Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/13889/2013
IA/13986/2013
IA/13903/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
On 20 February 2014	**On 21 March 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JKK
MMM
RTKK
(ANONYMITY DIRECTIONS MAINTAINED)

Respondents

Representation:

For the Appellant: Mr Smart, a Senior Home Office Presenting Officer
For the Respondents: Mr Vokes, instructed by Rotherham & Co Solicitors

DETERMINATION AND REASONS

1. The respondents are citizens of Malawi. I shall hereafter refer to the respondents as "the appellants" as they were before the First-tier Tribunal and to the Secretary of

State for the Home Department as the respondent. The appellants had applied, in March 2012, for leave to remain outside the Immigration Rules. Their applications were refused by the respondent on 17 April 2013. The appellants appealed to the First-tier Tribunal (Judge P J Clarke) which, in a determination promulgated on 7 November 2013 allowed the appeal on human rights grounds (Article 8 ECHR). The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. Mr Smart, for the Secretary of State, relied upon the grounds of appeal. These grounds assert that the First-tier Tribunal made a material error in law by treating the best interests of the children involved in this appeal as decisive. The respondent relies upon *SS (Nigeria)* EWCA Civ 550 [44]:

> These two characteristics are vouchsafed by authority of the House of Lords and the Supreme Court. With great respect they are capable, if not carefully understood, of investing child cases with a uniform prevailing force which yields no or little space to the context in hand. As for the first characteristic, the key phrase is of course "a primary consideration". It appears in *ZH* and subsequently, but is taken from Article 3(1) of the UNCRC, so the choice of words may be regarded as having particular significance. What sense is to be given to the adjective "primary"? We know it does not mean "paramount" – other considerations may ultimately prevail. And the child's interests are not "the" but only "a" primary consideration – indicating there may be other such considerations which, presumably, may count for as much. Thus the term "primary" seems problematic. In the course of argument Mr Auburn accepted that "a primary consideration" should be taken to mean a consideration of substantial importance. I think that is right.

3. The grounds conclude by asserting that,

> On the basis that the FTJ also found that R could adapt well in Malawi [29] and that the principal appellant's cases (sic) would have been diminished absent the presence of a child [31] and on the basis of the precariousness of the family ties developed in the UK [31] the SSHD requests an oral hearing.

4. The guidance given by the Supreme Court in *ZH (Tanzania) 2011 UKSC 4* has now been clarified both in *SS* and also by the Supreme Court itself in *Zoumbas [2013] UKSC 74.* The best interests of the children are not (as Laws LJ in *SS* pointed out) a paramount consideration in an immigration appeal; other factors may combine to outweigh the best interests of the children depending on the facts of each case. In the present appeal, the first appellant is the father of two children, the third appellant (who was born in 2006) is now aged nearly 8 years and also another child (J) who lives with her mother, a former partner of the first appellant with whom the first appellant has contact "about once a month" although he "speaks to her every day on the phone." (See determination paragraph 9(xi)). It appears that J and the second appellant have a good relationship.

5. The First-tier Tribunal quoted at length from the relevant jurisprudence. It relied upon *Azimi-Moayed & Others (decisions affecting children: onward appeals)* [2013] UKUT 00197 (IAC) where the Tribunal held that,

> Lengthy residence in a country other than the state of origin can lead to the 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 but past and present policies have identified seven years as a relevant period.

At [26] the First-tier Tribunal noted that the third appellant had been born in the United Kingdom and, save for a few months spent in Malawi as a baby, has lived in this country ever since. The judge was clearly influenced in his decision-making by the fact that the third appellant had crossed the seven year threshold. To have relied entirely upon that circumstance to allow the appeal would, as Mr Vokes acknowledged, might have constituted an error or law. However, I find that the judge has been aware of that particular pitfall and has avoided it, at least in part, by adopting an even-handed approach to the evidence. At [26], he noted that,

> Putting matters simply, although [the third appellant] is of a Malawian family all her life friends and schooling have been in the UK. There is no evidence that she speaks any language other than English. She has some family members in the UK, but more in Malawi. That slightly counteracts the other factors in her favour.

The judge noted at [29] that the third appellant's performance at school had been good, her deputy head teacher referring to the third appellant's "secure group of friends." The judge had "no reason to doubt that [the third appellant] would integrate well in Malawi" but he also noted that "all she has known is the United Kingdom." He was careful to give "full weight to the fact that her parents must have known they had no entitlement to remain past the end of their visas." On the other hand, the judge pointed out that, in the case of the parents, "they have been here for twelve years in one case and eight years in the other. On the basis of the Immigration Rules in operation at the date of their application they were beginning to approach the time when they could apply on the basis of long residence." The judge was also careful, however, not to employ a "near-miss" argument ("although I hasten to add that I am not using this as a 'near-miss' argument but rather to emphasise that their connection to this country is of significant duration.").

6. It is clear that the judge was taking into account not only the upheaval in the third appellant's private life which would be caused by her removal from a country in which she had been born and had lived for the vast majority of her 7 years but also that the first appellant's ties with his child, R, would, in all practical terms, be severed by his removal. In addition, the ties between the half-sisters (the third appellant and R) were also likely to be severed. The relationships in this appeal and the possible consequences of the appellant's removal, are, therefore, rather more complex than are indicated in the Secretary of State's grounds of appeal.

7. I am aware that the judge's analysis might also have been flawed had he failed to give a proper account of the public interest concerned with the removal of these appellants. However, at [26] (as I have noted above) the judge took proper account of factors which weighed against the appellants in the Article 8 proportionality exercise. He was aware also at [31] that, although the adult appellants had family ties in Malawi, their lengthy period of residence in the United Kingdom had been lawful "save for certain periods of [the first appellant's] stay, which I ignore, as the respondent has granted him leave to remain after those periods of overstay. [The adult appellants] have clearly themselves still got ties in the UK."

8. The principal assertion in the grounds of appeal (that the judge had used the best interests of the children as a determining factor in the Article 8 analysis) is not, in my opinion, made out. The judge had taken proper account of those factors which weighed for and against the appellants remaining in the United Kingdom whilst the importance of the best interests of the third appellant involve (as the judge recognised) relationships continuing in the United Kingdom with others including her half-sister. I do not say that another Tribunal faced with the same facts would have reached the same result; however, that is not the point. The judge has reached a conclusion which was available to him on the evidence and he has considered that evidence in an even-handed manner whilst having proper regard to the relevant jurisprudence. I find that the appeal should be dismissed.

DECISION

This appeal is dismissed.

Signed Date 15 March 2014

Upper Tribunal Judge Clive Lane