IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/45249/2013
IA/45250/2013
IA/45251/2013
IA/45252/2013
IA/45253/2013
IA/45254/2013

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court	**Determination Promulgated**
On 2nd October 2014	**On 30th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) M W
(2) F K
(3) S W
(4) A W
(5) Y W
(6) Su W
(ANONYMITY DIRECTION MADE AS "MW & OTHERS")

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr N Murphy (Counsel)
For the Respondent: Mr D Mills (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Freer, promulgated on 10th March 2014, following a hearing at Birmingham on 6th March 2014. In the determination, the judge dismissed the appeals of the Appellants, who subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are a family, consisting of a father, a mother, and his four children. They are all citizens of Sri Lanka. The principal Appellant is the father, who had arrived in the UK some eight years ago, on the basis of a work permit, following which he then obtained a Highly Skilled Migrant's visa, which was extended yet again to August 2012. Subsequent applications for leave to remain were then all rejected. He is the principal Appellant. The other five are his dependent claimants.

The Appellant's Claim

3. The Appellant's claim turns on family life (see paragraph 21 of the determination). The family are all Muslims, which is a substantial minority faith in Sri Lanka (see paragraph 26). The principal Appellant's wife cannot write in Tamil or in Sinhalese because she went to a private school where she studied in the English medium (see paragraph 27). The principal Appellant's claim is that if the family were removed they would not have the money to send their four children to a private school. They would be taught in the local language. They would be set back to the start.

The Judge's Findings

4. The judge considered the "best interests of the children" (see paragraph 59). The three children were of a young age. Accordingly, the judge held that,

> "this issue will focus mainly on S as the eldest child who has been in the UK continuously for a period exceeding seven years. That is because she has the strongest rights of the four children and if ... I do find that she fails to pass the legal threshold, so will the others *a fortiori*" (see paragraph 64).

5. The judge held that the eldest child, S, failed to pass the legal threshold, because although the "seven year Rule" was something that must be applied, this "is not a rigid marker but a flexible factor to be weighed with other matters" (paragraph 65).

6. The judge made a finding of fact that ,

> "the eldest child S adapted from her birth in Australia to life in Sri Lanka and then to life in the UK. As she adapted before, it seems reasonable to anticipate, with an evidential basis for it, that she can adapt again. She has a strong interest in remaining with her family. Her parents are still a major focus and she spends most of her evenings in the company of her siblings at a religious school ..." (paragraph 66).

The appeal was dismissed.

Grounds of Application

7. The grounds of application, which are well crafted, by Faraz Shibli, broadly state that the judge failed to properly assess the best interests of the minor children.

8. On 28th March 2014, permission to appeal was granted.

9. On 16th April 2014, a Rule 24 response was entered by the Respondent Secretary of State.

Submissions

10. At the hearing before me, Mr Murphy, of Counsel, attended on behalf of the Appellants. In well measured and clear, and comprehensive submissions, he stated that the judge had simply failed to assess what was in the best interests of the children. Given that this is "a primary consideration" it was important for the judge to specifically engage with what served the children's own best interests. The judge had not done that.

11. Moreover, the judge had only looked at the best interests of the eldest child, S, because he had ended up by suggesting that "she has the strongest rights of the four children" and that the interests of the other children would pale into insignificance in the light of S's interests, if she did not succeed (see paragraph 64). This was an incorrect approach.

12. Indeed, the second child, A W, was only marginally younger than the first child, and had also been in the UK for six years, such that an individualised consideration of his rights, and his best interests, also necessarily fell to be considered by the judge. Moreover, the judge made factual errors such as stating that the principal Appellant had two convictions, when he only had one conviction.

13. For his part, Mr Mills submitted that he would rely upon the Rule 24 response of 16th April 2013 and the judge was clearly right at paragraph 64, in stating that the eldest child, who had been in the UK continuously for a period of seven years, had the strongest claim to make. Secondly, the judge had apprised himself of the relevant case law. He was aware of **ZH (Tanzania)**.

14. More importantly, he earlier stated that this case was not subject to the case of **Zoumbas**, which at paragraph 25 qualified **ZH (Tanzania)**, thus suggesting that the judge took a nuanced approach to the matter before him (see paragraph 59).

15. Furthermore, the judge made adverse credibility findings (see paragraph 52) and was clear that it was not credible that S could not be taught basic level of Tamil before she returned to Sri Lanka, and that the language argument presented on behalf of the Appellants "taken in the round, is not a strong factor albeit a material one" (see paragraph 52).

16. In reply, Mr Murphy submitted that there was a clear error, if one considered the Grounds of Appeal in the round, because the plain fact was that the judge had not considered what was in the best interests of the children. Rather, the judge had simply subsumed their interests into the interests of the parents. This is something which **ZH (Tanzania)** had made clear could not be done.

Error of Law

17. I am satisfied that the making of the decision by the judge involved the making of an error of law, such that I should set aside the decision (see Section 12(1) of TCEA 2007). The determination of the judge is clear, comprehensive, and well thought out. In particular, the judge was expressly clear that,

> "the eldest child S adapted from her birth in Australia to life in Sri Lanka and then to life in the UK. As she adapted before, it seems reasonable to anticipate, with an evidential basis for it, that she can adapt again. She has a strong interest in remaining with her family. Her parents are still a major focus and she spends most of her evenings in the company of her siblings at religious school ..." (paragraph 66).

18. Notwithstanding this clear finding, it does appear that the judge has considered the "best interests" of the child, S, on the basis of her having "a strong interest in remaining with her family" rather than individually in her own right. That is a material difference in approach to what the decided cases such as **ZH (Tanzania)** and **Zoumbas** require.

19. The recent judgment by Mr Justice McCluskey in **Ugo (unreported)** is also to the same effect. Moreover, the interests of the other children, and in particular those of A W, who had also, by the time of the hearing before the learned judge, been in the UK for seven years and five months, have not been expressly considered. The "best interests" of the youngest two children have not been considered in terms at all.

20. In the event, though there is no doubt that the determination of the judge is a clear and careful one, appropriate consideration has not been given to the best interests of the children as required by the latest cases. The matter must accordingly be remitted back to the First-tier Tribunal for a hearing with respect to this specific issue.

Decision

21. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. This appeal is remitted back to the First-tier Tribunal, to be heard by a judge other than Judge Freer, with respect to the best interests of the children.

22. Anonymity order made.

Signed Date

Deputy Upper Tribunal Judge Juss 27th December 2014