# ASYLUM AND IMMIGRATION TRIBUNAL

**WR (Student: "Regular Attendance"; "Maximum Period") Jamaica [2005] UKAIT 00170**

**THE IMMIGRATION ACTS**

**Heard at: Field House**

**on : 16 August 2005**

Determination Promulgated

....05 December 2005..

**Before**

**Mr C M G Ockelton (Deputy President)**
**Miss E Arfon-Jones (Deputy President)**
**Professor A Grubb (Senior Immigration Judge)**

**Between**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant:Mr J Cobham of Andrews, Solicitors.
For the Respondent: Ms R Brown, Home Office Presenting Officer.

*(1) Paragraphs 60(iv) and 57(ii)(b) impose separate requirements: the former relates to the design of the course itself whilst the latter requires proof of actual attendance that is sufficient to meet the demands of undertaking the course; (2) Paragraph 60(vi) refers to the total period of leave not the total period spent in studying.*

## DETERMINATION AND REASONS

1. The Appellant arrived in the United Kingdom on 6 January 2001 and was granted leave to enter as a student until 31 January 2002. With appropriate extensions of leave, she undertook various short courses relating to beauty therapy and associated activities up to June 2003. On 28 July 2003, the Appellant applied for an extension of her leave to remain in the UK as a student in order to undertake a Diploma in Computer Studies at the School of Computing & Business Studies, Brixton Road London which was to commence in September 2003 and run until August 2004.

2. On 3 March 2004, the Secretary of State refused her application under paragraph 62, with reference to paragraph 60(iv), of *Statement of Changes in Immigration Rules*, HC 395 of 1994 on the basis that she had failed to produce satisfactory evidence of regular attendance on the computer studies course which had begun in the interim. The Secretary of State relied upon a letter from the School of Computing & Business dated 27 February 2004 which indicted that, although the Appellant was registered on the computer course, she had not attended any part of it.

3. The Appellant appealed against that refusal and, following a hearing, in a determination promulgated on 25 February 2005, an Adjudicator (Mr JP Griffin) allowed her appeal. The Adjudicator had before him evidence, which he accepted, that the Appellant had changed computer courses in October 2003 to one run by the Computer Training Centre (CTC) in Cannock. He accepted that the Appellant had notified the Home Office and the Home Office had contacted the wrong institution for an attendance record. The Appellant produced a record of attendance which showed that she had attended 42 out of the required 108 times at CTC. The Adjudicator accepted this and concluded that the Appellant satisfied paragraphs 60 and, by incorporation, 57 of HC 395.

4. The Secretary of State was granted leave to appeal to the Immigration Appeal Tribunal on the basis that the Adjudicator had erred in law in his determination.

5. By virtue of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (Commencement No 5 and Transitional Provisions) Order 2005 (SI 2005/565), the grant of permission takes effect as an order for reconsideration of the Appellant's appeal before the AIT limited to the grounds upon which permission to appeal was granted.

6. The Tribunal is required to approach this reconsideration in two stages. First, we must decide whether the Adjudicator's determination discloses a "material error of law". Second, if it does we must go on and substitute a fresh decision, deciding on the basis of the evidence whether to allow or dismiss the appeal.

**Material Error of Law**

7. It will be helpful if at the outset we set out the relevant provisions in HC 395 which deal with extension of leave as a student so far as they arise in this case.

8. An extension of stay may only be granted if the applicant satisfies paragraph 60 which, whilst setting out specific requirements for extensions of leave, also incorporates all the requirements for leave to enter set out in paragraph 57. For our purposes the important requirements are those in paragraph 60(ii) and (iv):

> "60. The requirements for an extension of stay as a student are that the applicant:...
>
> (ii) meets the requirements for admission as a student set out in paragraph 57(i)-(vi);...
>
> (iv) can produce satisfactory evidence of regular attendance during any course which he has already begun; or any course for which he has enrolled in the past;...".

9. Paragraph 57(ii)(b) requires that the applicant is able and intends to follow

> "a weekday full-time course involving attendance at a single institution for a minimum of 15 hours organised daytime study per week of a single subject or directly related subjects;..."

10. For the Secretary of State, Ms Brown submitted that the adjudicator had fallen into error in paragraph [15] of his determination and she drew our attention, in particular, to the following sentence:

> "It is not clear whether the 40% attendance equates to 15 hours per week and unfortunately no enquiries were made on this point."

11. Ms Brown submitted that this confused two requirements of the immigration rules: first, the requirement in paragraph 57(ii)(b) that the Appellant should be able and intend to follow a weekday full-time course with a minimum of 15 hours study per week and, secondly, the requirement in paragraph 60(iv) that for an extension of stay the Appellant should produce satisfactory evidence of regular attendance at a course on which she is registered. It was wrong for the Adjudicator to conclude that the Appellant's 40% attendance (being 42/108 attendance) had anything to do with the first requirement and it was perverse of him to conclude that this evidence established the requirement in paragraph 60(iv) of "satisfactory evidence of regular attendance".

12. Mr Cobham, who represented the Appellant, submitted that the Adjudicator had looked at the case in the round and, on the basis of

all the evidence, his decision was supported by the evidence and not perverse.

13. We accept Ms Brown's submissions.

14. First, it is clear to us that in paragraph [15] of his determination the Adjudicator has confused the two distinct requirements in paragraphs 57(ii)(b) and 60(ii). He may well have been led to this by the fact that in the Notice of Decision, the Secretary of State did rely upon paragraph 57(ii) but in the subsequent Explanatory Statement dated 5 May 2004 only referred to paragraph 60(iv) and the absence of satisfactory evidence of regular attendance at the computing course. We did not understand Ms Brown to doubt that both the computing course at the School for Computing & Business and the CTC course satisfied the requirement as to hours of study. She was right not to do so, the documents before us from the two institutions make clear that weekly attendance for these courses was 17 and 18/20 hours respectively.

15. It is, in our view, absolutely clear that the '15 hours per week' requirement and the 'regular attendance' requirement cannot properly be run together. The former is a requirement relating to the design of the course independent of any student's actual attendance. The latter is a requirement relating to a student's actual attendance within the parameters set by the course itself.

16. Second, by virtue of his conclusion that paragraph 60 was satisfied, the Adjudicator must have been satisfied that the evidence before him was in terms of paragraph 60(iv) "satisfactory evidence of regular attendance" on the computing course the Appellant was studying. That evidence was of attendance on 42 out of 108 occasions – which he calculated at 40% attendance.

17. Mr Cobham submitted that the record of attendance was wrong due to an administrative error. He told us that the Appellant's representatives had written to CTC in June of this year to seek clarification but had not received a reply. We are not surprised. As the Tribunal pointed out to Mr Cobham at the hearing, the documents show that CTC closed in June 2004. We note that at the original hearing the Appellant told the Adjudicator that her attendance record was due to the fact that CTC had insufficient computers and so when they were being used she went home (paragraph [9] of the determination). The Adjudicator seems to have accepted this explanation when he stated that he found her to be a truthful witness (para [12] of the determination). There would appear to be a discrepancy between what the Appellant said at the original hearing and Mr Cobham's explanation offered on her behalf before us. Mr Cobham did not seek to elaborate further. In the result, there is insufficient to displace or question the evidence from CTC that the

Appellant attended the computer course for which she was registered on 42/108 occasions between September 2003 and June 2004.

18. Did the Adjudicator err in law in considering this evidence sufficient to establish that the Appellant had produced "satisfactory evidence of regular attendance" at the course?

19. What is meant by the phrase "regular attendance" in paragraph 60(iv) of the Immigration Rules? We were not referred to any case law, nor are we are aware of any, which would assist in discerning its meaning. Does the phrase requires, in effect, "frequent" attendance or "satisfactory" attendance or, as the word "regular" might suggest, "attendance on a recurring pattern or period"? In one sense, a person may regularly attend a course but do so infrequently, for example by attending on every Monday but on no other days of the week. We do not consider that this would fulfil the requirement. Attendance characterised merely by a standard period or interval, but which is infrequent, is not sufficient.

20. It is important to notice that the requirement of "regular attendance" in paragraph 60(iv) is a companion requirement for extension of leave to that of "evidence of satisfactory progress" in paragraph 60(v) of the Rules. In substance these two requirements are looking for satisfactory attendance and satisfactory progress respectively. With that it mind, it seems to us that the word "regular" is used in paragraph 60(iv) in the same sense as "regularity" when it is used to describe an event happening often as in "the same examination questions came up with unfailing regularity". What must be established, in our view, is attendance that is sufficiently often, habitual or frequent in order to meet the demands of undertaking and completing the particular course. The evidence of actual attendance must be considered in each case and assessed in the light of the meaning of "regular" we have described. No mathematical formula or hard-and-fast percentage of attendance will necessarily determine this issue for every case, although as a matter of commonsense the greater the attendance (albeit falling short of 100% attendance), the more likely it will be that the Rule is satisfied.

21. Looking at the evidence relied upon by the Adjudicator we are left in no doubt that the evidence of 40% attendance could not possibly satisfy the requirement of establishing "regular attendance". It was, in the sense we have interpreted the Rule, "irregular" attendance and could only be understood as such. The Adjudicator's conclusion that paragraph 60(iv) was satisfied on the evidence before him was perverse.

22. For these reasons, we are satisfied that the Adjudicator's determination discloses a material error of law. We move on to consider what decision we should substitute.

**Decision on Reconsideration**

23. The Appellant must satisfy the Tribunal on a balance of probabilities that the requirements of the relevant immigration Rules, namely paragraph 60 (read with paragraph 57) are met.

24. It is clear from our conclusion in paragraph 21 above that on the evidence that was before the Adjudicator the Appellant could not establish that she satisfied paragraph 60(iv) of the Rules.

25. At the hearing, the Tribunal reminded the parties' representatives that the reconsideration was governed by section 85(4) of the 2002 Act and, as the Tribunal pointed out in *LS (post-decision evidence; direction; appealability) Gambia* [2005] UKAIT 00085, this means that post-decision change of circumstances must be taken into account. Whilst there are a number of issues that may have to be resolved in future cases in respect of the proper application of section 85(4) to in-country immigration appeals, in this case its application is clear. The Appellant must establish on the facts at the date of hearing that she satisfies paragraph 60 (read with paragraph 57) of the Immigration Rules.

*Paragraph 60(iv)*

26. As a consequence, Mr Cobham relied upon the Appellant's attendance at the Croydon College CIS Intranet in 2003/2004 on a NVQ3 Beauty Therapy course. An attendance record dated 4 May 2005 was sent to the AIT by facsimile from the Appellant's representatives the day before the hearing (15 August 2005). Attached to this is a certificate dated 30 November 2004 certifying that the Appellant had passed the NVQ in Beauty Therapy at level 3. Mr Cobham was unsure whether the document had been sent to the Home Office.

27. We were surprised to see this document. At no point in the proceedings had it previously been suggested that the Appellant was attending a course on Beauty Therapy at the Croydon College during 2003/2004. Her application to the Secretary of State was to undertake a computer course at the School of Computing and Business and before the Adjudicator she relied upon the self-same course albeit undertaken at CTC. Yet, it would appear from this documentation that at the time she was studying at CTC she was also studying for the NVQ3 at Croydon College which she successfully completed sometime in the summer of 2004.

28. We were not provided with details of this course. However, the document setting out the Appellant's attendance record does indicate there are 9 modules to the course held between Tuesday and Friday

and gives their durations. If they were studied contemporaneously the course does satisfy paragraph 57(ii)(b), namely a "weekday full-time course involving attendance … for a minimum of 15 hours organised study per week of…directly related subjects". We are content to accept that it does for the purposes of this appeal. We also note that the Appellant's attendance at the various elements of the NVQ3 course ranges between 45% and 100% with all but one in excess of 70% and of those 6 in excess of 80%. Her average attendance was 80.54% with unauthorised attendance stated to be 10.12%. Despite the late appearance of the evidence, for which no explanation was proffered by Mr Cobham, there is no reason to doubt its authenticity. We do not agree with Ms Brown's submission that this evidence is insufficient to satisfy the Rule. It seems to us that the consistency of attendance for 8 of the 9 modules for the duration of the course does amount to "satisfactory evidence of regular attendance" satisfying the requirement in paragraph 60(iv).

29. There is also other evidence in the file relevant to this issue. The same facsimile bundle contains a "Student Performance Review" dated 27 May 2005 from the City College of Technology (formerly CTC). This shows that between September 2004 and May 2005, the Appellant studied a Diploma in Information Technology at that College. Clearly this relates to matters arising after the Secretary of State's decision but must be taken into account by virtue of section 85(4) of the 2002 Act. The progress report is positive and indicates the Appellant's attendance on the course was 90%. Mr Cobham was unable to assist any further on this document and could not say whether the Appellant had completed the course. Be that as it may, the Appellant certainly plans to move on: she has been accepted upon a 2 year Foundation Degree in Spa Management at Warwickshire College International beginning in September 2005.

30. We are satisfied on the basis of this evidence that at the date of hearing the Appellant has established "regular attendance" on a relevant course and, therefore, she fulfils the requirement in paragraph 60(iv) of HC 395.

*Paragraph 60(vi)*

31. Paragraph 60(vi) of HC 395 requires the Appellant to prove that she

> "would not, as a result of an extension of stay, spend more than 4 years on short courses (ie courses of less than 2 years duration, or longer courses broken off before completion); … ".

32. Ms Brown submitted that the Appellant failed under paragraph 60(vi) because, having arrived on 6 January 2001, she had now been in the UK studying for more than four years on short courses. She submitted that the total period of study was to be taken as the

calendar year and not restricted to the (shorter) academic year in which the course was studied. Mr Cobham submitted that account should be taken only of periods of time when the Appellant was actually studying and, on that basis, she had not completed 4 years of study.

33. The Secretary of State did not rely on paragraph 60(vi) in refusing the Appellant's application. He could not have done so because, at that time, on no view could it be said that the Appellant would have been here for more than 4 years if her leave was extended. The point only arises because of section 85(4) and the Tribunal's obligation to consider the facts at the date of hearing and the Tribunal must be satisfied that the Appellant now fulfils the requirements of the Rules. Although the point was not taken before, Mr Cobham was able to deal with the issue on the basis of the evidence that was before the Tribunal.

34. Having looked carefully at the documentation, the Tribunal is satisfied that the Appellant has spent something in the order of 44 months studying on short courses since arriving in the UK in January 2001. We put it in this way because it is impossible to be precise on the documentary evidence but it is clearly less than 4 years, ie 48 months. Therefore, if Mr Cobham is correct in the interpretation he urged upon us, the Appellant meets the requirement in paragraph 60(vi).

35. Taken literally, the phrase "spend more than 4 years on short courses" is consistent with Mr Cobham's submission. It could be interpreted to mean time actually spent studying on short courses. Such an interpretation, however, has the potential to create evidential and other difficulties when calculating the relevant period of time "spent … on short courses". It would require the decision-maker to calculate in months, weeks and even days the total time spent studying on short courses. That might well be taken to include recognised holiday breaks during the courses but perhaps not to include holidays or breaks in study between courses. It would also have the curious result that an individual would be more likely to succeed in an application or appeal if, during the periods of her leave, she were to maximise spent time <u>not</u> studying, providing always that she studied enough to satisfy the other requirements of the rules.

36. In our view, these difficulties could not have been intended and are avoided if a different interpretation is adopted. The correct approach when applying paragraph 60(vi) is as follows. Paragraph 60(vi) is designed to restrict or limit the Appellant's <u>leave</u> to enter (or remain) in the UK as a student on short courses to a total of 4 years. The requirement is concerned only with an individual's immigration status as a student on short courses and not with the minutiae of calculating time actually spent studying.

37. The Appellant has been in the UK with leave to study since 6 January 2001 apart, it would seem, from a 2 week period in October/November 2002. Her leave which would have run out on 1 August 2003 was extended by virtue of section 3C, Immigration Act 1971. At the date of hearing, this means that she has been in the UK with leave for more than 4 years. As a consequence, the Appellant has failed to establish the requirement for extension of her leave to remain as a student set out in paragraph 60(vi).

38. Lest it be thought that the effect of section 85(4) and the passage of time before the appellant's appeal was heard is that the Appellant has been disadvantaged, in fact the reality of this case is that, as a result of the appellate process, the Appellant has already undertaken the course (and indeed others) for which she applied for leave on 28 July 2003.

*Conclusion*

39. The Appellant has failed to establish on a balance of probabilities that she meets the requirements of paragraph 60 (read with paragraph 57) of HC 395. The Secretary of State's decision is in accordance with the relevant Immigration Rules.

**Decision**

40. For the reasons we have given, we conclude that the Adjudicator made a material error of law and we substitute a fresh decision dismissing the appeal.

**Professor A Grubb**
**Senior Immigration Judge** **Dated 26.11.05**