Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24156/2012

THE IMMIGRATION ACTS

Heard at Field House
On 31st July 2013 and 5th September 2013

Determination Promulgated
On 11th September 2013

Before

UPPER TRIBUNAL JUDGE SPENCER

Between

MARIE-CHARLENE KARINE SANDIAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: On 31st July 2013, the appellant in person
On 5th September 2013, Mr R Solomon, counsel, instructed by A & P Solicitors
For the respondent: Mr T Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Mauritius, born on 28th February 1984. Her appeal against the decision of the respondent, made on 15th October 2012, refusing her application for further leave to remain in the United Kingdom as a Tier 4 (General)

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Student Migrant under paragraph 245ZX of HC 395, as amended, was dismissed under the immigration rules after a hearing before First-tier Tribunal Judge Wellesley-Cole, in a determination promulgated on 22nd January 2013. The First-tier Tribunal judge did not determine the appellant's human rights grounds of appeal under article 8 of the ECHR.

2. Permission to appeal was granted in the First-tier Tribunal and on 2nd April 2013 Deputy Upper Tribunal Judge Mailer found that the First-tier Tribunal judge had made an error on a point of law in her determination of the appeal for reasons set out in the appendix hereto.

3. Thus the appeal came before me on 1st July 2013 when I heard oral evidence from the appellant and her twin sister, Ms Marie Melissa Karine Sandian. A remarkable feature of the appeal is that I heard evidence from the appellant and her sister, which I accept because the manner in which each of them gave evidence demonstrated their credibility and their immigration history as set out in Mr Melvin's skeleton argument/written submissions confirmed what they said, which showed that they entered the United Kingdom as students more or less at the same time and although they followed different courses initially, ultimately they both completed a Diploma in Business Administration at the same college, namely the London College of Further Studies, after which they went on to study other identical courses together at the same colleges. I accept the appellant's evidence that she was depressed by being separated from her twin sister and so decided to live at the same address and follow the same courses. While the appellant's application for further leave to remain to embark upon a course leading to a postgraduate diploma in Hospitality and Tourism Management at the International School of Business Studies was refused, an identical application on the part of her sister was granted by the respondent.

4. The appellant's application was refused by the Secretary of State on the grounds that she did not have the necessary level of funds, namely £7,200 and also on the grounds that application was made on 3rd July 2012 and the closing date of the bank statements submitted in support of her application were dated 16th May 2012, namely more than one month prior to the date of application.

5. During the course of the hearing before me on 31st July 2013 the appellant claimed that she had an established presence studying in the United Kingdom and so was obliged to show funds totalling £1,600 only, in accordance with the criterion following paragraph 11 of Appendix C to HC 395, as amended because, at the date of the application, as required by paragraph 14, she had current leave to remain as a Tier 4 Migrant Student and an established presence studying in the United Kingdom.

6. The relevant part of paragraph 14 provided as follows:

> "An applicant will have an established presence
>
> studying in the UK if the applicant has … leave to remain as a Tier 4 migrant…and at the date of the application:

> (i) has finished a single course that was at least six months long within the applicant's last period of … leave to remain, or
>
> …"

7. At the first hearing Mr Melvin conceded that the application of the appellant had been made on the date she claimed, namely 31st May 2012 but did not accept that the appellant had in fact attended at the college so as to comply with the requirements of paragraph 14 of Appendix C.

8. As the appellant was unrepresented and had not expected this point to be taken against her I adjourned the hearing to enable her to produce evidence that she had in fact attended the college, which she presented at the hearing before me on 5th September 2013. After consideration of that evidence Mr Melvin, on behalf of the respondent, conceded that she had in fact attended the college as claimed.

9. Both representatives were agreed that the remaining issue in relation to the appeal under the immigration rules was whether or not the appellant had an established presence as a student in the United Kingdom at the date of the application, and alternatively in relation to the appeal on human rights grounds under article 8 of the ECHR the issue was whether the fact that her sister had been granted further leave in identical circumstances meant that her removal in consequence of the decision to refuse further leave amounted to a disproportionate interference with the right to respect for her private life.

10. Mr Solomon indicated that he did not wish to call any further evidence and therefore I proceeded to hear submissions made on behalf of both parties, which in effect encapsulated the written arguments contained in the reply on behalf of the appellant from Mr Solomon, dated 29th July 2013, and the respondent's skeleton argument/written submissions from Mr Melvin dated 4th September 2013.

11. I have set out the relevant requirements of paragraph 14 of Appendix C above. Mr Solomon argued that there had been a change of wording in the immigration rules. The previous requirement for an established presence studying in the United Kingdom, of an applicant having completed a course that was at least six months long within the last period of leave as a Tier 4 Migrant and the course having finished within the last four months, had been changed to a requirement that he should have finished a single course that was at least six months long within his last period of leave to remain. Mr Solomon relied upon the respondent's Modernised Guidance on Tier 4, valid from 25th September 2012, a copy of which was attached to his reply, which set out the definition of established presence as a student in the United Kingdom contained in paragraph 14 of Appendix C and went on to state:

    > "If the applicant's study has been interrupted (for example, because their sponsor's Tier 4 licence was revoked) they will still qualify as having an established presence providing at least six months of the course has been completed by the date on which the studies were interrupted."

12. Mr Melvin conceded that if the appellant had an established presence studying in the United Kingdom then she was not required to show any more than £1,600 which she had been able to do. He argued, however, that the summer vacation interrupted her studies.

13. In his skeleton argument/written submissions, although Mr Melvin referred to the decision of the High Court in Mumba, R (on the application of) v Secretary of State for the Home Department [2012] EWHC 508 (Admin) and quoted paragraph 21 of the judgement, which set out the amended version of paragraph 14 of Appendix C, he argued, in reliance upon the determination of the Tribunal in Molla (established presence – date of application) Bangladesh [2011] UKUT 161 (IAC), that the appellant had to have completed a course of at least six months long and had to have been studying within the last four months. He quoted incorrectly from the part of the paragraph dealing with an application for continued study. More accurately he should have said that the paragraph, considered in Molla required the course to have finished within the last four months. The situation is, however, that the paragraph referred to in Molla had been amended and was not in force at the date of the decision in the appellant's case.

14. In his skeleton argument/written submissions Mr Melvin also asserted that the appellant's own evidence was that the college had closed for the summer vacation on 11th June 2011 and never re-opened. The course had begun on 31st January 2011 so that the appellant had not finished a course that was at least six months long.

15. Mr Melvin also argued there was a lengthy period of time between the revocation of the appellant's sponsor's licence, which was conceded took place on 28th September 2011 and the date of her application on 31st May 2012. He submitted that if the appellant had an established presence it would mean that if an applicant's sponsor's licence had been revoked six months into his course he could then sit back and do nothing until shortly before the period of his leave expired and then claim to have had an established presence in the United Kingdom as a student.

16. In relation to the first point made by Mr Melvin, that a student's vacation has to be left out of account in calculating the length of time that he has been following a course, I accept the submission made by Mr Solomon, that the period of a vacation which occurs during a course does not have to be left out of account in calculating the length of the course.. Where, as in this case, the appellant's BSc course in Business Management was to run from 31st January 2011 to 31st January 2014 it is not possible to say that the course came to an end at the beginning of any period of vacation and resumed again only at the end of the particular vacation.

17. By way of illustration, there is a requirement in paragraph 245ZV(g) of HC 395, as amended, that if the course is below degree level the grant of entry clearance the applicant is seeking must not lead to the applicant having spent more than 3 years in the United Kingdom as a Tier 4 Migrant since the age of 18 studying courses that did not consist of degree level study. It would be remarkable if such an applicant were able to deduct from the length of time he had been in the United Kingdom the total

length of his vacations, on the grounds that they were excluded from the length of time he was studying.

18. In relation to the second point made by Mr Melvin, I note that the First-tier Tribunal judge described the appellant as having an unblemished immigration history and as a straightforward appellant who gave evidence in good faith for the purposes of the hearing. I found her to be an honest and reliable witness and in the light of the further documentation she submitted I accept that she was not aware of the fact that the sponsorship licence of the London Business Academy had been revoked until she received an e-mail on behalf of the academy on 9th January 2012. It does appear that the Secretary of State did nothing to notify the appellant of the revocation of the licence and did not give her the opportunity of finding a new sponsor during the course of her existing leave to remain, which did not expire until 30th July 2012.

19. Although it is the case that the respondent's guidance cannot be taken to be a definitive interpretation of the immigration rules, nonetheless in this case it is apparent that the previous version of paragraph 14 of Appendix C which provided as follows:

> "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 … and the course finished within the last four months …"

was deleted from the immigration rules with effect from 21st April 2011 by HC 908 and was replaced by the version to which I have referred. In DN (Student – course 'completed' – established presence) Kenya [2010] UKUT 443 the Tribunal decided that completed did not mean successfully completed. Since that determination was promulgated the Secretary of State has chosen to amend paragraph 14 of Appendix C so that an applicant is not required to have completed a course and has removed the requirement that the course should have finished within the period of four months prior to the date of the application. The guidance shows what the policy of the Secretary of State is and in my view giving the word "finished" its ordinary meaning I am satisfied that the appellant had finished a course which had run for six months, when her sponsor's licence was revoked and by the date of her application.

20. In these circumstances I am satisfied that the appellant complied with the requirements of the immigration rules and therefore I re-make the decision of the First-tier Tribunal by allowing her appeal under the immigration rules.

21. So far as the appellant's article 8 grounds of appeal are concerned, an important element of the appellant's private life is her relationship with her sister as well as all of the other contacts that she has made during the course of her time in the United Kingdom, which has spanned a period now of almost ten years, so that the appellant's removal in consequence of the decision would have consequences of such gravity as to engage article 8 of the ECHR. I am satisfied the decision was made in accordance with the law. So far as whether or not it was necessary and

proportionate, there cannot be any public interest in her removal given that she complies with the requirements of the immigration rules.

22. Even if I were wrong in finding that the appellant complied with the requirements of the immigration rules, in my view the public interest in the appellant's removal is weakened dramatically by the fact that in identical circumstances her sister was granted leave to remain. It matters not, in my view, that the matter was dealt with by a different caseworker, as asserted by Mr Melvin, what is important is that different treatment was afforded to the appellant from that which was afforded to her sister, in identical circumstances.

23. In these circumstances I also allow the appeal on human rights grounds under article 8 of the ECHR on the basis that the appellant's removal would amount to a disproportionate interference with her right to respect for her private life.

24. Following the finding by Deputy Upper Tribunal Judge Mailer that the decision to remove under section 47 of the Immigration, Asylum and Nationality Act 2006 was unlawful, I allow the appeal against that decision on the grounds that it was not in accordance with the law.

Signed Dated

P A Spencer
Judge of the Upper Tribunal

Appendix

"**REASONS FOR FINDING THAT THE TRIBUNAL MADE AN ERROR OF LAW SUCH THAT ITS DECISION FALLS TO BE SET ASIDE**

1. The appellant is a national of Mauritius born on 28 February 1984. Her appeal against the respondent's decision to refuse her application for leave to remain as a tier 4 (General) Student Migrant under paragraph 245ZX (d) of the rules was dismissed by First-tier Tribunal Judge Wellesley-Cole in a determination dated 2nd January 2013.

2. On the 11 February 2013 First-tier Judge Pooler granted her permission to appeal to the Upper Tribunal as it was arguable that the Judge failed to make a finding: as to the date on which the application was made and in consequence misdirected herself in reaching findings as to the availability of funds; as to whether funds in her parents' name(s) could be relied on and failed to take account of a fact – the exchange rate at the date of application which was in the public domain.

3. Mr Solomon submitted that the Judge should have allowed the appeal on the basis that there was a s.47 decision to remove the appellant made at the same time as the decision to refuse to vary her leave – Adamally. Ms Martin accepted that this is an unlawful decision.

4. Further, the appellant had contended throughout that she had applied on the 31st May 2012 and not as asserted by the respondent on the 23rd July 2012. There were 2 stamps endorsed on the application, one on the 1st June 2012 the other on the 24th July 2012. The Judge should have resolved that issue as the closing balance of her bank statement at the earlier date was no earlier than 31 days before the date of application. Having found the appellant to be a straightforward witness she should have given proper reasons for not accepting that the appellant applied on the 31st May 2012.

5. Further, given that the appellant had an established presence in the UK she had to show a lesser amount of maintenance namely, only £1600. The bank statements showed a sufficient level between 19 April and 16 May 2012. He relied on DN [2010] UKUT 443. The notion of 'established presence' requires presence as a student, not success as a student. The Rule had changed by the end of May 2012. Her sponsor's licence was revoked before the end of her course and she was not, as she should have been, given any opportunity to find another college.

6. Finally, the spot exchange rate was in the public domain and uncontentious. In addition the Judge erred in stating that the bank statements were not certified. They in fact bore the official stamp on every page of the respondent's bundle.

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7. Ms Martin submitted that the appellant had not finished her course because of the termination of the sponsor's licence. She accepted that the appellant had not been given an opportunity to find another college. She had not shown that she had an established presence.

8. Having considered the competing submissions I find there has been an error of law in the making of the decision. The Judge has not attempted to resolve the issue of the date of the application, simply stating that her sister's application may have been confused with her own. She set out the appellant's contentions at paragraph 6 and 7. However apart from referring to the fact of two stamps she did not consider the potential relevance of the date of application in assessing the bank statements concerned. It appears that the appellant had given compelling evidence in that regard and had produced proper proof of posting. Further, no consideration was given as to whether she had an established presence in the UK.

9. The Judge found that the appellant had not shown that she has the equivalent funds in terms of 'English currency – para 8'. That however was capable of being simply and uncontroversially ascertained using a currency converter. She also appeared to find that the appellant could not rely on her parents' bank account – para 9.

10. I accordingly find that the decision of the Judge did involve the making of an error on a point of law. I set aside the decision which will have to be remade.

11. The case should be listed for a Case Management Review not less than 14 days after the date on which this decision is sent to the parties, with a time estimate of 1 hour. Directions, including the appropriate disposal of the appeal, can then be considered."