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C5/2007/2180,C5/2007/1268

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL

1.IA/08444/2006,

2. IA/09383/2006 & IA/09384/2006

3. IA/13289/2007

4. IA/00458/2007

5. IA/01413/2007

6. IA/14327/2006

7. IA/13376/2006

8. IA/10320/2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2008

Before :

LORD JUSTICE SEDLEY

LORD JUSTICE LONGMORE

and

LORD JUSTICE MOSES

- -

Between :

1. G O O

2. E O & ANOTHER

3. W A

4. H Z

5. A M

6. K M

7. T G

8. A G

Appellan

- and -

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

- -

(Transcript of the Handed Down Judgment of

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Official Shorthand Writers to the Court)

- -

Mr N Padfield QC & Mr A Khan (instructed by Messrs N C Brothers & Co) for **Appellant No 1.**

Appellant No 2. (appeared in person)

Mr S Juss (instructed by Messrs Malik Law) for **Appellants No 3., 5. & 6.**

Mrs S Bassiri-Dezfouli (instructed by Messrs Francis MacFoy) for **Appellant No 4.**

Mr V Onuegbu (instructed by Messrs Ovo) for **Appellant No 7.**

Mr I Macdonald QC & Mr M Rupasinghe (instructed by Messrs Chipatiso & Co) for **Appellant No 8.**

Mr I Hutton (instructed by Treasury Solicitor) for the **Respondent**

Hearing date: Wednesday 9 April 2008

- -

Judgment

Lord Justice Sedley :

The issues

1.
The judgment which follows is the judgment of the court. It concerns a question of importance both to foreign students and to universities and colleges in the United Kingdom: what are the legal consequences if a foreign student who has obtained leave to enter or remain in order to follow a named course embarks on a different course or fails the course examinations?

2.
The particular consequences with which the court is concerned arise from the provisions of the Immigration Rules (HC 395) governing leave to enter or remain as a student (rules 57 to 62) and leave to enter for the purpose of re-sitting an examination (rules 69A to 69F). Central to the present cases is the requirement of rule 60(v) that a student who wants an extension of stay must produce "satisfactory evidence of regular attendance in his course of study, including the taking and passing of any relevant examinations". A series of closely reasoned AIT determinations has held this to confine the student to the course for which leave to enter was given, and to make passing the course examinations a requisite of any extension of stay.

3.
Having heard full argument, we are satisfied that this interpretation, while consistent with the words of the sub-rule, is inconsistent with the Immigration Act 1971 and with the Immigration Rules read as

a whole. In our judgment, the grant of clearance to enter the United Kingdom as a student does not confine the entrant to a single course of study, and failing an examination does not always negate satisfactory progress.

4.
Before we turn in detail to our reasons, it is relevant to recall that the admission of foreign nationals to study here is not an act of grace. Not only does it help to maintain English as the world's principal language of commerce, law and science; it furnishes a source of revenue (at rates which, by virtue of an exemption from the Race Relations Act 1976, substantially exceed those paid by home students) of frequently critical budgetary importance to the United Kingdom's universities and colleges as well as to many independent schools. We therefore find it unsurprising that the legislation and rules, correctly construed, do not place arbitrary or unnecessary restrictions on what foreign students can study here. It does not require evidence to remind us that it is not uncommon for a student to realise that he or she has made an unwise choice, or perhaps is being poorly taught, and to change courses or institutions with beneficial results. A rule preventing students from making such a change might well be arbitrary or unnecessary in the absence of case-specific reasons.

Changing courses

5.
It is necessary to start, as Ian Macdonald QC has demonstrated, not with the Rules but with the empowering statute, the Immigration Act 1971. This, by s.3, makes general provision for regulation and control of immigration:

(1) Except as otherwise provided by or under this Act, where a person is not [a British citizen] -

(a) he shall not enter the United Kingdom unless given leave to do so in accordance with [the provisions of, or made under,] this Act;

(b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;

(c) if he is given limited leave to enter or remain in the United Kingdom, it may be given subject to all or any of the following conditions, namely –

i)
A condition restricting his employment or occupation in the United Kingdom;

ii)
A condition requiring him to maintain and accommodate himself, and any dependents of his, without recourse to public funds; and

iii)
A condition requiring him to register with the police.

6.
The importance of this empowering provision is that, with one arguable exception, it gives the Home Secretary no authority to impose conditions on a student entrant as to the course he or she is to follow. The arguable exception is in the words "or occupation" in s. 3(1)(c)(i). Their evident purpose is to restrict what businesses a self-employed entrant may conduct, but Ian Hutton for the Home Secretary seeks to keep open the submission that it is wide enough to include a student entrant's course of study. For reasons to which we turn next we do not have to decide this point; we confine

ourselves to saying that its apparent meaning is the one reflected in rule 57(vii), which requires the intending student to satisfy the ECO that, within certain limits, he “does not intend to engage in business or to take employment” while here.

7.
What makes it unnecessary to decide the point is (a) that the Home Secretary does not in practice purport to impose any such conditions and (b) that any such practice would not, for reasons to which we now turn, be consistent with the Rules.

8.
At the court’s request, copies have been provided of the forms which applicants for entry clearance and for leave to remain as a student are required to complete.

9.
The entry clearance form, in part 6, begins by asking:

6.1.1 Have you been unconditionally accepted on a course of study in the UK?

On the assumption that the answer is yes, the form asks for full details of the course and of the body awarding the qualification. It then asks:

6.1.16 When this course of study is finished do you plan to undertake another course in the UK?

The accompanying notes issued by the Home Office make it clear that an affirmative answer is in no sense a disqualification. They invite a certain amount of detail (course, qualification and institution “where you hope to study”) but, in the nature of things, not the level of detail required for the initial course.

10.
For an extension of stay, the questions to be answered include the following:-

1.12 How long do you intend to stay in the UK on your present course of studies or further studies in the same subject?

1.13 Do you intend on completing these studies to follow any further course of studies in the UK; if so, for how long?

1.14 Was your last period of leave to enter or remain given to allow you to study?

Section 3 asks for details of “studies” – not “the subject” or “the course” – “from the time you were last given leave to enter or remain to study in the UK”. Section 4 then asks about “Your proposed studies” and asks the student to tick a box to indicate “what sort of course you intend studying”. Box 4.3 asks, ambiguously, about “the course on which you are enrolled”, but the note of required documentary evidence makes it clear that this relates to “the course for which you are seeking an extension of stay”.

11.
Thus the information upon which the Home Office decides applications to enter as a student contemplates that the entrant may progress in the fullness of time from one course to another. More importantly, it does not suggest that entry will be conditional on not changing courses. The information required on an application to remain as a student clearly contemplates the possibility that the student will not continue (or possibly even embark) on the course for which he or she is admitted. This seems to us no more than realistic. What will of course matter is if the entrant does anything

which is inconsistent with the purpose for which, or any lawful conditions on which, he has been permitted to enter or remain. But it appears also to be the case that a student who abandons or is excluded from his course at an early stage, or who enrols or re-enrols in an unrecognised institution, may succeed in remaining here lawfully for the duration of his leave provided he continues to comply with the restrictions on any employment he takes and provided the leave is not meanwhile revoked.

12.
The material parts of the Immigration Rules are these:

Requirements for leave to enter as a student

57. The requirements to be met by a person seeking leave to enter the United Kingdom as a student are that he:

(i) has been accepted for a course of study, or a period of research, which is to be provided by or undertaken at an organisation which is included on the Register of Education and Training Providers, and is at either;

(a) a publicly funded institution of further or higher education which maintains satisfactory records of enrolment and attendance of students and supplies these to the Border and Immigration Agency when requested; or

(b) a bona fide private education institution; or

(c) an independent fee paying school outside the maintained sector which maintains satisfactory records of enrolment and attendance of students and supplies these to the Border and Immigration Agency when requested; and

(ii) is able and intends to follow either:

(a) a recognised full-time degree course or postgraduate studies at a publicly funded institution of further or higher education; or

(b) a period of study and/or research in excess of 6 months at a publicly funded institution of higher education where this forms part of an overseas degree course; or

(c) 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; or

(d) a full-time course of study at an independent fee paying school; and

(iii) if under the age of 16 years is enrolled at an independent fee paying school on a full time course of studies which meets the requirements of the Education Act 1944; and

(iv) if he has been accepted to study externally for a degree at a private education institution, he is also registered as an external student with the UK degree awarding body; and

(v) he holds a valid Academic Technology Approval Scheme (ATAS) clearance certificate from the Counter-Proliferation Department of the Foreign and Commonwealth Office which relates to the course, or area of research, he intends to undertake and the institution at which he wishes to undertake it; if he intends to undertake either,

(i) postgraduate studies leading to a Doctorate or Masters degree by research in one of the disciplines listed in paragraph 1 of Appendix 6 to these Rules; or

(ii) postgraduate studies leading to a taught Masters degree in one of the disciplines listed in paragraph 2 of Appendix 6 to these Rules; or

(iii) a period of study or research, as described in paragraph 57(ii)(b), in one of the disciplines listed in paragraph 1 or 2 of Appendix 6 to these Rules, that forms part of an overseas postgraduate qualification; and

(vi) intends to leave the United Kingdom at the end of his studies; and

(vii) does not intend to engage in business or to take employment, except part-time or vacation work undertaken with the consent of the Secretary of State; and

(viii) is able to meet the costs of his course and accommodation and the maintenance of himself and any dependants without taking employment or engaging in business or having recourse to public funds; and

(ix) holds a valid United Kingdom entry clearance for entry in this capacity.

Leave to enter as a student

58. A person seeking leave to enter the United Kingdom as a student may be admitted for an appropriate period depending on the length of his course of study and his means, and with a condition restricting his freedom to take employment, provided he is able to produce to the Immigration Officer on arrival a valid United Kingdom entry clearance for entry in this capacity.

Refusal of leave to enter as a student

59. Leave to enter as a student is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 57 is met.

Requirements for an extension of stay as a student

60. The requirements for an extension of stay as a student are that the applicant:

(i)(a) was last admitted to the United Kingdom in possession of a valid student entry clearance in accordance with paragraphs 57- 62 or valid prospective student entry clearance in accordance with paragraphs 82 - 87 of these Rules; or

(b) has previously been granted leave to enter or remain in the United Kingdom to re-sit an examination in accordance with paragraphs 69A-69F of these Rules; or

(c) if he has been accepted on a course of study at degree level or above, has previously been granted leave to enter or remain in the United Kingdom in accordance with paragraphs 87A-87F, 128-135, 135O-135T and143A-143F of these Rules; or

(d) has valid leave as a student in accordance with paragraphs 57-62 of these Rules; and

(ii) meets the requirements for admission as a student set out in paragraph 57 (i) - (viii); and

(iii) has produced evidence of his enrolment on a course which meets the requirements of paragraph 57; and

(iv) can produce satisfactory evidence of regular attendance during any course which he has already begun; or any other course for which he has been enrolled in the past; and

(v) can show evidence of satisfactory progress in his course of study including the taking and passing of any relevant examinations; and

(vi) would not, as a result of an extension of stay, spend more than 2 years on short courses below degree level (ie courses of less than 1 years duration, or longer courses broken off before completion); and

(vii) has not come to the end of a period of government or international scholarship agency sponsorship, or has the written consent of his official sponsor for a further period of study in the United Kingdom and satisfactory evidence that sufficient sponsorship funding is available.

Extension of stay as a student

61. An extension of stay as a student may be granted, subject to a restriction on his freedom to take employment, provided the Secretary of State is satisfied that the applicant meets each of the requirements of paragraph 60.

Refusal of extension of stay as a student

62. An extension of stay as a student is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 60 is met.

69A. The requirements to be met by a person seeking leave to enter the United Kingdom in order to re-sit an examination are that the applicant:

(i) (a) meets the requirements for admission as a student set out in paragraph 57(i)-(viii); or

(b) met the requirements for admission as a student set out in paragraph 57 (i)-(iii) in the previous academic year and continues to meet the requirements of paragraph 57 (iv)-(viii)

save, for the purpose of paragraphs (i) (a) or (b) above, where leave was last granted in accordance with paragraphs 57 - 62 of these Rules before 30 November 2007, the requirements of paragraph 57(v) do not apply; and

(ii) has produced written confirmation from the education institution or independent fee paying school which he attends or attended in the previous academic year that he is required to re-sit an examination; and

(iii) can provide satisfactory evidence of regular attendance during any course which he has already begun; or any other course for which he has been enrolled in the past; and

(iv) has not come to the end of a period of government or international scholarship agency sponsorship, or has the written consent of his official sponsor for a further period of study in the United Kingdom and satisfactory evidence that sufficient sponsorship funding is available; and

(v) has not previously been granted leave to re-sit the examination.

Leave to enter to re-sit an examination

69B. A person seeking leave to enter the United Kingdom in order to re-sit an examination may be admitted for a period sufficient to enable him to re-sit the examination at the first available opportunity with a condition restricting his freedom to take employment, provided the Immigration Officer is satisfied that each of the requirements of paragraph 69A is met.

Refusal of leave to enter to re-sit an examination

69C. Leave to enter to re-sit an examination is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 69A is met.

Requirements for an extension of stay to re-sit an examination

69D. The requirements for an extension of stay to re-sit an examination are that the applicant:

(i) was admitted to the United Kingdom with a valid student entry clearance if he was then a visa national; and

(ii) meets the requirements set out in paragraph 69A (i)-(v).

Extension of stay to re-sit an examination

69E. An extension of stay to re-sit an examination may be granted for a period sufficient to enable the applicant to re-sit the examination at the first available opportunity, subject to a restriction on his freedom to take employment, provided the Secretary of State is satisfied that the applicant meets each of the requirements of paragraph 69D.

Refusal of extension of stay to re-sit an examination

69F. An extension of stay to re-sit an examination is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 69D is met.

13.
By s.3C of the 1971 Act as amended, an application for variation of limited leave to enter or remain, if made before expiry of the leave, causes the leave to be extended pending a decision but does not allow a further application to be made for variation during that time.

14.
Where rule 57(i) requires evidence that the entrant has been accepted at a recognised institution "for a course of study", rule 57(ii) does not simply go on to require evidence that he is able and intends to follow that course, as one would expect if there was a single-course policy. Rather the second sub-rule appears to accept that, so long as the course meets one of the prescribed standards, the choice is the student's. This in turn defines the "capacity" in which the student, under sub-rule (ix), is given entry clearance: it is as a student, not as a student of a particular subject or institute.

15.
Once here, the need to seek an extension of stay will depend in the first instance on how long the initial leave was for. If it was for 3 years [1] [1], and during that time the student has first done badly and failed the initial examinations, then changed courses, done well and graduated, he will have done nothing wrong in relation to his leave to enter. It is only if such a student then applies for an extension of stay, still as a student, that the present understanding of the law will stand in his way, because he will be unable to satisfy rule 60(v): he will not have made satisfactory progress in his original course of study and will have failed his initial examinations. It will be nothing to the point that on the course to which he switched he has done well and passed all the examinations.

16.
The AIT has on more than one occasion found this to be a compelling reading of the sub-rule. In TY (Burma) [2007] UKAIT 00007 the tribunal (C.M.G.Ockleton, D-P, and SIJ Grubb) said:

15. That, then leads to the second issue: where more than one course of study has been undertaken by the student whilst in the UK are all (or only some) to be taken into account when applying the phrase "his course of study" in paragraph 60(v)?

18. We have not found this to be an easy issue to resolve. The array of terms used in paragraphs 57 and 60 make the search for a coherent meaning problematic. However, there is a rational organisation to paragraphs 57 and 60 which underlies the verbal chaos. To be admitted to the UK as a student, an individual must be accepted for a "course of study" at an appropriate institution as set out in paragraph 57(i). The same requirement applies where an extension of stay is sought as a student because all the requirements of paragraph 57 must be satisfied under paragraph 60. Likewise, the transitional provisions in paragraph 60(i) also require that the applicant for an extension be accepted on a "course of study". The decisions to grant leave to enter and then subsequent extensions of that leave focus on the individual undertaking a "course of study". As leave is granted or renewed, it relates to a particular "course of study" to be completed or freshly embarked upon.

19. It seems to us, taking that as an underlying feature of the student rules read together, "his course of study" in paragraph 60(v) also focuses on the "course of study" for which leave to enter or remain was last granted. We see nothing unfair or surprising in requiring the applicant to show 'satisfactory progress' in that "course of study" rather than any other. Why should the individual's progress be assessed by reference to any other "course of study" when further leave is requested? It is the one for which leave was most recently granted or, if appropriate, for which a transfer was subsequently approved by the Secretary of State. Any previous course(s) of study will have been taken into account in earlier decision(s) to extend the individual's leave. It is the course of study which the individual either wishes to continue or, at least in leave terms, is the most immediate, against which it is most appropriate to assess progress. Indeed, we do not consider there to be any justification for an individual to obtain leave for a course of study and then switch to a less difficult one because it proves too difficult but claim, as is proposed in this case, 'satisfactory progress' in the lesser course. Usually such an individual will have shown, in reality, that the leave granted to undertake the more difficult course was in retrospect mistaken.

17.
A few months later in JJ and SS (Gambia) [2007] UKIAT 00050 a full tribunal (Hodge P, SIJ Grubb and IJ Phillips) adopted a parallel approach to sub-rule (iv). They said:

15. Paragraph 60(iv) also contemplates that regular attendance being either "during any course which has already been begun" or "any other course for which he has been enrolled". Mr Jowett submitted that as a consequence the Immigration Judge was entitled to look at the ACCA course on which the first appellant was now enrolled and also at the management course that he completed in November 2004. Although the former was post-decision, it was admissible by virtue of s. 85(4) of the Nationality, Immigration and Asylum Act 2002. There was no doubt, he submitted, that the first appellant's attendance on both those courses met the requirement in paragraph 60(iv).

16. On the face of it, the wording of para 60(iv) suggests that an individual has a choice: he may rely upon his current course (if any) which he has begun or any other completed course in the past. On behalf of the respondent, Mr Hammonds submitted that this interpretation was to be avoided and the focus should be, as under para 60(v) in relation to 'progress', on the course for which the appellant was last granted leave or subsequent permission by the Secretary of State to undertake.

17. We agree. The reasoning of the Tribunal in para [19] of the Tribunal's decision in TY, which we set out above, has equal force in respect of the attendance requirement in para 60(iv). An individual's

attendance on courses undertaken before his existing period of leave will have been taken into account in reaching earlier decisions to extend his leave. What is relevant to the current decision whether to extend leave is the nature of the individual's attendance on courses undertaken during his current period of leave for which leave was granted or subsequent permission to transfer was given by the Secretary of State. There is no rationality in allowing an appellant to trade on his attendance record on earlier courses despite the fact that his attendance record on any course during his current period of leave is poor and unacceptable. An interpretation which avoids this nonsensicality is preferable despite the apparently flexible language used in para 60(iv). Thus, para 60(iv) limits consideration to the course that the appellant was last granted leave to undertake or, if appropriate, for which permission to transfer was subsequently given by the Secretary of State. That course may be one that the individual has already begun or, alternatively where that is not possible, that he has already completed.

18.
While both decisions carry the authority of the full tribunal, each is signed only by its author (a practice about which this court has in the past expressed its unease). The author of the two decisions we have cited is Professor Andrew Grubb, whose academic experience and authority lend weight to the AIT's view. It is therefore with much caution, though in the end without doubt, that we have arrived at the different reading of rule 60 which is set out above.

19.
Our reasons for taking a different view of the central sub-rules from that taken by the AIT are these. First, neither the background of statutory powers nor the configuration of the entry clearance rules by which they are exercised is suggestive of either a power to limit students to a single course or a practice of purporting to do so. Secondly, while rule 60 (v), standing alone, certainly supports the AIT's reading, it does not do so unequivocally, as Professor Grubb's reference to the 'verbal chaos' of the rules underlines. Rule 60 (iv) is plainly sufficiently elastic to admit proof of regular attendance on more than one course: indeed that is its obvious meaning. As has been seen, it was principally the need to make it chime, if possible, with rule 60(v) that persuaded the tribunal in JJ and SS to read it down.

20.
Rule 60(v), however, is in our view ambiguous. The significance of "his" course of study depends on which course or courses is or are meant. This has to be deduced from elsewhere. It is perfectly true that the sub-rule could have said, and does not say, "a course of study". But we respectfully differ from the AIT on two grounds. First, for reasons we have given we do not agree that the "rational organisation" of rules 57 to 60 is predicated upon the student's pursuit of a single course of study. One notes, in addition to the indicators set out earlier in this judgment, that rule 60(vi) overtly contemplates an extended stay embracing a succession of courses; and the Home Office's application forms and guidance notes are consistent with this. Secondly, we are not persuaded in any event that it would follow from such a predicate that rule 60(v) could apply only to a single pre-determined course. It could still intelligibly mean whichever course of study the student had settled on.

21.
We would have reached these conclusions independently, but we reach them with the more confidence because they correspond closely with what this court (Lord Phillips MR, Rix and Scott Baker LJJ) decided in Zhou v Home Secretary [2003] EWCA Civ 51. The Home Secretary had contended that, in order to have the advantage of the standing licence accorded to students to take part-time work, it

was necessary to comply continuously with the criteria for entry clearance in rule 57 of the Immigration Rules. The court, rejecting this proposition, said:

“30. One can foresee many circumstances in which a person admitted as a student who embarks on a course which complies with the requirements of paragraph 57 may find that he is, perhaps temporarily, unable to maintain 15 hours a week attendance on the course. The college may, because of unforeseen circumstances find that it cannot provide 15 hours a week tuition in the chosen subject. The course may prove unsatisfactory and the student may wish to transfer to another teaching institution – as happened in this case. We do not understand it to be suggested that such events would place someone admitted as a student in breach of a condition attached to the leave to enter, so as to render that person liable to removal under section 10 of the 1999 Act. It seems to us patently unsatisfactory that such an event should render that person in breach of Code 2, and quite possibly guilty of an offence under section 24 of the 1971 Act, if he continues in temporary employment, particularly as the earnings from this might be necessary to supplement income needed for subsistence.”

This meaning, the court pointed out in §32,

“…. has much to commend it on grounds of practicality. Leave to enter ‘as a student’ determines an individual’s student status at the moment of entry. Thereafter, for the period for which leave to enter has been granted, the basis on which the individual remains within the country is that leave to remain here for the period in question has been given to him ‘as a student’.”

Correspondingly, the court went on to hold, the provisions made by rules 57 and 58 for the grant of leave to enter for an appropriate period ‘as a student’

“suggest that the individual will enjoy the status of a student during that period.”

22.
Thus the construction of the rules at which we have arrived forms a counterpart to the construction reached for different but related purposes in Zhou.

Failing examinations

23.
We turn to the requirement of rule 60(v) that satisfactory progress includes “the taking and passing of any relevant examinations”. In SW (Jamaica) [2006] UKAIT 00054 the tribunal (C.M.G.Ockleton D-P and E. Arfon Jones D-P) held – as summarised in their headnote –

In order to meet the requirements of paragraph 60(v), an applicant must have taken and passed any relevant examinations. Other evidence of satisfactory progress may add to but cannot substitute for success in examinations.

24.
The tribunal said:

7. The phraseology of the rule is slightly peculiar. Whatever may be its precise effect in the course of an appeal, on its face it does not require the appellant to establish that she has made satisfactory progress by producing evidence: it requires her to produce evidence of certain matters. The evidence is required to be of “satisfactory progress … including the taking and passing of any relevant examinations”. It does not appear to us that it is possible to read that phrase as meaning that evidence of passing any relevant examinations is an optional extra. The clear meaning of the words is

that whatever other evidence is also provided, the applicant is required to show that she has both taken and passed any “relevant examinations”.

8. Of course it is right, as Mr Goldborough pointed out that if there are no “relevant examinations”, an applicant will not be able to show that she has taken and passed them: that, in our view, is the value of the word “any”. The rule is constructed in such a way 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 examinations have been taken and passed.

9. It is also true that on its face this rule makes no allowance for a person who may, within the regulations of his or her course, have an opportunity to re-sit an examination or paper which has not been passed at the first attempt. That consideration, however, does not cause us to modify our interpretation of this paragraph of the rules, because paragraphs 69A - 69 F make specific provision for leave to enter or remain in order to re-sit an examination.

10. We remind ourselves also that leave to enter or remain as student has always depended on the course being one which the Secretary of State was satisfied was of a proper standard and at an institution which maintained proper records of attendance and progress, and such leave is now conditional on the course being at an institution appearing on the Secretary of State’s list of approved institutions. We have little doubt that the institution’s attitude to examinations is one of the factors which would be taken into account in deciding whether an institution was to be approved or not. In this context it is not at all surprising that paragraph 60 should require that any relevant examinations have been taken and passed.

25.
As can be seen, part of the basis of the AIT’s reasoning is the single-course assumption which we have held to be incorrect. If this element is subtracted, there remains the not uncommon situation in which genuine personal difficulties have either prevented a student from sitting a course examination or caused him to fail it. The present cases, to the facts of which we will be coming, afford reminders of the kinds of vicissitude that can impede studies.

26.
For the Home Secretary, Mr Hutton accepts that rules 69A to 69F do not mitigate all the possible effects of the AIT’s reading of rule 60(v). They apply to students who want either to re-enter or to extend their stay in order to re-sit an examination, and they require proof of regular attendance in the same terms as rule 60(iv), though not, of course, evidence of success in examinations as in rule 60(v). But they make no allowance, for example, for an extension of stay in order to repeat a year which has been lost through illness or bereavement or to sit examinations which the student was unable for these or other reasons to attempt.

27.
There is more than one way of responding to such an unsatisfactory situation. The Home Secretary’s way, described by Mr Hutton, is to be flexible about the application of her own rules. She treats the re-sit rules as applying to the taking of examinations which have not so far been sat at all. She does not insist on the student passing each and every examination so long as he or she “achieve[s] the results which the relevant educational establishment deems necessary to have successfully progressed on the relevant course” – even to the extent of total failure of examinations. She will accommodate a change of course if the student can justify it and show satisfactory progress prior to the change. But, this apart, a student who has changed courses without having done well on the

original course and has then followed a new course with complete success is treated as debarred by rule 60(v) from obtaining an extension of stay for further studies under rules 61 and 62.

28.
Whether the limited measure of flexibility described by Mr Hutton is considered by the Home Office to be within the rules or to be an exercise of discretion outside them [2] [2] we do not know. What we do know from the case histories to which we are coming is that the power is not always exercised either generously or even fairly.

29.
A second way of dealing with such anomalies is to ask whether the rules really are so stringent that the anomalies have to arise at all. The appellants' case is that there is no need to read rule 60(v) with the stringency of SW (Jamaica); that doing so is productive of injustice; and that a more generous reading can do much to prevent this. In support of his approach Mr Macdonald reminds us of the decision of Woolf J, as he then was, in R v IAT, ex parte Gerami [1981] Imm AR 187:

"…it would not be right to treat a person as disqualified from being given further leave to remain in this country because of a prolonged lack of success. That is a matter which only goes to discretion under para 12 and does not amount to a condition precedent to a successful application."

30.
While, as Mr Macdonald acknowledges, the rules are no longer in the form they were in then, Gerami in his submission forms part of the acquis of law and practice relating to foreign students – an acquis which appears to have remained undisturbed until and for a decade after the introduction of HC 395 in 1995 and only recently to have become contentious. Whether this is right or not, the approach of Woolf J in Gerami seems to us to make so much sense that it would take clear words to displace it; and we consider that rule 60(v) is by no means clear in this regard. Of course the Home Secretary needs to know how a student has done in his examinations in order to decide whether he is making satisfactory progress and should be allowed to stay on. But it would take very explicit words to lay down that a student who has attended every lecture and seminar and turned in excellent coursework has not made satisfactory progress because he was too ill to sit his examinations, and that he is therefore debarred for good from having another shot at them. We do not believe that Parliament, in approving the Immigration Rules pursuant to s.3(2) of the 1971 Act, can have thought that it was sanctioning in such circumstances the termination of a prospective career in which a foreign student had invested years of his life and possibly all his family's savings; nor that the Home Secretary, if called upon to explain them, would have said that this was their intended effect.

Conclusion of law

31.
In our judgment the meaning of rule 60(v) is that a student who wants an extension of stay must be able to produce evidence of satisfactory progress, whether on the course named in his application for entry clearance or on another recognised course which he or she has undertaken. A failure to sit or to pass relevant examinations will always be material to the evaluation of the student's progress, but whether it is decisive will depend on the reason for it. If the reason is not inconsistent with satisfactory progress, rule 60(v) is satisfied.

The individual cases

32.

Of the eight cases before the court, we have separated one, that of Esther O, which raises issues different from the rest. Of the remaining seven, the material facts, and the conclusions which follow from our analysis of the law, are these:

(i) **A G**, a citizen of Zimbabwe (d.o.b 10 October 1939), arrived in the United Kingdom on 20 August 2003 and was granted leave to enter as a visitor until 20 February 2004. She was then granted leave to remain in the UK as a student until 09 June 2006 in order to study full time for a National Certificate in Dental Nursing, a two-year course at the Citizen 2000 Educational Institute.

The appellant returned to Zimbabwe in December 2004 because her son had died and returned to the United Kingdom in February 2005 to resume her studies. Thereafter, she attempted and failed her examinations in November 2005. She sat further examinations in May 2006 of which she failed two and passed two.

At the time when the appellant made an application for further leave to remain as a student she had not received the results of the examinations taken in May 2006. Her application for further leave to remain as a student was made on the basis of the failed examinations of November 2005 and was refused by the Home Secretary on 18 August 2006 on the ground that she did not satisfy the requirements of paragraph 62 with reference to paragraph 60(v) [3] [3] of the Immigration Rules because failing her examinations meant that she could not show evidence of satisfactory progress in her course of study.

IJ Martins took into account the circumstances of the Appellant's son's death and in light of the Appellant's attendance and progress throughout the course considered that she had demonstrated that she was making satisfactory progress in her course of studies.

On reconsideration the AIT held that there was a material error of law on the part of the immigration judge in finding that the progress the Appellant had made in the pursuit of her course satisfied the requirements of paragraph 60(v). The AIT went on to hold that while satisfactory progress in a course can be demonstrated without passing examinations if there are none to sit, it is mandatory to pass them if there are examinations to sit. The Appellant's failure in the May 2006 examinations meant that her progress was not satisfactory within the meaning of paragraph 60(v) of the Immigration Rules.

Granting the application for leave to appeal to this Court, the AIT considered that there had arguably been a failure to apply rule 69D.

Conclusion

Whether or not this case might have ranked as a re-sit case under rule 69D, in our judgment the immigration judge who determined that the appellant had satisfied rule 60 made no error of law in doing so, and her decision should be restored.

There remains in the case of this appellant a potential problem. She needs now to do a 2-year practical course in order to become registered with the National Dental Council. Section 3C of the 1971 Act extends her leave to remain pending this appeal, but subsection (4) of that section prevents her from applying for further leave during that period. We have allowed Mr Macdonald to reserve any consequent issues until the handing down of this judgment, in the hope that an accommodation will be reached in the light of it. If not, we have given liberty to apply.

(ii) **T G**, a citizen of St. Lucia (d.o.b 14 November 1977), sought a variation of her leave to remain in the UK as a student in October 2006. Her application was refused because the Home Secretary was

not satisfied that she intended to follow her chosen course of study or that she could show satisfactory progress in her last course of study, including the taking and passing of any relevant examinations in accordance with rule 60(v).

IJ Clough accepted that the Appellant had a good reason for not following her course of study, namely that she had been ill. Upon reconsideration, the AIT concluded that she had made a material error of law by relying on a sickness exception which was not contained in the Rules and so had exercised a discretion which did not arise under the Rules.

Conclusion

For the same reasons, the immigration judge's decision should be restored.

(iii) **K M**, a citizen of Sri Lanka (d.o.b 05 July 1977), arrived in the United Kingdom as a student in January 1999 with 12 months leave to remain in the UK subject to a condition prohibiting employment and recourse to public funds. She was subsequently granted several extensions of stay, the last of which was until 31 August 2006. On 23 August 2006 she applied for further leave to remain as a student and on 20 November 2006 a decision was made to refuse to vary leave to remain on the ground that the Secretary of State was not satisfied that she could show evidence of satisfactory progress in her course of studies. She had not completed a single course of study or obtained a single qualification since her original leave to remain in the UK was granted.

IJ Simpson accepted that the Secretary of State was entitled to reach the decision he did. The appellant had embarked on several courses of study which she later abandoned without showing satisfactory progress in any of them. The reasons she had given, which went to her psychological state, were not in the immigration judge's view sufficient to explain her lack of progress up to the time of the Home Secretary's decision.

On reconsideration, IJ Thew considered it necessary to focus on the failure of the appellant to make satisfactory progress on the course (the BBA course) for which the last leave to remain was granted, and which the appellant had abandoned to start yet another course. But she went on to consider the entirety of the appellant's courses before holding that there was no satisfactory explanation of why she had not completed the BBA course.

Conclusion

The original determination arguably contains no error of law. This was found to be a case of failure to make more than marginal progress on any of a succession of courses. But a reconsideration was directed, and AIT's focus on the last course for which entry clearance was granted may have prevented it from reaching a rounded view of whether rule 60(v) was met. We do not consider it right to take away the entitlement the appellant had secured to reconsideration of her case on a correct legal basis. Her appeal will be remitted to the AIT.

(iv) **A M**, a citizen of Pakistan (d.o.b 19 February 1982), entered the United Kingdom in 1998 and after obtaining A levels enrolled at the University of North London to do a course in finance and accounting. In 2002 he transferred to the University of Westminster to do a degree in business management. Although he completed the first two years of the course, he had to interrupt his studies in July 2004 to visit Saudi Arabia, where his father had been taken ill and subsequently died. He returned to London in February 2005 but was told by the University that since he had lost study time he should not take the May 2005 finals but take the May 2006 finals. He lost interest in the business

management course, however, and enrolled on an IT degree course at the London College of Science and Technology.

The Home Secretary refused the appellant's application for further leave to remain in the United Kingdom on the ground that he could not show evidence of satisfactory progress in his course of study, including the taking and passing of any relevant examinations.

IJ Thorndike decided in the Appellant's favour on the basis of his progress on the IT degree course, despite its dubious value compared with the abandoned one.

On reconsideration the AIT overset Dr Thorndike's determination on the ground that the material course on which to test satisfactory progress was the course at Westminster University. Although he had enrolled for the third year, he had pursued it only for a month and had failed to notify the Secretary of State that he had abandoned the course. He had therefore failed to show evidence of satisfactory progress in his course for which he had been granted leave to enter or remain.

Conclusion

In the light of our construction of the Rules, IJ Thorndike's determination should be restored. We appreciate that, at least to those with means, the ability to change courses can give opportunities to prolong their stay for some years. But there are remedies in the Home Office's hands for this, including rules 60 (v) and 60(vi).

(v)**W A**, a national of India (d.o.b 6 August 1983) was given entry clearance to study for a master's degree in business administration at the University of Wolverhampton. He did not pursue this course but instead pursued a diploma course in business administration at the Horizon College.

His application for an extension of leave to remain on the basis of continuing studies was refused by the Secretary of State on the grounds that he had failed to disclose material facts and had not produced satisfactory evidence of intent to follow a course of study.

On appeal IJ Kamara found that the appellant had not made false representations and was a genuine student, but held that he could not show satisfactory evidence of regular attendance under rule 60(iv). He was not entitled to establish regular attendance and satisfactory progress on a course undertaken without the Secretary of State's knowledge and different from the course for which he was granted entry clearance.

She added, however, that the Home Secretary should give favourable consideration to any application now made by the appellant on discretionary grounds: "I found the appellant to be a genuine student who has obtained a diploma in business administration and is well into the master's programme, which was the reason for his coming to the United Kingdom in the first place".

Reconsideration was refused.

Conclusion

For the reasons we have given, provided the further course undertaken by the appellant was a recognised course, it was the course by which the appellant's attendance and progress fell to be judged. This should now be done by way of remission, unless the Home Secretary, given the IJ's concluding comments, accepts that the appropriate leave to remain should be granted.

(vi) **H Z**, a citizen of Iran (d.o.b 13 September 1982), entered the United Kingdom in August 1996 as a student. He enrolled on a Bachelor of Engineering course in communication and radio engineering at

King’s College, London, failed his examinations on that course and then at the beginning of the academic year in 2003 changed his course to a Bachelor of Engineering in telecommunications and engineering, on which he failed a series of examinations and re-sits. He then embarked on a course in engineering with business management in September 2005 and completed the first year successfully.

In September 2006, the appellant applied for and was refused further leave to remain as a student in order to enable him to continue the course. IJ Bennett concluded that his earlier failures were not relevant because they did not relate to the course of study on which the Appellant had been enrolled since September 2005. He had shown evidence of satisfactory progress on that course of study, having taken and passed material examinations.

On reconsideration the AIT (SIJ Waumsley) found that the immigration judge had made a material error of law and dismissed the appellant’s appeal on the ground that rule 60(v) related to the course of study for which the student was last granted leave to enter or remain, or, if appropriate, to which a transfer was subsequently approved by the Secretary of State.

Conclusion

For the reasons we have given, the immigration judge had applied the correct test, and his determination should be restored.

(vii) **G O-O**, a citizen of Nigeria (d.o.b 05 April 1983), entered the United Kingdom in April 2003 as a student. He was granted extensions of stay to 30 September 2005 for the purpose of following a HND computing course at Reading College. He was not successful in the first year and succeeded in passing only one of the six modules. He then lost interest in the course and commenced a BSc in Telecommunications at Oxford Brookes University in September 2005 without notification to the Home Office until he applied for further leave to remain a few weeks later.

The Secretary of State refused his application for further leave to remain in view of the fact that he had failed to provide evidence of satisfactory progress on the HND course at Reading College. IJ Lane allowed his appeal on the ground that the appellant was making satisfactory progress on the course at Oxford Brookes University.

On reconsideration the AIT (IJ Lewis) found that the immigration judge had misapplied the law in taking into account the BSc course, and that the appellant had not made satisfactory progress on the HND course for which leave had been given to enter the UK.

Conclusion

Here too the first immigration judge, for the reasons we have given, applied the correct test, and his determination should be restored.

33.
E O, a citizen of Nigeria (d.o.b. 11 November 1975), was granted entry clearance on 30 November 1998 to study on a course called “Access to Nursing”. Her leave to pursue that course was extended 31 July 2000. At that time she was granted further leave to remain to follow a diploma course on a Higher Education Nursing Programme at Thames Valley University. That extension was renewed until 16 April 2004 when she was granted further leave to remain to resume that diploma course. Leave was due to expire on 30 June 2006 but she applied for further leave to remain to study for an MSc in Health and Management. On 27 July 2006 the Secretary of State refused that application, relying on,

amongst other grounds, the fact that she had not produced evidence of satisfactory progress (paragraph 60(v)).

34.
Ms O's appeal was heard by IJ Griffith in September 2006. In a determination promulgated on 10 October 2006 he found that she had resigned from the course at Thames Valley University in September 2002 following a miscarriage. She became pregnant again and gave birth to her daughter Chantal, who is also an appellant, in August 2003. She resumed her diploma course in April 2004 but left it in August 2005. In April 2006 she enrolled at the Rhazes Institute for a masters degree in health management.

35.
Her explanation, accepted by that immigration judge, was that she had not wished to resume the course because she had been told she would have to start again at the beginning; she preferred to accept the offer of a place, following an entrance exam and interview, at the Rhazes Institute. She was able to produce certificates of attendance between 30 April 2002 and 13 July 2005 and a letter from the Thames Valley University showing that she had failed only one module.

36.
On the basis of that evidence the immigration judge concluded that:-

"The appellant showed sufficient commitment to the course she was attending at the Thames Valley University. The fact that she was permitted to return and resume her studies in year 2 demonstrates that the university considered her to be a capable and committed student."

The judge accepted her explanation for not wishing to repeat the entire course.

37.
The Secretary of State appealed. In a determination promulgated on 27 February 2007, SIJ Jordan found an error of law in the determination of IJ Griffith. He pointed out that the rules required the appellant to produce satisfactory evidence of regular attendance and evidence of satisfactory progress and that the test was not whether the appellant could show sufficient commitment. Having identified that error, the Senior Immigration Judge concluded that there was not, in any event, evidence of commitment. He concluded that by 2005 the appellant had effectively abandoned her studies. She had not obtained a diploma within three years at Thames Valley University or at all (see § 10).

Conclusions

38.
Central to the five grounds of appeal on which the appellant now relies is the contention that the decision of the Secretary of State and of Senior Immigration Judge Jordan were founded on non-attendance. The appellant points out that there was no basis, as Immigration Judge Griffith concluded, for such a conclusion. That, however, was not the only reason for the Secretary of State's refusal to grant a further extension. The Secretary of State was entitled to rely upon the absence of satisfactory evidence of progress during the diploma course at Thames Valley University. That she had not made satisfactory progress was undeniable since she had never completed the course and had, according to her evidence before Judge Griffith, been required to re-start the entire course. There was no basis for her assertion that she had made satisfactory progress, whatever the reasons she advanced for resigning from that course on two occasions.

39.

The second ground of the appeal again asserts that refusal of the extension was based on non-attendance. The appellant refers to the fact that she was proposing to change courses. That does not appear to have been the basis upon which an extension was refused and thus does not trigger similar considerations to those with which this court has been engaged in the other appeals.

40.
Ground 3 suggests that the Senior Immigration Judge applied an incorrect standard of proof. There is no basis for that contention. Ground 4 suggests that the Secretary of State failed to consider her reasons for non-attendance. Those reasons were given and accepted by Immigration Judge Griffith. The difficulty is that she had never obtained any factual finding, even from Judge Griffith to demonstrate satisfactory progress in the course which she was pursuing. Once Senior Immigration Judge Jordan had correctly identified the error in applying a test of "commitment", not to be found within the Rules, he was entitled to look to the explanations advanced for the absence of progress and conclude that there was no basis for asserting that progress was satisfactory.

41.
The appellant's final ground merely repeats in a compendious fashion the grounds she had previously advanced.

42.
We are happy to record that the appellant has now completed her MSc course. She has spent, so she tells us in her grounds, the sum of £80,000 on her education so far. She says, in her statement, that she intends to work in the health industry in a Health Board within Nigeria and we hope that the substantial funds she has expended will assist in achieving that ambition. But for the reasons we have given, her appeal, which we repeat does not raise any of the issues raised in the other appeals, is dismissed.

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1 [1] We were told that the former practice of giving leave to enter for an initial 12 months renewable has been superseded by a practice of giving leave for the duration of the proposed course or module.

2 [2] It was part of Mr Macdonald's submission that s.4 of the Immigration Act 1971 has placed all such residual powers on a statutory basis, to the exclusion of the royal prerogative.

3 [3] The decision refers in error to paragraph 60(iv).