



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/17108/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 11th April 2019**

**Decision & Reasons Promulgated
On 29th April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

**DEEPAK [R]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Walsh of Counsel, instructed by Farani Taylor Solicitors
For the Respondent: Miss Jones, HOPO

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Judge Craft made following a hearing on 1st November 2018 at Hatton Cross.

Background

2. The appellant is a citizen of Nepal born on 10th December 1986. On 13th February 2018 he made a human rights claim in an application for leave to remain in the UK on the basis of his private life. The application was rejected by the respondent on 31st July 2018 and his appeal came before Judge Craft.

3. The appellant has a lengthy immigration history. He originally entered the UK on 7th September 2009 under a Tier 4 (General) Student visa which was valid until 31st May 2011. He then made an in time application for further leave which was refused on 22nd February 2013.
4. He appealed and the application was remitted back for reconsideration which took place on 22nd June 2015 when it was again refused on 11th March 2016. His subsequent appeal was dismissed.
5. One of the issues before the Judge was the respondent's contention that the appellant fell for refusal on the grounds of suitability under Section S/LTR under paragraph 276AD(1)(i) because ETS had a record of the appellant's TOEIC speaking tests taken on 22nd August 2012, on 18th September 2012 and on 27th November 2013. It was the respondent's view that the appellant's certificate was fraudulently obtained by the use of a proxy test taker.
6. The judge found in the appellant's favour in respect of that aspect of the appeal, and the respondent does not challenge his decision.
7. The judge dismissed the appeal in relation to private and family life grounds. At paragraph 33 she wrote as follows

“The exceptional circumstances relied upon by the appellant are the strength of his relationship with S, his cousin's teenage son who is now 16 years old. The Tribunal has given careful consideration to the totality of the evidence received by it and the representations made on behalf of the appellant on this point. The Tribunal notes that the respondent had taken into account the allegation that the appellant had used deception in reaching its decision on exceptional circumstances. The Tribunal stresses that it is satisfied that the respondent had every reason to be suspicious of the appellant's conduct because of the evidence as to widespread fraud at the colleges at which ETS records indicated the appellant had sat English tests. Their conclusion was clearly based on a careful assessment of detailed generic evidence. The Tribunal has had the advantage of receiving evidence from the appellant and has reached the decision set out above but that does not in any way amount to a criticism of the obviously careful consideration of the fraud issue undertaken by the respondent in this case. In its deliberations the Tribunal has redressed the balance of the matters under consideration by accepting that the appellant did not receive or make use of a certificate. However having done so the other reasons given by the respondent for the finding that there are no exceptional circumstances in this case accord with the Tribunal's own conclusions. S is living in a secure family unit with his mother and father. This may be enhanced by the appellant living with his family but that family unit will not be broken or substantially damaged by the appellant returning to Nepal and he will still be able to remain in communication with S by all the means that are available to them. S himself is of an age when he will becoming more independent of family ties in future years. The question for the Tribunal taking full account of all considerations weighing in favour of the refusal is whether the prejudice to the appellant's family and private life is of a

manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8 and the Tribunal has concluded that it is not sufficiently serious to amount to such a breach. The Tribunal was satisfied that Article 8 is engaged and that the action of the respondent interfered with it but is satisfied that the respondent has shown that the interference was lawful and was necessary in the pursuance of the interests of immigration control and that the interference was proportionate to that interest. Therefore the appellant's appeal must be dismissed."

The Grounds of Application

8. The appellant sought permission to appeal on the grounds that the judge had erred in failing to record that the appellant's Counsel had made an application for an adjournment to allow for the appellant's family members to give oral evidence in support of his family life in the UK. The judge refused the application but no mention of it appears within the determination and no reasons for the refusal of that application has been provided.
9. Second, it was argued that the judge had failed to have regard to the appellant's family life and third that the judge had failed to have regard to the previous 2017 determination which ought to have provided her starting point.
10. Permission to appeal was granted by Judge Kelly on 22nd January 2019.
11. On 8th April 2019 the respondent served a reply accepting that the representative had made an application for an adjournment request but submitting that the error in not referring to it in the determination was immaterial.

Submissions

12. Mr Walsh relied on his grounds. In essence he submitted that the judge's overall conclusions were reached without having the benefit of oral evidence. She had made findings in the appellant's favour, accepting that Article 8 was engaged and it would have been assisted her considerations, had live oral evidence been given.
13. Miss Jones submitted that the judge's failure to record the adjournment application was immaterial and the decision should stand.

Findings and Conclusions

14. Clearly the judge ought to have recorded in her determination that an application for an adjournment had been made and should have set out her reasons for refusing it. However the error is not material since she did in fact accept the evidence as set out in the witness statements which were before her from the appellant's cousin and from his cousin's husband and from S himself.

15. Those statements attest to the closeness of the appellant to S. They state that S confides in him and the appellant takes him to play cricket and to watch football. He brings stability to his life and looks on him as a role model. The appellant helps him with his homework and they do a lot of physical activities together, in particular helping him to play football and cricket and keeping himself in good physical condition.
16. None of this evidence was contested by the judge. She accepted that there was a close relationship between the appellant and S. However she balanced that by recording that the appellant himself had close family in Nepal. Moreover S himself is about to become more independent of family ties and in any event his family ties will not be broken by the appellant's removal.
17. So far as private life is concerned Mr Walsh accepted that the appellant's private life had always been precarious and therefore ought to be given little weight. He also acknowledged that he was in difficulty since according to his own note the appellant's representative had objected to the previous determination being put in by the respondent. It is therefore not open to the appellant now to argue that the judge erred in law by accepting the appellant's arguments at the hearing.

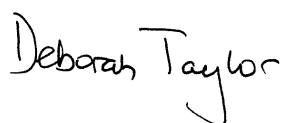
Decision

18. The judge did not err in law.
19. The decision stands.
20. The appellant's appeal is dismissed.

No anonymity direction is made.

Signed

Date 24 April 2019



Deputy Upper Tribunal Judge Taylor