Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02855/2019

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On: 27 September 2019	**On 3 October 2019**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SHANA MOHAMADSHARIF SHAIKH

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Maqsood, Counsel
For the Respondent: Ms R Bassi, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India, born on 9 May 1987. She has been given permission to appeal against the decision of First-tier Tribunal Judge Greasley dismissing her appeal against the respondent's decision to refuse her human rights claim.

2. The appellant entered the United Kingdom on 11 March 2011 with leave to enter as a Tier 4 General Student valid until 30 September 2012. She applied for leave to remain on the same basis on 29 September 2012 and was granted further leave until 28 January 2014. On 23 January 2014 she applied for further leave to remain, again as a Tier 4 student, but on that occasion her application

was refused on 19 April 2016. She was served with removal papers on the basis of having obtained leave to remain by deception in relation to the use of a fraudulently obtained TOEIC English language certificate from the Educational Testing Service, ETS, which she had submitted in support of her current and previous applications. The certificate related to an English language test taken at Synergy Business College of London on 22 August 2012. Her application was also refused on the basis that she did not have a valid CAS, her Tier 4 sponsor having lost its licence.

3. The appellant appealed against that decision and her appeal was heard on 6 December 2017 by First-tier Tribunal Judge Telford who found that the respondent had made out the allegation of deception and use of a fraudulently obtained certificate. The appellant's appeal was dismissed on 12 January 2018 and permission to appeal to the Upper Tribunal was refused. The appellant became appeal rights exhausted on 28 March 2018.

4. On 10 April 2018 the appellant applied for leave to remain on Article 8 private life grounds. Her application was refused in a decision dated 30 January 2019. The respondent considered that the appellant failed to meet the suitability requirements in paragraph S-LTR.1.6 as her presence in the UK was not conducive to the public good because her conduct, in fraudulently obtaining a TOEIC certificate, made it undesirable to allow her to remain in the UK. The respondent had been informed by ETS that a proxy test taker had been used and that they had cancelled the appellant's test result. The appellant was therefore unable to meet the requirements in paragraph 276ADE(1). The respondent considered further, and in any event, that there were no significant obstacles to the appellant's integration in India and that there were no exceptional circumstances justifying a grant of leave outside the immigration rules.

5. The appellant appealed against that decision. Her appeal was heard on 24 April 2019 by First-tier Tribunal Judge Greasley. The respondent was not represented at the hearing. The appellant was legally represented. She gave oral evidence before the judge denying that she had acted dishonestly in relation to the English language test at Synergy Business College of London and claiming that she had taken the test and genuinely obtained the scores that she did. She stated that she wished to study for a Ph.D. in Management. The judge noted that there was no evidence from the respondent. There was no ETS bundle, generic or otherwise, and no determination from the previous appeal, and neither was there any representation on behalf of the respondent. On that basis the judge concluded that the respondent had failed to establish the facts upon which he sought to rely in relation to the allegation of cheating. The judge went on to consider the appellant's human rights claim. He considered that the appellant was not able to meet any of the criteria in Appendix FM or paragraph 276ADE(1) of the immigration rules on the basis of family or private life. The judge considered that the appellant's real intention was to stay in the UK permanently and that she saw further studies, such as a Ph.D, as a way of achieving that, rather than having any clear idea of what she wanted to study or how she would fund her studies. He concluded that she would be able to continue her private life in India and that the decision to

remove her from the UK was lawful and proportionate. He dismissed the appeal.

6. The appellant then sought permission to appeal to the Upper Tribunal on the grounds that Judge Greasley's conclusion, that her removal from the UK would not breach her Article 8 human rights, was inadequately reasoned and that the judge had failed to give appropriate weight to her private life established in the UK.

7. Permission was granted by First-tier Tribunal Judge Hollingworth.

8. The matter then came before me. At the hearing Ms Bassi produced a Rule 24 response, an application under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to produce the determination of Judge Telford in the appellant's previous appeal and the decisions of the First-tier Tribunal and Upper Tribunal refusing permission to appeal, and an application to cross-appeal out of time against Judge Greasley's finding on the allegation of fraud.

9. Ms Bassi confirmed that she wished to pursue a cross-appeal and challenge Judge Greasley's findings on the basis that the previous determination ought to have been produced and would have led the judge to have followed the principles in Devaseelan. Mr Maqsood objected to the application on various bases including that it had been made out of time, with no explanation for the delay, and with no reasons provided for the respondent having failed to refer to Judge Telford's determination in the refusal decision and having failed to produce it for the appeal before Judge Greasley.

10. I refused Ms Bassi's application as there was no reason given by the respondent, let alone any satisfactory reason, for the timing of the application for permission to cross-appeal. No reason was given as to why an application had not been made within the permitted period from service of Judge Greasley's decision on 1 May 2019 and why the application was being made at such a late stage. In any event, even if the respondent's application for permission was admitted, there was no basis for concluding that Judge Greasley had erred in law by failing to consider a document which had not been brought to his attention and therefore Judge Telford's determination was of no relevance to the error of law assessment. Its relevance would only arise if Judge Greasley's decision were set-aside and there was to be a re-making of that decision. The grounds seeking permission, even if admitted, were therefore unarguable.

11. Mr Maqsood then proceeded to make his submissions in support of the appellant's challenge to Judge Greasley's decision. He relied upon the Court of Appeal judgments in Khan & Ors v Secretary of State for the Home Department [2018] EWCA Civ 1684 and Ahsan v The Secretary of State for the Home Department (Rev 1) [2017] EWCA Civ 2009 and the respondent's compromise arising from those cases, that where a finding was made by the First-tier Tribunal in an ETS case that there had been no deception, the decision would be rescinded and the appellant would be put back in the position he was in prior to the decision being made and would be able to make a fresh

application. In the appellant's case she should, therefore, be put back in the position she was in when she made her application on 23 January 2014. She would be able to make a fresh student application and could then pursue her Ph.D. That was a matter that Judge Greasley ought to have considered but had failed to do. He had failed to follow the rationale in Khan and had therefore erred in law.

12. Ms Bassi objected to the grounds pursued by Mr Maqsood referring to Khan, as that was not included in the grounds seeking permission nor was it the basis upon which permission was granted. As for the grounds giving rise to the grant of permission, the judge had made adequate findings on Article 8 and had considered all relevant matters. The grounds did not challenge the judge's findings in relation to "very significant obstacles", but only his findings outside the immigration rules. However the judge had considered all relevant matters in that regard, adopting the proper approach to the question of private life as set out in the case of Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813. The judge's findings were open to him and there was no error of law.

13. Mr Maqsood, in reply, reiterated the points previously made in regard to the principles in Khan and submitted that the appellant ought to have been given an opportunity to vary her application to a student application.

14. I advised the parties that I was upholding Judge Greasley's decision. My reasons for so doing are as follows.

15. I do not agree with Mr Maqsood that the submissions he made in relation to Khan could be read into the grounds seeking permission to appeal. I found his grounds to bear little, if any, relation to the original grounds and on that basis alone I reject the case he presented. Mr Maqsood's reliance upon Khan was, in any event, in my view, misconceived. The case of Khan, like Ahsan, was concerned with the adequacy of a remedy challenging a section 10 decision. It involved different circumstances entirely, whereby the applicants had, as a result of a section 10 removal decision made pursuant to an allegation of deception, which had the effect of curtailing their leave to remain or refusing them further leave, been deprived of a right of appeal in which they could challenge the deception allegation before the First-tier Tribunal. The compromise made by the respondent was for the applicants to be given the opportunity to make a human rights claim which, if refused, gave rise to a right of appeal and, if successful in showing that there had been no fraud, would lead to the decision being rescinded and would enable the applicants to make a fresh application. They would effectively be put back into the position they were in before the deception allegation was made. For the appellant in this case, the position she was in prior to the respondent's decision of 30 January 2019 was that she had already had the benefit of an in-country right of appeal and the First-tier Tribunal had concluded that she had fraudulently obtained her TOEIC certificate.

16. I entirely reject Mr Maqsood's suggestion that Judge Greasley's findings on the deception point vindicated the appellant to the extent that she ought to be

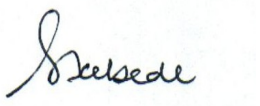
returned to the position she was in when she submitted her application on 23 January 2014, prior to the deception allegation having been made in the first place and prior to Judge Telford's decision. Judge Greasley did not conclude that the appellant had not cheated and had not used deception. His decision was essentially a criticism of the respondent for a lack of participation in the proceedings and a lack of evidence and his conclusion was that, as a consequence of such inactivity, the respondent had failed to establish the facts upon which he relied in making the allegation. His decision in no way undermined or overturned the previous findings of the First-tier Tribunal of which he was unaware. Mr Maqsood's submission to the contrary was simply wrong.

17. Accordingly there is no merit in the submission that Judge Greasley erred by failing to take account of the effect of Khan, as Mr Maqsood interpreted it, in his assessment of the appellant's private life and in his approach to her evidence about her intended studies. The judge plainly had concerns about the genuineness of the appellant's intentions in relation to her studies and gave detailed and cogent reasons for those concerns, at [24] and [25]. He was entitled to draw the adverse conclusions that he did in that regard. Having properly concluded that the appellant could not meet the criteria in paragraph 276ADE(1) the judge had regard to all relevant matters in assessing proportionality outside the immigration rules. He gave detailed consideration to the appellant's private life in the UK, including her length of residence here and her ties to the UK, and he also considered her circumstances in India in terms of family, cultural and other ties, employment prospects and ability to pursue her private life in that country. He was fully entitled to conclude that the appellant had failed to show that her circumstances were such as to justify a grant of leave outside the immigration rules and he properly concluded that her removal from the UK would not be disproportionate.

18. For the reasons fully and properly given, and on the evidence available to him, the judge was fully entitled to dismiss the appeal on the basis that he did.

DECISION

19. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

Signed 
Upper Tribunal Judge Kebede Dated: 2 October 2019