



## BRIEFING PAPER

Number 7421, 8 December 2015

# Support for higher education students in England with discretionary and limited leave to remain in the UK

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Inside:

1. Background
2. Eligibility requirements for classification as a home student
3. Students with discretionary leave to remain (DLR)
4. BIS Consultation

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# Contents

<b>Summary</b>	<b>3</b>
<b>1. Background</b>	<b>4</b>
<b>2. Eligibility requirements for classification as a home student</b>	<b>5</b>
2.1 Immigration status	5
2.1 Residency requirement	5
2.2 Exceptional cases	5
<b>3. Students with discretionary leave to remain (DLR)</b>	<b>6</b>
3.1 Changes to student support regulations in 2011	6
3.2 Developments relating to students with DLR	6
The 2013 Newcastle judgement	6
The Tigere Judgement 2015	7
3.3 Student Loans Company response to the Tigere ruling	8
<b>4. BIS Consultation</b>	<b>10</b>
4.1 Options for change	10
Government's preferred option - Long Residency category	10
Cost of the new student support category	11
4.2 Next Steps	11

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## Summary

Under current student support regulations only students who are classified as home or EU students are eligible to apply for student support including tuition fee loans, maintenance loans and grants. Other students who fall into a narrow group of exceptional categories, such as refugees, may also be eligible to apply for student funding, but students with limited leave to remain and discretionary leave to remain (DLR) are ineligible.

Many students with DLR have been resident in the UK for a considerable time and some have completed most of their schooling in the UK, but for student support purposes these students are classified as overseas students which means that they are unable to access public funds for their higher education and they may be charged higher unregulated fees. This policy therefore effectively shuts many of these students out of higher education.

This treatment of students with DLR has been challenged in court in the Tigere case and in July 2015 the Supreme Court ruled that excluding students with DLR from student support was unlawful and breached the European Convention on Human Rights.

In response to the Tigere judgement, on 16 September 2015, the Student Loans Company issued an interim policy for the handling of student support applications from students with limited and discretionary leave to remain.

The government is now considering how to respond to this ruling and has recently launched a consultation a [New Eligibility Category for Higher Education Student Support](#)<sup>1</sup> which proposes creating a new category of student for student support purposes. The consultation is open for four weeks and the government will respond in 2016 and aims to bring in new regulations for the academic year 2016/17.

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<sup>1</sup> Department for Business, Innovation and Skills, [New Eligibility Category for Higher Education Student Support](#), December 2015

# 1. Background

Only students classified as home or EU students are eligible for publicly funded student support such as tuition fee loans, maintenance loans and grants. Students classified as overseas students receive no public funding and generally pay higher tuition fees than home students.

Each student is assessed as a home/EU student, or an overseas student, based on their individual circumstances taking into account their immigration status and residency in the UK. To be assessed as a home student applicants should generally have 'settled status' in the UK and meet a three year residency requirement.

Up until 2011 students with an immigration status of discretionary leave to remain (DLR) were treated as home students for student support purposes so they were eligible to apply for the full student support package. In February 2011 the rules were tightened and students with DLR became ineligible for student support and became classified as overseas students.

Since the change there have been calls to review this situation and in 2015 a Supreme Court ruling in the Tigere Case, ruled that the blanket ban on student finance for students without settled status was unlawful.

In response to the Tigere ruling the Student Loans Company (SLC) has published an interim policy for the handling of student funding applications from students with discretionary, or limited leave to remain.

The Department for Business Innovation and Skills (BIS) has recently launched a consultation on the policy in this area.

## 2. Eligibility requirements for classification as a home student

Classification of students for student support purposes is based on each individual student's immigration status and residency in the UK.

### 2.1 Immigration status

The regulations governing the classification of students as home or overseas are set out in the [Education \(Student Support\) Regulations SI 2011/1986](#). Schedule 1 Part 2. The regulations state that to be eligible for public support a student must have 'settled status', or fall into a specific category of exceptions. The term 'settled' is given the meaning in section 33 (2A) of the *Immigration Act 1971* ie a student must have right of abode, or indefinite leave to remain in the UK

### 2.1 Residency requirement

Schedule 1 of the regulations states that students must also meet a residency requirement to be considered as settled and eligible for student support. Under Schedule 1 students must have been 'ordinarily resident' in the UK for three years before the first day of the first academic year of the course. It is not necessary to have had settled immigration status in the UK for the full three years, students only need to show that they have it on, at the latest, the first day of the first academic year of the course.

There is much case law on the term 'ordinarily resident' and a number of these cases can be found on the website of the UK Council for International Student Affairs (UKCISA) at ['Ordinary residence' case law](#).

Students whose families have been temporarily resident abroad and the families of people in the armed forces may also meet the residency requirement. In case of a dispute each situation is considered on its own merits based on the student's individual circumstances.

### 2.2 Exceptional cases

Other students may be eligible for support if they fall into one of the exceptional categories. These other categories cover refugees and their families and persons with humanitarian protection.

## 3. Students with discretionary leave to remain (DLR)

### 3.1 Changes to student support regulations in 2011

Up until 2011, under student support regulations, persons with certain temporary awards of leave to enter or remain in the UK as a result of a claim for asylum, including DLR, were eligible to receive higher education fee support and maintenance support.

In February 2011 the [Education \(Student Fees, Awards and Support\) \(Amendment\) Regulations 2011](#) SI 87 came into effect; these regulations tightened the rules on persons eligible for student support and removed eligibility for student support, regulated fees and home fee status from holders of DLR until they were awarded settled status.

These changes meant that students with DLR would in future be classified as overseas students and this had significant implications for the costs of studying, as these students could be charged higher fees than home students and would not have access to public funds.

The rationale for the change was given in the [Explanatory Memoranda](#) to SI 2011/87:

This restriction of eligibility for support has been introduced to manage increased pressures on the student support budget. Transitional arrangements are made to ensure that students currently assessed as eligible under existing regulations will continue to receive the support they have been awarded.

Universities have some discretion over the charging of fees and they may allow asylum seekers to study as home students and charge home rates of fees. Regardless of this however the SLC has no discretion in the application of the student support regulations so these students, even if charged home rates of fees, will have no access to student finance to cover the cost of fees, or their living costs.

The changes in the rules in 2011 were not universally welcomed. A report by the Refugee Support Network in February 2012 [“I just want to study”: Access to Higher Education for Young Refugees and Asylum Seekers](#), highlighted the difficulties faced by young students with DLR status. The report recommended that students with DLR should have access to student support. The Refugee Children’s Consortium also published a briefing on this issue, [Briefing on Access to Higher Education for Refugee Young People](#).

### 3.2 Developments relating to students with DLR

#### The 2013 Newcastle judgement

In 2013 two young Ethiopians with DLR applied to the High Court in Newcastle for assistance with university tuition fees from their local

## 7 Support for higher education students with discretionarily leave to remain

authority. The court decided that as the young people had arrived in the UK as unaccompanied asylum seeking children, the local authority had a duty under children leaving care legislation (specifically the *Children's Act 1989* s23 b+c), to provide funding for tuition fees and related expenses.

A case information note by Coram the Children's Legal Centre,<sup>2</sup> gave an overview of the Newcastle judgement

### **July 2013 update:**

The local authority appealed against the High Court's decision but the case was upheld in the Court of Appeal (*Kebede v Newcastle CC* [2013] EWCA 960 Civ). The judges affirmed that the natural meaning of 'expenses connected with his education' include the major expense of tuition fees and is not limited to the costs of books and stationary and the like (para. 13) and rejected Newcastle's argument that its resources were a relevant factor when deciding whether to make a grant under section 24B(2) of the Children Act 1989. While it was accepted that immigration status was relevant (for example, if a young person has no leave to remain before a university course starts, or there no likelihood of his leave being extended), 'what is an educational need must be assessed in the educational context' in each case (paras 21-22).

The Coram newsletter suggested that this case could have significant implications for local authorities:

### **Access to higher education**

The case of *Kebede v Newcastle CC* was upheld in the Court of Appeal this week, with important implications for young people with discretionary leave who have been in the care of a local authority and want to go to university but are unable to access student support or home fees. It may now fall to the local authority to fund their access to university, either by paying their fees or providing them with a loan<sup>3</sup>

## **The Tigere Judgement 2015**

On [29 July 2015](#)<sup>4</sup> the Supreme Court allowed an appeal from a student with DLR seeking to challenge the refusal of student support based on their immigration status.

The case was brought by Beaurish Tigere, a 20 year old student who had arrived in the UK from Zambia with her parents when she was six years old. She had attended primary and secondary schools in the UK and achieve three A-levels. She was accepted at Northumbria University to read international business management, but was refused student finance because her immigration status of DLR meant she was not eligible for a loan.

The Supreme Court found that the blanket exclusionary rule preventing anyone without settled status in the UK, from applying for student loans was disproportionate and could not be justified and therefore breached the student's rights under Article 14 (discrimination) and Article 2 of

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<sup>2</sup> Coram Children's Legal Centre, Migrant Children's Project Newsletter August 2013 - *R (on the application of Kebede) v Newcastle City Council* [2013] EWHC 355 (Admin)

<sup>3</sup> [Migrant Children's Project Newsletter August 2013](#)

<sup>4</sup> [Judgement R \(on the application of Tigere\) \(Appellant\) v Secretary of State for Business, Innovation and Skills \(Respondent\)](#)

Protocol 1 (access to education) of the European Convention of Human Rights..

The effect of the Court's judgment is to require the Secretary of State to consider adopting revised criteria for eligibility for student support which would avoid breaching the Convention rights of other similar applicants.

The judgement was discussed in articles in the [Guardian](#)<sup>5</sup> and the [Daily Telegraph](#).<sup>6</sup>

### 3.3 Student Loans Company response to the Tigere ruling

On 16 September 2015, a statement was posted on the website of the Student Loans Company setting out new criteria for assessing students with DLR - [Interim Policy for handling cases following the Supreme Court ruling in the case of Tigere](#):

The Department is giving full consideration to the Supreme Court's ruling of 29 July 2015 (on the application of Tigere) (Appellant) v Secretary of State for Business, Innovation and Skills (respondent) 2015 UKSC57. The adoption of the policy set out below is an interim measure: it is entirely without prejudice to any future position on eligibility for student support that the Secretary of State may decide to adopt at a future date.

In that regard, the Department will soon be launching a public consultation to seek views on what regulatory changes may be required in light of the ruling.

As an interim policy measure, the Secretary of State intends to use an adaptation of the Immigration Rule 276ADE(1) (as proposed by Lord Hughes's judgment in the Supreme Court's ruling) when considering post-Tigere applications for exceptional student support.

The Department will consider these individual cases against the following criteria:

- those under 18 years of age to have lived in the UK for at least 7 years;
- those aged 18-25 years who have spent at least half their life in the UK;
- is ordinarily resident in England; and
- has been ordinarily resident in the United Kingdom and Islands throughout the three year period preceding the first day of the first academic year of the course.

The Department plans to amend the Student Support Regulations during this academic year such amended regulation would supersede this interim policy.<sup>7</sup>

<sup>5</sup> ["School-leaver overturns immigration-related blanket ban on student loan"](#), *The Guardian*, 29 July 2015

<sup>6</sup> ["British-educated teens finally granted student loans to go to university"](#), *The Daily Telegraph*, 30 July 2-015 and

<sup>7</sup> [Policy Statement – Interim Policy for handling cases following the Supreme Court ruling in the case of Tigere](#), Student Loans Company, 16 September 2015.



## 9 Support for higher education students with discretionarily leave to remain

The charity Just for Kids Law [stated](#) that the changes may benefit some people who are currently ineligible for student support:

It is important to note that these criteria will apply for a temporary period only, as the Department for Business Innovation and Skills (BIS) (which oversees the Student Loan Company), is planning to consult more widely on the issue, before deciding what to do in the longer term.

However, the changes that have been announced should benefit a significant number of people who are currently not able to get a student loan, depending on their exact circumstances.<sup>8</sup>

### Student finance application process for students with DLR

Students with DLR who require student funding have been advised to submit an application to the SLC in the usual way and this will be assessed against the criteria set out in the [interim policy measure](#). Students who have had an application rejected by the SLC before the introduction of the interim policy measure are being advised to appeal their earlier decision. Information on how to appeal is available in a [guide](#)<sup>9</sup> published by Student Finance England.

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<sup>8</sup> [Interim policy notice from Just for Kids Law Friday](#), 18 September 2015, Just For Kids Law

<sup>9</sup> Student Finance England, [Student Finance Matters How to Appeal](#)

## 4. BIS Consultation

On 2 December 2015 BIS launched a short consultation on provisions for students who are not settled in the UK - [New Eligibility Category for Higher Education Student Support](#). The document states that the Secretary of State 'intends to protect the rights of those the Supreme Court identified, while at the same time recognising that public finances for higher education are finite and that the bodies responsible for student support require clear rules to administer the system in a way that is cost effective for the public purse'.<sup>10</sup>

### 4.1 Options for change

The consultation suggests various options for changing the regulations such as removing the requirement for settled status, or introducing a wholly discretionary scheme which would work on a case by case basis.

#### Government's preferred option - Long Residency category

The government's preferred option however is to create a category of people without settled status, who will be eligible for student support where they have been resident in the UK for a long period of time and where for part of that time they have been ordinary lawfully resident. This is set out in the consultation document on p10:

##### **A new long residence requirement**

27. Our favoured option is to create a new eligibility category to sit alongside the existing categories in the Regulations in the same way as we have incorporated changes in EU law in the recent past. This new category would require students, if under the age of 18 on the date of starting their course, to have lived in the UK for at least seven years continuously; or, if between the ages of 18 and 24 on the date of starting their course, to have spent half their life in the UK. This would demonstrate that they were sufficiently connected to the UK for the purpose of benefiting from a student loan on the advantageous terms of the student support scheme. Applicants who are current temporary migrants or the dependants of temporary migrants would not be eligible. The time spent in a temporary migrant route will be discounted in the calculation of the required eligibility period spent in the UK.

28. They would also need to satisfy the requirement for three years' ordinary lawful residence which has been in place since the 1960s, in line with most other applicants. The Supreme Court unanimously upheld the lawfulness of this requirement. It requires that an applicant for student support has been ordinarily resident in the United Kingdom and Islands (Channel Islands and Isle of Man) throughout the three-year period preceding the first day of the first academic year of the course.

29. This new category would recognise that such persons had a clear connection with the UK; were likely to be integrated with their peers here; and were unlikely to be removed from the UK unless they committed a serious criminal offence. It would identify

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<sup>10</sup> BIS, [New Eligibility Category for Higher Education Student Support](#), December 2015  
p3

## 11 Support for higher education students with discretionarily leave to remain

those in this country who are sufficiently connected to it for the purposes of receiving the considerable public subsidy represented by the student loan scheme.

30. Our intention is not to give eligibility for student support to people who are here on a temporary basis only and who may not remain in the UK permanently. This is important as student funding takes the form of student loans and non-repayable grants which are a substantial cost to public funds over a long period of time. Therefore this policy proposal is not intended to apply to those categories of persons, and their dependants or family members, who are here on a temporary basis only including for the purposes of, for example, receiving full-time education or work.

### **Cost of the new student support category**

The consultation document states that creating a new category of eligible student for student support will cost £16.6 million in loans and allowances for every additional 2000 students:

Estimated Student Loans Company additional administration costs are around £200,000 for the initial set-up costs and £100,000 per annum in ongoing costs. There will also be additional costs for the Home Office in verifying applicant information.

The Home Office does not collect data by reference to length of residence in a way which allows us to quantify who might qualify for student support in the proposed new category of eligible student. It is therefore impossible for us to calculate with precision the costs of creating this new category. We estimate that every additional 2,000 students will generate annual costs of around £16 million in loans and £0.6m in allowances.

*The Education (Fees and Awards)(England) Regulations 2007* enable Higher Education Institutions to charge higher fees to people who do not fall within the Regulations schedule of eligible persons. Therefore institutions will wish to be aware of this potential change which would mean that they would need to charge home fee rates to people who fall into this new category.

## **4.2 Next Steps**

The consultation lasted for four weeks and closed on 8 January 2016, the responses are currently being analysed. The Department intends to publish a response and an Equality Assessment early in 2016.

The government intends to amend the regulations for the academic year 2016/17.

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