Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/34958/2014**

IA/34959/2014

IA/34961/2014

IA/34963/2014

IA/34968/2014

THE IMMIGRATION ACTS

At Field House **Decision and Reasons**
on 18th September 2015 **Promulgated**
on 24th November 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

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DQ

(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S.Harding, Counsel, instructed by March and Partners, Solicitors
For the Respondent: Mr T Wilding, Home Office Presenting Officer

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DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Introduction

1. The proceedings before the First tier Tribunal were not anonymised. I am influenced by the fact that there are children affected by this decision and at this stage have made an anonymity order.

2. Although it is the respondent who is appealing, for convenience I will continue to refer to the parties as they were in the First-tier Tribunal.

3. The first appellant came to the United Kingdom in January 2000. He was joined by the second appellant, his wife, in July 2002. The third appellant, his eldest daughter, came to the United Kingdom in December 2009 at the age of 11. She is now aged 17. The remaining fourth and fifth appellants are their 10-year-old daughter and 8 year-old son, born in the United Kingdom. All are nationals of Albania. The first, second and third appellants entered the United Kingdom illegally and the first two appellants unsuccessfully claimed asylum.

4. An application made on behalf of the family for leave to remain was refused in September 2012. Following reconsideration the refusal was maintained in August 2013. Removal directions were made and the family appealed.

5. Their appeals were heard by First tier Judge Morgan at Taylor house on 26 February 2015. It was accepted at hearing on behalf of the two adult appellants that they retained ties with Albania (paragraph 7). It was common case that the respondent intended to remove the family as a unit and the focus in the appeal was on private rather than family life.

6. In a decision promulgated on 12 March 2015 the judge allowed the appeals of the fourth and fifth appellants under the immigration rules and allowed all of the appeals on article 8 grounds.

7. The judge was influenced by the two youngest children and concluded they were well settled in the United Kingdom. At paragraph 16 the judge referred to exceptional facts. The judge did refer to section 117 and it was agreed between the parties that the two youngest children constituted qualifying children within the legislation. The judge said that it would not be reasonable to expect them to return to Albania and for the same reason found that paragraph 276 ADE (iv) applied. Consequently, their appeals were allowed on this basis.

8. Permission to appeal was granted on the basis that the judge failed to consider relevant jurisprudence, namely, Zoumbas [2013] 2014 UKSC 74;EV(Philippines)-v- SSHD EWCA Civ 874 and Nagre [2013] EWHC 720.

9. At hearing, argument focused upon the grounds of appeal advanced, with both representatives suggesting that if an error of law was found the matter should be remitted for a de novo hearing in the First-tier Tribunal.

The First tier decision

10. First-tier Judge Morgan stated there were no significant factual disputes, concluding the family circumstances outlined were credible and consistent. The appeal was presented on the basis the family were to be removed as a unit and the appeal turned on private rather than family life.

11. At paragraph 13 the judge sets out considerations taken into account in assessing the reasonableness of return. The first point was that the two younger children have been born and at that stage lived in the United Kingdom seven and nine years respectively. Both speak a little Albanian but their primary language is English. They are well settled in the United Kingdom and integrated into the British educational system.

12. For these reasons the judge concluded it would not be reasonable to expect the two British-born children to return to Albania. In support of this conclusion reference was again made to the fact they have been in the United Kingdom over seven years.

13. At paragraph 16 the judge referred to the exceptional facts of the case and concluded the younger children's best interests favoured them remaining in the United Kingdom and cited ZH Tanzania [2011]

UKSC 4 for the proposition that they should remain unless there were countervailing reasons of considerable force.

14. At paragraph 18 the judge referred to other factors weighing in the family's favour but was not persuaded they would outweigh the respondent's legitimate right to exercise effective immigration control.

15. Clearly the judge was allowing the appeal because of the two British-born children having lived here over seven years. Having reached this view, the judge concluded it followed it would be unreasonable to expect them to leave the United Kingdom and consequently paragraph 276 ADE (iv) applied.

Consideration

16. It is now well established that the welfare of children is a primary but not a paramount consideration in a situation like the present. There is also a statutory obligation on the respondent by virtue of section 55 to promote the best interests of the child, irrespective of their nationality.

17. It is also established that the longer a child is in the United Kingdom, then the more unreasonable it is to expect them to leave. The longer they are here the more they can put down roots and integrate. Seven years in the country for children has historically been considered a milestone. However, it is of note that the focus of young children until around the age of four or thereabouts is to their parents rather than their surroundings. Furthermore, seven years is only a guide and an assessment of the individual circumstances must take place.

18. A decision maker is required to consider each individual child affected and also the family as a whole. Any health issues have to be taken into account. A relevant consideration is whether the family are being expected to leave as a unit and whether there are wider members of the family settled. The question of integration has to be considered.

19. An important consideration is whether the children or one of the parents is British. ZH Tanzania [2011] UKSC 4 emphasised the intrinsic importance of British citizenship.

20. The ties with the home country of the parents and the children have to be considered. What support, if any, will be available to them for resettlement is relevant. Any special features have to be factored into the evaluation. The notion of exceptional circumstances means

something more than the unusual or the unique but is aimed at an outcome which will be particularly harsh.

21. In considering the decision of First-tier Judge Morgan I am struck by the vintage of the cases referred to and the absence of reference to the important up-to-date cases.

22. There have been various significant cases applicable in this situation which had not been referred to. In Azimi-Moayed and others(decisions affecting children; onward appeals) [2013]UKUT 00197 the President, the Honourable Mr Justice Blake summarised the principles established from Upper Tribunal jurisprudence in relation to children. The starting point is that their best interests are to be with both their parents. Lengthy residence can lead to development of ties and past and present policies identify seven years as relevant. However, the tribunal noted that seven years from the age of four is likely to be more significant than the first seven years of life when young children are focused on their parents.

23. There are greater similarities in the factual situation in Zoumbas –v- SSHD [2013] UKSC 74 with the present case than ZH Tanzania where the children and one of their parents were British. In Zoumbas, Mr Zoumbas came here in May 2001. He entered the country illegally and then claimed asylum. His wife entered the country illegally the following year and also unsuccessfully claimed asylum. Their first child was born in the United Kingdom three years later, in April 2004.Mother and child were removed in October 2005 but returned illegally in March 2006 .Mrs Zoumbas had a second child in February 2007 and a third in April 2011. They sought a judicial review of how their claims were dealt with. Dismissing their appeal the Supreme Court at paragraph 24 said:

> There is no irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stay in the United Kingdom so that they could obtain such benefits as healthcare and education which the decision maker recognised may be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. They were part of a close-knit family with highly educated parents and were at an age when their emotional needs can only be fully met within the immediate family unit. Such integration as had occurred into United Kingdom society would have been predominantly in the context of that family unit...

24. In EV Philippines and others –v- Secretary of State for the home Department [2014] EWCA Civ., the family came to the United Kingdom lawfully. In June 2007 the mother came as a work permit holder and was joined in April 2008 by her husband as her dependent. In July 2009

their three children joined them. They were born in 2001, 2002 and 2004, respectively. In March 2011 they applied for indefinite leave to remain and this was refused. The difficulty for the family was that the mother was being underpaid by the Care Home where she worked and did not meet the requirements of the rules.

25. The Court of Appeal gave guidance on how tribunals should approach the proportionality exercise where it is determined the best interest of the children is to continue their education in England. The Court said it was necessary to determine the strength of the factors which make it in their best interest to remain and to take account of any factors pointing the other way. What is in their best interest will depend on their age; the length of time they have been in the country; how long they have been in education; what stage of education has reached; to what extent they have become distanced from their home country; and how renewable those connections may be. British citizenship is another factor. (Para 35).

26. The Court pointed out the longer the child has been here, the more advanced and critical a stage their education is at, the looseness of ties with their home country will all add weight in their favour. By contrast, if their best interests only remain on balance, the result could be the opposite. Balanced against their interests the Court referred to as `the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, ex hyposthesi, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant …'

Conclusion

27. It is my conclusion First-tier Judge Morgan failed to demonstrate that a proper and balanced assessment of all the relevant factors had taken place. Instead, the decision is based solely on the fact the two youngest children had been here since birth and were progressing in their education. The judge should have demonstrated the factors in the cases cited above were considered and indicate the weight given.

28. The judge referred to exceptional circumstances in the appeal. However, I cannot see any exceptional circumstances identified. Rather, the judge has allowed the appeal solely on the basis that the

two younger children were born and have lived here all their lives for a period in excess of seven years and are doing well at school. I do not see anything exceptional in this. What the judge does not refer to is the fact that the family had no right to be here and whilst the children were born here they are not British.

29. The judge's failure to do so and to indicate relevant factors were taken into account amounts to a material error of law and the decision cannot stand. The judge allowed the appeals of the fourth and fifth appellant's under the immigration rules on the basis it would be unreasonable to expect them to leave the United Kingdom. This conclusion was solely premised upon the judge’s conclusion in relation to article 8.As it was flawed so to is the decision under the immigration rules. Consequently, the matter should be remitted to the First-tier tribunal for a de novo hearing.

Decision

30. The decision of the First-tier Tribunal allowing the appeals of the fourth and fifth appellant's under the immigration rules and of the five appellants on article 8 grounds contains a material error of law and cannot stand. The decision is set aside and the appeals are to be reheard de novo in the First-tier Tribunal.

Deputy Upper Tribunal Judge Farrelly