officer was represented by Mr Rabinder Singh of counsel, instructed by the Office of the Solicitor to the Department of Social Security. The

claimant attended and was represented by Mr Peter Turville of Oxfordshire Welfare Rights. I am grateful to both representatives for particularly well-constructed submissions.

5. The main issue until shortly before the oral hearing was whether or not the August 1995 amendment to the definition of "student" was ultra vires. I shall deal with that issue before turning to the arguments on the proper construction of the definition.

The 1995 amendment - ultra vires

6. Immediately prior to August 1995 the definition of "student" in regulation 61 of the Income Support (General) Regulations 1987 was as follows (omitting paragraph (b) on sandwich students):

> "a person, other than a person in receipt of a training allowance, aged less than 19 who is attending a full-time course of advanced education or, as the case may be, a person aged 19 or over but under pensionable age who is attending a full-time course of study at an educational establishment; and for the purposes of this definition--
>
> (a) a person who has started on such a course shall be treated as attending it throughout any period of term or vacation within it, until the last day of the course or such earlier date as he abandons it or is dismissed from it;"

That was the form of the definition considered by the Court of Appeal in Chief Adjudication Officer v Clarke and Faul (14 February 1995). The effect of regulation 2 of the Social Security Benefits (Miscellaneous Amendments) Regulations 1995 (SI 1995 No 1742) was, from 1 August 1995, to remove the words which I have underlined. It was those words which were crucial to the claimants, success in Clarke and Faul.

7. Mr Turville put the ultra vires argument in two ways. Both rested on the assumption that the 1995 amendment, if valid, has the effect contended for by the adjudication officer, ie that students in the position of Ms Clarke and Ms Faul or in the position of the claimant in the present case are to be deemed not to be available for employment and so excluded from entitlement. The first was that the amendment was irrational and therefore invalid. The second was that the amendment was invalid for the same reason as the provisions excluding most asylum-seekers from entitlement to income support were found to be invalid by the Court of Appeal in R v Secretary of State for Social Security,ex carte Joint Council for the Welfare of Immigrants [1996] 4 All ER 385, [1997] 1 WLR 275.

8. On irrationality, Mr Turville submitted that eligibility for student grants and loans is based on current attendance on a full-time course of study, whereas the income support rule was based on past attendance on a full-time course. He said that the result was irrational and contrary to the policy statements on the introduction of the student loan scheme, linking the removal of income support entitlement for full-time students to the

availability of loans. Students in the position of the claimant were put into a cruel dilemma in only being able to receive any financial support by abandoning their course permanently (and thereby forfeiting any future entitlement to a student grant). If they did not do so, they would be denied the benefit based on financial need, even though they might have no resources at all. He argued that no sensible person could have intended to produce that result. Mr Singh submitted that the test for irrationality was extreme, and not met in the present case. It was not enough that many people would think the result of a legislative provision harsh or unfair or unwise. A court has to be satisfied that the person who made the decision in issue had taken leave of his senses. The highly restricted basis on which a legislative provision can be found invalid on the ground of irrationality was reinforced by the decision in Nottinghamshire County Council v Secretary of State for the Environment [1986] AC 240.

9. On this point, I prefer Mr Singh's submissions to Mr Turville's. In my view, the House of Lords, decision in the Nottinghamshire case means that the irrationality argument cannot get off the ground. I have considered the conditions in which a Commissioner can find a legislative provision invalid on the ground of irrationality in some detail in decision CIS/14141/1996. My conclusion there was that where a regulation made by the Secretary of State had been subject to Parliamentary scrutiny (as by the negative resolution procedure) it could only be found invalid on the ground of irrationality if it was found that there was bad faith on the part of the Secretary of State or that the Secretary of State had misled or deceived Parliament in some way. I also concluded that nothing in Foster v Chief Adjudication Officer [1993] AC 754 or in the Tribunal of Commissioners' decision CIS/391/1992 weakened that requirement. In the present case there is no evidence of any such bad faith or of any misleading of Parliament. Therefore, apart from the question of whether the 1995 amendment was so unreasonable that no Secretary of State in his senses could have made it (on which I tend to agree with Mr Singh) , the irrationality challenge must fail.

10. The second strand of the ultra vires argument was that based on the Joint Council for the Welfare of Immigrants case (which I shall call "the asylum-seekers case"). The principle applied by the majority of the Court of Appeal was succinctly stated by Waite LJ, at [1996] 4 All ER 402:

> "Subsidiary legislation must not only be within the vires of the enabling statute, but must also be so drawn as not to conflict with statutory rights already enacted by other primary legislation."

By a majority, the Court of Appeal concluded that the regulations removing the income support rights of most asylum-seekers, in particular those who sought asylum otherwise than on arrival in the United Kingdom or who were appealing against an adverse determination, had the effect of rendering their ostensible statutory rights under the Asylum and Immigration Appeals Act

1993 to a proper consideration of their claims to asylum valueless by making it totally impossible for them to remain in this country to pursue their claims. The regulations were therefore struck down.

11. The circumstances of that case were extreme. Simon Brown LJ described the position of the deprived asylum-seekers (other than those with dependent children able to claim priority need under the homelessness legislation) as follows, at [1996] 4 All ER 3956:

> " (l) They have no access whatever either to funds or to benefits in kind.
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> (2) They have no accommodation and, being ineligible for housing benefit, no prospect of securing any.
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> (3) By the express terms of their leave to stay they are invariably forbidden from seeking employment for six months and, even assuming that thereafter they apply for and obtain permission to work, their prospects of obtaining it are likely to be poor, particularly if they speak no English.
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> (4) They are likely to be without family, friends or contacts and thus in a position of peculiar isolation with no network of community support.
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> (5) Their claims take on average some 18 months to determine, on occasions as long as four years. An individual has no control over this and no means of hastening a final decision. If eventually the claim succeeds there is no provision for back-payment.
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> (6) Quite apart from the need to keep body and soul together pending the final determination of a claim, expense is likely to be incurred in pursuing it. Applicants must attend for interviews with the Home Office and with any advisers they may have. They must have an address where they can be contacted with notices of appointments or decisions. To miss an appointment or the time for appeal is to forgo their claim."

Simon Brown LJ referred to the fuller rights than previously enjoyed conferred on asylum-seekers by the 1993 Act. He then continued, at [1996] 4 All ER 401-2:

> "And yet these regulations [the amending income support regulations] for some genuine asylum seekers at least, must now be regarded as rendering these rights nugatory. Either that, or the 1996 regulations necessarily contemplate for some a life so destitute that, to my mind, no civilised nation can tolerate it. . . . I would hold it unlawful to alter the benefit regime so drastically as must inevitably not merely prejudice, but on occasion defeat, the statutory right of asylum seekers to claim refugee status. ... I, for

my part, regard the 1996 regulations now in force as so uncompromisingly draconian in effect that they must indeed be held ultra vires. I would found my decision ... on the wider ground that rights necessarily implicit in the 1993 Act are now inevitably being overborne. Parliament cannot have intended a significant number of genuine asylum seekers to be impaled on the horns of so intolerable a dilemma: the need either to abandon their claims to refugee status or alternatively to maintain them as best they can but in a state of utter destitution. Primary legislation alone could in my judgment achieve that sorry state of affairs."

12. Mr Turville accepted that intercalating students could not be said to be in the same position as asylum-seekers, but submitted that students could be put into a position of financial destitution, with no source of income at all from student grants or loans or from income support if they were incapable of work (as through illness) or unable to find work. The proper question was whether the removal of financial support from the class of students hit by the 1995 amendment was so severe or disproportionate as to conflict with their statutory rights to education or to grants. I think that the furthest he went in identifying a statutory right which could be interfered with was through the argument that a student forced by financial destitution to abandon a course permanently (in order to qualify for income support) would then lose the right to a mandatory grant, even for the period unused from the first course, if a new course was later started. Without going into any detail, I accept that such an effect follows from the conditions laid down in regulation 14 of the Education (Mandatory Awards) Regulations 1994, made in implementation of the Education Act 1962. Mr Turville had also put his case on the basis of an interference with students, rights to education as such, but I do not think that such an argument can work, because there are no statutory rights to receive education beyond the age of compulsory attendance.

13. I agree with Mr Singh that the crux of the asylum-seekers, case was not just an interference with statutory rights, but an effect rendering those rights valueless in practice. Mr Turville had relied on Neill LJ's formulation in terms of the interference with statutory rights being disproportionate to the objects to be achieved by the secondary legislation (thus being able to bring in what he said was an absence of a clear objective in the 1995 amendment on students). But Neill LJ was in the minority. I am satisfied. that the majority of the Court of Appeal were prepared to strike down secondary legislation only under stricter conditions. Mr Singh submitted that, without devaluing the adverse effects on intercalating students, the position in which they were put was simply not in the same league as that of asylum-seekers. The choice forced on asylum-seekers was a stark and desperate one. So far as intercalating students were concerned, although they had no access to-funds in the form of grants, student loans or income support, they might well have accommodation and family or friends to rely on. The test must

look at the generality of students affected, rather than individual examples of extreme hardship. There was no legal bar on their obtaining remunerative work. I agree with that general submission. The situation into which intercalating students are put is not serious enough to render their rights to mandatory grants valueless, and the conditions for the application of the principle in the asylum'seekers, case are not met.

14. I maintain that conclusion even taking account of the position of those who, like the present claimant, are incapable of remunerative work because of illness or disability. "Disabled students" (amongst others) are not deemed to be unavailable for employment under regulation 10(1)(h) of the Income Support Regulations. Students who are entitled to the disability premium or the severe disability premium or who are deaf come under this rule, as do those who have been incapable of work for a continuous period of at least 196 days (see paragraphs 7 to 7B of Schedule 1 to the Income Support Regulations). A student who does not qualify for a premium who is incapable of work will obviously be in a particularly difficult financial situation unless and until the 196 days are achieved. However, I consider that the difficulties are not sufficiently extreme to alter the conclusion which I have reached in the previous paragraph.

15. Accordingly, I reject the submission that the 1995 amendment was ultra vires. The appeal tribunals decision is not to be supported on that basis.

The meaning of the definition of student

16. The primary submission on behalf of the adjudication officer was relatively simple: that the majority of the appeal tribunal erred in law by taking into account the irrelevant fact that the claimant was not in fact attending a course, when the definition of student in regulation 61 extends to those who are deemed to be attending, and in misconstruing the meaning of "abandon". Mr Singh referred to what was said in Clarke and Faul about that meaning. At page 6 of the transcript, Hoffmann LJ said that ,'abandon,' had a final meaning in regulation 61:

> "The context places the word in conjunction with two other events which are undoubtedly final, namely the end of the course and the student's dismissal from it. Furthermore, nothing short of total abandonment can make the definition work. If the commencement of an intercalated year means that the definition no longer applies, what happens when the student returns a year later? The definition cannot apply to. the remainder of the course, because it contemplates that the period which ends with the last day of the course will have begun with the student starting on the course, not with his resuming it after a break."

Hirst LJ agreed that abandonment should in its context be construed as connoting permanent abandonment and Glidewell LJ agreed that it should be construed as meaning "gives up the course finally". Mr Singh submitted that the result of the 1995 amendment was to leave the definition using stark language, under

which if a person started on a full-time course of study the deeming of attendance stopped only in three clearly defined cases: the ending of the course, the final abandonment of the course or a final dismissal from it. The claimant had not been finally dismissed from his course, she had not finally abandoned it and it had not ended, so that the appeal tribunal must have erred in law in concluding that she was not a student. Mr Singh submitted that the chairman of the appeal tribunal had got the legal approach right in his reasons for dissenting.

17. Shortly before the date of the oral hearing, Mr Commissioner Howell issued decision CIS/13986/1996, which put forward a different line of reasoning. The circumstances appear from the Commissioner's reasoning in paragraphs 9 and 10 of the decision:

> "9. The last day of this claimant's course, if all had gone according to plan, would have been the end of the summer term of 1996 when he completed the final year exams. However, in September 1995 it became certain that he would not complete the course, or any course, in this way after he failed to get the prerequisites for the final year at either in the second year exams or an initial resit in September. It was not until after June 1996, when he resat and passed the second year exams, that he was told he could come back to the university as a student admitted to the f inal year degree course; and then the last day of his course became the end of the summer term 1997. But in October 1995, when he claimed income support, there was no 'last day' of any course that he was on. He was not permitted by the university to be there as a student on any course at all. His grant had been stopped, on the correct ground that he was not then a student in further or higher education. He only became one again, and only got a grant for his maintenance again, when readmitted as a student engaged on a course from the following autumn.
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> 10. In my judgment the majority of the tribunal were correct in holding on these facts that the exclusion of income support under reg 10(1)(h) did not apply to the claimant because he had been dismissed from the course for which he was originally enrolled. As they put it at page 51:
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> > 'The majority concluded that the appellant was to be treated as having been dismissed from the course due to having failed the re-sit. If by his own endeavours without tutorial or lecture attendances he succeeded in passing the re-sit examination [sc in June the following year] the majority concluded that the appellant would be considered to be starting an engineering course with a different student intake.'
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> In other words he had not been permitted to continue with his original course, and so had in effect been dismissed from it. If permitted to restart his studies the following year he would then be a member of a <u>different</u> course from

the one he started on, even though the course content might be similar and the degree aimed at the same."

18. The Commissioner then referred to the Court of Appealls decision in Clarke and Faul. He said that in relation to the intercalated years dealt with in those cases it would always remain possible to identify the last day of the course for which the student was currently enrolled and unconditionally entitled to attend. Where, as in CIS/13986/1996, that was not so, it was much more important to identify "the course" which a person is to be deemed artificially to be attending. The Commissioner asked (in paragraph 13) whether it is:

> "just the general programme of lectures, tuition and so forth offered by a university or college to lead to a particular qualification, or the actual programme of attendance and study to be followed by the individual person being considered as a student'. The first has no necessary temporal connotations, while the second does. In my view the 'course' that has to be identified for the definition of a student in reg 61 must be the individual student's course in the second of these senses, because of the obvious temporal connotations of the references to the period of study, the start of the course, and the last day of the course, which are meaningful only in relation to an individual person's programme as a student. This is also I think the more consistent with the approach of the Court of Appeal in Clarke and Faul, and with the separate def inition of 'period of study' in reg 61 for the purposes of chapter VIII of the regulations, which also has to work with the same definition of 'student'."

The claimant's dismissal from the continuous course of full-time study for three academic years for which he originally enrolled was undoubtedly final, as there was only a possibility of his returning to a different course. The Commissioner finally noted that, as either construction of 'the course' was arguable, his result accorded better with any likely intention of Parliament in approving the regulations.

19. Mr Turville submitted that the position of the claimant in the other appeal heard with the present one (CIS/15594/1996) was essentially the same as that of the claimant in CIS/13986/1996. Having been prevented from proceeding to the next stage of his programme of study by examination failure, he was not on any course by reference to which a last day could be identified. Mr Turville invited to me reach the same result in that other appeal as Commissioner Howell, as an alternative to his ultra vires argument. He put considerable emphasis on that result retaining the consistency between the conditions of eligibility for student grants and loans and the conditions of entitlement to income support which had been produced by Clarke and Faul, and which had been recognised as of importance by Mr Commissioner Sanders in CIS/576/1994 (currently before the Court of Appeal as Webber) and by Mr Commissioner Howell. Mr Turville referred to the White Paper on Student Loans as disclosing no positive policy intention

to exclude intercalating students and those in the position of the claimant in the other appeal from eligibility for income support as part of the general policy of excluding students as a class from eligibility.

20. Mr Singh submitted that the result of decision CIS/13986/1996 is inconsistent with the ratio of Clarke and Faul, or at least with powerfully persuasive statements of the Court of Appeal, and that the construction of the words "the course" adopted by Mr Commissioner Howell was not open to him in the context of the structure of the legislation. He submitted that the new form of the legislation was clear and unambiguous, so that reference to the probable purpose of the legislation was inappropriate. The fact that many people might think the result of the legislation to be extremely harsh did not make it ambiguous. However, if the probable purpose of the 1995 amendment was to be considered, Mr Singh pointed to the words which the Court of Appeal in Clarke and Faul had found were ambiguous, so as to allow it to prevent the then definition of student from having the effect of excluding, intercalating students from eligibility for income support. He submitted that, in revoking those very words, the draftsman of the 1995 amendment could only (in the absence of any other evidence of the intention of the promoter of the legislation) have intended to produce the effect unsuccessfully argued for by the adjudication officer in Clarke and Faul. Finally, Mr Singh cited the decision of Mr Commissioner Rowland in CIS/14477/1996 where, although the approach adopted in CIS/13986/1996 was not specifically argued, the Commissioner reached a result that was inconsistent with that approach.

21. The claimant in the present appeal would appear to have been in the position described by Mr Commissioner Howell in CIS/13986/1996 where the last day of the course for which she was currently enrolled and was unconditionally entitled to attend could be identified. However, Mr Turville argued that such an identification was not possible, because the claimant could not know far in advance whether she would in fact be fit to return to her programme of studies in September 1996. He also argued that it would be monstrous if claimants who failed examinations were entitled to income support while excluded from attendance, but students excluded from attendance by reason of injury or illness were not entitled. He submitted that a similar argument could be made that the claimant's original course had ended or that she had finally abandoned that course and that when and if she returned to study in September 1996 she would be on a different course. Mr Singh submitted that if the dismissal argument in CIS/13986/1996 could spill over into abandonment cases that was additional evidence of the wrongness of the approach. The same could have been said about Ms Clarke and Ms Faul, yet they only succeeded in the Court of Appeal because of the words "throughout any period of term or vacation".

22. On this question, I regret that I am unable to follow CIS/13986/1996. That is for essentially two reasons: one to do with the construction of ',the course,, in the definition of student and one to do with the effect of Clarke and Faul.

23. The finding that two constructions of "the course" are arguable is central to CIS/13986/1996. Where I part company with Mr Commissioner Howell's approach is in the assertion that identifying the course as the actual programme of attendance and study to be followed by the individual person requires identifying it as "the continuous course of full-time study for [the period of academic years] for which he originally enrolled" (paragraph 14 of CIS/13986/1996). I do not see why such temporal connotations necessarily follow. For example, I do not see why, in the circumstances of exclusion from normal progress because of examination failure, the fact that the person can no longer obtain the originally aimed-for qualification on the originally expected date, means that, if re-admitted after an interval, the re-admission must be to a different course. I do not see why it is crucial that the last day of the course will turn out to be later than the last day which was expected at the outset. It seems to me a much more natural use of language to say that in such circumstances, if the person is re-admitted to follow essentially the same programme which would have been required if the examinations had been passed, first time and to obtain the same qualification, the person returns to the same course. The facts that the person's individual programme of attendance and study will now end on a date a year later, say, than previously expected and that most of the other students at that stage of the programme will have started a year later than the person seem to me to make no difference. I am afraid that I see little if any difference in the results between looking at the course as the general programme offered by the relevant institution and looking at as the programme followed by the relevant individual, shorn of the temporal connotations which in my view should not be attached to the second approach.

24. So far as Clarke and Faul is concerned, Mr Commissioner Howell appears to suggest that, because the claimants in that case could always identify the last day of the course for which they were currently enrolled and were unconditionally entitled to attend, those in comparable positions would be caught by definition of student as amended in August 1995. It was the fact that the claimant in CIS/13986/1996 could not know whether and when he would pass his re-sit examinations so as to qualify for the next stage of study which enabled the Commissioner to accept that the claimant had been finally dismissed from his original course. There is force in Mr Turville's argument that a person who is given leave of absence as a result of illness or injury (as was Ms Faul and the claimant in the present case) does not have an unconditional right to return, as most institutions impose a test of fitness to do the course. As I have indicated in the previous paragraph, I do not think that whether or not the last day of the course can be identified at any particular time is very important, but even if it were, I do not think that it forms a reliable line to distinguish cases of examination failure from cases of intercalation for other reasons. The ground for putting cases of examination failure in a special category thus falls away. Although I see the attraction of mitigating the crude harshness of the 1995 amendment for one group affected, I rather agree with Mr Turville that there seems no good reason why those

who fail examinations should be favoured over those who are disabled from continuing their studied by illness or injury.

25. In addition, I do not find it possible to avoid the effect of what was decided in Clarke and Faul. Of course, in that case the Court of Appeal was not dealing specifically with someone who had failed examinations; and did not have the approach adopted in CIS/13986/1996 specifically put to it. I accept Mr Singh's submission that what was said by the Court of Appeal about abandonment and dismissal was part of the ratio decidendi of the case. Glidewell LJ stated expressly, and Hoff mann LJ by necessary implication, that the appeal would have been decided against the claimants on the basis of the meaning of "abandon" and was only decided in their favour because of the point on "throughout any period of term or vacation". When one looks at the passage quoted in paragraph 16 above from Hoffmann LJ's judgment it is clear, from the way in which he talks of a person returning to the remainder of the course after an intercalated year and of what total abandonment of the course means, that he did not regard "the course" as altered by the interposition of the intercalated year and the postponement of the last day of the course. It seems to me that if the approach of CIS/13986/1996 were right, it would undermine the distinction between final and total abandonment of a course and an abandonment which is not final which is part of the decision in Clarke and Faul. As I have already concluded that the same principles should be applied to cases of abandonment and cases of dismissal, it follows that the approach of CIS/13986/1996 is, in my judgment, inconsistent with Clarke and Faul.

26. Accordingly, I follow CIS/14477/1996 in preference to CIS/13986/1996. I acknowledge that this involves accepting that the 1995 amendment, as it was put in CIS/13986/1996, has the extraordinary result of creating:

> "a class of outlaws who were prevented from obtaining public assistance by the mere fact of having once signed up for public assistance and not being finally excluded from it."

However, I consider that in the light of Clarke and Faul, Commissioners do not have the freedom to interpret the definition of student in regulation 61 of the Income Support Regulations so as to avoid that result.

The decision on the appeal

27. The upshot is that the majority of the appeal tribunal of 25 January 1996 erred in law in deciding that the claimant was not a student from 29 September 1995 down to the date of its decision. The decision is accordingly set aside. In the light of developments since the appeal tribunal made its decision, it is expedient for me to substitute a decision based on the findings of fact made by the appeal tribunal with the addition of further findings. That decision is set out in paragraph 1 above.

28. I was told in written submissions that payment of the award of income support made by the appeal tribunal had been suspended by the Secretary of State. I was concerned to ensure that, if the claimant had remained incapable of work for at least 196 days from 3 July 1995, payment had been made for the period following that event. For in those circumstances, the claimant would fall within the meaning of ' "disabled student" in paragraph 7 of Schedule 1 to the Income Support Regulations and therefore within one of the exceptions to regulation 10(1)(h) . Since she would then not be deemed to be unavailable for employment, the normal rule of paragraph 5 of Schedule 1 would enable her to be entitled to income support without making herself available for employment. I was told by the claimant's representative, and I accept, that payment had been made from the expiry of 196 days to a date in August 1996, when she was found no longer to be capable of employment. I was not expressly told that she had returned to her studies on 23 September 1996 (and forgot to ask) , but I shall proceed on that basis, so that as far as possible I can dispose of the appeal. If I am mistaken about the facts, then my decision can be reviewed.

29. I regard the return to actual attendance at a full-time course of study as putting an end to the running of the indefinite claim for income support made on 29 September 1995. Therefore, the period in issue on the appeal runs from 29 September 1995 to 22 September 1996. The claimant has to be treated as a student, and therefore deemed to be unavailable for employment and so not entitled to income support, for all of that period, except for the period from the 196th day of incapacity for work to the last day on which she was incapable of work. I leave the adjudication officer to identify the precise dates and to calculate the amount of entitlement by reference to what has already been done in relation to payment. If there is any dispute about the identification of those dates or the calculation of benefit, the appeal may be returned to a Commissioner for further decision.

(Signed) J Mesher
Commissioner

Date: 16 June 1997