Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04321/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2nd September 2019	**On 30th September 2019**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

SANPREET SINGH GILL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Malik instructed by MYM Solicitors
For the Respondent: Ms S Cunha, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge C J Woolley, promulgated on 28 May 2019, dismissing his appeal against the refusal of leave to remain on Article 8 grounds.
2. The Appellant entered the UK on 17 March 2006 with entry clearance as a student valid until 31 May 2009. On 30 December 2008 he applied for leave to remain as a Tier 1 Migrant which was refused on 11 February 2009 with no right of appeal. The Appellant remained in the UK illegally. On 27 May 2009 he applied for leave to remain as a Tier 4 Student, which was granted on 13 November 2009 valid until 27 May 2012. The Appellant applied for leave to remain as a Tier 4 Student on 24 May 2012, which was granted on 30 July 2012 valid until 27 April 2014. This leave was

curtailed to expire on 1 April 2014. The Appellant applied for leave to remain as a Tier 4 Student on 31 March 2014, which was refused on 15 May 2014 with no right of appeal.

3. The Appellant was served with notice of removal on 26 March 2015. He applied for indefinite leave to remain on grounds of long residency on 24 November 2016 which was refused on 6 September 2017 and certified under Section 94(1) of the Nationality, Immigration and Asylum Act. The Appellant's subsequent judicial review application was settled by consent; the Respondent agreed to grant the Appellant an in-country right of appeal.

4. The Respondent refused the Appellant's application for leave to remain on 13 February 2019 on the grounds that he has used a proxy test taker in his English language test certificate submitted with his application on 24 May 2012 and relied on in his application of 31 March 2014. The Appellant could not satisfy paragraph 276B of the Immigration Rules or paragraph 276ADE of the Immigration Rules.

5. The Appellant appealed. The judge found that the Respondent had failed to prove the allegation of deception. It was conceded by the Appellant's representative that the Appellant could not satisfy paragraph 276B of the Immigration Rules and it was not submitted that he could satisfy the eligibility requirements of Appendix FM. The judge considered paragraph 276ADE and found that there were no very significant obstacles to reintegration and no unjustifiably harsh consequences on return to India.

6. Permission to appeal was granted by First-tier Tribunal Judge Gibb on the grounds that, having found in favour of the Appellant on the fraud point, it was arguable that the judge erred in not considering what the Appellant's situation would have been if the allegation had not been made, and not applying the concession in Khan (see below) that in such cases an opportunity to make a further application would be provided.

Submissions

7. Mr Malik relied on Nabeel Ahsan & others v the Secretary of State for the Home Department [2017] EWCA Civ 2009 and Khan and others v the Secretary of State for the Home Department [2018] EWCA Civ 1684. He agreed the Appellant's immigration history as set out in the refusal letter and accepted that the Appellant could not satisfy paragraph 276B or 276ADE of the Immigration Rules. There was no challenge to the judge's finding that there were no very significant obstacles to reintegration.

8. There was some discussion on the basis of the refusal of leave to remain as a Tier 4 student on 15 May 2014. The decision was not on the file and Ms Cunha did not have a copy of it. Mr Malik submitted that the decision must have been taken on grounds of deception because the Appellant only had an out of country right of appeal against

removal. I gave Ms Cunha an opportunity to obtain the reasons for that refusal letter and the decision to remove the Appellant.

9. After consulting Home Office records, Ms Cunha confirmed that the student application was refused because the Appellant had used deception in a previous application. She provided a copy of the notice of a person liable to removal under Section 10, which stated: "You are specifically considered a person who has sought leave to remain in the United Kingdom by deception following information provided to us by Educational Testing Service (ETS) that on 23/5/2012 an anomaly with your speaking test indicated the presence of a proxy test-taker."

10. Mr Malik submitted that the effect of the judge's finding that the Appellant had not used deception was that he should be put in the position he would have been in had the allegation not been made. Following Ahsan and Khan, he should be given an opportunity to provide information in relation to the Tier 4 application made in March 2014. The judge had failed to appreciate the Respondent's own policy when assessing proportionality. It was not proportionate to remove the Appellant without giving him an opportunity to submit further evidence on his Tier 4 application.

11. Ms Cunha sought to challenge the finding that the Appellant had not used deception on the basis that there was an error of law. I was not minded to entertain such a submission because the Respondent had not applied for permission to appeal within the relevant time and had failed to raise this issue before today's hearing. There was no Rule 24 response to the grant of permission by the First-tier Tribunal on 19 July 2019. I refused Ms Cunha's application for permission to appeal against the judge's finding that the Appellant had not used deception because it was significantly out of time and there was no plausible explanation for the Respondent's failure to submit a cross-appeal or the failure to raise any arguable errors of law prior to today. It was not in the interests of justice to allow the Respondent to rely on such a point.

12. Ms Cunha submitted that there was no material error in the judge's conclusion at paragraph 51(i) in which he stated:

> "I find that the appellant's immigration status has been precarious from the moment he arrived in the UK. He arrived as a Tier 4 (General) student in 2006. This was always going to be a temporary status and he could not have anticipated that he would ever be granted permanent status from this. He was an overstayer from 15th May 2014, and had no leave after that date (I have not accepted that the decision in **Khan** can operate so as to grant leave retrospectively). When his immigration history is considered as a whole his status at all times has been precarious."

13. Ms Cunha submitted that, notwithstanding the error by the Respondent in relation to the fraudulent English language certificate, the judge considered the Appellant's private life in the UK and properly assessed proportionality. Even though the judge did not specifically refer to or consider the position the Appellant would have been

in had the allegation of deception not be made, the judge still considered all relevant factors. There were no unjustifiably harsh consequences on the Appellant's return to India. His private life had been precarious in all respects and he could not satisfy the Immigration Rules.

14. In order to allow an Article 8 appeal outside the Immigration Rules on the basis of private life in the UK as a student, the circumstances had to be truly exceptional and that was not the case here. Notwithstanding the judge's alleged failure to properly apply Khan, the historic injustice in this case was not sufficient to outweigh the public interest and any error on the part of the judge was immaterial.

15. There was then some discussion on whether to dispose of the appeal under Rule 39 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Mr Malik made the following proposal: "Upon the Respondent agreeing to reconsider the Appellant's application of 31 March 2014, having given a period of 60 days to vary that application or provide any further evidence in support of that application, by consent it is ordered that the Appellant be given permission to withdraw the appeal and the finding that the Appellant had not submitted a fraudulent English language test certificate should stand. However, Ms Cunha wished to proceed in relation to the error of law issue and asked me to conclude that any error on the part of the judge was not material. It was apparent that she had not consented to the proposed order and therefore it would not be appropriate to make such an order under Rule 39.

16. Mr Malik submitted that the Appellant should be put in the position he would have been in had the allegation of a deception not been made. It would not be appropriate to remove him without giving him an opportunity to submit further evidence in relation to his application made in March 2014 for leave to remain as a student. The decision should be set aside and the appeal allowed under Article 8.

17. The Appellant's human rights claim was not based on his length of residence in the UK. The Appellant had established private life in the UK and the only justification for interfering with his private life was the allegation that he used deception. That allegation was not made out and, therefore, there was no justification for removing the Appellant at this time. The appeal should be allowed in order for the Appellant to be given an opportunity to provide further information and for the Respondent to consider a grant of leave as a student.

18. Mr Malik submitted that Article 8 was engaged relying on Ahsan at paragraph 88:

> "In the particular circumstances of the present cases, it is also worth emphasising that, as Mr Knafler correctly submitted (see para. 76 above), whether the Appellants' removal would be a breach of their article 8 rights depends not on any multi-factorial assessment of proportionality but on the single factual question of whether they cheated in their TOEIC tests – and on whether a fair procedure has been made available for deciding that question."

19. Mr Malik also relied on Khan at paragraph 37:

> "Further, at paragraph 8 of the note, it was stated:
>
> > 'Nonetheless, for the avoidance of doubt, the Secretary of State for the Department confirms that:
> >
> > (i) For those individuals whose leave was curtailed, and where that leave would still have time to run as at the date of an FTT determination that there was no deception, subject to any further appeal to the UT, the curtailment decision would be withdrawn and the effect would be that leave would continue and individuals would not be disadvantaged in any future application they chose to make;
> >
> > (ii) For those whose leave has been curtailed, and where the leave would in any event have expired without any further application being made, the Respondent will provide a further opportunity for the individuals to obtain leave with the safeguards in paragraph (iii) below.
> >
> > For those whose leave had expired, and who had made an in time application for further leave to remain which was refused on ETS grounds, the effect of an FTT determination that there was no deception would be that the refusal would be withdrawn. The applicant in question would still have an outstanding application for leave to remain and the Respondent will provide them with a reasonable opportunity to make any further changes to their application which would be considered on the basis of them not having employed any deception in the obtaining of their TOEIC certificate, and they would in no way be disadvantaged in any future application they chose to make.
> >
> > (iii) In all cases, the Respondent confirms that in making any future decision he will not hold any previous gap in leave caused by any erroneous decision in relation to ETS against the applicant, and will have to take into account all the circumstances of the case.
> >
> > However, the Respondent does not accept that it would be appropriate for the Court now to bind him as to the approach that he would take towards still further applications in the future, for example by stating that each applicant has already accrued a certain period of lawful leave. The potential factual permutations of the cases that may need to be considered are many and various. In some cases, for example, it will be apparent that, whilst on the facts as

> presented at the appeal an Appellant's human rights claim is successful, he would not have been able to obtain leave at previous dates. Again, this issue will have to be dealt with on a case by case basis."

20. Mr Malik referred to the appendix in Khan and the consent orders therein in support of his submission that, if the removal decision had not been made, the 2014 application for leave to remain as a student would still be live and the Appellant should be given time to submit further information in support of that application. Without the opportunity to do so, his removal would be unlawful.

Conclusions and Reasons

21. This is an appeal against the decision dated 13 February 2019 refusing indefinite leave to remain and the Appellant's human rights claim under paragraphs S-LTR and R-LTPR of Appendix FM, 276B, 276ADE and 322 of the Immigration Rules.

22. The judge found in the Appellant's favour in respect of paragraphs S-LTR and 322 of the Immigration Rules. It was accepted that the Appellant could not satisfy Appendix FM, 276B or 276ADE. The judge considered Article 8 outside the Immigration Rules and found that the Appellant's removal would interfere with his private and family life. It is submitted that the judge erred in his assessment of proportionality because he failed to consider the position the Appellant would have been in if the allegation of deception had not been made following Ahsan and Khan.

23. Taken at its highest, the position the Appellant would have been in, absent the deception allegation, is that the decision to refuse student leave (dated 31 March 2014) remains outstanding and the Respondent cannot rely on the notice of removal under section 10 served on 26 March 2015.

24. However, I agree with First-tier Tribunal Judge C J Woolley that the decision in Khan does not operate to grant leave retrospectively. At best the weight attached to the public interest could be reduced because the Appellant could not be considered an overstayer from 15 May 2014. This does not, however, alter the position that the Appellant's status in the UK has been precarious at all times. I find that there is no material error of law in the judge's findings at paragraph 51 (i).

25. In Ahsan, at paragraph 87, Underhill LJ stated: "Specifically in the case of a student, even if his or her article 8 rights are engaged, it does not follow that those rights are breached by their removal before they have completed their course. On the contrary, if they cannot comply with the applicable Immigration Rules, their removal is very likely to be justified."
26. There was no evidence before the Respondent or the First-tier Tribunal to show that the Appellant could succeed on his application for leave to remain as a student. It is open to the Applicant to submit further evidence to the Respondent, relying on Khan

27. The Appellant cannot satisfy the requirements of the Immigration Rules and the weight to be attached to the public interest is significant. Little weight should be attached to the Appellant's private life established at a time when his immigration status was precarious. There were no exceptional circumstances which would render the refusal of leave to remain disproportionate.

28. The judge's conclusion that the decision of 13 February 2019 did not breach Article 8 was open to him on the evidence before him. I find that there was no material error of law in the decision promulgated on 28 May 2019 and I dismiss the Appellant's appeal.

Notice of Decision

The appeal is dismissed

No anonymity direction is made.

J Frances

Signed Date: 27 September 2019

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed Date: 27 September 2019

Upper Tribunal Judge Frances