Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/18970/2018**
HU/20852/2018
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THE IMMIGRATION ACTS

Heard at Field House **Decision and Reasons Promulgated**
On 21 October 2019 **On 23 October 2019**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

SUJATA [K]
ISHOR [R]
[A R] (A MINOR)
[ANONYMITY ORDER NOT MADE]
Respondents

Representation:
For the appellant: Mr Steven Kotas, a Senior Home Office Presenting Officer
For the respondents: Ms M Gherman, Counsel instructed by Farani Taylor Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimants' appeals against the Secretary of

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State's decision on 31 August 2018 to refuse them leave to remain on human rights grounds.

2. The claimants are Nepalese citizens, a husband and wife and their 6 year old daughter.

Background

3. The following chronology is extracted from the Secretary of State's refusal letter, the other documents in the Home Office bundle, and the evidence recorded in the First-tier Judge's decision, all of which would have been before the First-tier Judge.

4. The principal claimant married the second claimant in June 2008 and came to the United Kingdom to pursue her accounting and marketing studies here. They entered the United Kingdom as a Tier 4 student migrant and dependant on 28 January 2010, just under 10 years ago (the second claimant's passport contains a dependant Tier 4 visa in line with that of his wife). They both had leave to remain on that basis until 23 June 2014 but unfortunately, the principal claimant's College lost its sponsor licence and she was unable to obtain another CAS despite being given the usual 60-day letter and an opportunity to do so.

5. The principal and second claimants have had no valid leave to remain since her curtailed leave expired on 23 June 2014. The second claimant has had some health problems arising from osteoarthritis and hip surgery.

6. In November 2010, the third claimant was born here. She is a Nepalese citizen. In November 2011, when she was just a year old, the third claimant returned to Nepal to live with her grandparents there.

7. The principal and second claimants have relatives in Nepal, who do not provide them with financial support. The family are not able to maintain themselves in the United Kingdom and are depending on financial support from friends here.

8. The principal claimant's parents live near Kathmandu, and the second claimant's live in east Nepal, in a joint household with his married brother, who has two children. The principal claimant also has a widowed grandfather living in Nepal, and two brothers, one of whom lives with her grandfather, and the other in separate accommodation.

9. In October 2016, the third claimant returned to the United Kingdom to join her parents, accompanied by the grandfather. The child was becoming too much for him. They entered on a family visit visa valid for 6 months, which expired on 4 April 2017. It appears that the child began to attend school immediately, as school records exist from the end of 2016. She has

not had very much time at school here and there is no other evidence of her having developed links outside the family.

10. The third claimant did not return to Nepal in April 2017 with her grandfather and became an overstayer, albeit this was not of her making. She has remained in the United Kingdom without valid leave since then.

11. The third claimant has spent a total of one year just after her birth and 6 months in 2016/2017 lawfully in the United Kingdom, and a further 11 months unlawfully before the decision under challenge. It is accepted that she is not a qualifying child.

12. The principal claimant made four attempts to regularise the family's immigration situation after the expiry of her student leave on 23 June 2014. On 23 June 2015, she made an application for leave to remain outside the Rules which was refused on 28 September 2015 and was not challenged.

13. On 25 August 2017, the claimants made an application for leave to remain as a Tier 2 (General) Migrant and dependant which was refused on 10 August 2017 and the refusal maintained, following administrative review, on 15 September 2017.

14. On 25 September 2018, the couple made an application for leave to remain as Tier 1 (Entrepreneur) Migrants which was refused on 26 January 2018 and the decision maintained on 3 March 2018.

15. On 14 March 2018, the claimants made a further human rights claim under Article 8 ECHR on the basis of family and private life which was refused on 31 August 2018. That is the decision under challenge in this appeal.

Secretary of State's decision (31 August 2018)

16. In her refusal letter, the Secretary of State noted that the second claimant was neither a British citizen, nor was he settled in the United Kingdom as a refugee or by way of humanitarian protection. The claimants' claim was considered and rejected on the basis that the claimants could not bring themselves within the Rules because the principal claimant had spent only 8 years here, and her daughter even less. The family were being supported in the United Kingdom by friends and extended family here.

17. The Secretary of State did not accept that the claimants had demonstrated very significant obstacles to returning to Nepal as a family and reintegrating there. The claimants had all spent the majority of their lives there, and in the case of the principal and second claimants, their formative years. They would have the advantage of skills and knowledge

developed in their time in the United Kingdom to assist them in resettling in Nepal on return.

18. The Secretary of State did not consider that there were any exceptional circumstances for which leave to remain should be granted outside the Rules with reference to Article 8 ECHR. She considered that no unjustifiably harsh consequences of return had been demonstrated. In particular, she considered the situation of the claimant's daughter who although aged 7 had lived in Nepal until the age of 6. The Secretary of State considered it reasonable for the child to return and go to school in Nepal.

19. The Secretary of State considered the claimant's assertion that she was 6 months pregnant with her second child (in August 2018) but considered that there was no evidence that she was unable to travel nor that there was any medical reason why she should not return to Nepal and give birth to her second child there.

20. The claimants appealed to the First-tier Tribunal.

First-tier Tribunal decision

21. The First-tier Judge had no Home Office Presenting Officer to assist her at the hearing. She heard submissions from Ms Gherman to the effect that 'there was uncertainty whether [the first and second claimants] were overstayers and living illegally in the United Kingdom'. I find it difficult to understand why there was thought to be any uncertainty, given the chronology I have set out above, which was plain from the Home Office documents.

22. The First-tier Judge accepted the claimants' account as truthful but found that the claimants could not bring themselves within the Rules. Ms Gherman did not rely at the hearing on Farani Taylor's assertion in section 120 grounds that leave should be granted on a discretionary basis.

23. The Judge went on to consider Article 8 outside the Rules, by way of a full *Razgar* 5-step assessment. She noted that the second claimant had been a charge on the public purse as he had significant NHS treatment during his time here, but did not consider that the proposed interference with the family's private life was proportionate and allowed the appeal.

24. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

25. The Secretary of State argued that the First-tier Judge had failed to give adequate weight to the public interest under section 117B and that the children (the second child now having been born) were not qualifying children and that no exceptional or compelling circumstances for the grant of leave to remain outside the Rules had been identified.

26. Permission to appeal was granted by Upper Tribunal Judge Martin on the basis that it was arguable that the First-tier Judge had erred in allowing these appeals outside the Immigration Rules without identifying the justification for so doing, having found no insurmountable obstacles to the continuation of family life in Nepal.

Rule 24 Reply

27. There was no Rule 24 Reply on behalf of the claimants.

28. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

29. For the Secretary of State, Mr Kotas relied on the grounds of appeal and noted that there was in the First-tier Tribunal's decision no self-direction as to the requirement of unjustifiable harshness for the grant of leave to remain outside the Rules.

30. For the claimants, Ms Gherman argued that the First-tier Judge was entitled to decide as she had. The principal claimant and her husband had acquired 9 years' residence in the United Kingdom at the date of decision. They met the (neutral) requirements of subsections 117B(2) of the Nationality, Immigration and Asylum Act 2002 (as amended).

31. Ms Gherman acknowledged that sub-paragraphs 117B(3), (4) and (5) were not of assistance to the claimants, and that subsection 117B(6) was inapplicable, but argued that the First-tier Tribunal was entitled to reach the decision it had and that sufficient reasons had been given for the decision. She contended that the Secretary of State's appeal was no more than a disagreement with the findings of the First-tier Judge.

32. Ms Gherman relied on the concise summary of the relevant considerations in *GM (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ at [24]-[32]. She had not brought a copy of that decision, but I decided to reserve my decision in order to consider the *GM* judgment. I now give my decision in these appeals.

Analysis

33. The first point is that the First-tier Judge's finding of fact, that she was unsure of the length of overstaying, cannot be sustained. The situation is clear: the principal and second claimants overstayed from 23 June 2014 and the third claimant, although she was born when her mother had leave to remain and returned to Nepal during the currency of that leave, re-entered as a visitor, but immediately began attending school and overstayed from 4 April 2017, when her 6-month visit visa expired. Of course, that is not her fault: a 6-year old does not make decisions as to where she lives or whether she goes to school, but the principal claimant and her husband would have been well aware that not only were they overstayers, but that their daughter had no leave to remain.

34. I begin by considering the effect of part VA of the Nationality, Immigration and Asylum Act 2002 (as amended). Section 117A requires a court or Tribunal to consider the 'public interest question' that is to say, whether an interference with the right to respect for family and private life is justified under Article 8(2).

35. Sub-section 117B(1) states that the maintenance of effective immigration controls is in the public interest. Section 117B(2) says that it is in the interest of the public and the economic wellbeing of the United Kingdom for persons wishing to enter or remain here to speak English. These parties do speak English but that is neutral in relation to this application.

36. Sub-section 117B(3) states that it is in the public interest for persons wishing to enter or remain to be financially independent. These parties are not: they do not have permission to work and are depending on financial assistance from friends in the United Kingdom.

37. Subsection 117B(4) states that little weight can be given to a private life developed when a person is in the United Kingdom unlawfully. That was the case for the principal and second claimants from June 2014 to the date of decision in August 2014, that is to say for over 4 years. For the third claimant, she has been in the United Kingdom unlawfully since April 2017.

38. Subsection 117B(5) states that little weight can be given to a private life which was developed while a person was in the United Kingdom precariously. These claimants have been precariously in the United Kingdom, on student and dependant leave, for all of the time when they were not here unlawfully.

39. It follows that little weight can be given to these claimants' private life. The family life between these claimants and the new baby will not be affected since there are at present no removal directions and if removed, they would be removed as a family unit. The children are at an age where their best interests are to be with their parents.

40. I have considered the summary in *GM* to which I was referred by Ms Gherman. I do not recite it here. I note, particularly, that at [29] the Court states that the proportionality test is to be applied to the circumstances of the particular case, evaluated in a real-world sense, and that there is a requirement for proper evidence (see [30]). There was very little evidence before the First-tier Judge of strong social family or social ties in the United Kingdom; on the other hand, there is a significant extended family in Nepal to whom this family retains ties, as the evidence indicated.

41. There was no evidence of significant obstacles to their returning to Nepal and reintegrating there. The principal claimant has a number of qualifications obtained here which she could use on return, and they have a wider family to support them as they settle back in to their country of nationality. All members of the family had lived most of their lives in Nepal.

42. I am satisfied, having reviewed the evidence before the First-tier Judge, that her conclusion that the appeals should be allowed outside the Rules is perverse, because it fails to give sufficient weight to the public interest or to strike a proper balance between that interest and the relatively weak ties which this small family has developed to the United Kingdom.

43. I therefore set aside the decision of the First-tier Tribunal and remake the decision by dismissing all three appeals.

DECISION

44. For the foregoing reasons, my decision is as follows:

    The making of the previous decision involved the making of an error on a point of law.

    I set aside the previous decision. I remake the decision by dismissing the claimants' appeals.

Signed Judith AJC Gleeson Date: 21 October 2019
Upper Tribunal Judge Gleeson