Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00041/2013
DA/00042/2013
DA/00043/2013
DA/00045/2013
DA/00044/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
on 28th October 2013	**on 16th December 2013**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MB
NM
WL
SL
KL
(Anonymity direction in force)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Rutherford instructed by TRP Solicitors
For the Respondent: Mr Smart – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of a panel of the First-tier Tribunal composed of First-tier Tribunal Judge Forrester and Mr Getlevog (hereinafter referred to as "the Panel") who in a determination promulgated on 24th May 2013 dismissed the Appellant's appeal against the decision of the Secretary of State dated 20th December 2012 to deport the first appellant following a criminal

conviction on 1st February 2008 and to deport the remaining members of his family members 'in line'.

Background

2. The appellants are all nationals of the DRC and a family unit. The first appellant was born on 31st May 1974, the second appellant, his wife, on 22nd January 1981, the third appellant on 26th August 2006, the fourth appellant on 19th February 2008 and the fourth appellant on 15th June 2010. The third, fourth, and fifth appellant's are the sons of the first and second appellant.

3. The Panel set out the immigration history of the first Appellant in paragraphs 2.1 to 2.6 and of his wife in 3.1 to 3.2 which I do not need to repeat.

4. In relation to the first Appellant the Panel also refer to a previous determination of the 2nd March 2009 dismissing his asylum claim and set out some of the findings made by the Adjudicator at length in paragraph 9.2 as they do in respect of the second Appellant's claim in 9.9. Their findings commence at paragraph 11 and in paragraph 13 state:

> " In relation to the decision to deport both the Husband and Wife and given the mandatory terms of section 32 of the UK Borders Act 2007 and the Immigration Act 1971 we find that pursuant into those statutory provisions that both the Husband and Wife are liable to be deported"

5. The Panel accepted that it was necessary to deal with Article 8 ECHR and the impact of deportation on the Appellants' collectively. They state in paragraph 14 that they have considered the Independent Social Workers report prepared by Christine Brown but claim that significant parts of the report are premised on the basis the first Appellant is to be deported with the other Appellants remaining in the United Kingdom.

6. At paragraphs 16 the Panel considered the provisions of the Immigration Rules and found that none of the Appellants' are able to succeed under the same.

7. Paragraph 18 contains something common to deportation determinations written by Judge Forrester which is a discourse of some nine pages in length setting out case-law relating to deportation, some of which has been overtaken by further decisions of the European and domestic courts, before leading to the Panels conclusions under Article 8 ECHR at paragraph 21 which are in the following terms:

> We do not find that the family's removal to the DRC would amount to a disproportionate interference with any rights under Article 8 nor could such removal be an exceptional circumstance. The most important factor for the family and children in particular is that they should stay together as a family.

> The decisions made by the Husband and Wife in the course of their time in the UK when they never had any right to remain or status here has created the situation in which they find themselves with the Children. But nothing put before us or the Immigration Judges who, before us, have considered the claims suggests that the Husband or Wife will be at risk on return. The Husband may well expresses his contrition but we have borne in mind the gravity of the offence committed and its impact upon the public interest in stamping out the commission of offences such as those for which the husband was convicted.

8. The Panel dismissed the appeal against deportation under both the Rules and by reference to the Human Rights Act.

Discussion

9. There was discussion at length during the hearing before the Upper Tribunal in relation to a matter appropriately raised by Mr Smart relating to the immigration decision under consideration. The Respondent's records show no deportation order has been made under section 32 UK Borders Act 2007 and in this respect paragraph 13 of the determination is wrong.

10. Mr Smart could find no evidence of there ever having been a signed deportation order so the appeal cannot be against a refusal to revoke and must therefore relate to the provisions of the 1971 Act and the claim that the deportation of the first Appellant is conducive to the public good that his family members should be deported in line.

11. Miss Rutherford accepted it was a conducive decision that had been challenged outside the Rules on Article 8 ECHR grounds. It was also submitted that a different decision could and should have been arrived at had the evidence been properly considered, even when taking into account the public interest argument.

12. If the Panel misunderstood the immigration decision under appeal this is a legal error. There has never been a decision to deport under the provisions of the UK Borders Act and the statement in paragraph 13 that "given the mandatory terms of section 32 and the Immigration Act 1971 they find that the Husband and Wife are liable to be deportation" must be tainted by such error.

13. Section 3(5) of the 1971 Act gives the Secretary of State power to deport a non British Citizen (a) if he deems it to be conducive to the public good (b) if another member of the family is to be deported and (c) if a court recommends it after conviction of an offence punishable by imprisonment. Section 3(5)(a) is reflected in paragraph 363 of the Immigration Rules, which states that a person is liable to deportation where the Secretary of State deems that person's deportation to be conducive to the public good.

14. The Panel should have taken this as their staring point and followed the guidance provided in the case of Bah (EO (Turkey) – liability to deport) [2012] UKUT 00196(IAC) in which the Tribunal said that in a deportation appeal not falling within section 32 of the UK Borders Act 2007, the sequence of decision making set out in EO (deportation appeals: scope and process) Turkey [2007] UKAIT 62 still applies but the first step is expanded as follows: (i) Consider whether the person is liable to be deported on the grounds set out by the Secretary of State. This will normally involve the judge examining:- (a) Whether the material facts alleged by the Secretary of State are accepted and if not whether they are made out to the civil standard flexibly applied; (b) Whether on the facts established viewed as a whole the conduct character or associations reach such a level of seriousness as to justify a decision to deport; (c) In considering b) the judge will take account of any lawful policy of the Secretary of State relevant to the exercise of the discretion to deport and whether the discretion has been exercised in accordance with that policy; (d) If the person is liable to deportation, then the next question to consider is whether a human rights or protection claim precludes deportation. In cases of private or family life, this will require an assessment of the proportionality of the measures against the family or private life in question, and a weighing of all relevant factors; (e) If the two previous steps are decided against the appellant, then the question whether the discretion to deport has been exercised in accordance with the Immigration Rules applicable is the third step in the process. The present wording of the rules assumes that a person who is liable to deportation and whose deportation would not be contrary to the law and in breach of human rights should normally be deported absent exceptional circumstances to be assessed in the light of all relevant information placed before the Tribunal.

15. There is no indication the Panel undertook the correct assessment although, as the challenge to the determination is limited to the proportionality assessment conducted by the Panel and the failure to properly consider section 55 so far as it relates to the children outside the Immigration Rules and not the findings that he is liable to deportation, I find that notwithstanding the misdirection in paragraph 13 that the conclusion of the Panel that the first Appellant is liable to be deported, so far as this is the answer to the first of the questions posed in Bah, is correct and is not affected by any material legal error.

16. The next stage of the assessment that should have been conducted by the Panel was to consider whether a human rights or protection claim precludes deportation. In cases of private or family life, this required an assessment of the proportionality of the measures against the family or private life in question, and a weighing of all relevant factors.

17. The findings of the Panel that there was no sustainable protection claim is not challenged in the grounds seeking permission to appeal is therefore a preserved finding both in relation to the Refugee Convention and Article 3 ECHR.

18. The question to be considered therefore is whether a properly conducted proportionality balancing exercise was undertaken by the Panel. The grounds seeking permission to appeal allege it was not by reference to the failure of the Panel to properly consider the evidence made available, including the report from Christine Brown, and the actual circumstances of the children, and applicability of relevant case law.

19. I accept Christine Brown's report was considered by the Panel as there is a specific reference in paragraph 14 of the determination to the report from which the Panel set out a number of passages. The report itself is to be found at section F, pages 1-36. The core theme running through the report is that it is not in the children's best interests for their father to be deported, as the Panel state, but it is clear that what is proposed is the deportation of the family unit as a whole as evidenced by the immigration decisions under appeal and that this is not a family splitting case. It is a case in which it was necessary to consider whether the children's best interests are served by remaining in the United Kingdom based upon the ties they have established to this country and the impact upon them of having to re-locate and re-establish themselves with their parents in the DRC.

20. It is noted that the children have formed ties within the United Kingdom which is the country in which they were born and the only environment they have experienced to-date. Christine Brown notes that the children remain of an age when they have limited or no understanding of their circumstances but that all three appear to be thriving and meeting their developmental targets, something she states will be compromised by their removal to the DRC. The children are not of an age when they can state their views but they can indicate their wishes through other means and she states that they should be given careful consideration by those decision-makers charged with their future welfare [5.4]

21. Bearing in mind her observations Christine Brown concludes in paragraph 5.6:

> "With this in mind, I believe that [W], [S], and [K] have demonstrated their feelings, as far as they are demonstrably able for their respective ages, regarding their life as it is now with their mother and their father in the United Kingdom unequivocally, through positive body language and responses from all three children towards both their parents that evidenced the cohesive nature of their mutually interdependent relationships with one another. Therefore, the children's perceived views and wishes must be central to any decision made on their behalf, regardless as to how these have been expressed and, also, consideration of the safeguards that are now in place to ensure as far as possible their future welfare without the potentially dangerous disruption of their lives if removed to the DRC without any of these measures either being transferable or maintained."

.

22. It was accepted by Mr Smart that a reading of the determination demonstrated a lack of attention to detail but he submitted that even if proper attention had been given to the evidence it would not have made a material difference.

23. On behalf of the Appellant's Miss Rutherford argued that the consideration in paragraph 21 of Article 8 outside the Immigration Rules was wholly inadequate.

24. In assessing the proportionally was the decision in the best interests of the children are paramount concern. In Azimi-Moayed and others (decisions affecting children; onward appeals)[2013] UKUT 197(IAC) (Blake J) the Tribunal held that (i) The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions: (a) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary; (ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong; (iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period; (iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable; (v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well-being of society amply justifies removal in such cases.

25. A reading of the determination does not allow me to find any express reference to these important considerations or even allow me to infer the findings made in relation to such issues. The report of Christine Brown is said to contain an analysis of the lives of the children in the UK at paragraphs 4.1 to 4.12, 4.128 to 4.20 and 4.29. The child W was also nearly seven years of age at the date of the hearing and his circumstances required proper analysis. Christine Brown notes that the second Appellant stated to her that the children have been integrated into the culture of the United Kingdom and have little or no understanding of their African heritage which has been something the first Appellant has deliberately avoided giving his own dual heritage and problems that may occur within the Congolese community in the United Kingdom [4.5].

26. I find the assessment of the Article 8 ECHR element of the appeal inadequate. I find the fact the Panel thought this was an automatic deportation appeal, when clearly it is not, may have influenced the weight they gave to the balancing exercise. I find the statement in paragraph 21 that the decisions made by the Husband and Wife in the course of their time in the UK when they never had any right to remain or status here has created the situation in which they find themselves with the Children, may indicate the Panel reduced the weight they gave to the best interests of the children when Lady Hale in ZH (Tanzania) made it clear that the actions of the parents were not a relevant factor when considering the best interests of the children.

27. I find the Panel erred in law in relation to the Article 8 ECHR assessment with specific reference to the best interests of the children. Whilst the result may be the same such a conclusion can only be safely arrived at when all the evidence has been considered with the degree of care required in an appeal of this nature, that of anxious scrutiny, and adequate reasons given for findings made.

28. I find that as the Appellants have not had the benefit of a properly considered Article 8 ECHR claim before the First-tier Tribunal, the interests of justice require the appeal to be remitted to the First-tier Tribunal at Sheldon Court for this to be undertaken, especially in light of the fact it is the lives of children which are being considered and the second appeal criteria being applicable to appeals from the Upper Tribunal.

Decision

29. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the Panel. The following directions shall apply to the future conduct of this appeal:**

    i. The appeal shall be remitted to the First-tier Tribunal sitting at Sheldon Court Birmingham to be listed on a date to be agreed in light of the operational requirements of that centre. Time estimate 3 hours. To be heard by a panel nominated by Resident Judge Renton.

    ii. The hearing before the First-tier Tribunal shall be limited to consideration of the Article 8 ECHR ground of appeal, including an assessment of the best interests of the children, and whether the decision to deport is proportionate in light of the findings made.

    iii. The findings relating to the inability of the Appellants to substantiate their claim to be entitled to international protection and their inability to satisfy the Immigration Rules shall be preserved findings, as shall their respective immigration history.

iv. The parties must file and serve upon each other a consolidated, indexed, and paginated bundle containing all the evidence upon which they intend to rely no later than 14 days before the date of the hearing. Witness statements shall stand as the evidence in chief of the maker.

v. A Lingala interpreter shall be provided.

vi. Any application to vary these directions shall be made in writing to Resident Judge Renton at Sheldon Court.

vii. Anonymity - The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed…….
Upper Tribunal Judge Hanson

Dated the 21st November 2013