**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Numbers: IA/32940/2015**

**IA/32942/2015**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 27 July 2017** | **On 08 August 2017** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE LATTER**

**Between**

**NG**
**SG**
(ANONYMITY DIRECTIONS MADE)

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr D Shrestha, Counsel.
For the Respondent: Mr E Tufan, Home Office Presenting Officer.

**DECISION AND REASONS**

1. This is an appeal by the appellants against a decision of the First-tier Tribunal dismissing their appeals against the respondent's decision of 24 September 2015 refusing the first appellant's application for leave to remain as a general student and the second appellant's application as his dependent wife.

2. The first appellant ("the appellant") is a citizen of Nepal born on 25 January 1991 and the second appellant is his wife, also a citizen of Nepal and born on 31 December 1988. They were initially granted leave to enter the UK on 9 March 2011 until 28 June 2013. On 24 April 2013, they applied for further leave to remain but their applications were refused on the basis that the appellant had fraudulently obtained his TOEIC certificate by using a proxy to take the test. Further, the appellant had provided a CAS, valid when issued, but his college had had its licence revoked and for this reason he was not entitled to any points under Appendix A of the Immigration Rules ("the Rules").

3. The appellants appealed to the First-tier Tribunal and their appeal was listed for hearing on 1 November 2016. At that hearing an application was made for an adjournment, firstly on the basis that their representative had only been instructed the previous day and whilst he had the appellants' bundle of documents, he did not have the respondent's bundle. The judge put the matter back for the representative to take instructions and for the Tribunal to arrange for copies of the respondent's documents to be provided with a view to the hearing re-starting in the afternoon.

4. Shortly after the first application, the appellants applied for an adjournment on the basis that in the previous week the decision in SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229 had been heard in the Court of Appeal and it was the representative's understanding that the respondent had indicated that she did not intend to pursue her appeal and would be changing her policy. However, the representative was unable to refer to any record of what had happened in the Court of Appeal and the matter was put back again.

5. Then yet another application for an adjournment was made on the basis that the respondent sought to rely on a report from Professor French but this had only been served on the day of the hearing. The judge considered the applications on the various grounds put forward and decided that a fair hearing was still possible. He heard evidence from the appellants and considered the statements and reports relied on by the respondent. He found that the onus of showing that the appellant had used a proxy had been discharged and the appeal was dismissed.

6. In the grounds it is argued that the judge erred in law by refusing the adjournment applications, had further erred by finding that the respondent could discharge the initial burden of showing that on the face of it there was evidence of deception but in any event the appellant had given a plausible innocent explanation and the respondent's evidence was not sufficient to discharge the legal burden. Finally, it is argued that the judge failed to consider article 8 outside the Rules and in particular failed to take into account the best interests of the appellants' young child.

7. At the hearing before me Mr Shrestha adopted his grounds. Mr Tufan indicated that he did not seek to resist the appeal as there must be concerns arising from the fact that the respondent had sought to rely on

an expert report produced on the day of the hearing and secondly, the judge had failed to give any or any adequate consideration to the best interests of the appellants' child.

8. I agree that Mr Tufan's concession is rightly made. The fact that the appellants' representative did not have the respondent's bundle would not have justified an adjournment nor would the fact that there had been a hearing in the previous week before the Court of Appeal in SM and Qadir. However, the fact that the respondent was seeking to rely on an expert report from Professor French produced on the day of the hearing to supplement the statements of Mr Millington and Ms Collings about how proxy tests were detected satisfies me that the appellant was entitled to an adjournment and, in the light of the issues raised in this appeal, was disadvantaged by the failure to grant one. I further accept the submission that the judge erred by finding at [47] that there were no circumstances requiring him to consider the appeals outside the Rules when the appellants were parents to a child born in the UK on 26 July 2012. His best interests were relevant to the assessment of article 8 and did merit consideration outside the Rules.

9. In these circumstances, I am satisfied that the proper course is for the decision to be set aside and for the appeal to be remitted to the First-tier Tribunal for a fresh hearing before a different judge.

Decision

10. The First-tier Tribunal erred in law such that the decision is set aside. The appeal is remitted to the First-tier Tribunal for a full rehearing by a different judge. The anonymity order made by the First-tier Tribunal remains in force until further order.

Signed H J E Latter Date: 7 August 2017

Deputy Upper Tribunal Judge Latter