Upper Tribunal
(Immigration and Asylum Chamber)

Naeem (Para 120A of Appendix A) [2013] UKUT 00465 (IAC)

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 5 July 2013	.....

Before

Mr C M G Ockelton, Vice President

Upper Tribunal Judge Martin

Between

MUHAMMAD OMAR NAEEM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr Kube, of Salam & Co. Solicitors

For the Respondent: Mr G Harrison, Home Office Presenting Officer.

Points obtained “under paragraphs 113-120 of Appendix A” to the Rules are not so obtained if paragraph 120A prevents them being obtained.

DETERMINATION AND REASONS

1.
The appellant is a national of Pakistan. He has been in the United Kingdom as a student since February 2008. On 31 May 2012 he made an application for further leave as a Tier 4 (General) Student Migrant. His application was refused on 22 October 2012 on the ground that his proposed studies as described in his Confirmation of Acceptance for Studies (CAS) did not represent academic progression from his previous study. The appellant’s appeal against that decision to the First-tier Tribunal was dismissed by Judge Fisher. He now appeals, with permission, to this Tribunal.

2.
The Secretary of State’s decision when originally made included a simultaneous decision to give removal directions under s.47 of the Immigration, Asylum and Nationality Act 2006. As Judge Fisher

indicated, that decision cannot survive Ahmadi v SSHD [2012] UKUT 00147 (IAC) and Adamally and Jaferi v SSHD [2012] UKUT 00414 (IAC). Judge Fisher allowed the appeal in respect of the s.47 decision. No further issue arises on it.

3.
So far as the decision in relation to further leave is concerned, the relevant parts of the Statement of Changes in Immigration Rules, HC 395 (as amended), are as follows. The Rules for Tier 4 (General) Students begin at paragraph 245ZT. The requirements for leave to remain are set out in paragraph 245ZX, and one of them, at sub-paragraph (c) is:

"The applicant must have a minimum of 30 points under paragraphs 113-120 of Appendix A".

4.
Paragraphs 113 to 120 of Appendix A are to the effect that the 30 points are available, and only available, for a Confirmation of Acceptance for Studies. Paragraphs 113-115 and Table 16 state that requirement in simple, though long-winded terms. Paragraphs 115-120 are notes qualifying that requirement. They are complex and we do not need to refer to them in details. Paragraph 120 is now followed by paragraph 120 – SD. That paragraph specifies what is meant by "specified documents" in paragraphs 118-120. It was inserted from 20 July 2012, after the present appellant made his application: it is not said to apply to this appeal. The next paragraph is paragraph 120A. At the date of the appellant's application paragraph 120A immediately followed paragraph 120. The history of paragraph 120A is complex. It began as paragraph 120B, being preceded by another paragraph numbered 120A. That was on 21 April 2011. It was inserted by HC 1148, and took effect from that date, save in respect of applications made but not decided before that date. On 6 April 2012 it was amended. The paragraph that immediately prior to that date had carried the number 120A was deleted and the present paragraph was renumbered (or rather re-lettered) to reflect that omission. Again, the changes which took place on 6 April 2012, under the authority of HC 1888, did not affect applications made but not decided before that date. Further amendments were made on 20 July 2012 by Cm 8423. These amendments have particular relevance to the present case, because they include a definition of academic progress. On this occasion there was no provision that the changes were to have no effect on applications made before the date of the amendment.

5.
The appellant's application was made, as we have said, on 31 May 2012, and decided on 22 October 2012. The date of the application was after 6 April 2012, and the date of the decision was after 20 July 2012. It follows that the relevant form of paragraph 120A is, for all present purposes, that in effect after 20 July 2012. It is as follows:

"120A. (a) Points will only be awarded for a valid Confirmation of Acceptance for Studies (even if all the requirements in paragraphs 116 to 120A above are met) if the sponsor has confirmed that the course for which the Confirmation of Acceptance for Studies has been assigned represents academic progress from previous study as defined in (b) below undertaken during the last period of leave as a Tier 4 (General) student or as a student, where the applicant has had such leave except where:

(i) the applicant is re-sitting examinations or repeating modules in accordance with paragraph 119 above, or

(ii) the applicant is making a first application to move to a new institution to complete a course commenced elsewhere.

(b) For a course to represent academic progress from previous study, the course must:

(i) be above the level of the previous course for which the applicant was granted leave as a Tier 4 (General) Student or as a Student, or

(ii) involve further study at the same level, which the Tier 4 Sponsor confirms as complementing the previous course for which the applicant was granted leave as a Tier 4 (General) Student or as a Student".

6.
On behalf of the appellant, Mr Kube does not suggest that the Cm 8423 amendments should not apply. Indeed, it is difficult to see how he could have made that submission in the light of the authorities, particularly Odelola v SSHD [2009] UKHL 25. Rather, Mr Kube argues that the appellant was not required to comply with paragraph 120A at all. His argument is neatly encapsulated in the grant of permission:

"The application contends that the judge was not entitled to deny the appellant points, as he did at paragraph 9 of his determination, by reference to paragraph 120A of Appendix A to the Immigration Rules because paragraph 245ZX(c) of the Rules required the applicant to have a points minimum under "paragraphs 113 to 120 of Appendix A", without there being any reference to paragraph 120A of the Appendix".

7.
Mr Kube took us through the history of paragraphs 113-120, and 120A. He was able without difficulty to show a certain amount of prevarication, and at least one error: the reference to "paragraphs 116-120A above" must be a relic of the time when the paragraph under consideration was 120B. With the greatest respect, however, none of this assists in showing that paragraph 120A does not apply to the appellant's case.

8.
Paragraph 120A applies to the appellant's case, not because paragraph 120A is to be taken as included in the phrase "under paragraphs 113 to 120 of Appendix A" in paragraph 245ZX, but because paragraph 120A is itself a part of the Rules and, where it applies, prevents points being accumulated under paragraphs 113 to 120. It would have that effect wherever it stood in the Rules, and the fact that it happens immediately to follow paragraph 120 is irrelevant. The Rules have to be read as a whole. It is not open to an applicant or appellant to say that a paragraph of the Rules of general application, does not apply in his case. The appellant needed to obtain points under paragraphs 113 to 120 of Appendix A. He could only do so under the Rules, and the Rules require progress to be shown in order for those points to be obtained.

9.
Mr Kube's second point was that if paragraph 120A did apply, its requirements were met, because the appellant's new course would represent academic progress from his previous study. His previous study was at NQF/QCF Level 4, whereas the proposed study was at level 5.

10.
That argument, which might have been open to the appellant if the amendments under Cm 8423 had not applied to him, is clearly not open on the basis of paragraph 120A as amended. The question is not the actual level of his previous studies, but the level "of the previous course for which the applicant was granted leave as a Tier 4 (General) Student". Although it appears that the appellant only

completed Level 4, it is clear that he was in April 2009 granted leave in respect of a three year course comprising Levels 4, 5 and 6. In fact he did not complete Level 4 until January 2012, by which time the college had discontinued the course structure under which the appellant had originally enrolled. His new enrolment was for Level 5. As the college indicates, “this is at a higher level than his completed course”; but it is not at a higher level than the course on the basis of which he was previously granted leave: that was a course which would have taken him beyond Level 5. It follows that the appellant’s new course did not meet the requirements of paragraph 120A of Appendix A; and he was therefore entitled to no points for his Confirmation of Acceptance for Studies.

11.
It is accordingly clear that the decisions of the Secretary of State and the First-tier Tribunal to that effect were correct. The First-tier Tribunal made no error of law. We dismiss the appellant’s appeal.

C M G OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 3 September 2013