Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: HU/11449/2019 (P)**

THE IMMIGRATION ACTS

Decided under rule 34 (P)	**Decision & Reasons Promulgated**
On 30 July 2020	**On 6 August 2020**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

OSSAMA FAROUK HASHEM IBRAHIM

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Representation (by way of written submissions)
For the appellant: Liberty Legal Solicitors
For the respondent: Ms H Aboni, Senior Home Office Presenting Officer

Background

1. This appeal comes before me following the grant of permission to appeal to the appellant by First-tier Tribunal Judge Andrew on 7 April 2020 against the determination of First-tier Tribunal Judge O'Garro, promulgated on 21 November 2019 following a hearing at Hatton Cross on 21 October 2019.

2. The appellant is an Egyptian national born on 10 January 1976. On 12 July 2010, he entered the UK as a tier 4 student with valid leave until October 2013. He then obtained further leave until 28 December 2014 and the day before the expiry of his leave applied to remain on human rights grounds. This was refused on 2 April 2015 with a right of appeal which he exercised. The appeal was dismissed on 17 May 2016 and he exhausted his appeal rights in November 2016.

3. On 9 December 2016 the appellant applied for further leave to remain based on his private life. This was refused on 5 July 2018 without a right of appeal. That decision is not before the Tribunal.

4. On 13 July 2018 the appellant made a further human rights claim which was refused on suitability grounds on the basis that he had used deception by obtaining a false English language certificate from ETS in an application he had made for leave to remain as a student in November 2013. This is the decision the appellant has now appealed.

5. The appeal came before judge O'Garro (not O'Gara as stated in the grant of permission and in the grounds) at Hatton Cross on 31 October 2019. The judge heard oral evidence from the appellant and considered the evidence. She concluded that the respondent had not discharged the burden on her to show that the appellant had falsely obtained an English language test certificate. She then proceeded to consider his article 8 claim. As the appellant was no longer in a relationship, she found that he could not meet the requirements of appendix FM. She accepted that the appellant had established a private life during the time he had spent here and considered that both under the immigration rules and on article 8 grounds. She found that there would not be very significant obstacles to his reintegration to Egypt, that his stay had always been precarious and that there were no exceptional circumstances to warrant a grant of leave outside the rules. The appellant had expressed the fear of return to Egypt because of the political situation but this was not particularised or pursued at

the hearing and the judge found that if he had a genuine fear, it was open to him to make an asylum application. Accordingly, she dismissed the appeal.

6. The appellant sought permission to appeal against the judge's decision. Two grounds were put forward but essentially they are part of the same argument which is that the judge erred in not following the approach of the Court of Appeal in Khan and others [2018] EWCA Civ 1684. It is maintained that having found that the appellant had not used deception to obtain leave on a previous occasion the respondent should have withdrawn her decision and the appellant should have been given a period of at least 60 days leave to allow an application for further leave to be submitted. Although the grounds do not specify what they maintain the judge should have done, it can be inferred that the appellant wanted her to allow the appeal on the basis of the historic injustice done to him.

Covid-19 crisis: preliminary matters

7. The matter was due to be listed for a hearing at Field House but due to the Covid-19 pandemic and the need to take precautions against its spread, this did not occur and directions were sent to the parties on 15 May 2020. They were asked to present any objections to the matter being dealt with on the papers and to make any further submissions on the error of law issue within certain time limits.

8. The directions specifically sought submissions from the appellant on the distinction to be drawn, if any, with Khan and others (*op cit*) on which the appellant relied, arising from the fact that those cases involved judicial reviews and not statutory appeals. The appellant was also asked to provide submissions as to the effect, if any, of the fact that the respondent's decision under appeal post-dated that judgment. The Tribunal indicated that it would also be assisted by a reference to the paragraph of the judgment which contained the direction said in the grounds to have been made by the Court of Appeal as there appeared to be a conflict between what the grounds alleged and what was said in the judgement at paragraph 37. The Tribunal indicated that it would be assisted by submissions from the respondent too as to the impact of the judgment as it applied to this case.

9. The Tribunal has received written submissions from both parties. I now consider the matter.

10. In doing so I have regard to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules), the judgment of Osborn v The Parole Board [2013] UKSC 61, the Presidential Guidance

Note No 1 2020: Arrangements during the Covid-19 pandemic (PGN) and the Senior President's Pilot Practice Direction (PPD). I have regard to the overriding objective which is defined in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as being "*to enable the Upper Tribunal to deal with cases fairly and justly*". To this end I have considered that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues (Rule 2(2) UT rules and PGN:5).

11. I have had careful regard to the submissions made and to all the evidence before me before deciding how to proceed. Neither party has raised any objection to the matter being considered on the papers. A full account of the facts are set out in those papers and that the issue to be decided is a narrow one. There are no matters arising from the papers which would require clarification and so an oral hearing would not be needed for that purpose. I have regard to the importance of the matter to the appellant and consider that a speedy determination of this matter is in his best interests. I am satisfied that I am able to fairly and justly deal with this matter on the papers before me and I now proceed to do so.

Submissions

12. The appellant's submissions are dated 29 May 2020. The respondent replied on 8 June 2020. To date there appears to have been no further submissions from the appellant.

13. The appellant addresses the Tribunal's direction on Khan in his submissions. That case concerned three applicants whose applications for further leave were refused or whose leave was curtailed following a change in section 10 of the Immigration and Asylum Act 1999 which meant that the only way they had to challenge a decision within the UK was by way of judicial review. It is submitted that a compromise between the applicants and the respondent was reached. Individuals whose applications for further leave were refused or who had their leave curtailed without a right of appeal could make a human rights claim to the respondent if they had a private or family life so as to engage article 8. In the event that the human rights claim was refused, and subject to any certification under section 94 of the Nationality, Immigration and Asylum Act 2002, the individual would have an in country right of

appeal where the ETS deception allegation would be considered in full by a fact-finding First-tier Tribunal judge who was best suited for a dispute of this nature. Khan acknowledged that judges were not bound by this compromise but the judgment endorsed the encouragement that judges make findings of fact on the deception allegation.

14. It is submitted that the appellant's case was not distinct from Khan because his human rights claim was refused on the deception allegation and that in the light of the judgment that allegation should be considered by a fact-finding judge. It is submitted that in December 2016 the appellant applied for leave to remain on family and private life grounds and that his application was refused on suitability grounds without a right of appeal. Following Ahsan [2017] EWCA Civ 2009 in July 2018, the appellant submitted further submissions and his application was refused on 19 June 2019, again on suitability grounds, with an in country right of appeal that led to the current proceedings. The submissions maintain that once the judge found that the respondent had not proved deception on the part of the appellant, the appeal should have been allowed. The Tribunal is reminded of the directions given by the Court of Appeal which are summarised as: (i) if the applicants are successful on appeal on the basis that they did not commit fraud, the respondent will rescind her decisions; (ii) the respondent will thereafter grant a period of at least 60 days' leave to allow an application for further leave to be submitted; (iii) when making any future decision on applications for leave to remain the respondent will not hold against an applicant any previous gap in leave caused by any erroneous ETS deception decision.

15. The appellant, therefore, argues that there has been a historic injustice and that with in accordance with Ahsan and paragraph 37 of Khan, he should be returned to the position he would have been in prior to the deception allegation being made. In this case, that would have meant his human rights application of 9 December 2016 would not have been refused on suitability grounds. It is maintained that the appellant has suffered and been prejudiced as a result of the earlier deception allegation and that removal at this stage is therefore unlawful. It is submitted that the judge erred in the determination should be set aside. It is maintained that it is unnecessary to remit the appeal back to the First-tier Tribunal and that the Upper Tribunal should set aside the determination and remake the decision. If the appeal is allowed it is submitted that the respondent should grant the appellant's application of December 2016.

16. The respondent's submissions do not address the specific directions made by Upper Tribunal Judge Smith which appear within the body of more standard directions. Possibly, these were not noticed by the respondent.

17. The respondent accepts that the judge gave adequate reasons for finding that the deception allegation had not been made out by the Secretary of State and that she was, therefore, correct to proceed to a consideration of the article 8 claim. It is noted that the appellant was no longer in a relationship and that the appeal was pursued on private life grounds only. It is submitted that it was open to the judge to find that there would not be very significant obstacles to his reintegration on return to Egypt, that although he had been away for some nine years he had left as an adult and would be familiar with the culture and society there. He also had a sister who would be able to assist him in re-integrating, he was fit and healthy and had gained employable skills and qualifications whilst in the UK. The respondent submits that the judge gave adequate reasons for finding that article 8 could not be met within the rules and that there were no compelling or exceptional circumstances which would justify a grant of leave outside the rules.

Discussion and conclusions

18. I have considered all the evidence, the grounds for permission and the submissions made by both parties.

19. The first point to make is that the appellant did not rely on Khan or Ahsan in support of his hearing before the First-tier Tribunal Judge. I have considered the Record of Proceedings and the determination with care and this was not a matter pursued before the judge. The judgment did not form part of the appellant's bundle nor was it submitted to the judge at the hearing. The judge cannot therefore be criticized for failing to take it into account. The appellant relied only on his private life claim and the issue of unfairness did not form part of it.

20. Secondly, the Khan judgment is in respect of a judicial review applicant and is not binding on the First-tier Tribunal as the appellant's submissions themselves concede.

21. Third, the appellant's case can be distinguished from Khan in that the appellant did not have his leave curtailed and did not make a further student application which was refused. His December 2016 application was made on private life grounds and although it was refused, the appellant then made a further article 8 claim which was refused with an in country right of appeal. Unlike the other applicants in Khan, the

appellant's human rights claim was considered by the First-tier Tribunal and findings of fact were made on the deception allegation.

22. Fourth, whilst the respondent's note (set out at paragraph 37 of Khan) indicated that the effect of an First-tier Tribunal determination that there was no deception would be that the refusal would be withdrawn and that the outstanding application would be decided on the basis of deception not having been employed, the respondent did ***not*** agree to bind herself to the same course of action in future applications.

23. Even assuming this process were to be followed, the Tribunal has not been provided with a copy of the decision of 5 July 2018 made in response to the application of December 2016 and, therefore, has no way of knowing whether that application was refused partially or solely (or at all) because of a deception allegation. The present decision letter does not provide reasons for the refusal of that claim. Nor is there any information as to the basis of that claim so that the appellant's submission that that application should have been granted or should be granted following the "no deception" finding made by the First-tier Tribunal in the present appeal is made completely out of context.

24. In any event, the appellant made a further human rights claim and that was considered. I note that the respondent in Khan undertook not to put applicants at a disadvantage in any future application by virtue of a deception allegation and I also note that although the appellant's claim was refused on suitability grounds, his private life claim was nevertheless considered substantively. It is also relevant that the appellant's somewhat short term relationship as it was at the date of the application, had ended prior to the appeal hearing.

25. The appellant maintains that he has been placed at a disadvantage by the deception allegation but the grounds fail entirely to identify how his extremely weak application could have succeeded or what disadvantage has been caused given that the facts of his case. His family life claim cannot succeed because he has no such life and that was conceded at the hearing. His private life claim which is unparticularized is based on a precarious period of leave and indeed, no challenge is made to any of the judge's findings on that claim. It was open to the judge to find that the appellant had left Egypt as an adult, that he was fit and well and had gained qualifications and employable skills whilst he had been here which could be put to good use, that he remained familiar with Egyptian customs and culture and had a sister there would could help him to resume a life there. Even without any

allegation of deception, the appellant cannot show that he comes remotely near the rules to show any very significant obstacles to re-integration on return to Egypt and does not qualify for leave on private life grounds. Furthermore, no exceptional or compelling circumstances have been identified, either at the hearing or in the grounds, which would warrant a grant of leave outside the rules.

26. The appellant indicated that he feared returning to Egypt because of the general political unrest and the judge properly found that it was open to him to make an asylum application if he wished to do so.

Decision

27. The decision of the First-tier Tribunal does not contain any errors of law and it is upheld. The appeal is dismissed.

Anonymity

28. There has been no request for an anonymity order at any stage and I see no reason to make one.

Signed

R. Kekić

Upper Tribunal Judge

Date: 31 July 2020