



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002370

First-tier Tribunal No: HU/51680/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 15 July 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

KAMALJEET KAUR TOOR
(no anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Karnik, instructed by JML Solicitors
For the Respondent: Ms H Gilmour, Senior Home Office Presenting Officer

Heard at Field House on 30 June 2023

DECISION AND REASONS

1. The appellant is a citizen of India born on 27 December 1982. She appeals, with permission, against the decision of the First-tier Tribunal dismissing her appeal against the respondent's decision to refuse her human rights application for leave to remain on the basis of her private and family life in the UK under Appendix FM of the immigration rules.

2. The appellant arrived in the UK on 1 October 2020 with leave to enter valid until 22 July 2012 as a Tier 4 student. On 20 July 2012 she submitted an application for further leave as a Tier 4 student but that application was refused on 3 October 2012. On 18 December 2012 her application was reconsidered and she was granted leave to remain until 17 April 2014. She submitted a human rights application on 14 March

2014 which was refused on 11 August 2014 and, on the same date, 14 March 2014, applied for further leave as a Tier 4 student. On 5 December 2018 the appellant was served with removal papers, but those were removed on 16 January 2019 when challenged by the appellant on the basis that her application of 14 March 2014 was still outstanding, and the respondent then considered her application and refused it on 20 March 2019. The appellant appealed against that decision and her appeal was heard on 10 January 2020 by First-tier Tribunal Judge Joshi and dismissed on 7 February 2020. The appellant became appeal rights exhausted on 3 September 2020, after unsuccessfully applying for permission to appeal to the Upper Tribunal. She then applied again for leave to remain on 10 August 2020, and on 25 November 2020 varied her application to that of indefinite leave to remain. Her application was refused on 12 April 2021, giving rise to this appeal.

3. In the appellant's appeal heard on 10 January 2010, Judge Joshi considered the refusal decision of 20 March 2019, which relied on paragraph 322(1A) of the immigration rules based upon the appellant having fraudulently obtained her TOEIC certificate provided with her Tier 4 student application of 14 March 2014. In that decision the respondent considered that the appellant had used a proxy taker in her English language test and her scores had accordingly been cancelled by ETS. The appellant's husband, who was a dependent upon her application, was also an appellant before Judge Joshi. The appellant did not attend the hearing, but her husband did. An adjournment request was made based upon the appellant's ill-health, namely a combination of her suffering from fainting, dizziness and headaches, and her mental health. Judge Joshi noted that the appeal had been adjourned three times previously for the same reason and that there was no evidence before him to confirm that the appellant was unfit to attend. He refused to adjourn and the appeal proceeded without a representative, as the representative who had attended was only instructed on the adjournment request. Judge Joshi found that the respondent had provided sufficient evidence to satisfy the evidential burden of proof and also found that the appellant had provided an innocent explanation in response which satisfied the minimum level of plausibility. He concluded, however, that overall the respondent had satisfied the legal burden of proof and that the provisions of paragraph 322(1A) were met. He found that the respondent's decision refusing the applications of the appellant and her husband were proportionate and he accordingly dismissed the appeal.

4. In a letter dated 16 March 2021 in support of the appellant's subsequent application for indefinite leave to remain, her solicitors submitted that she had had lawful leave since entering the UK on 1 October 2020, under 3C of the Immigration Act 1971, as the ETS/ TOEIC cheating allegation was wrong and she therefore had to be put back to the position she would have been in had the error not occurred. Reliance was placed on the fact that the appellant had been unable to attend the hearing owing to ill-health and upon the Report of the All Party Parliamentary Group (APPG) on TOEIC which found that the respondent's evidence was not reliable.

5. The respondent's refusal decision, dated 1 April 2021, relied upon the previous decision under paragraph 322(1A) and the findings of Judge Joshi in concluding that the appellant's application fell for refusal under the general grounds for refusal and therefore did not meet the requirements of paragraph 276B(iii) of the immigration rules. The respondent considered, with regard to the appellant's family life with her husband, that there were no insurmountable obstacles to that family life being continued in India. The respondent considered further that there were no very significant obstacles to the appellant's integration in India and that she could not meet the requirements of paragraph 276ADE(1) of the immigration rules on the basis of her

private life. The respondent found there to be no exceptional or compelling circumstances outside the immigration rules on wider Article 8 grounds.

6. The appellant's appeal against that decision was heard in the First-tier Tribunal by Judge Shepherd on 7 March 2022 and was dismissed in a decision promulgated on 23 March 2022. The appellant and her husband gave oral evidence before the judge. It was noted that the appellant's husband had been granted indefinite leave to remain the previous year in a separate application. The appellant relied upon two pieces of evidence which had not been before Judge Joshi, namely medical evidence confirming that she had been unwell at the time of the previous appeal hearing and an article from the BBC about the ETS testing. Judge Shepherd considered that the medical evidence did not provide any basis for departing from Judge Joshi's decision. She had regard to the decision in DK and RK (Parliamentary privilege; evidence) India [2021] UKUT 61 as to the extent to which the appellant was able to rely on the APPG report, and found that that did not provide any basis for departing from Judge Joshi's decision. As for the BBC article, the judge considered that to contain generic comments on the ETS scandal but did not take the appellant's own case any further. The judge found accordingly that there was no good reason to depart from Judge Joshi's decision and she therefore concluded that the appellant failed to meet the requirements of paragraph 276B(i) and (iii). Judge Shepherd went on to consider Article 8 and found there to be no insurmountable obstacles to family life continuing in India for the purposes of Appendix FM and no very significant obstacles to the appellant's integration in India for the purposes of paragraph 276ADE(1). She found the respondent's decision to be proportionate and concluded that there was no breach of Article 8.

7. The appellant sought permission to appeal to the Upper Tribunal on two grounds. Firstly, that the judge had misapplied Devaseelan by failing to consider the appellant's new application on its own merits rather than proceeding on the basis that deception had been established as a result of Judge Joshi's decision, by treating the appeal as an appeal against Judge Joshi's decision, by failing to follow the proper approach as to how treat the appellant's absence from the first hearing and how her evidence should be treated, and by failing to take account of and make material findings on material evidence. Secondly, that the judge had erred in her approach when undertaking the balancing exercise under Article 8.

8. Permission to appeal was refused in the First-tier Tribunal, but was subsequently granted by the Upper Tribunal upon a renewed application. The respondent opposed the appeal in a rule 24 response.

9. The matter came before me for a hearing and both parties made submissions. I shall address the submissions in the discussion below.

Discussion

10. The appellant's first ground was a challenge to Judge Shepherd's application of the Devaseelan principles whereby Mr Karnik, relying upon the decision in LD (Algeria) v Secretary Of State For Home Department [2004] EWCA Civ 804, submitted that the judge had failed independently to consider the appellant's case on its own merits, and had failed to undertake a holistic assessment of the case taking all the evidence into account, but had simply relied upon Judge Joshi's decision and had used that decision as a gateway rather than as a starting point. However it seems to me that, on the contrary, Judge Shepherd's approach was entirely in line with that set out in Devaseelan. The judge was clearly fully aware of the approach she should take to

Judge Joshi's earlier decision, as she expressed at [77]. She directed herself appropriately at [78] on the principles in Devaseelan and she went on to consider whether there were good reasons not to follow Judge Joshi's decision, as she was required to do in accordance with the guidance given at [25] of AL (Albania) v The Secretary of State for the Home Department [2019] EWCA Civ 950.

11. Mr Karnik submitted that, had Judge Shepherd properly applied Devaseelan, she would have found that there was good reason to depart from the decision of Judge Joshi, for several reasons. He submitted that there was extensive oral evidence before Judge Shepherd which had not been the case before Judge Joshi, which included evidence that the appellant had started learning English at the age of four years, and, further, a detailed account of the circumstances in which she took the English language test. Mr Karnik submitted that that was important because the appellant had been unwell at the time of the hearing before Judge Joshi and that Judge Joshi had therefore not had the benefit of that oral evidence. Mr Karnik submitted that the appellant had provided a proper explanation as to why she was able to give evidence before Judge Shepherd but not before Judge Joshi, namely that her medical condition, which had prevented her from giving oral evidence previously, had since been diagnosed and was being controlled by medication by the time of the hearing before Judge Shepherd. However that was a matter considered by Judge Shepherd who had regard to the new evidence, namely a letter dated 11 February 2020 from Duncan Steet Primary Care Centre and a letter dated 15 January 2020 from Nuffield Health, and found that it did not support the appellant's claim. She noted at [50] that those letters had not been found by the Upper Tribunal, when refusing permission to appeal against Judge Joshi's decision, to have provided a proper reason for the appellant not having been able to attend the hearing at that time, and at [81] she found that neither letter explained why she was unfit to attend the hearing before Judge Joshi. As Ms Gilmour submitted, Judge Shepherd was perfectly entitled to accord the weight that she did to the two letters in assessing the credibility of the appellant's account of why she did not attend the hearing before Judge Joshi, which was in turn material to the question of the weight to be given to her evidence overall.

12. In any event Judge Shepherd clearly gave full consideration to the additional evidence provided by the appellant before her and provided proper reasons for concluding that it did not provide a proper basis for reaching a different conclusion to that reached by Judge Joshi and that it did not, therefore, amount to a good reason to depart from his decision. In so far as Mr Karnik relied upon the appellant's account, given in her oral evidence before Judge Shepherd, of the circumstances of the test and her attendance at the test, the judge found at [80] that the evidence before her was largely the same as that before Judge Joshi and, to the extent that it had been expanded upon before her, that new evidence was inconsistent and unreliable. In so far as Mr Karnik relied upon the appellant's account of, and evidence in support of, her English language ability in support of her claim to have had no reason to cheat in her test, Judge Shepherd addressed that matter at [79] and found that the evidence now before her took matters no further. Mr Karnik also relied upon the developments in the Panorama investigation and the realisation of the scale of the purported cheating since Judge Joshi's decision, as explained in the BBC report and the case of DK and RK (Parliamentary privilege; evidence) India [2021] UKUT 61, which he submitted supported a claim that the appellant was simply an innocent victim who had turned up at a dishonest college and was unaware that the test was being taken by someone else. That was particularly important, he submitted, because Judge Shepherd made adverse findings on the grounds that the appellant had not sought to obtain the voice recordings, whereas that would not have been of any relevance in the circumstances. However Judge Shepherd noted, at [80], that there was no objective evidence to

support the appellant's claim in that regard. Further, as Ms Gilmour submitted, the Tribunal in DK and RK (ETS: SSHD evidence, proof) India [2022] UKUT 112 found that the Secretary of State's evidence was amply sufficient to discharge the burden of proof. Indeed I note that the Tribunal said, at [129] of that case that "*In these circumstances the real position is that mere assertions of ignorance or honesty by those whose results are identified as obtained by a proxy are very unlikely to prevent the Secretary of State from showing that, on the balance of probabilities, the story shown by the documents is the true one.*"

13. In the circumstances it seems to me that Judge Shepherd undertook a full and holistic assessment of all the evidence in the round. I reject the assertion that she approached Judge Joshi's decision as "*res judicata*". On the contrary, she properly followed the principles in Devaseelan and took the decision as a starting point, going on to consider it in the context of the additional evidence before her and giving careful consideration to the weight to be accorded to the evidence. She provided cogent reasons for according the evidence the weight that she did and for concluding, ultimately, that there was no good reason not to follow Judge Joshi's decision. Accordingly the appellant's first ground is not made out.

14. There is also nothing of any merit in the second ground. The judge clearly undertook a full Article 8 proportionality balancing exercise, taking into account all relevant factors, from [103] to [107]. At [92] she gave detailed reasons for concluding that there were no insurmountable obstacles to the appellant's family life with her husband continuing in India, taking into account at [92((iii))] that he had been granted indefinite leave to remain in the UK. At [95] she gave full and cogent reasons for concluding that there were no very significant obstacles to the appellant's integration in India. All of those matters then formed part of her balancing exercise and were taken together with the public interest factors in favour of the appellant and those weighing against her. It was entirely open for the judge to conclude that the balance fell in favour of the public interest.

15. For all of these reasons I do not consider that any error of law arises from Judge Shepherd's decision. Her decision was based upon a full assessment of all the evidence in line with the relevant guidance and principles in Devaseelan, with cogently reasoned findings and conclusions. The judge was entitled to reach the decision that she did on the basis of the evidence available to her.

Notice of Decision

16. The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside. The decision to dismiss the appeals stands.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 June 2023