Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26846/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2nd July 2014	**On 14th July 2014**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

SUMAIRA NAEEM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No attendance, nor representation
For the Respondent: Mr L Tarlow, Senior Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Pakistan born on 10th April 1984. She appeals with permission against the decision of the First-tier Tribunal (Judge Morris) who in a determination promulgated on 23rd April 2014 dismissed her appeal against the

decision of the Respondent to refuse leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under paragraph 245ZX(d) of the Immigration Rules HC 395 as amended.

2. The case was listed for oral hearing in accordance with the directions given by the Upper Tribunal following the grant of permission by the First-tier Tribunal (Judge Landes) on 21st May 2014. There was no appearance or representation on behalf of the Appellant at the hearing before the Upper Tribunal. On the case file it demonstrates that the Appellant was served with notice of hearing on 29th May 2014 to the address given as her home address. Notice of hearing was also served upon her legal representatives Rahman & Company Solicitors on the same day. Whilst directions were sent to the Appellant and to her legal representatives with the grant of permission, no further documentation had been provided in accordance with those directions. On the file there is a letter dated 23rd June 2014 from Rahman & Co stating "Further to the above matter we do not have any instructions from the client to attend the hearing on her behalf of 2nd July 2014." Thus the letter demonstrates that her legal representatives were aware of the hearing and were not instructed to attend on her behalf and the case file also demonstrates that she was served with notice of the hearing on 2nd July. She did not attend and in those circumstances, and in the light of the documentation that I have just set out in the preceding paragraph, I am satisfied that the Appellant did have notice of the hearing and thus the appeal should proceed in her absence.

3. The history can be briefly stated. The Appellant arrived on 24th May 2011 in possession of a visa conferring leave to enter as a Tier 4 (General) Student Migrant until 2nd September 2012. On 31st August 2012 she made an application for further leave to remain as a Tier 4 (General) Student Migrant under the points-based system. That application was refused on 10th January 2013 on the basis that the Appellant failed to meet the requirements of paragraph 245ZX(d) and in relation to Appendix C. The Appellant's case was that she had enrolled for an Extended Diploma in Management at West City College. It appears that the Respondent withdrew the decision before the Appellant's hearing was to take place on 31st May 2013.

4. On 13th June 2013 the Respondent issued a fresh decision to refuse the application on the same grounds. The reasons given can be stated as follows. It was refused because it was asserted on behalf of the Respondent that the documents of the Appellant did not include all the mandatory information required under the Rules. Therefore she did not meet the requirements of paragraph 245ZX(d) with reference to Appendix C of the Rules. The reasons given were as follows:-

   (i) She was required to prove she had the required maintenance fees of £1600 together with outstanding course fees. She was required to show that she was in possession of £2,600 for a consecutive 28 day period.

   (ii) The deficiencies in the documents were also set out namely that

(a) the HBL bank statement she produces in the name of Tanveer Bagham, and no documents relating to the Appellant's maintenance had been provided in her own name;

(b) no birth certificate or Sponsor's letter had been provided with her previous application which had been refused on 10th January 2013. A bank statement in the name of Tanveer Bagham was provided but there was no explanation as to who the person was;

(c) there was nothing to explain the Appellant's relationship (if any) with Tanveer Bagham, nor was there a letter from that person confirming her willingness to sponsor the Appellant;

(d) neither a birth certificate nor a Sponsor's letter had been provided with the Appellant's current application and there was no reference to either of these documents.

(e) The fact that the Appellant had provided the Sponsor's letter and a birth certificate at the appeal stage did not have an effect on the prior refusal decision.

5. The Appellant sought to appeal that decision and general Grounds of Appeal were issued which stated that the decision was unlawful as it was incompatible with her rights under the European Convention (Article 8), it was stated that she was a genuine student and that the Respondent had failed to follow her policy of "evidential flexibility policy". It was also asserted that the decision was not in accordance with the law (the decision to remove under Section 47).

6. The appeal came before the First-tier Tribunal (Judge Morris) who in a determination promulgated on 23rd April 2014 dismissed her appeal under the Immigration Rules and also on Article 8 grounds.

7. The reasons given by the judge to dismiss the appeal under the Immigration Rules was that for the reasons given at paragraph 14(i)(a) – (e) and (ii)(a) and (b) and (iii) and (iv) were that the Appellant had not demonstrated that she had shown on the balance of probability that all the documents contain undated information and in the form specified under Appendix C were provided. The judge gave a number of reasons for reaching this conclusion by consideration of the documents that had been produced with the application, by consideration of the application form and the evidence that had been given before the Tribunal. It appears that the judge did accept that a birth certificate and a declaration were subsequently provided after the application but in her view the argument based on the case of **Khatel and Others (Section 85A; effect of continuing application) [2013] UKUT 00044**, that as the date of the application met the date upon which the application was made and that it was not a continuous period ending with the date of decision, any information that had been provided could not be taken into account. However at 14(iii) the judge reached the conclusion that even at the date of the hearing, the Appellant had not satisfied the requirements of Appendix C stating "the birth certificate produced is said to have

been taken from the birth register in Pakistan but, given that it was not the one originally issued, it is a copy and according to the requirements of Appendix C it should have been notarised it was not." Thus she dismissed the appeal. The judge also gave consideration to her claim under Article 8 of the ECHR at paragraphs 16 to 23. There are no grounds challenging the decision made on human rights grounds.

8. An application to appeal that decision was made and on 21st May 2014 permission was granted by First-tier Tribunal Judge Landes.

9. Thus the application was listed before the Upper Tribunal. As I have set out in the early paragraphs, the Appellant, although served with notice of the hearing as were her legal representatives, there was no appearance no attendance and no further documentation has been either filed or served upon the Tribunal or the Respondent in accordance with the directions that were provided with the grant of permission. No further information of any kind has been produced.

10. Mr Tarlow relied upon the decision of the First-tier Tribunal and the findings that were made in relation to the application. In relation to the grant of permission, it was noted at paragraph 2 that it was arguable that the judge misdirected herself as to the affect of the **Khatel** argument (see **Nasim 2013] UKUT 610**). The conclusion was that Section 85A did not prevent the Tribunal from considering evidence that was before the Respondent when a decision was made even if the evidence had not been before the Respondent at the date of the application for the purposes of paragraph 34F. In this respect, it was submitted that even if the judge was in error in her assessment of the decision of **Khatel**, the notarised birth certificate was still not before the Respondent and was not even before the First-tier Tribunal at the date of the hearing and thus she could not meet the Rules.

11. I made some enquiries of Mr Tarlow considering the case file concerning the issue of documentation and in particular why the decision was withdrawn on 30th May 2013. In this context it is right to observe that nowhere in the documentation, either put before the First-tier Tribunal or the Upper Tribunal does the Appellant provide any information as to why the decision was withdrawn and what information she provided subsequently (if any) as a result of the withdrawal of the decision. It is also right to observe that the Respondent did not provide any information either and the determination of the First-tier Tribunal, understandably, also makes no reference to it because it does not appear that any of the parties referred to it. At its highest, the only information was that it was refused on the same grounds as it was in January 2013. In those circumstances I asked Mr Tarlow to look at the file. The case record that he had indicated that the decision was withdrawn as a result of the evidential flexibility policy. It appeared that she submitted the bank statement of Tanveer Bagham only with her application and there was no evidence that she was an acceptable financial Sponsor and thus applying the decision of **Rodriguez**, the decision was required to give full effect to the evidential flexibility point. It is not clear from the case records what documentation they were going to require from the Appellant or what, if any, correspondence there was between the parties or what the Appellant did in the light of the withdrawal. It appears that the documentation that

was before the Secretary of State at the time of the withdrawal of the decision included an affidavit from her mother (or declaration) and a birth certificate. However the Appellant has not provided any evidence relating to the circumstances surrounding the withdrawal and there was no evidence either put before the First-tier Tribunal or in the grounds for the present appeal as to what documentation, if any, was sent after the withdrawal. In particular, it is not known what documentation was being sought or was subsequently sent by the Appellant.

12. I posed the question as to whether or not it could be the notarised birth certificate because the birth certificate as the judge noted had not been in the correct form. However that was speculation as no evidence could be ascertained concerning this issue. Mr Tarlow submitted that in the circumstances as the judge noted she had not provided all the mandatory documentation either with her application for the reasons that she properly gave or before the Respondent made the second decision and in those circumstances the Respondent was not under any obligation to ask for any further documents either under paragraph 245AA or the evidential flexibility point. He submitted that if the document had been available and indeed it was the notarised birth certificate there was no explanation by the Appellant why it had not been sent after the first decision was withdrawn. He submitted that she had had the opportunity to provide information and she had not attended court to progress her appeal in any way.

13. I reserved my determination.

14. The grounds as drafted submit that the judge misdirected herself in relation to the law and the facts. Firstly the finding made by the judge that she had not produced all of her documentation at the time of the application is said not to be supported by the evidence (see paragraph 5 of the grounds). In this respect it is said that the application form referred to boxes being ticked at L22 and L23 and the First-tier Tribunal failed to take this into account but had focused at the box beside "birth certificate" which had been blanked out. As the judge granting permission noted that was a very thin argument but the judge had explained carefully why she had not accepted the Appellant's primary submission that all the documents had been submitted with the original application and this was not simply the fact that the relevant box on the application form had been tippexed out but also that the documents on the envelope on file matched those ticked on the application form and also that the Appellant had not mentioned in the Grounds of Appeal that it was her contention that all documents had been sent.

15. I respectfully agree with that view. It is plain after looking at the documentation as described by the First-tier Tribunal and the reasons given by Judge Morris for finding that the Appellant had not provided all the specified documents with the original application were clearly set out at paragraphs 14(i)(a) – (e) and (ii), (iii) and (iv). Those findings were sustainable findings made on the evidence and the matters set out in paragraph 5 are merely a disagreement with the judge's proper assessment of the evidence that was before her. The reasons given was that the application form completed by the Appellant was shown to her during the hearing and the section

asked her to confirm which documentation had been produced, she had ticked the boxes but the box relating to whether or not a birth certificate had been included clearly showed she had originally ticked that box but then deleted the tick using tippex. Furthermore the envelope in which the Appellant's application and its accompanying documents were sent was produced and shown to the Appellant. The document from the envelope were the same as those the Appellant had indicated by the means of the tick on the application form. They did not include any further documents such as the Appellant's birth certificate. The judge was entitled to find that on the balance of probabilities no other documents had been sent with the Appellant's application and that was because the correlation between the boxes the Appellant had ticked and the presence of the documents referred to in those boxes made it more likely than not the documents contained in the original envelope were the only ones that she sent. It is also clear now from the case records that had she provided all these specified documentation it would not have been necessary for the decision to have been withdrawn and further enquiries made, although of course it is not known what enquiries were made or that the Appellant did in any event. Thus there is no merit in that ground.

16. As to the second ground concerning a material misdirection in law relating to the judge's view of **Khatel**, in this respect it is plain that the judge did not take into account the decision of **Nasim and Others [2013] UKUT 610** which noted that as held in **Khatel and Others** Section 85A of the Nationality, Immigration and Asylum Act 2002 precludes the Tribunal, in a points-based appeal from considering evidence as to compliance with points-based Rules, where that evidence was not before the Secretary of State when she took her decision; but the Section does not prevent a Tribunal from considering evidence that was before the Secretary of State when she took the decision, whether or not that evidence reached her only after the date of the application for the purposes of paragraph 34F of the Immigration Rules.

17. It appears to be the position that the First-tier Tribunal accepted that the birth certificate and the declaration had been provided, not with the application but with the appeal grounds before the hearing that was to take place in May 2013 and before the withdrawal of the decision. Therefore the judge's conclusion that **Khatel** did not apply is not right in the context of the decision of **Nasim** as set out above. However, the judge did not leave the matter there. Even if it were right that those documents had been provided before the decision and therefore the Tribunal were not precluded from considering them, the judge noted at (14(iii) that "even now, the Appellant does not satisfy the requirements of Appendix C". The birth certificate produced is said to have been taken from the births register in Pakistan but, given that it was not the one originally issued, it is a copy and according to the requirements of Appendix C, it should have been notarised. It was not. Therefore as the determination makes plain, even at the date of the hearing (which was too late in any event) the Appellant still did not meet the requirements of Appendix C. In those circumstances any error in the application of **Khatel** could make no difference to the outcome.

18. It appears to be accepted that the notarised birth certificate was not provided because the grounds go on to state at paragraph 6 that the failure to provide a notarised copy of the birth certificate would be something covered by the evidential flexibility policy or paragraph 245A of the Immigration Rules. The difficulty with that argument is that it does not take into account the history of the appeal that I have set out earlier and that if those documents had been provided along with the Grounds of Appeal against the decision of January 2013 and therefore before the Secretary of State, the original decision was withdrawn and the Appellant appears to have been given the opportunity by way application of the evidential flexibility policy to provide all the specified documents required for consideration of her application.

19. Whilst I have set out that it is not clear what documents, if any were requested nor is it clear from any evidence provided upon the Appellant, who has the burden of proof in this appeal, as to what she did in relation to the withdrawal. However, I conclude from the history and on the only documentation that has been placed before me, that having already been given an opportunity to rectify any problems with her documentation as the First-tier Tribunal Judge noted it was still not rectified even at the time of the hearing before Judge Morris. In those circumstances, I do not consider that it can be properly argued that the Respondent had a duty yet again to ask the Appellant to provide any further documentation, having already given her the opportunity to rectify any difficulties with the documentation.

20. The Appellant has not provided any further documentation, she has not appeared before the Tribunal to argue her case any further and I remind myself that the burden to demonstrate that the First-tier Tribunal Judge was in error lies on the Appellant. For the reasons that I have given, I do not find that there is any error of law that was material to the outcome of this appeal and therefore the decision shall stand.

21. The First-tier Tribunal Judge also dealt with the human rights issues under Article 8. There is no challenge in the grounds to those findings.

Decision

The decision of the First-tier Tribunal does not involve the making of an error of law to set aside the decision. Thus the decision stands. The appeal is dismissed.

Signed Date 10/7/2014

Upper Tribunal Judge Reeds