Upper Tribunal
(Immigration and Asylum Chamber) Appeal nos: **IA 30898, 99-13**

THE IMMIGRATION ACTS

At **Field House** Decision signed: **31.07.2014**
on **30.07.2014** sent out: **04.08.2014**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

DC PATEL & another

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: Mr Vemal Makol, (working under the supervision of Maalik & Co)
For the respondent: Miss Julie Isherwood

DETERMINATION AND REASONS

This is an appeal, by the appellants, against the decision of the First-tier Tribunal (Judge Nicholas Easterman), sitting at Hatton Cross on 6 December 2013 and 20 February 2014, to dismiss a student appeal by a citizen of India, born 1 April 1988, and his dependent wife. The result depends solely on the answer to the question of whether the appellant was required to show funding to the level needed for an established student, or as a new one.

2. The answer under the terms of the Rules depends on the wording of note 14 to appendix C:

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> 14. An applicant will have an established presence studying in the UK if the applicant has current entry clearance, leave to enter or leave to remain as a Tier 4 migrant, Student or as a Postgraduate Doctor or Dentist and at the date of application:
>
> (i) has finished a single course that was at least six months long within the applicant's last period of entry clearance, leave to enter or leave to remain, or
>
> (ii) is applying for continued study on a single course where the applicant has completed at least six months of that course, or
>
> (iii) is applying for leave to remain as a Tier 4 (General) Student on the doctorate extension scheme.

3. This appellant's immigration history included a post-graduate diploma course in business administration at Quinton College, which he said he had followed from 5 November 2012 to 5 June 2013. The judge didn't accept that he had finished it, though the appellant's attendance letter, saying he was attending all his classes regularly, at a ratio of 89.50% is, perhaps rather curiously, dated after it had ended, on 27 June. However I shall start where the judge ended, by assuming the appellant did finish his course.

4. As the judge pointed out, the appellant didn't qualify to be treated as an established student under (i), because he hadn't finished that course within his last period of leave to remain. This had been from 12 March till 6 September 2014; but on 4 April it was 'curtailed', so as to expire on 9 June. The reason was that Quinton College's sponsor licence had been withdrawn.

5. The question is whether the appellant qualifies under (ii). At paragraph 23, the judge seems to have read (ii) as if it included the 'within last period of leave' condition; but, as will be clear, it does not. The judge's only stricture on the attendance letter was that it did not say in terms whether the appellant had finished his course, which is right as far as it goes. However, the letter does show that he had been attending it for over six months; and 'has completed six months of …' cannot in context mean that the person concerned has completed the course as a whole.

6. The appellant's real difficulty with (ii), however, was that, because of the withdrawal of Quinton College's licence, he wasn't applying for continued study on the course he had been on for six months or more, but on another one, at FLR Vista Business College. That ruled him out under (ii), and note 14 generally.

7. This cannot be a rare situation, where someone has had to change colleges, when one lost its sponsor licence. Not surprisingly, a student organization called UKCISA [UK Council for International Student Affairs] had taken it up with the Home Office, and they had replied on 8 December 2011, in the terms set out by the judge at paragraph 17. The judge declined to take it into account, as its terms seemed contrary to those of the Rules, and he hadn't heard of UKCISA.

8. Neither had I heard of them before; but this was clearly a genuine Home Office letter, intended for general consumption, and not just an exercise of

discretion in favour of a small group of applicants; and there would have been no point in its being written, if it had simply repeated the Rules. In my view, the judge should have taken account of it; and, unless he decided that it enabled a clear answer to be given to the questions posed by this case (as to which see *AG & others* (Policies; executive discretions; Tribunal's powers) Kosovo [2007] UKAIT 00082), required the Home Office to consider it for themselves.

9. The first point in the letter is by way of re-iterating the 60-day period allowed students to change their sponsoring college, starting from when their leave is curtailed because the licence has been revoked. The second one gives this assurance:

> … where the student has studied for at least six months they would be considered to have had an "established presence" in the UK.

10. Miss Isherwood argued that I should read that assurance as subject to the qualification that the student must have studied for the whole of that six months with leave to be here on that course, under the general scheme of the student rules. Mr Makol suggested that it should be taken at face value.

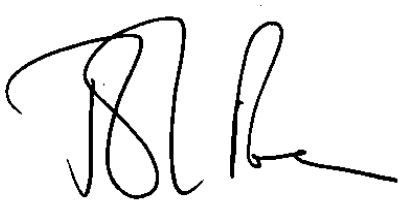
11. If the assurance in question were part of the rules, then I should have to decide what was meant by it; but it is not. I will simply point out that, almost by definition, a student who was affected by the first point in the letter would, like this appellant, not have had leave to remain for the whole six months of his studies, since his leave would have come to an end when 'curtailed'.

12. However, the judicial head-note of *AG & others* includes this:

> *(4) If the policy was taken into account and the claimant can show that the terms of the policy and the facts of his case are such that there was no option open to the decision-maker other than to grant him the remedy he seeks, his appeal should be allowed with a direction.*
> *(5) But where within the terms of the policy the benefit to the appellant depends on the exercise of a discretion outside the Immigration Rules, the Tribunal has no power to substitute its own decision for that of the decision-maker.*

13. Here, the Home Office did not take into account the policy set out in the UKCISA letter, and it is still for them to do so. I have said what I have at **11** in the hope it may be helpful to them, and to the appellant; however I remain concerned that his English was apparently bad enough for him to have to give evidence through an interpreter before the judge, and that this appears to have been his second 60 days' grace period.

Appeal allowed
Home Office directed to reconsider application in terms of policy



(a judge of the Upper Tribunal)