Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/25837/2013
IA/25838/2013
IA/25839/2013
IA/25840/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1st May 2014	**On 2nd May 2014**
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Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MR MIN PRASAD KHAREL
MISS YOGITA KHAREL
MRS BIJULA KHAREL
MASTER YASH KHAREL

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Jusmount & Co, Solicitors
For the Respondent: Ms A Everett (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This matter came before me on 12th March 2014 when I decided:-

(i) "This is an appeal to the Upper Tribunal, with permission, by the Secretary of State. However, for the sake of continuity and clarity I shall continue to refer to the Secretary of State as the Respondent and to the Kharel family as the Appellants.

(ii) The Appellants are citizens of Nepal and are husband, wife and their two children. The eldest child born in 2003 was born in Nepal and came to the UK aged three in 2006. The other was born in the UK in 2007. The husband first came to the UK in 2004 as a work permit holder. His wife and eldest child joined him in 2006.

(iii) Apart from a period of some eight months the family have been in the UK lawfully.

(iv) They made an application to the Secretary of State for indefinite leave to remain prior to the introduction of the new Immigration Rules. The Secretary of State refused the application on 6th June 2013.

(v) The Appellants appealed and their appeals came before the First-tier Tribunal (Judge Creswell) sitting at Newport on 8th January 2014. Having heard the appeals Judge Creswell allowed the appeals on Article 8 grounds.

(vi) The Secretary of State sought and was granted permission to appeal to the Upper Tribunal. The Secretary of State's grounds are that the First-tier Tribunal erred in law in its approach to the Article 8 assessment. It failed to take into account MF (Nigeria) [2013] EWCA Civ 1192 which, she argues, indicates that the Immigration Rules are a complete code, Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) which, she argues, indicates that an Article 8 assessment should only be carried out under the ECHR where there are compelling circumstances not recognised by the Rules and also Nagre [2013] EWHC 720 (Admin), which indicates that an appeal should only be allowed where there are exceptional circumstances.

(vii) The Secretary of State also asserts that the First-tier Tribunal misdirected itself in finding that the best interests of one of the children made removal of the Appellants disproportionate as the child had spent less than seven years in the UK and would be returning to Nepal with her parents.

(viii) The Secretary of State also argued that the First-tier Tribunal failed to give adequate reasons why it was in the best interests of the children to remain in the UK and why they could not continue their private and family life together in Nepal on the basis they are young enough to adapt with the support of their parents and that many children throughout the world move countries in the middle of their education.

(ix) Before me Ms Holmes relied on the grounds. On the Appellants' behalf Mr Hussein argued that the determination was not flawed or tainted by error of law. The Judge quite properly took the view that the length of time in the UK (10 years) was a substantial period of time; that the eldest child now aged 10 was only three on arrival and the Judge was entitled to find that if an

application was made by that child under paragraph 276ADE of the Immigration Rules it was likely to succeed. He argued the circumstances in this case were compelling such that the Judge was entitled to consider Article 8 outwith the Immigration Rules.

(x) I find that the First-tier Tribunal's treatment of Article 8 was flawed and must be set aside for the following reasons.

(xi) The First-tier Tribunal has found both that the new Rules do not apply because the application preceded them but then considered them, in particular paragraph 276 ADE which the judge felt assisted the eldest child. It seems to me that this application being made prior to the new rules coming into force and in the absence of transitional provisions rendering them retrospective, they cannot have application to this case. However, where they have relevance is that they give a clear indication of Parliament's view of what is and is not proportionate in immigration cases. The Judge in this case has, I find, in considering where the best interests of the children lie and the weight to be attached to them wholly failed to consider that these children are Nepalese as are their parents. They do not meet the Immigration Rules to permit them to remain and unlike British children they could have no expectation of being permitted to enjoy the benefits of life in the UK. The distinction to be drawn between British children and non-British children is made clear in Zoumbas [2013] UKSC 74. This was not taken into consideration by the First-tier Tribunal.

(xii) In suggesting that the eldest child met the requirements of paragraph 276 ADE on the basis that she was aged ten at the date of hearing and had been in the UK seven years the Judge erred. Paragraph 276ADE applies only when a child has been in the UK for seven years at the date of application. Additionally the Judge failed to give reasons why the child would meet the second requirement of the Rule, namely that it would be unreasonable to expect her to return to Nepal. She would be returning with her parents and sibling to the country of her nationality and heritage. In failing to take into account the Supreme Court case of Zoumbas in particular and failing to give adequate reasons as to why the family should not return to the country of their nationality and culture I find the First-tier Tribunal made an error of law. As this case was about Article 8 only, that error was fundamental and material to the outcome which means that the determination must be set aside in its entirety to be redecided.

(xiii) Both representatives before me indicated that the appropriate venue for it to be redecided was the Upper Tribunal".

2. I therefore adjourned the case to be relisted before me for a resumed hearing and it was duly listed for 1st May.

3. On 24th April the Appellants' solicitors wrote to the Tribunal indicating that they had been instructed by the Appellants to withdraw the appeals. However the appeal to the Upper Tribunal is the Secretary of State's appeal and thus not the Appellants' to withdraw.

4. I indicated to the Appellants' representative that if they were saying that they no longer challenged the Secretary of State's decision to refuse them leave to remain then I would allow the appeal to the Upper Tribunal on the basis that it is unchallenged by the Appellants. The representatives agreed to that course of action. Accordingly I allow the appeal to the Upper Tribunal on the basis that it is unchallenged by the Appellants, which has the effect that the Appellants' original appeals against the Secretary of State's decision are dismissed.

5. The appeal to the Upper Tribunal is accordingly allowed.

Signed Date 1st May 2014

Upper Tribunal Judge Martin