



Upper Tribunal

(Immigration and Asylum Chamber)

IA/20826/2015

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House, London

Decision & Reasons

Promulgated

On the 1<sup>st</sup> April 2016

On 20<sup>th</sup> April 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MISS P. F. A.

(Anonymity Order made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Singer (Counsel)

For the Respondent: Ms Everett (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge S. P. J. Buchanan, promulgated on the 17<sup>th</sup> August 2015, in which he dismissed the appeal of the Appellant and her three dependent children on human rights grounds, both within and outside of the Immigration Rules.

2. Within the Grounds of Appeal it is argued that the First-tier Tribunal Judge erred in not giving the necessary weight to the evidence of family life produced by the Appellant. It was argued that the Appellant had been able to show that the children's father continued to play an important role in their lives and that he had written a letter of support and provided a witness statement. It is argued that the totality of the evidence in respect of the children's father being involved in their lives was not considered by the First-tier Tribunal Judge. Within the second ground of appeal it is argued that the Appellant's private life in the UK ought to be recognised and protected and that the Tribunal was in error to use against her the fact that she received support from third parties, because she was unable to work in the UK. Within the third ground of appeal it is argued that the Tribunal failed to have regard and did not properly consider the best interests of her children when considering the case under the Immigration Rules.
3. In granting permission to appeal First-tier Tribunal Judge Brunnen found that "the grounds on which permission to appeal is sought submit at paragraph (c) that the Judge erred in law in that he failed to consider the best interests of the Appellant's children when considering the Article 8 case outside of the Immigration Rules". Judge Brunnen found that this was arguable. He did not, however, consider that there was any merit in the remainder of the Grounds of Appeal and did not grant permission in respect of the other grounds of appeal.
4. Within the Respondent's Rule 24 reply dated the 22<sup>nd</sup> February 2016, it was argued that the First-tier Tribunal Judge directed himself appropriately and did discharge the burden regarding Section 55 of the Borders, Citizenship and Immigration Act 2009 to fully consider the best interests of the children and it is argued that the Judge referred to the best interests of the children consistently throughout the determination.
5. In his oral submissions, Mr Singer relied upon the Skeleton Argument that he had submitted, and on the Grounds of Appeal. He argued that there was a material error in that the Judge had not discharged his duties under Section 55 and had not directed himself in respect of Section 55 nor

considered it. He argued that the Judge had not mentioned the best interests of the children or how this was a primary consideration, nor had he made any findings in respect of their best interests nor balance these against the legitimate aim sought to be achieved.

6. In her submissions on behalf of the Respondent, Ms Everett relied upon the Rule 24 reply. However, she conceded that she was unable to point to anywhere within the decision of First-tier Tribunal Judge Buchanan where he had referred to Section 55 or the best interests of the children. Nor was she able to point to anywhere within the determination where the best interests of the children had been specifically dealt with. She agreed that this was something that the Judge had to specifically consider and further agreed that it would be a material error on the part of the Judge not to have considered Section 55 and the best interests of the children in determining the Article 8 claim. She further agreed that if there was a material error in this regard, the matter should be remitted back to the First-tier Tribunal for a hearing de novo before any First-tier Tribunal Judge other than Judge Buchanan.
7. The Appellant, Miss P. F. A., indicated that if the matter were remitted back to the First-tier Tribunal for a rehearing, she would now wish for there to be an oral hearing at which she wanted to give evidence rather than the matter being listed again for a paper hearing and agreed that she was willing to pay the additional fee required in respect thereof. She asked that the matter be listed for a Case Management Review hearing in order that directions be given.

#### My Findings on Error of Law and Materiality

8. Section 55 of the Borders, Citizenship and Immigration Act 2009 provides that in relation, among other things, to immigration, asylum and nationality, the Secretary of State must make arrangements for ensuring that those functions “are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom”.

9. As was stated by Lady Hale in the case of ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4 “any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be ‘in accordance with the law’ for the purposes of Article 8(2)”. Lady Hale also specifically found that the consideration of the best interests of the children was a primary consideration, although not either “the primary consideration” or “the paramount consideration”. It is well-established within the case law that First-tier Tribunal Judges do have to consider the best interests of the children for the purposes of Section 55, and that this does have to be a primary consideration, when taking decisions that have an effect on children who are in the UK. As was properly conceded by Ms Everett on behalf of the Respondent, First-tier Tribunal Judge Buchanan was under a duty to consider the best interests of the children for the purposes of Section 55, in determining the Appellant’s appeal.
10. Although it was suggested within the Rule 24 reply that the First-tier Tribunal Judge had referred to the best interests of the children consistently and throughout the determination between [6.1] and [7.3], in fact when one reads the decision of First-tier Tribunal Judge S. P. J. Buchanan, nowhere within that decision does he refer to Section 55 of the Borders, Citizenship and Immigration Act 2009. Nor does he make any reference to Article 3(1) of the UNCRC in respect of the best interests of the children being a primary consideration. Nor does the Judge make any findings regarding the best interests of the children, and nor does he specifically state that those best interests are a primary consideration when considering the human rights aspect of the appeal.
11. I therefore do find that the decision of First-tier Tribunal Judge S. P. J. Buchanan does contain a material error of law, in that it is clear that he has failed to take account of the best interests of the children as being a primary consideration for the purposes of Section 55 when considering the human rights claim. The decision of First-tier Tribunal Judge S. P. J. Buchanan is therefore set aside in its entirety and the matter is remitted back to the First-tier Tribunal for rehearing de novo before any First-tier Tribunal Judge other than First-tier Tribunal Judge Buchanan.

12. As the Appellant indicated that she now wished to give oral evidence at any rehearing, rather than having the case heard again on the papers, I direct that the matter is listed for a Case Management Review hearing before the First-tier Tribunal, in order that directions can be given including directions for payment of the appropriate fee and directions regarding further evidence and listing the matter for an oral hearing.

### Notice of Decision

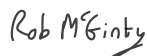
The decision of First-tier Tribunal Judge Buchanan does contain a material error of law and is set aside;

The case is remitted back to the First-tier Tribunal for rehearing de novo before any First-tier Tribunal Judge other than First-tier Tribunal Judge Buchanan;

The matter is to be listed for a Case Management Review hearing before the First-tier Tribunal given the Appellant's indication that she now wishes to give oral evidence at any rehearing;

Given that the appeal in this case does involve children, unless and until a Tribunal or Court directs otherwise, the Appellant and her children are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This Order applies both to the Appellant and to the Respondent. Failure to comply with this Order could lead to contempt of Court proceedings.

Signed



Deputy Judge of the Upper Tribunal McGinty  
2016

Dated 3<sup>rd</sup> April