Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/30303/2015**

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A/33213/2015

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A/33216/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30th August 2017	**On 04th October 2017**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THUSHYANTHAN THANGAVEL (FIRST APPELLANT)
KAVITA THUSHYANTHAN (SECOND APPELLANT)
U T (THIRD APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: No appearance
For the Respondent: Mr N Bramble

DECISION AND REASONS

1. The appellants appeal, with permission, against the determination of First-tier Tribunal Judge Nicholls who dismissed their appeal against the Secretary of State's refusal of their application for leave to remain outside the Immigration Rules.

2. The appellant, his wife and child are nationals of Sri Lanka who entered the United Kingdom on 13th September 2010 with entry clearance for the first appellant as a student. Thereafter his leave was extended until it was curtailed on 20th May 2013. He was again granted leave in the capacity of student until 28th February 2015 and on that date he made an application for leave to remain on the basis that he had "always aspired to obtain a PhD in my area of study". He asked for his application to be put on hold or for a grant of leave to remain outside the Immigration Rules to enable him to enrol at a later date.

3. First-tier Tribunal Judge Nicholls noted at paragraph 2 of his determination that none of the three appellants attended the hearing of the appeal on 24th November 2016.

> *"2. None of the three Appellants attended the hearing of the appeal on 24 November 2016. They had not notified of any legal representative in the UK. Notice of the date, time and place of the hearing was sent to the first Appellant on 18 November 2015 and to the second and third Appellants on 11 July 2016, all to the last known address shown on the notices of appeal. No alternative address had been provided by the Appellants. No message or explanation for their absence was received prior to calling the case on the scheduled date of hearing. With the consent of the Respondent, this appeal is now decided on the basis of the documents provided by both parties".*

4. The appellants applied for permission to appeal against the decision on the basis that the judge had made a significant error of law by hearing the case in the absence of the main appellant and his family members. The appellant accepted that he did not turn up for the hearing but he disputed he did not provide an explanation for his absence and states:

> *"In fact I have sent a fax to Taylor House to the fax number provided in the notice of hearing explaining the reason for my incapacity to be present during the hearing namely the severe injury I suffered in my left knee and ankle by falling from the stairs".*

5. He added that he was an appellant in person and did not have legal representation so it was crucial for him to attend the hearing. He did not have the skill to represent his case and would have relied on oral submissions.

> *"When I had the accident and following it had to be on complete bed rest for at least fifteen days, I have no other way but to request an adjournment of the hearing and to reschedule for a later date to allow me to have access right to justice".*

The appellant added that the judge had made an error of law by not taking his request and compelling circumstances into consideration.

6. Permission was granted on the basis that the medical evidence supplied by the appellant in his application for permission to appeal did cover the date of hearing.

7. The Secretary of State was not represented at the hearing before the First-tier Tribunal.

8. At the hearing before me Mr Bramble relied on the Rule 24 notice submitted by the Secretary of State and opposed the appellant's appeal. The First-tier Tribunal Judge directed himself appropriately and there was nothing attached to the respondent's copy of the grounds of appeal to show that a fax was sent to the Tribunal as stated in the grounds of appeal. That was a matter that the appellant would have to establish by way of documentary evidence.

Conclusions

9. The appellant did not attend the hearing before me. He was notified of the date of the hearing before the Upper Tribunal on 19th July 2017. He made an application for an adjournment on 29th August 2017 (the appeal hearing was 30th August 2017), stating that he wished to have representation as his case was complicated and exceptional but he was not in a financial position to pay a representative. That application was refused by the Upper Tribunal on 29th August 2017. The case is not complicated. I considered that it was in the interests of justice for the hearing to proceed before me on 30th August 2017 on the basis that the appellant was clearly aware of the date, time and venue of the hearing and could have attended in person himself to make representations as to the evidence he would have placed before the judge and therefore underlining the error of law made. He did not. The best person to give evidence as to his circumstances was the appellant and he chose not to attend. At no point was the appellant advised that the hearing would not proceed before the Upper Tribunal.

10. I turn to a consideration of whether there was an error of law in the Decision of the First-tier Tribunal Judge. He considered the grounds of the appellant's private life appeal and noted that this has been developed whilst he was in education. The judge added at paragraph 9 of his decision:

> *"9. Like much of the grounds of appeal, the comments which the Appellant made are now somewhat out of date. The current provision is that the Immigration Rules deal with all relevant article 8 aspects unless there are additional exceptional or compelling factors revealed by the evidence. There are no such factors in this appeal, not least because the Appellant has not submitted any evidence in support of these appeals. The immigration history set out by the Respondent in the reasons for refusal letter shows that the first Appellant has been in the UK as a student from 13 September 2010 until the expiry of his last*

leave on 28 February 2015, even though there was at one time a problem because the sponsor licence of his college was surrendered. He has, therefore, a good immigration record. He said in his original application form at section 3 that he had completed an MSc in information technology but wanted to go on to study for a PhD in IT. The first Appellant has, therefore, a high-grade academic qualification even if it may not be of the final standard that he wished. As the Respondent rightly pointed out, if he wishes to pursue another course of study it is open to him to make a new application for entry clearance.

10. ***There is no other evidence about the circumstances of this Appellant or of his wife and son.*** *I have no information about the child other than his date of birth on 29 February 2012, making him now four years old. There is no question of him being separated from either of his parents and if enforced removal takes place, it is clear this family would be removed together. There would be no interference with the family life. Taking into account the provisions of paragraph 276ADE, none of the Appellants would qualify under any of the provisions except for, possibly, sub-section (vi) but there is no evidence of any difficulties in this family reintegrating in Sri Lanka, let alone difficulties of any seriousness. There is no indication that there are any aspects of their life in the UK which cannot be adequately and properly replicated in Sri Lanka and no basis for a claim that it would be in any way unreasonable for this family to return to their country of nationality".*

In sum, the judge at paragraph 12 set out the following:

"12. I find, therefore, that the decision of the Respondent refusing leave to remain on grounds outside the Immigration Rules was a proper and justified interference with the private lives that will, certainly, have been developed in the UK over the last six years. The first Appellant is not close to the end of a course of study which it would be reasonable for him to complete. His desire is to start a new course of study which, so far as the evidence before me shows, has not been arranged. He can make those arrangements from Sri Lanka if he wishes to do so. Although there would be an interference with the private lives of all three Appellants, they do not qualify under the provisions of paragraph 276ADE and there are no compelling or exceptional factors which would require a separate consideration outside the terms of the Immigration Rules".

11. Did the judge procedurally err in failing to adjourn the hearing? **Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) clearly sets out the principles to be applied** in relation to adjournments and the head note of which reads:

> *". In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284.*

12. I have taken into account the concept of fairness and the overriding objective.

13. First, I am not satisfied that there was indeed documentary evidence before the judge by the date of the hearing to explain the appellant's absence or requesting an adjournment. Overall I am not persuaded that by the date of the hearing the appellant had notified the Tribunal of his request for an adjournment, the surgery stamp on the medical certificate is illegible. There is a stamp at the bottom of the letter dated 23rd November 2016 but it is not clear to where this was sent.

14. On file was a note of the letter sent by the appellant to the First-tier Tribunal and which purports to be dated 23rd November 2016. On the letter is written by First-tier Tribunal Judge Nicholls:

> *"Received by First-tier Tribunal Judge Nicholls at 10:45 a.m.* ***Tuesday 29th November 2016*** *– by which time decision completed, filed and file posted back to TH". 29.11.16.* [the hearing was on 24th November 2016]

That note is signed by the judge.

15. There is no indication of any date stamp as to when this letter requesting an adjournment and indicating a knee and ankle injury was received by the Tribunal. I can see the medical certificate attached but that certificate purports to date from 22nd November 2016 but exempts him from work from 20th November 2016. This would mean the certificate itself was backdated. The radiology notes which are attached indicate that they are dated 21st November 2016 but also indicate that the appellant had the fall at least two weeks prior to the radiology report, which would date the injury from 7th November 2016.

16. It is clear from the documentation that it contrasts with the grounds of application for permission to appeal whereby the first appellant states he had to have complete bed rest following the accident "therefore, when I had the accident and following it had to be on complete bed rest for at least fifteen days". If that was correct the appellant could have attended the First-tier Tribunal hearing. According to the medical records provided, the appellant had the accident on 7th November 2016 and the appeal hearing before the First-tier Tribunal Judge was 24th November 2016.

17. I have also taken into account the overall circumstances of this appeal. I note from the file that on 11th July 2016, at least four months before the First-tier Tribunal hearing, the appellant was given a direction that he should send all copies of any evidence on which he intended to rely in support of his appeal. The appellant and his wife submitted no further evidence. In relation to the evidence before the judge, the appellant was clearly able to write a letter to the Tribunal requesting an adjournment but apparently unable to submit a witness statement

18. There is mention that in his grounds of appeal to the Upper Tribunal that he did not have the skill to represent his case by writing any grounds but it is clear that he was able to write sufficient and coherent grounds to submit an appeal to the First-tier Tribunal. The appellant is clearly able to put pen to paper and to have written a witness statement and failed to do so.

19. Secondly and furthermore, the second main appellant, his wife, did not attend the hearing either and there was no explanation for her absence. There was no indication she had any problems or that she could not have attended to give evidence. In my view, the judge was entitled against the background and context of the appeal, which I have set out above, to proceed in the manner that he did.

20. It was open to the judge to proceed on the evidence that he did and I find no error of law and the decision shall stand.

No anonymity direction is made.

Signed Helen Rimington Date 3rd October 2017

Upper Tribunal Judge Rimington