Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/06503/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On 30 September 2013	**On 14 October 2013**
Prepared 1 October 2013	

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

SUKHJEET KAUR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Malik, Counsel, instructed by Mayfair Solicitors
For the Respondent: Ms H Horsley, Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals with permission against the determination of First-tier Tribunal Judge Sullivan promulgated on 27 June 2013, dismissing her appeal against a decision of the respondent dated 13 February 2013 to refuse to grant her further leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant.

2. The appellant entered the United Kingdom on 29 November 2009 with leave to enter as a Tier 4 Migrant until 2 November 2011. She made an in

time application for her leave to remain to be extended but this was refused initially in a decision dated 27 January 2012 on the basis that her sponsoring college had not confirmed that the course she wished to pursue represented academic progress and thus did not comply with the requirements of paragraph 120A of Appendix A of the Immigration Rules which at that date provided as follows:

> "120A 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 undertaken during the last period of leave as a Tier 4 (General) Student or as a Student except where: …"

Judge Harris allowed the appeal on the basis that the respondent's decision was unfair in that the appellant had not been given an opportunity to address the grounds of refusal which she did not and could not have known.

3. Subsequent to that, on 13 April 2012, the appellant forwarded a new Confirmation of Acceptance for Studies ("CAS") (issued by Citizen 2000 Education Institute, signed on 8 February 2012) and other supporting documents to the respondent, the CAS due to expire on 9 August 2012. This CAS states that the appellant "is making academic progress and is currently studying the Diploma in Business Management level 6 course, the course is an accredited Ofqual qualification and will achieve a recognised qualification".

4. The respondent refused the application afresh, stating in a letter dated 13 February 2013 that the CAS had assigned on 8 February 2012 had not been taken into consideration as it had not been submitted in support of the application made on 1 November 2011, and that it required a further application.

5. The appellant appealed against that decision on the grounds that, amongst other matters:-

   (i) the respondent had erred in not taking into account the new, amended CAS and that as the parties were bound by the un-appealed findings of fact, it was not open to the respondent following a successful appeal to make a further adverse decision on the same issue relying on the same evidence as before, the matter therefore being "res judicata" and that the appellant on that basis met the requirements of the Rules [13];

   (ii) the respondent's decision was contrary to the United Kingdom's obligations pursuant to Article 8 of the Human Rights Convention; and, was contrary to the law.

6. In her determination, Judge Sullivan found:-

(i) that Judge Harris's determination was not determinative of the current appeal [16] as the earlier refusal had been based on an absence of evidence that the appellant's proposed course of study represented academic progression; that that determination had not determined that issue, the matter being remitted to the respondent for further consideration and to give the appellant an opportunity to demonstrate that she met the requirements of the Immigration Rules;

(ii) that the earlier determination did not make findings of fact as to whether or not the appellant's proposed course of study represented academic progression [17];

(iii) that the current CAS does not deal with the issue of academic progression as between the earlier, ABE course and the current course of study [18];

(iv) that paragraph 120A of Appendix A of the Immigration Rules stipulates that points will only be awarded for a valid CAS if the sponsor has confirmed that the course for which the CAS is assigned represents academic progress [19] which is defined in the Rules;

(v) that although the evidence from the sponsor confirms that the appellant is making academic progress generally [21] it does not confirm either that its level 6 course represents academic progress from the ABE course or that it complements that course and thus she did not fulfil the requirements of paragraph 120A of Appendix A of the Rules [22];

(vi) that the decision to remove the appellant pursuant to Section 47 of the Immigration, Asylum and Nationality Act 2006 was not in accordance with the law that the appeal against her decision should be allowed;

(vii) that the decision to refuse to vary the appellant's leave to remain did not interfere with her right to respect for her private life [25] the appeal therefore fell to be dismissed on human rights grounds.

7. The appellant sought permission to appeal against the decision, quoting paragraph 120A of Appendix A as set out above [2] and submitting:-

i. that the judge erred by permitting the re-litigation of an issue already determined by Judge Harris, the respondent erring by repeating the decision previously made without taking into account the new evidence [9 to 11];

ii. that the determination is factually flawed and the fact findings are against the weight of the evidence, the judge failing to note whether the appellant was refused on the basis of a CAS issued previously for a course level 5, not on the basis of a CAS issued for a Diploma in Business Management QCF6 [12];

iii. that the new CAS states that the appellant is making academic progress [14] and that the judge's construction of paragraph 120B (sic) is inconsistent with the language of the Rule, the judge erring in assuming (wrongly) that the appellant has to demonstrate that she has made academic progress or the college is to give some type of justification for its statement and academic progress [15];

iv. that the wording of paragraph 120 represents a significant change from paragraph 60(v) of the Rules, the new Rules requiring only that the sponsoring institution confirms that the course for which the CAS has been assigned represents academic progress and that the construction imposed by her of the Rules is legally flawed [18], arguing that a Rule preventing students from making a change of courses may well be arbitrary or unnecessary: relying on **GOO v SSHD [2008] EWCA Civ 747**.

8. Permission to appeal was granted by Upper Tribunal Judge Latter on 14 August 2013. Judge Latter stated:-

> "The grounds satisfy me it is arguable that the First-tier Tribunal may have erred in law. So far as ground 1 is concerned, it does seem that the issue crystallises into whether the respondent was entitled to disregard the CAS dated 8 February 2012 submitted following the decision of Judge Harris issued on 10 April 2012. The issue also arises of whether in any event the CAS met the requirements of the Rules. In this context the position should be clarified as to which provisions of the Rules applied at the date of decision in the light of the various amendments which are made to paragraph 120A."

The hearing on 30 September 2013

9. Mr Malik submitted that Judge Sullivan had taken the updated CAS into account, and had been entitled to do so given that the decision of the Court of Appeal in SSHD v Raju [2013] EWCA Civ 754 did not disturb the findings made by the Tribunal in Khatel [2012] UKUT44 (IAC) regarding the effect of Section 85A of the 2002 Act.

10. Mr Malik accepted that none of the exceptions set out in paragraph 120A applied, submitting that the phrasing in the CAS of 8 February 2012 was sufficient to show that the appellant had been making academic progress. He submitted that nothing in the Immigration Rules required the sponsor to assess the progress being made and that the current Rule, unlike the previous Rule 60(iv) did not require an assessment as to whether progress

was in fact being made. He said that he would not make any points regarding paragraphs 1 to 12 of the grounds as drafted.

11. Ms Horsley submitted that the version of the Immigration Rules at the date of decision did define "academic progress". She provided a copy of the relevant Rule, as set out in Naeem (para 120A of Appendix A) [2013] UKUT 00465 (IAC).

12. Mr Malik accepted that the appellant could not succeed if that Rule were in effect but sought permission to amend the grounds of appeal to argue that, following Munir & Anor v SSHD [2012] UKSC 32 Odelola v SSHD [2009] UKHL 25 was no longer good law and thus there was no longer any reason why the presumption against retrospectivity should not apply to the Immigration Rules. He submitted also that it was incorrect for the respondent now to say that the version of the Immigration Rules set out in the grounds of appeal was not that which is applicable, something not challenged until after he had finished his submissions.

13. Mr Malik further submitted that until now the Secretary of State had not set out in detail the version of the Immigration Rules on which she sought to rely and that it was unclear whether Judge Sullivan had had the correct version introduced with effect from 8 July 2012 (see Cm 8423) in reaching her decision. He asked me to note also that the point had not been taken below as to which version was in effect.

14. Ms Horsley objected to the amendment of the grounds at this stage, the appellant having been put on notice that the relevant version of the Immigration Rules was an issue identified by Upper Tribunal Judge Latter when granting permission to appeal.

15. Mr Malik submitted that the respondent had been on notice as to what version the appellant thought was applicable yet had decided not to put in a Rule 24 letter. I refused the adjournment for the reasons set out below.

Decision and Reasons

The history of paragraph 120A of the Immigration rules

16. There is some confusion over the relevant paragraph of the immigration rules which relates to the requirement for an academic sponsor to confirm an applicant's progress. The provision was introduced as paragraph 120B with effect from 4 July 2011 by HC 1148. It was then with effect from 6 April 2012 re-numbered as 120A (HC 1888). The paragraph was again renumbered by Cm 8423 and became 120A (a). The only change relevant to the facts of this case relates to amendment introduced by Cm 8423, so that the provision (so far is relevant to this appeal) now reads:

> 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** [emphasis added]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:

… (omitted)

(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.

The application to amend the grounds of appeal

17. The proposed amendment to the grounds of appeal seeks to introduce an entirely new basis of challenge, that is, that the appellant had acquired a vested right as a result of the immigration rules as previously drafted, and that it was not open to the respondent to amend the immigration rules with retrospective effect. The changes in the rules and the decision of the Supreme Court in Munir on which Mr Malik seeks to rely predate the decision of the First-tier Tribunal by a substantial period.

18. I do not consider that it is arguable that the decision in Munir affects materially the decision in Odelola or there is any other arguable basis to depart from the established law that an application is to be decided according to the rules in place at the date of decision, absent any exception to that rule such as transitional provisions.

19. For reasons which are not clear, the grounds of appeal to the Upper Tribunal cite a version of the Immigration Rules which had been superseded by the date of decision. The tenor of the grounds of appeal is that paragraph 120A simply required there to be a confirmation that a new course represented progress and did not require an assessment. I accept that was so prior to the amendment introduced by Cm 8423, but the effect of that was to introduce such requirements. The grounds do not engage with the fact that paragraph 120A had been amended prior to the date of the respondent's decision.

20. It is not disputed that the provisions of paragraph 120A were amended by Cm 8423 with effect from 20 July 2012 nor is it submitted by Mr Malik that there are any transitional arrangements with respect to those changes. It is evident from Judge Sullivan's determination [19] that she had in mind the amended of the Rules as is clear from her reference to academic progress being defined within the Rules. I find no merit in the submission that in referring to that the judge had had in mind the provisions, defining academic progress, which had previously been within the guidance. Although academic progress had been defined in the rules, the determination clearly records that progress is defined within the Rules.

21. Further, I do not accept that Mr Malik was taken by surprise by the respondent's argument as to which version of the immigration rules was applicable. It is unclear why the grounds of appeal use the earlier version of paragraph 120A. It is not clear either why they do not, if it is alleged that that version of the Rules was in fact applicable, raised that issue or indeed the grounds put to the First-tier Tribunal. Further, the difficulties of the different versions of paragraph 120A were drawn to the attention of the parties in the grant of permission by Upper Tribunal Judge Latter.

22. I am not satisfied that any failure to comply with Rule 24 restricts the respondent from raising here the fact that the judge's decision was correct from the basis of the Immigration Rules or to submit that the grounds

appear to have been drafted in error as to the correct provision of the Immigration Rules.

23. I do not accept that the respondent is deemed by failure to submit a Rule 24 notice to have accepted the propositions put forward in the grounds of appeal and Mr Malik cited no authority for that proposition nor did he submit that the effects of the Procedure Rules or for that matter the directions made in this case had that effect.

24. Given that the doubts regarding which version of the Immigration Rules was applicable had been raised within the grant of permission, the appellant had ample time in which to seek to amend or supplement the grounds of appeal but did not do so.

25. In the circumstances, I am satisfied that it is not in the interests of justice to permit the amendment of the grounds of appeal, and I indicated that that was so. Mr Malik had, however, indicated that he would require an adjournment but confirmed to me that this would only have been had I been minded to grant his request to amend the grounds of appeal. I indicated that had I been minded to do so then I would have of course adjourned the matter to permit further argument but this eventuality did not arise.

Decision

26. I am satisfied that for the purposes of this appeal Judge Sullivan was entitled to take into account the most recent CAS given that this had been supplied to the respondent in support of the application. That was not challenged by the respondent. I find, however, that the judge was correct to conclude that this CAS did not comply with the requirements of paragraph 120A as amended by Cm 8423 with effect from 8 July 2012, which Mr Malik accepted.

27. Given that Mr Malik no longer sought to pursue paragraphs 1 to 12 of the grounds of appeal it is unnecessary for me to reach a conclusion on these other than to note that Judge Sullivan set out in adequate detail why she considered that Judge Harris's decision was not determinative of the facts giving rise to this appeal, not least because there had been a change in the Immigration Rules and because the appellant had adduced a new CAS. Accordingly, I am satisfied that the determination of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

SUMMARY OF DECISIONS

1 The determination of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed Date: 14 October 2013

Upper Tribunal Judge Rintoul