



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)**

APPEAL NUMBER: IA/01608/2016

THE IMMIGRATION ACTS

**Heard at: Field House
On: 22 January 2018**

**Decision & Reasons Promulgated
On: 31 January 2018**

Before

Deputy Upper Tribunal Judge Mailer

Between

**MR BIBHUTI TAMRAKAR
ANONYMITY DIRECTION NOT MADE**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: In person

For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal Judge promulgated on 25 September 2017 dismissing his appeal against the respondent's decision to refuse him leave to remain as a student.

2. A section 120 notice under the Nationality Immigration and Asylum Act 2002 was served on the appellant. The appellant gave notice of appeal on 20 March 2016, citing his reliance on Articles 3, 6 and 8 of the Human Rights Convention.
3. The First-tier Judge dismissed his appeal against the refusal of further student leave under the Rules. He noted that his appeal also contended that there would be insurmountable obstacles to his return to Nepal because of the post earthquake situation there. He noted his wife's outstanding appeal before the Court of Appeal; he stated that the best interests of his daughter had to be taken into account under s.55 of the Borders, Citizenship and Immigration Act 2009.
4. In dismissing his appeal the Judge noted at [11] that their leave had always been precarious. Paragraph EX.1 of Appendix FM did not apply. Nor did he satisfy the private life requirements under paragraph 276ADE of the Rules. The earthquake in Nepal has caused great hardship but he did not accept that it has caused insurmountable obstacles to his return to Nepal where he has several close family members, or that it amounts to exceptional circumstances warranting consideration of his Article 8 rights outside the Rules. At most it would be a reason for considering compassionate leave but this is a matter for the secretary of state alone.
5. In granting permission to appeal the First-tier Tribunal Judge Hollingworth stated that it was arguable that the appellant and his wife would face very serious hardships, in the light of the factors explained by the appellant. The 'concatenation of circumstances' in his case set in juxtaposition to the content of the Immigration Rules enabled the Judge to proceed to consider whether there would be a breach of Article 8 outside the Rules. The Judge however declined to take that course.
6. At the commencement of the hearing of 22 January 2017, Mr Jarvis accepted that the First-tier Judge had erred. In particular there were no specific reasons or findings made with regard to paragraph 276ADE(vi) of the Rules. The Judge referred to "insurmountable obstacles" which was not the test. There is a different applicable test, namely "very significant obstacles."
7. Nor did the Judge deal with the fact that the appellant's wife had an appeal before the Court of Appeal which had not been decided yet. (I was informed that as at the date of hearing it had still not been heard, albeit that a date has been scheduled).
8. Mr Jarvis stated that this was relevant as the Judge was required to deal with the position of whether the appellant would be required to separate from his family pending the outcome of his wife's appeal. The effect on the rest of the family, including the child, was not considered.
9. Nor was the Judge precluded from considering the compassionate leave in this case, having regard to the circumstances.
10. In the circumstances, Mr Jarvis submitted that the Article 8 claim needs to be reconsidered. There are unusual features applicable in this case which have not been properly considered.

Assessment

11. Mr Jarvis has very fairly and properly accepted that various matters relevant to the appellant's appeal had not been fully considered by the Judge. In particular, no consideration was given as to the potential separation of the family, including their child, in the event that his appeal, which included a decision to remove him, were dismissed.
12. In the circumstances I set aside the decision of the First-tier Tribunal. The parties agreed that in that event, a fresh decision would have to be made. The appellant accepts that the case should be remitted to the First-tier Tribunal for the hearing.
13. I am satisfied that the extent of the judicial fact finding which is necessary for the decision to be re-made is extensive. I have had regard to the overriding objective and conclude that it would be just and fair to remit the case.

Notice of decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside.

The appeal is remitted to the First-tier Tribunal (Hatton Cross) for a fresh decision to be made by another Judge.

No anonymity direction made.

Signed

Date 29 January 2018

Deputy Upper Tribunal Judge C R Mailer