Students and the Immigration Courts: UK

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In the last article I indicated that I shall further deal with how the courts have dealt with students' issues in the UK. Anyone aggrieved with a decision from the UK Border Agency has a right to seek recourse in the courts. Students so aggrieved would also do likewise. I shall endeavour to outline by way of examples common issues which cause a misery to many students.

The approach by the courts to students' appeals has hitherto been harsh. This can be demonstrated by the Tribunal requiring students to prove at the time of the variation request, written consent by the Secretary of State to change courses earlier in time, when at the relevant time the Secretary of State had been willing to permit such changes so long as a letter was written to the specified department of the Home Office. A good example to such an approach is the case of TB (student application - variation of course -effect) Jamaica 2006 UKAIT 00034. This is a typical matter whereby a student changed her course without receiving a consent or decision from the Home Office. The court ruled that the nature of the change was such that the appellant could not comply with the requirements of the Immigration Rules in relation to the course for which she had initially applied. The court even rejected post decision evidence in relation to an application entirely different in nature from that for which the appellant had applied. In that case the first Immigration judge was criticised and found to have erred in considering that the provisions of section 85 (4) of the Nationality, Immigration and Asylum Act 2002 as explained in the case of LS Gambia (Post decision evidence, direction; applicability) were to be taken into account.

This decision caused considerable hardship. Furthermore the courts took a stern approach to the failing of courses, with regards to its interpretation of rule 60v, Immigration Rules, namely "satisfactory progress" In the case of SW and others (Paragraph 60 (V): Jamaica 2006 UKAIT 00054 the court ruled that satisfactory progress may be shown without examinations if there have been no examinations : but if there have been examinations, satisfactory progress has to be shown by evidence including evidence that the exams have been taken and passed. There are also specific provisions which make it possible to apply for further leave to remain to re-sit exams.

The other significant feature about students is regular attendance. In the case of JJ and SS (student ; regular attendance; which course) the court ruled that regular attendance may still be established despite some justifiable absences, for example on account of illness or, perhaps a student has to return home because of family or personal circumstances such as the death of a close family relative.

The approaches outlined above have since been significantly reviewed by the Court of Appeal. The Court of Appeal has clearly established that the grant of entry clearance to enter the UK as a student does not confine the entrant to a single course of study, and failing an examination did not always mean negate the making of satisfactory progress in a course of study within the meaning of Rule 60 (v) Immigration rules. This is dealt with in the matter of Obed and others v Secretary of State for the Home Department [2008] EWCA Civ 747 which is also known as (the case of Goo v Secretary for the Home Department) In that matter the appellants had each been given leave to enter or remain in the United Kingdom as students. They appealed against the decision of the Asylum and Immigration Tribunal refusing to renew their leave. Leave had been refused because in each case the students had failed examinations or changed courses. The

students had been found not to have made satisfactory progress in their courses of study within the meaning of rule 60 (v) of the Immigration rules. The court of appeal had to consider the legal position of a situation in which foreign students who had obtained leave to enter or remain in order to follow a named course embarked on a different course of failed examinations. In essence the Court of Appeal allowed the appeals.

The court held that a student who abandoned or was excluded from his course or who enrolled at an unrecognised institution could succeed in lawfully remaining in the UK for the duration of his leave provided he continued to comply with restrictions on any employment he took, and provided the leave was not in the meantime revoked. The court also ruled that rule 60 (v) was ambiguous. It is also significant to note that in that case the court observed that section 3 of the Immigration Act 1971 made general provision for the regulation or control of Immigration but gave the Secretary of State no authority to impose conditions on a student entrant to the course he was to follow.

A failure to sit or pass relevant examinations would always be material to the evaluation of the student's progress, but whether it was decisive would depend on the reason for it. If the reason was not consistent with satisfactory progress, rule 60 (v) would be satisfied. The approach of Woolf J in R v Immigration Appeal Tribunal, exparte Bahman Geramin (1981) Imm AR 187 namely that lack of exam success went to the discretion rather than being a condition precedent to a successful application, made such sense. In essence if a student attended all lectures and seminars and produces excellent course work then should such a student fail exams as a result of illness, it would have to be properly examined as parliament might not have intended such harshness; to terminate a career in the bud, where the student had invested so much in terms of resources.

A word of advice is that students should be very careful when registering for courses at colleges. It is absolutely important to ensure that the course for which you have registered is actually offered by the college which has agreed to enrol you. In the matter of NA and others (Cambridge College of learning) Pakistan, Cambridge of learning (CCOL) never ran a Postgraduate diploma in business management course or a postgraduate diploma in IT course. In those premises a person applying for leave to remain under tier 1 (Post Study Work) scheme to rely on a certificate of an award of such a diploma following a course will amount to false representation and so will fall foul of paragraph 322 (1A), HC395. Such a person would also be unable to meet the requirement of Para 245Z because he or she could never have undertaken such a course.

The case of OA Nigeria v The secretary of State is also helpful as the court of appeal ruled that it was not open for a senior Immigration judge to dismiss an appeal by a Nigerian student seeking leave to remain on the basis that funding received in the past was not likely to be available in the future. Issues of funding and sponsorship are vital in student matters. In all the premises it is significant to note that the Immigration rules should not be construed with all the strictness applicable to the construction of a statute or Statutory instrument. They must be construed sensibly according to the natural meaning of the language that is employed. See the case of The queen on the app. Of De Oliveira v SSHD [2009} EWHC 47. Always with the help of appropriate legal advice try try try again!

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