Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01334/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21 April 2015	**On 24 April 2015**

Before

LORD BANNATYNE
UPPER TRIBUNAL JUDGE WARR

Between

DANIEL WILLIAMS
(NO ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Ogunnubi, Counsel
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This matter came before us as an appeal against a decision of the First-tier Tribunal dated 12 January 2015. The First-tier Tribunal considered a number of appeal grounds against a deportation order made by the respondent on 3 July 2014. These grounds included the following: that the deportation order was not proportionate in terms of Article 8. Among the First-tier Tribunal's findings was this: the deportation order was proportionate in terms of Article 8. The appellant sought permission to

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appeal against that decision and certain others. Permission to appeal was granted only in relation to the First-tier Tribunal's Article 8 decision.

Background

Immigration History

2. The respondent noted that the appellant who is a citizen of Nigeria claimed to have first arrived in the United Kingdom on 20 September 2000. He married an EEA national on 15 September 2008 and applied for a residence card as the dependant of an EEA national on 29 December 2008. He was issued a residence card on 15 December 2009 and the card expired on 15 December 2014. The appellant was convicted at Inner London Crown Court on 3 December 2013 of four counts of possession/control of articles for use in fraud and was sentenced to a total of 14 months' imprisonment. On 24 December 2013 the appellant appealed against the sentence and, on 14 February 2014 the Court of Appeal refused him permission to appeal. The respondent noted that the appellant met the criteria of a family member of an EEA national. A decision to make a deportation order was made on 3 July 2014. By the date of the decision of the First-tier Tribunal the appellant was no longer a family member of an EEA national.

Findings in Fact

3. For the purposes of this appeal the only findings in fact to which we require to refer are these:

- The appellant resides with his partner.
- He has a step-daughter who is 9 years old and resides with the appellant and his partner. She is a UK citizen.
- He and his partner have a daughter who is 3 years old. She resides with the appellant and his partner. She is not a UK citizen.
- "I find that removing the Appellant from the United Kingdom would interfere with the relationship the Appellant has with his daughter and his partner. I also note that the Appellant's partner has an application which is pending before the Respondent. It will also affect the right of a third party namely the Appellant's stepdaughter who is a British citizen". (See: paragraph 20 of the First-tier Tribunal's determination).

Submissions on behalf of the Appellant

4. The submission on behalf of the appellant was a short one: within any Article 8 consideration which was carried out by the First-tier Tribunal there was no consideration of the best interests of the two children. Reference was made to Section 55 of the Borders, Citizenship and Immigration Act 2009. This failure to consider the best interests of the children amounted to a material error of law.

Reply on behalf of the Respondent

5. It was submitted by Mr Nath that the First-tier Tribunal had carried out a consideration of Article 8 from paragraph 20 onwards in its determination. In the course of that consideration it made a finding that the appellant was not the step-father of the older child as he was not married to his partner.

6. With respect to the younger child it was accepted that there appeared to be no separate consideration of her within the determination. However, it was submitted having regard to the particular circumstances of the younger child, that there was no material error of law in failing to consider Section 55 in relation to her. The particular circumstances relative to the child which were relied on were these: she is 3 years old and a citizen of Nigeria. On this basis it was argued that, having regard to past and present policies to the effect that seven years was the relevant period in establishing lengthy residence and given that very young children are focussed on their parents rather than their peers and are adaptable then even if Section 55 had been considered in relation to her it would have made no difference to the decision of the First-tier Tribunal. It was submitted that in those circumstances consideration of Section 55 would not have resulted in a finding that her best interests were to remain in the UK, to a degree that outweighed the public interest in deportation of the appellant.

Discussion

7. We are, without difficulty, persuaded that there is a material error of law.

8. There is no consideration of the best interests of either child. This is no mere error of form by failing to refer expressly within the determination to Section 55. This is an error of substance. Looking to the determination there is no attempt to engage with the question of the best interests of the children and to weigh this against the public interest.

9. Mr Nath referred us, in the course of his submissions, to paragraph 23 of the First-tier Tribunal's determination where he submitted there was some consideration of one of the children. It is correct that there is reference to one child within the said paragraph, however, there is no consideration of what is in that child's best interests. Moreover, there is no reference to the other child and the issue of her best interests. The issue of the children's best interests appears to have been entirely overlooked by the First-tier Tribunal.

10. In Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 the Supreme Court at paragraph 10 said this regarding the approach to an Article 8 assessment involving children:

> "In their written case counsel for Mr Zoumbas set out legal principles which were relevant in this case and which they derived from three decisions from this court, namely ZH (Tanzania) (above), H v Lord Advocate 2012 SC (UKSC) 308 and H(H) v Deputy Prosecutor of the Italian Republic [2013] 1AC 338.

Those principles are not in doubt and Ms Drummond on behalf of the Secretary of State did not challenge them. We paraphrase them as follows:

(i) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;

(ii) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;

(iii) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

(iv) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued while other important considerations were in play;

(v) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(vi) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and

(vii) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent".

11. We are satisfied that the First-tier Tribunal failed to have regard to paragraphs (i) – (vi) of the guidance given by the Supreme Court.

12. Moreover the First-tier Tribunal has failed to consider the importance of the older child's UK citizenship. The importance of a child's UK citizenship was emphasised in the observations of Lady Hale in ZH (Tanzania) [2011] UKSC 4 (see: paragraph 30).

13. For the foregoing reasons we allow the appeal.

14. We have considered whether we should re-make the decision. We have decided that we should not. The failure to consider the interests of the children within the First-tier Tribunal's determination is total and we believe that in these circumstances the interests of justice would only be served by this matter being remitted to a differently constituted First-tier Tribunal for reconsideration. We accordingly order that such reconsideration should take place.

15. We make no anonymity direction.

Signed Date 24 April 2015

Lord Bannatyne
Sitting as a Judge of the Upper Tribunal