NZLR. 24/6/84 X

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

M.No.193/83

683

Special Consideration

IN THE MATTER of the Judicature Amendment Act 1972

BETWEEN STEVEN MORRISON of Dunedin, Student

Applicant

Motion on appeal filed CA 213/84

AND THE DIRECTOR-GENERAL OF EDUCATION appointed pursuant to the Education Act 1964 and its amendments

First Respondent

Appeal reported [1985] 2 NZLR

AND THE CHAIRMAN AND MEMBERS OF THE TERTIARY ASSISTANCE GRANTS APPEAL AUTHORITY established pursuant to Section 193AA of the Education Act 1964 and its amendments

Second Respondent

Hearing: 20 March, 1984.

Counsel: R. Somerville & G. Mirkin for Applicant.
D.L. Wood for First and Second Respondent.

18/6/84 Judgment: 18 June 1984

JUDGMENT OF VAUTIER, J.

This is a notice of motion in terms of the Judicature Amendment Act 1972 seeking a review of a decision of the Director-General of Education which the Tertiary Assistance Grants Appeal Authority decided it had no jurisdiction to set aside or alter on an appeal made to it. The decision was one declining to award the applicant an "accommodation grant" as referred to in Part IV of the Tertiary Assistance Grants Regulations 1982 ("the Regulations").

The applicant is and was at all material times a physical education student at Otago University.

The facts can be stated in brief summary as follows: The applicant was born on , 1964. His parents with whom he normally resided live in Mosgiel and after enrolling for the first year of a Bachelor of Education degree he found, he says, that his classes extended over such a period of the day and evening that travelling to and from Mosgiel by bus, the only mode of transport available to him, would cause him undue hardship. On certain days he would be absent from home for 14 and a half hours leaving insufficient time for study. He had, for these reasons, at the time when he made the application in writing for the grant on 25 February, 1983 obtained accommodation in Dunedin but he claimed that without the grant sought he would be unable to pay his accommodation costs and for food with the aid only of the amount of $27 per week provided to him as a study grant and would have to give up his accommodation in Dunedin.

The application was made to the Department of Education in reliance upon the Regulations abovementioned, which had come into force on 1 February, 1983. The application was declined by letter dated 8 March, 1983 written on behalf of the first respondent, the Director-General of Education. The material parts of the letter read:

> "You are not automatically entitled to an accommodation grant because you live within the accommodation grant boundary for Otago University.
>
> There is a provision for the Director-General to award an accommodation grant to students not otherwise eligible if he is satisfied that extraordinary circumstance exist which justify the award.

> The purpose of the provision is to provide for accommodation grants to be awarded in rare cases where students are not able to live with their families because their relationship with their parents is such that it would be unreasonable for them to do so.
>
> Your application has been considered under the extraordinary circumstances provision but it is considered that there are no grounds to justify the award of an accommodation grant in your circumstances.
>
> I regret that your application has been declined."

On 20 March, 1983 the applicant re-applied in writing for this grant to be made to him, referring to the limited bus time-table, the distance his parents' home was from the bus stop, the fact that on three evenings he would have to wait nearly two hours after his last lecture for the next available bus and to the quantity of books and other materials he would have to carry to and from Mosgiel and the cost of the bus fares. He corrected certain factual errors in his earlier application. He adverted also in this letter to his finding the atmosphere at home not conducive to study. This further application was supported by a letter from his course advisor, a senior lecturer, and from his brother who had done the same course some years previously. The reply, dated 29 March, was brief and read:

> "Thank you for your letter of 20 March 1983, concerning your eligibility for an accommodation grant. As your parents' home is within the accommodation boundary for Otago University, I confirm that you are not eligible for the award of an accommodation grant.
>
> The Registrar of your institution has been informed."

The applicant then addressed a letter dated 6 April with supporting letters to the Tertiary Assistance Grants Appeal

Authority which is a body established pursuant to the provisions of s.193AA of the Education Act 1964 ("the Act"), which section was inserted by s.5 of the Education Amendment Act 1979. The opening sentence read:

> "I have been advised by the Department of Education that I can appeal to you regarding their decision re my accommodation grant".

The same basic facts were traversed in this letter, the only new matter adverted to being the necessity for the applicant to study reference books available in the University Library and not available in Mosgiel. The supporting letters were from his mother, the Professor and Dean of the Faculty and also copies of supporting letters mentioned earlier. Pursuant to the provisions of Clause 57 of the Regulations (Part VIII of which deals with appeal procedure) a report prepared on behalf of the first respondent was sent to the second respondent. It is necessary to quote this report in full because it sets forth matters which are now the subject of challenge in this Court and also the text of statutory provisions to which I will hereafter need to refer. The report, which is dated 19 April, 1983, reads:

> "The Secretary
> Tertiary Assistance Grants Appeal Authority
> Department of Justice, etc.
>
> MORRISON, STEVEN TAG 50/83
>
> Thank you for sending me a copy of Mr Morrison's letter concerning the decision made in respect of his application for an accommodation grant.
>
> In terms of Regulations 57(2)(a) and (b) of the Tertiary Assistance Grants Regulations 1982 I attach the file on this application. As provided for by Regulations 57(2)(c) and (d) I offer the following comments:
>
> Mr Morrison has applied under Regulation 38(e) of the Tertiary Assistance Grants Regulations 1982

to be awarded an accommodation grant on the grounds of his lecture time-table and the public transport situation between Mosgiel and Dunedin.

APPEAL PROVISIONS

Section 193AA(6) of the Education Act 1964 specifies departmental decisions on tertiary assistance grants that can be appealed against. These decisions are:

'(a) Fixing the amount of any bursary, scholarship, grant, award or allowance paid or payable to any person by reason of hardship; or

(b) Declining to award such a bursary, scholarship, grant, award, or allowance to any person; or

(c) Approving as a full-time programme for any person in any year any specified part of a course of study; or

(d) Refusing so to approve any part of a course of study for any person; or

(e) Refusing to extend the period in respect of which any person may receive payments under any bursary, scholarship, grant, award or allowance; or

(f) Refusing to recognise the amount of work passed in any year by any person as being sufficient to entitle that person to the reinstatement of any bursary, scholarship, grant, award, or allowance; or

(g) Refusing to recognise any qualification or amount of work gained or passed by any person as being equivalent of any other qualification or amount of work.'

An accommodation grant is not paid to a person by reason of hardship and any decision made under Regulation 38(e) is not made on hardship grounds.

Contrary to Mr Morrison's statement in his letter of 6 April, this department has not advised him that he has a right of appeal.

There is no provision in the Education Act 1964 which provides a right of appeal against a decision to decline an accommodation grant under Regulation 38(e)

CONCLUSION

The jurisdiction of the Appeal Authority to consider appeals is limited to decisions made by the Director-General which have a right of appeal under the Education Act 1964. Where no right of appeal exists,

> no valid appeal can be made. I would therefore submit that in terms of the Education Act 1964, Mr Morrison's letter does not constitute a valid appeal."

A copy of this report was sent to the applicant under cover of a letter dated 19 April, 1983 with an invitation to comment within 14 days and this the applicant did in a letter dated 29 April, 1983, the relevant portions of which read:

> "In reply to the Director General report (sic) which states that I am not eligible to appeal against his decision, I hereby quote Section 193AA of the Education Act 1964 which states that decisions on tertiary assistance grants can be appealed against
>
> '(a) Fixing the amount of any bursary, scholarship, grant, award or allowance paid or payable to any person by reason of hardship; or
>
> (b) Declining to award such a bursary, scholarship, grant, award, or allowance to any person; or'
>
> Here it is quoted the word any, it does not state that the accommodation grant does not come under this decision, (all sic) nor does it state anywhere else in this act that the accommodation grant does not come under this decision. To refer to the term 'by reason of hardship', it makes common sense that such a grant should be awarded so that a student can pursue his/her studies away from home without high financial hardship. The grant is provided so that a student can pursue his/her course of studies in an environment congenial to study, which would not be the case if I had to travel for long periods every day to and from my parents home by public transport which is to say the least is inadequate for anyone who does not work in a normal 8a.m. - 5p.m. situation.
>
> I therefore reject the Director Generals decision and I have, in view of my case - already stated - appealed to my M.P. Mr S. Rodger. I feel very strongly that my case is just and valid, and circumstances dictate that I must live away from home in order to fully dedicate myself to my studies."

A copy of this letter was sent by the second respondent to the first respondent inviting comment thereon and on behalf of the latter a reply was sent dated 16 May, 1983, reading as follows:

"Thank you for sending me a copy of this student's comments on our earlier report.

In our submission of 19 April we submitted that Mr Morrison does not have a right of appeal in terms of Section 193AA(6) of the Education Act 1964.

In his letter of 29 April Mr Morrison argues that the relevant work (sic) is 'any bursary, scholarship, grant...'. The department submits that the punctuation and wording of the section clearly relates to:

'a Fixing the amount ... paid or payable to any person by reason of hardship; or

b Declining to award such a bursary ... to any person.'

The intention of the two paragraphs is to grant the right of appeal against any level or refusal of a hardship grant.

The grounds on which accommodation grants are awarded are clearly defined in Part IV of the Tertiary Assistance Grants Regulations 1982 which deals specifically with accommodation grants.

The various types of hardship grants and their conditions of award are set out in Part V specifically to emphasise their difference from other grants covered in the regulations.

Nowhere in Part IV and specifically in Regulation 38 is there any reference to hardship. The criteria to be judged are strictly matters of fact.

The Director-General is given authority to:

1. Designate 'accommodation catchment areas'.

2. Form an opinion of where a student might 'in the normal course of his life live.'

3. Form an opinion of the circumstances of a married student.

4. Form an opinion as to extraordinary circumstances which would make it impossible for a student under 20 years of age to live at home.

I would also refer the Appeal Authority to the definitions of 'accommodation grant', 'hardship grant' and 'special grant' which further emphasise that an accommodation grant is not a hardship grant.

The principle of whether an accommodation grant is subject to appeal is a very important one and of great significance to this department. We regard Mr Morrison's appeal as a precedent case and invite the Appeal

Authority to confirm that there is no right of appeal.

GENERAL COMMENT

Although, in the department's opinion, it is not relevant to the appeal, the Authority might like to know that if the appeal did lie, it would constitute a challenge to the actual accommodation boundary area.

The accommodation grant boundaries were established in consultation with representatives of this department, the tertiary institutions and the students' associations. A general guideline of 48 kilometres and one and a half hours travelling time each way was used.

Within this guideline the boundaries were decided on the basis of formal scheduled classes between the hours of 8 am and 5 pm and were linked to the availability of public transport to get students to the 8 am lecture and home after 5 pm.

The problem with Mr Morrison's timetable seems to be the fact that he has an English lecture from 7-8 pm on Monday, Tuesday and Wednesday evening. The English paper which he is taking, English I, is also scheduled at 11.30 am on Monday, Wednesday and Friday, however this option clashes with Mr Morrison's Biology lectures. Biology is a compulsory subject for the B Ph Ed degree, English is not. It is simply an option which he has selected to take. In view of this fact the department does not consider it unreasonable for the student to live at his parents' home in Mosgiel, which is within the agreed accommodation grant boundary, and travel daily to the university."

The Authority then delivered its decision dated 31 May, 1983 and it is sufficient for me to quote the last five paragraphs, reading:

"The main point at issue is whether the Appeal Authority has jurisdiction in this case. Section 193AA(6) of the Education Amendment Act 1979 details the decisions which are subject to appeal and these are listed in the Department's report.

The appellant contends that s.193AA(6)(a) applies in his case because in his view the accommodation grant is awarded on grounds of hardship. The

Department disputes that contention.

Part IV of the Tertiary Assistance Grants Regulations 1982 prescribes the matters to be taken into account in respect of accommodation grants and there is no reference to hardship. Part V of the Regulations refers in detail to hardship grants and special hardship grants. Decisions made under Part V are subject to appeal.

In the present case the appellant asserts that an inconvenient transport timetable justifies the award of an accommodation grant. That depends on whether the Director General of Education considers that such a reason justifies the award of an accommodation grant on grounds of 'extraordinary circumstances' under Part IV of the Regulations. That is a decision which is outside the jurisdiction of the Appeal Authority because I do not consider that an inconvenient transport timetable can be construed as hardship as prescribed in the Regulations.

The appeal is invalid."

It is necessary in order to understand the points taken by the first respondent and upheld by the Authority to set out in full Regulation 38 of the Regulations:

"Award of accommodation grant - Subject to regulation 36 of these regulations, an accommodation grant shall in any year be awarded to every applicant who -

(a) Has attained or will attain the age of 20 years before the 1st day of February in that year and is not living at the home of any parent of his; or

(b) Has not attained or will not attain the age of 20 years before the 1st day of February in that year, but is divorced, separated from his or her wife or husband, or widowed, and not living at the home of any parent; or

(c) Has not attained or will not attain the age of 20 years before the 1st day of February in that year, has never had a spouse, and is not living at the home of any parent of his, if -

(i) No home of a parent of his with whom in the opinion of the Director General, he might in the normal course of his life live is situated within an area designated by the Director-General as an accommodation catchment area in respect of any tertiary

institution offering the course of study in respect of which that applicant's study grant was or will be awarded; or

(ii) Every home of a parent of his with whom in the opinion of the Director General, he might in the normal course of his life live (being a home situated within such an area) is so situated that, in the opinion of the Director General, that applicant could not satisfactorily undertake that course of study at the tertiary institution in respect of which that area was designated while living at that home; or

(d) Is residing with his spouse, and satisfies the Director General that his circumstances justify the award; or

(e) Satisfies the Director General that extraordinary circumstances justify the award."

It should here be mentioned that a Department of Education publication produced entitled Accommodation Grant Boundaries sets forth in detail the boundaries and areas of "the accommodation catchment area" as it is referred to in Reg.38 for the various tertiary institutions throughout New Zealand and as regards the University of Otago there is included the Borough of Mosgiel to the southwest and the Borough of Port Chalmers to the north east. The boundaries, it is there stated, have been established within the general guidelines referred to in the first respondent's report of 16 May, 1983. The Borough of Mosgiel, it will be noted, is well within both the distance limit referred to, being only 16 kilometres to the south of Dunedin and the time limit referred to, because the applicant refers to the time occupied as being one and a quarters hours which includes the 15 minutes walking time from his home to the bus stop.

Four broad submissions were advanced on behalf of the applicant, these being:

1. That the first respondent acted ultra vires in considering and rejecting the applicant's application for the award of an accommodation grant in terms of Reg.38 of the Regulations.

2. That the first respondent applied an ultra vires regulation when considering and rejecting the applicant's application. The contention here was that Reg.38 incorporates limitations or qualifications as to the award of the grants which are not within the scope of the authority given to make the regulations in question. This submission was advanced as an alternative to the first submission.

3. That the second respondent made an error of law on the face of the record by failing to exercise its jurisdiction to consider and determine the applicant's appeal against the determination of the first respondent.

4. That the second respondent acted ultra vires in failing to exercise its jurisdiction to consider and determine the applicant's appeal against the determination of the first respondent. This submission was advanced on the basis of this Court holding that the second respondent did in fact have jurisdiction to entertain the appeal.

I proceed to deal with each of these submissions in turn. In support of the first submission Mr Somerville referred to recent authoritative statements concerning the exercise of statutory discretionary powers. He referred, first, to the statements to be found in Van Gorkom v. Attorney-General [1978] 2 NZLR 387 in the joint judgment of Richmond, P. and Richardson, J. at p.390:

> "...the discretion is reposed in the Minister but it is to be exercised within the powers conferred on him. So long as he is acting within the limits of his discretionary authority, it is for the Minister to determine the policies to be applied. But, as is true of anyone entrusted with a discretion, he must direct himself properly in law: he must call his attention to the matters he is bound to consider and he must exclude extraneous considerations (Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223; [1947] 2 All ER 680, Rowling v. Takaro Properties Ltd [1975] 2 NZLR 62). In the end it is for the Court to determine whether he has acted within his discretion. It must determine whether 'the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature' (Carltona Ltd v. Commissioners of Works [1943] 2 All ER 560, 564)."

As was pointed out, the fact that there are included in the regulation here under consideration references to the opinion of the first respondent and to the first respondent having to be satisfied as to matters referred to, does not take the case outside the requirements as to complying with the general rules thus referred to. Reference was here made to the statement of Lord Wilberforce in Secretary of State for Education and Science v. Tameside Metropolitan Borough Council [1977] AC 1014 at 1047:

> "The section is framed in a 'subjective' form - if the Secretary of State 'is satisfied'. This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met,

> then the exercise of judgment, however bona fide it may be, becomes capable of challenge: see Secretary of State for Employment v. ASLEF (No.2) [1972] 2 QB 455, per Lord Denning MR at p.493."

Shah v. Barnet London Borough Council and other appeals [1973] 1 All ER 226 and Re Moodie and Others ex parte Emery [1981] 34 ALR 481 provide two recent examples of the application of these general rules with regard to the same subject matter as here under consideration, i.e. monetary grants to aid students.

I accept Mr Somerville's further submission in relation to this particular ground for review that, as the decision of the Court of Appeal in CREEDNZ Inc. v. Governor-General [1981] 1 NZLR 172 illustrates, the identification of the considerations to which a statutory authority is bound to have regard depends upon the construction of the statutory context in which the discretion arises. Among the points raised in support of the applicant's case on the facts here presented was the specific interpretation placed by the first respondent upon Reg.38(e) whereunder the regulations provide that an accommodation grant shall in any year be awarded to every applicant who "satisfies the Director-General that extra-ordinary circumstances justify the award". In the letter of 8 March, 1983 sent on behalf of the first respondent to the applicant there is specific reference to the discretion thus conferred. The reference follows, as will be noted, advice to the applicant as to his not being automatically entitled to the grant sought because of his living within the accommodation grant boundary for Otago University. Then follows the reference to the purpose of the provision of Reg.38(e) as being to provide for

the grants to be awarded "in rare cases where residents are not able to live with their families because their relationship with their parents is such that it would be unreasonable for them to do so."

Mr Wood for the respondents conceded that he was not able to refer to anything in the Education Act 1964 itself or in the Regulations which authorised the first respondent interpreting the words used in Reg.38(e) in this very narrow way. The fact that this statement as to interpretation is followed immediately by the reference to the application having been considered under the "extraordinary circumstances provision" and then by a reference to it being considered that there were no grounds to justify the grant in the applicant's circumstances must in my view convey the strongest implication that it was because of the fact that the applicant had not put forward any facts indicative of the relationship with his parents being a factor in his not wishing to live at home, that the application had necessarily to be declined on this ground alone. It appears very likely that officers of the Education Department may have had in mind this factor of unsatisfactory parent and child relationships as the situation calling for a special over-riding discretion being incorporated in the Regulations as has been done by means of Reg.38(e). The words thus used and the context in which they appear make it very plain in my view that the first respondent has, indeed, fettered his discretion in what I regard as a completely unauthorised way by thus interpreting Reg.38(e). In the departmental publication earlier referred to the particular provision in the Regulations is given an even narrower interpretation. There is there to be found under the heading "Extraordinary

Circumstances" the following:

> "There is provision for an accommodation grant to be awarded to a student who is under 20 if there is evidence of physical or sexual violence or molestation in the home and because of this the student is required to live away from home.
>
> Applications for accommodation grants under this provision must be supported by a statement or certificate from the family doctor, lawyer or minister of religion who is personally aware of the situation."

The words used in the Regulation "that extraordinary circumstances justify the award" clearly oblige the first respondent in my view to turn his mind to and form a conclusion upon any circumstances affecting the applicant for this type of grant which can be said to be quite different from those encountered as regards the general run of applicants for such grants. There is nothing whatever to indicate that the words are used in the Regulation with any other than their ordinary English meaning. The Shorter Oxford Dictionary gives as the first meaning for the adjective "extraordinary" the meaning "out of the usual course or order: (often) opposite to ordinary," and as a further meaning "of a kind, amount, degree or measure not usually met with: exceptional". Numerous instances can be found in the reports of the Courts interpreting the word "extraordinary" in just this fashion (see, for example, Stroud's Judicial Dictionary, 4th Ed. Vol.2, p.992). It has here to be borne in mind, as Mr Somerville pointed out, that an authority given a discretion in specific terms is not ordinarily permitted to exercise that discretion in accordance with some predetermined fixed policy and thus fail to have regard to the specific circumstances of each case as presented so as to enable him to determine whether the discretion in the terms conferred should or should not be exercised. The point is

dealt with in Wade, Administrative Law 5th Ed. at p.330 under the heading "Over-Rigid Policies":

> "An authority can fail to give its mind to a case, and thus fail to exercise its discretion lawfully, by blindly following a policy laid down in advance. It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case: each one must be considered on its own merits and decided as the public interest requires at the time. The Greater London Council fell foul of this principle when it proceeded to make a large subsidy to the London bus and underground services as a matter of course because the ruling party had promised to do so in their election campaign. They regarded themselves as irrevocably committed in advance, whereas their duty was to use their discretion. Nor may a local authority lawfully resolve to refuse all applications for housing for children of families considered to be 'intentionally homeless', since the power to provide housing implies a duty to consider the different circumstances of each child."

I am accordingly constrained to agree that on this ground alone the first respondent appears to have acted ultra vires.

Mr Somerville referred to a number of other aspects appearing from the terms of the correspondence which, in his submission, made it appear that those delegated by the first respondent to deal with the matter did not actually consider the specific grounds put forward by the applicant as disclosing a special hardship imposed upon him. He pointed out that the memorandum prepared in the Department dated 3 March, 1983 recommending the declining of the application simply referred to the applicant as having access to a reliable public transport service while living at home which in fact enabled him to arrive at the University in time for his first morning lecture and to return home after his last lecture in the evening. Nothing was said, it was pointed out, as to the difficulties which this particular applicant would

face in satisfactorily carrying out any studies for the purposes of his course while being compelled to be absent from his home daily for periods of up to 14 and a half hours and the other particular difficulties which would be imposed upon him by reason of the particular course which he was undertaking and the time-table of lectures which he had to operate under. The reference to the applicant having disclosed no grounds justifying the award of the grant in question (letter of 8 March, 1983) made it clear, it was said, that the hardship grounds put forward by the applicant were not regarded as insufficient to constitute extraordinary circumstances, they were simply treated as not falling within the scope of the provision at all. The further point advanced was that when the grant was re-applied for with an amended statement of certain of the facts and new matters advanced the amended application was simply declined with the bald statement as to the applicant being ineligible for the award of this particular grant.

I should here say that I have expressed my conclusion with regard to the legal interpretation of Reg.38(e) but I do not think that I should express any concluded views with regard to the factual issues thus raised as to the conclusions reached or expressed to have been reached by or on behalf of the first respondent. I say this because of the conclusion I have reached and to which I will hereafter refer as regards the question of the correctness of the decision of the second respondent on the question of jurisdiction and the form which any relief to which the applicant is entitled should take.

It is, however, desirable that I should express a conclusion with regard to the submission advanced as to the validity of Reg.38. The argument here advanced was that the power conferred by the statute upon the Governor General in Council to make the Regulation here being considered did not permit the discrimination between one class of student and another that is to be found in these Regulations. This submission was advanced as an alternative to the first submission and accordingly it is not necessary for me to deal with it. I will, however, state briefly the reasons for the view I have formed. Under s.193 of the Education Act 1964, as substituted by the Education Amendment Act 1969, s.4, it is provided:

> "For the purpose of enabling persons to pursue courses of primary, secondary, continuing, technical, community college, university, or higher education, or courses forming part of their training as teachers or kindergarten teachers, the Governor-General may make regulations establishing bursaries, scholarships, grants, awards and allowances (however described) or any of them and every bursary, scholarship, grant, award and allowance so established shall be -
>
> (a) awarded in accordance with; and
>
> (b) of such annual or other specified value as is described by the regulations that establish it."

As was pointed out in the case cited by Mr Somerville, New Zealand Drivers' Association v. New Zealand Road Carriers [1982] 1 NZLR 374 in the joint judgment of Cooke, McMullin and Ongley, JJ. it is said at p.388:

> "The Court is concerned with whether, on the true interpretation of the parent Act, regulations are within the powers conferred by Parliament. They will be invalid if they are shown to be not reasonably capable of being regarded as serving the purpose for which the Act authorises regulations."

The provision of accommodation grants for those not living with their parents while pursuing a course of study is clearly, he pointed out, capable of serving the purpose referred to in the statute, but the introduction of the age limit of 20 years combined with a geographical test is not reasonably so because it pre-supposes that it is convenient and desirable in all cases where the student is not 20 years of age and the student's parents live within the prescribed area that the student live with his parents. It is said that this manifestly is not the true situation. It is said that it further pre-supposes that students living with their parents do not have expenses associated with the place where they live which again is manifestly incorrect in that some students may be charged board at home and in addition incur substantial travelling expenses. The provisions, as drafted, it is said, introduce a discrimination not justified by the wording of the statute. Mr. Wood, however, pointed out that the terms in which s.193 and the general regulation making powers contained in s.203 of the Act are expressed show that the intention was to leave it to be laid down in regulations all matters such as the particular persons who are to be entitled to the bursaries and subject to what conditions, qualifications or other criteria and generally to provide for all the administrative matters necessary to enable the various schemes to be satisfactorily operated. As regards the question of discrimination on account of age he referred to the numerous instances to be found in the Education Act of discrimination on the grounds of age, e.g. in ss.17, 108(2), 109 and 115. Mr Wood distinguished statements to be found in the judgment of Cooke, J. in the Supreme Court in Van Gorkom's case ([1977] 1 NZLR 535) where the question of ultra vires was

fully argued. The question did not call for consideration in the same way in the Court of Appeal because of a change in the relevant regulations in the meantime. He pointed out that the considerations adverted to with regard to sex discrimination could not be said to be applicable to the present case.

My conclusion is that Mr Somerville's argument on this question is not sustainable. The statutory provision by incorporating the words "awarded in accordance with the Regulations that establish it" shows clearly in my view an intention on the part of Parliament to leave to be worked out in accordance with regulations made under the statute the precise conditions under which bursaries, etc., for the general purpose stated are to be awarded. I agree with Mr Wood that s.193 in this way shows an intention to empower the Governor General in Council not only to establish certain grants but to lay down the terms of entitlement thereto. Clearly, all such bursaries could not be left to be claimable by anybody in the community who was seeking to pursue educational courses of the kind referred to. In the case of Shah v. Barnet London Borough Council (supra), the statutory provision empowered local education authorities to make regulations regarding the grant of scholarships and other allowances in respect of "pupils over compulsory school age" to enable them to take advantage of educational facilities. The regulations made by the local authority had the effect of limiting applicants to those ordinarily resident in the United Kingdom for three years prior to the commencement of study. No attempt was made in that case to argue that the imposing of a limiting qualification such as this went outside the regulation making power. In order effectively to give assistance to the maximum

number of students from the limited funds which would inevitably be made available to the Education Department for the purpose, a scheme clearly had to be devised as a matter of administration which eliminated as far as possible those not really in need of the assistance and/or those having a lesser need for assistance.

I turn now to the third submission, that is as to the second respondent having made an error on the face of the record in failing to exercise its jurisdiction to consider and determine the appeal brought to it against the determination of the Director-General to decline the application. The contentions advanced by Mr Somerville as to the way in which this matter should be approached are founded in my view on well accepted law. The leading case of Rex v. Northumberland Compensation Appeal Tribunal ex parte Shaw [1952] 1 KB 338, shows that the decision of a statutory tribunal is open to certiorari and may be quashed on the grounds of error on the face of the record, whether or not the error is one which takes the statutory authority outside its jurisdiction. The earlier decision to the contrary in Racecourse Betting Control Board v. Secretary for Aid [1944] 1 Ch. 114 is now recognised as being no longer authoritative (see Wade p.275 etc. seq.)

The decision of the second respondent declining the jurisdiction is certainly a matter of record. The second respondent has expressly founded his decision that the appeal is "invalid" on the basis that s.193AA(6)(a) limits the jurisdiction of the authority to grants paid or payable to any person by reason of hardship. He upheld the Department's contention

that an accommodation grant cannot fall within the scope of these words.

Section 193AA as inserted in the principal Act by s.5 of the Education Amendment Act 1979, it is to be noted, reads in part as follows:

> "193AA Tertiary Assistance Grants Appeal Authority - (1) There is hereby established the Tertiary Assistance Grants Appeal Authority (in this section and section 193AB of this Act referred to as the authority).
>
> '(5) The function of the authority shall be to hear and determine appeals made to it in accordance with this Act.
>
> (6) This subsection applies to every decision under this Act (being a decision that the person or body making it had power to make in some other way) -
>
> "(a) Fixing the amount of any bursary, scholarship, grant, award, or allowance paid or payable to any person by reason of hardship; or
>
> (b) Declining to award such a bursary, scholarship, grant, award, or allowance to any person".

Then follow the further sub-clauses (c) to (g) set forth verbatim in the departmental report of 19 April, 1983 which I earlier quoted in full.

Mr Somerville supported his argument that there was a right of appeal to the second respondent in the circumstances of this case by contending that an accommodation grant under Reg.38 is awarded by reason of hardship for the following reasons:

(i) An accommodation grant is made as a grant in aid to students in respect of their accommodation expenses and by reason of the hardship that would ensue if

students had to pay those expenses unaided.

(ii) The current provisions empowering the Director-General to award accommodation grants replaced a grant called the Tertiary Hardship Grant which was awarded in varying amounts dependant on the contents of a budget by each applicant. The current system merely generalises the "hardship" which students suffer when living away from home as opposed to the previous system which required an individual assessment of each student's financial position. The Tertiary Assistance Grants Appeal Authority was set up at the same time as the previous regulations were enacted. There has been provision for additional "hardship" grants under both systems.

(iii) In a case like the applicant's, the award or rejection of an accommodation grant is clearly based on an assessment of the hardship incurred by the individual student if he were not awarded the grant. He suggested that it was difficult to imagine any other circumstances which could be relevant to the extraordinary circumstances inquiry.

(iv) The empowering section speaks of grants awarded "by reason of hardship" as opposed to merely speaking of "hardship grants". Thus, clearly the legislative did not intend the right of appeal to be limited to the hardship grants provided for in Part V of the Regulations.

Mr Wood, on the other hand, submitted that the introduction of the words "by reason of hardship" at the end of subsection (6)(a) had the effect of limiting that provision

solely to the "hardship grants" to which Mr Somerville referred and that no other grants or awards or allowances were intended to come within this provision because it was only in respect of the special "hardship grants" and "special hardship grants" payable in terms of Part V of the Regulations that the first respondent had any discretion as to the amount of the awards. The amounts of other bursaries, scholarships, grants, etc., he said, were all fixed by the Regulations and this being so there would be no point in giving a right of appeal because no discretionary power would have been exercised by the first respondent.

After considering this matter fully I have reached the conclusion that there is, as Mr Somerville contended, a right of appeal to the second respondent against a refusal of the first respondent to award an accommodation grant but I reach this conclusion for a different reason from that which he put forward. The primary question in my view is whether or not the intention of the Legislature as shown by the language used is that the phrase "by reason of hardship" should apply to all the types of monetary educational assistance referred to in subsection (6)(a) or whether those words are applicable only to and qualify only the words "allowance paid or payable to any person". Upon a consideration of the Act as a whole and of the various Regulations which were in existence at the time when the Education Amendment Act 1979 introducing this provision was enacted the contents and effect of which Parliament must, of course, be assumed to be aware, I find it impossible to conclude that the intention was that these qualifying words should apply to all the forms of assistance mentioned. It is true that the general principle of construction is that where a number of

things are referred to followed by a general expression or qualification, that is to be taken as referring to all the preceding words. That principle is thus stated in Halsbury Laws of England, 4th Ed. Vol.44, para.878:-

> "General words applying to several preceding words. As a matter of ordinary construction, where several words are followed by a general expression which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all."

The authority referred to, however, The Great Western Railway Company v. The Swindon and Cheltenham Extension Railway Company [1884] 9 App.Cas. 787, shows that this general rule is subject to qualification. The true position is made clear in the judgment of Lord Bramwell. The Court was dealing with a statutory provision, the Lands Clauses Act 1863 which stated that "lands" shall extend to messuages, lands, tenements, and hereditaments of any tenure. The question the Court had to decide was whether incorporeal hereditaments were brought within this extended definition of the word "lands". Lord Bramwell said:

> "1st, I think that as a matter of ordinary construction, where several words are followed by a general expression as here, which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all. For instance, 'horses, oxen, pigs, and sheep, from whatever country they may come,' the latter words would apply to horses as much as to sheep. And then the general words apply to those of the antecedent to which they are applicable and not to the others, and the words are to be read as 'of whatever tenure, if any'. 2nd. If the general expression is limited to 'hereditaments', then it does not extend to messuages, lands, and tenements, except as included in hereditaments, which cannot be the case. 3rd. If 'hereditaments' was put in to include incorporeal hereditaments, we have not had any incorporeal hereditaments suggested to us which could be said to be subject to tenure."

The same kind of reasoning is in my view applicable here. The various bursaries, scholarships, grants and awards provided for by the Regulations in existence in 1979 were not, as Mr Wood pointed out, payable or awarded on any basis of hardship. There were, however, certainly various other criteria to be fulfilled and in numerous instances the Director-General of Education is given a discretion as to the actual amount of the assistance to be provided. For example, under the Secondary Schools Technical Bursaries Regulations 1977 the Director-General has the power to grant a bursary for daily travel, the actual amount of which he is required to fix having regard to the rates fixed by the Minister for school transport assistance from time to time. Again, under the Secondary Schools Academic Bursaries Regulations 1973, under Reg.15(3) a bursary awarded may be cancelled or abated to any degree by the Director-General if he is satisfied that the circumstances of the pupil have altered so that the pupil no longer needs it or he needs only a part of it to enable him to continue his selected course of instruction. Reference could similarly be made to the Social Work Bursaries Regulations 1976 whereunder the Director-General is given a discretion as to the payment of a boarding allowance in addition to the bursary. None of these discretionary powers, it appears to me, would fall within the subsequent sub-paragraphs of subsection (6) and I am quite unable to see any good reason why having regard to the wide scope of the rights of appeal given by subsection (6) as a whole a right of appeal in respect of these particular matters can be said to be excluded by the introduction of a qualification which is quite inappropriate in its wording to the particular forms of assistance being referred to. The fact is here that the general expression certainly cannot in Lord Bramwell's words be said

to be as much applicable to the first and other words as to the last.

In construing this provision to ascertain the intention as expressed it is necessary to bear in mind that in the same amending statute a wider authority than previously existed was given to make regulations regarding the establishing of the various kinds of monetary grants to enable persons to pursue various educational courses. Section 193(1) as it stood in the Education Act 1964 referred only to the establishing of "bursaries" by the Minister. The new s.193(1) empowered the Governor General by Order in Council to make regulations establishing "bursaries, scholarships, grants, awards and allowances (however described)". Different forms of monetary grants from those which had hitherto been made available were thus clearly envisaged but at that stage of course the Regulations referred to were still to be promulgated. As was pointed out in the course of the argument, there were following the 1979 Amendment established for the first time in the Tertiary Assistance Grants Regulations 1980 forms of discretionary hardship grants designated as Supplementary Hardship Grants and Special Hardship Grants. The words in s.193AA(6)(a) "allowance paid or payable to any person by reason of hardship" are clearly appropriate to grants of the kind thus introduced in Part IV of the Tertiary Assistance Grants Regulations 1980 and continued by Part IV of the new Regulations made in 1982. As I have mentioned, however, those words are certainly completely inappropriate as regards the other monetary forms of assistance which are available on the basis of quite different criteria from that of hardship. Special allowances of the kind introduced immediately following the amending statute enacted in 1979 seem

clearly to have been in contemplation at that time but no specific name having then in all probability been decided upon it was necessary to designate these in a general way in the statute. The use of the words employed is thus readily understandable.

I accordingly conclude that the decisions which are the subject of a right of appeal to the second respondent are not limited in the manner contended for by the first respondent to assistance afforded to students on the basis of personal hardship because the words "bursary, scholarship, grant, award" are not each to be read as qualified by the words "paid or payable to any person by reason of hardship". It accordingly follows that I conclude that I must uphold Mr Somerville's submission that the second respondent acted ultra vires in failing to exercise its jurisdiction to consider and determine the applicant's appeal against the determination of the Director-General.

The relief which was sought on behalf of the applicant was either, (a) an order quashing the first respondent's decision and ordering that he properly determine the applicant's application, or, (b) an order that the second respondent properly consider and determine the applicant's appeal against the decision of the Director-General. It is clear, I think, in view of my conclusion that the second respondent did have jurisdiction to entertain the appeal that the second course referred to is the only appropriate one. In Shah v. Barnet London Borough Council (supra) it is said in para.2 of the headnote:

> "Where the court granted a person relief by way of judicial review of a decision of a local education authority to refuse an application for an award under s.1 of the 1962 Act, the appropriate remedy was an order of certiorari quashing the refusal to make an award and an order of mandamus requiring the authority to reconsider the application. The court could not and should not make a declaration of the person's entitlement or right to an award or of the authority's duty to make an award, since that would usurp the authority's function."

This is in accordance with what is said by Lord Scarman in the course of his judgment (see p.240 d).

The question of the actual entitlement to the grant in question must remain for determination by the first respondent or by the second respondent exercising its appellate jurisdiction. The Court is limited to ensuring the due observance of the law in the course of the determination of the question ofthe applicant's rights in this regard. There will accordingly be an order by way of certiorari quashing the decision of the second respondent holding that the appeal had no validity and an order by way of mandamus requiring the second respondent to consider the appeal on its merits and hear and determine it in accordance with the duty imposed by s.193AA(5) of the Act.

The applicant is entitled to costs and I fix these in the sum of $600.

SOLICITORS:

Wilkinson Rolfe & Kilroy, Dunedin, for Applicant.
Tonkinson, Wood & Adams Bros., Dunedin, for Respondents.