IAC-FH-KH-V4

Upper Tribunal
(Immigration and Asylum Chamber)

Molla (established presence – date of application) Bangladesh [2011] UKUT 161 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 November 2010	.....

Before

SENIOR IMMIGRATION JUDGE STOREY

Between

ENAMUL AHAD MOLLA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: Ms H Horsley, Home Office Presenting Officer

When assessing whether a Tier 4 (General) applicant has an "established presence", the relevant date for calculating whether he has completed a course of study within specified periods of time is the date of application.

DETERMINATION AND REASONS

1. The appellant is a citizen of Bangladesh. He attended the hearing unrepresented. I explained that I would assist him as far as I could in ensuring his case was put to best effect.

2. On 30 March 2010 he had applied for leave to remain as a Tier 4 (General) Student Migrant under the Points Based System and for a biometric document. In a determination notified on 5 August 2010 the First-tier Tribunal (Immigration Judge Monro) dismissed his appeal against a decision dated 12 May 2010 that he did not meet in full the requirements of para 245ZX(d) of HC 395 as amended.

3. The IJ concluded that the appellant did not qualify for reduced maintenance levels as he had not shown he had "an established presence studying in the United Kingdom" and so as a result he had not shown he had sufficient in funds. The IJ stated:

> "As he started a new course in October, that 6 month course would have had to cover the period April to September 2009. There is no information before me as to what course if any the appellant was studying during the relevant period".

4. The appellant was successful in obtaining permission to appeal on the basis of a submission that the IJ was wrong to find that he had not shown he met all the requirements of para 245ZX. In particular he submitted that he had in fact demonstrated that he had completed a course that was at least 6 months long during the last period of his leave (his last grant of leave was from 26 March 2009 to 31 March 2010) and so should have been treated as qualifying for a reduced maintenance level.

5. In her determination the IJ had cited the respondent's Tier 4 Policy Guidance. She referred to paras 34-38 but in fact the provisions which she cited are to be found at paras 104-112 of Tier 4 of the Points Based System – Policy Guidance version 03/10 "to be used for all Tier 4 applications made on or after 3 March 2010". The relevant passages are:

> "104. The amount of money a student had to show will depend on whether he/she already has an established presence in the United Kingdom. A student that has an established presence in the United Kingdom needs to show less money for living costs.
>
> > A student … has an established presence studying in the United Kingdom if he/she was last given permission to stay under Tier 4, as a student … and he/she:
> >
> > Has completed a single course of at least six months during his/her last grant of leave;
> > or
> >
> > Is currently studying a single course, of which he/she has completed at least six months;
> > or

Is currently studying and has completed a single course of at least six months during his/her current permission to stay.

And his/her last grant of leave ended no more than four months before his/her Tier 4 application was made; or

He/she is currently following a course of study.

A student cannot amalgamate two or more courses to make up the six months' study.

…

106. A student can qualify for the reduced maintenance levels whether he/she is applying from inside the United Kingdom or from overseas.

107. A student that does not have an established presence studying in the United Kingdom must show that he/she has money for his/her living costs for each month of his/her course up to a maximum of 9 months.

108. A student with an established presence studying in the United Kingdom must show that he/she has money for his/her living costs for each month of his/her course up to a maximum of 2 months.

…

109. A student that does not have an established presence studying in the United Kingdom must show that he/she has money for his/her course fees plus:

Inner London - £800 for living costs for each month of their course up to a maximum of 9 months …

Outer London …

110. A student that does have an established presence studying in the United Kingdom must show that he/she has money for his/her course fees plus:

Inner London - £800 for living costs for each month of their course, up to a maximum of 2 months.

Outer London …

112. Examples of the money required are given in Annex 5."

6. By the time the appellant's application for permission to appeal came before a Senior Immigration Judge the Court of Appeal had given its judgment in Pankina [2010] EWCA Civ 719. Understandably, in view of the IJ's seemingly exclusive reliance on Policy Guidance, this led the SIJ concerned to consider that there was an arguable error of law. However it does not appear to have been appreciated that the applicable Immigration Rules themselves specify in

Appendix A both what is “established presence” and the requisite level of funds (in addition to course fees) needed for Tier 4 applicants.

7. Para 245ZX(d), as amended on 6 April 2010 (HC 439), states that to qualify “The applicant must have a minimum of 10 points under paragraphs 10 to 14 of Appendix C”. the latter state:

“Tier 4 (General) Students

10. A Tier 4 (General) Student must score 10 points for funds.

11. 10 points will only be awarded if the funds shown in the table below are available to the applicant and the applicant provides the specified documents to show this. Notes to accompany the table appear below the table.

Criterion

If studying in inner London:

(i)Where the applicant does not have an established presence studying in the United Kingdom, the applicant must have funds amounting to the full course fees for the first academic year of the course, or for the entire course if it is less than a year long, plus £800 for each month of the course up to a maximum of nine months.

(ii) Where the applicant has an established presence studying in the United Kingdom, the applicant must have funds amounting to the course fees required either for the remaining academic year if the applicant is applying part-way through, or for the next academic year if the applicant will continue or commence a new course at the start of the next academic year, or for the entire course if it is less than a year long, plus £800 for each month of the course up to a maximum of two months.

“Notes”

12. An applicant will be considered to be studying in London if the institution, or branch of the institution, at which the applicant will be studying is situated in a London Borough specified in the United Kingdom Border Agency guidance. If the applicant will be studying at more than one site, one or more of which is in London and one or more outside, then the applicant will be considered to be studying at more than one site, one or more of which is in London and one or more outside, then the applicant will be considered to be studying in London if the applicant’s … {Confirmation of Acceptance for Studies} states that the applicant will be spending the majority of time studying at a site or sites situated in London.

13. Guidance published by the United Kingdom Border Agency will set out when funds will be considered to be available to an applicant, including the circumstances in which the money must be that of the applicant and the extent to which a sponsorship arrangement that provides the required funds will suffice.

14. An applicant will have an established presence studying in the United Kingdom if the applicant has completed a course that was at least six months long within their last period of leave as a Tier 4 migrant, a student or as a Postgraduate Doctor or Dentist, and this course finished within the last four months, or the applicant is applying for continued study on a course where the applicant has completed at least six months of that course and has been studying within the last four months."

8. In DN (student; course 'completed'; 'established presence') Kenya [2010] UKUT 443 the Tribunal held that in order to show only two months' worth of 'Maintenance' under Appendix C, rather than being required to show nine months' worth, a student must have been studying on a course within the last four months, and that course must itself have lasted for more than six months. The course may still be continuing, but if it came to an end within the last four months, and the student is embarking on another course (or repeating the same course), it matters not whether he was successful on the previous course. Appendix C requires the course to have been 'completed' no more than four months before, but that should not be taken to mean 'successfully completed'. The notion of 'established presence' for Maintenance purposes requires presence as a student, not success as a student.

9. During the course of submissions several things became clear. First, it is not in dispute that the appellant is someone who is "studying in inner London" for the purposes of the Rules. Second, the appellant did not have at the relevant time sufficient in savings to cover the full costs of the fees of his course together with £800 for each month of the course, up to a maximum of 9 months. (To do that he would have needed to show he was in possession of £8,400 at least at the time of application which was 30 March. In fact the most he had been able to show was that he had £3,721.78 in his possession (on 19 March 2010)). On the other hand, the respondent accepted that he could qualify under Appendix C of the Rules if he was only required to show a reduced rate of funds by virtue of having an "established presence" as defined in paragraph 14.

10. The first question that arises is did the IJ err in trying to decide the case by reference to the Policy Guidance provisions dealing with persons having established presence? Even though the Policy Guidance cannot be used to establish the requirements of the Immigration Rules, Sedley LJ made clear in Pankina that it can nevertheless give rise to a legitimate expectation that appellants should be able to benefit from Policy Guidance provisions that are more generous than the Rules: see HM and others (PBS - legitimate expectation - paragraph 245ZX(I)) Malawi [2010] UKUT 446 (IAC). However, in respect of established presence the requirements of the Policy Guidance do no more than reiterate the requirements of paras 10-14 of Appendix C. Hence the IJ did not err in law in applying the criteria she did relating to Tier 4 (General) Students.

11. The next question arising is this. Given that the IJ relied on the correct requirements, although failing to note they were set out in the Rules and not

just in Policy Guidance, did she err in law in concluding the appellant could not show established presence? In my judgment she did not.

12. From October 2008 – May 2009 the appellant was at Guildhall College pursuing an ABE degree. He discontinued that. In October 2009 he commenced a foundation course at the London College of Advanced Studies (LCAS). His main BSC course in Business Information Technology (Top Up) at this same college was due to start on 8 February 2010.

13. It is plain that at the date of application in March 2010 he had been studying in the UK within the last four months, so he met this element of the para 14 requirements.

14. However he also needed to show he met the other elements of the para 14 requirements, namely, either: (1) that during his last period of leave he had completed a single course of at least six months; or (2) he was applying for continued study on a course where he has completed at least six months of that course and has been studying within the last four months.

15. In the appellant's case, recalling that his leave to remain ran from 29 March 2009 to 31 March 2010 and that he applied on 30 March 2010, he could only qualify under (1) if his foundation course, which commenced in October 2009, was of at least six months' duration by the date his period of leave was due to expire (31 March 2010). However, in a letter from LCAS dated 30 June 2010 it is stated that the appellant "was doing a degree foundation course from October 2009 to January 2010 since his main course (BSc BIT top up) had started on 8 February 2010." Accordingly, being only of four months duration, the appellant could not qualify under (1).

16. Could the appellant come within (2) above? Again, the appellant could show he had been studying within the last four months. However, by the date of decision on 5 August 2010 we know from this same letter that the appellant was enrolled on the BSc BIT top up course which started on 8 February 2010. Even if the requirement in (2) were to be understood as one solely concerned with whether the applicant satisfies it as at the date of decision, then even then the appellant fell (just) short of 6 months. However, Appendix C clearly contemplates that the applicant shows he satisfied this requirement at the date of application (in this case, 30 March 2010). On the date of application the appellant was not studying a (single) course of which he had completed 6 months. He was only a few weeks into the course. That the date of application is the applicable point in time for calculating such matters is clear from the wording of para 1A of Appendix C: "In all cases where an applicant is required to obtain points under Appendix C, the applicant must have the funds specified in the relevant parts of Appendix C at the date of the application and must also have had those funds for a period of time set out in the guidance specifying the specified documents for that purpose".

17. Accordingly the appellant failed to show he would benefit from the relevant provisions of Appendix C which allow for reduced fees.

18. Where do these conclusions leave this appeal? Looking back at the IJ's determination it can be seen that she did not refer either to the significance of the relevant provisions of Appendix C of the Immigration Rules or to the correct version of the Policy Guidance, nor did she refer to the legal guidance given in Pankina. Nonetheless, the version of the Policy Guidance she did cite was to the same effect as the correct version and did no more than reiterate the requirements set out in para 10-14 of Appendix C of the Immigration Rules. The IJ also made clear in para 5 that she would have been prepared to accept that the appellant "qualified for the reduced fund requirement" if he was able to show that he had completed a single course of at least six months during this last period of leave. She found that the appellant had not shown that and, hence dismissed the appeal.

19. In summary, notwithstanding certain shortcomings, the IJ's assessment was properly based on the appellant's failure to show he qualified under para 245ZX. That assessment was not vitiated by legal error.

Signed Date

Senior Immigration Judge Storey
(Judge of the Upper Tribunal)