Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/46379/2014**

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IA/46382/2014

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 04 September 2017 **On 12 October 2017**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

C E & M O
(AND TWO CHILD DEPENDENTS)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellants: Ms S. Pinder, Counsel instructed by Universe Solicitors
For the respondent: Ms Z. Ahmad, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings because the case involves child welfare issues. I find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly

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identify them or any member of their family. This direction applies both to the appellants and to the respondent.

DECISION AND REASONS

1. The first and second appellants are the parents of the third and fourth appellants who are children aged 10 years and 9 years old. They appealed against the respondent's decision dated 04 November 2014 to refuse a human rights claim.

2. First-tier Tribunal Judge A. Black ("the judge") dismissed the appeal in a decision promulgated on 29 December 2015. The appellants appealed to the Upper Tribunal asserting that the First-tier Tribunal failed to make clear and unambiguous findings relating to the best interests of the children. Some of the judge's findings indicated that their best interests might lie in remaining in the UK, while others indicated that she thought their interests would lie in remaining in the family unit in Nigeria. The judge failed to make any clear findings relating to the best interests of both children and failed to consider whether they were capable of being outweighed by public interest considerations.

Decision and reasons

Error of law

3. After having considered the First-tier Tribunal decision, the grounds of appeal and oral submissions I was satisfied that the First-tier Tribunal decision involved the making of an error of law and gave summary reasons for setting aside the decision at the hearing.

4. It was a finely balanced decision, because the judge considered a number of factors that were relevant to the assessment, including the fact that both children were born in the UK and were doing well at school. She noted that the oldest child was nearly eligible to register as a British citizen and that it would be in her best interests to register as a British citizen. She considered whether the parents would be able to care for the children in Nigeria and considered the medical issues raised. However, what was lacking from the analysis were clear findings as to whether it was in the best interests of the children to remain in the UK or to go to Nigeria with their parents. Some findings indicated that the interests of the oldest child might be to remain in the UK. In the end, the only reason given was that it was in their interests to remain as a family unit and it was therefore reasonable to expect the children to leave the UK with their parents [47].

5. The judge's analysis focussed on the practicalities of the family returning to Nigeria, but the decision is lacking an evaluative assessment of what weight should be placed on the ties that the children had established in the UK after a seven-year period of continuous residence. The Court of Appeal decision in *MA (Pakistan) v SSHD* [2016] EWCA Civ 705 made clear that the fact that a child has been resident for seven years must be given "significant weight" in the proportionality exercise. The decision was made after the First-tier Tribunal hearing in this case, but the policy guidance referred to in the judgment was a published document at the date of the First-tier Tribunal decision.

6. The judge considered whether it would be reasonable to expect the oldest child to leave the UK with her family given that she had been resident for a continuous period of seven years and considered aspects of her position in the UK. She noted that the youngest child did not have seven years' continuous residence at the date of the application [46]. At the date of the hearing he had been resident for a continuous period of seven years. Paragraph GEN.1.9 of Appendix FM states that the requirement to make a valid application will not apply when the Article 8 claim is raised in an appeal. By the date of the hearing it was at least arguable that paragraph 276ADE(1)(iv) applied to the youngest child. Although the judge appeared to reject the argument that paragraph 276ADE(1)(iv) applied at the date of the hearing, she made an alternative finding that it would be reasonable to expect the youngest child to leave the UK. Perhaps because it was an alternative finding, there was little reasoning or assessment of the youngest child's circumstances to support the finding [39].

7. Although the judge considered a number of factors that were relevant to an assessment of the best interests of the children, and her conclusion was that they could return to Nigeria as a family, an overall reading of the decision does not disclose particularly clear findings as to where the best interests of the children lay. The judge went on to refer to the House of Lords decision in *R v SSHD ex parte Razgar* [2004] UKHL 27 and the Court of Appeal decision in *SSHD v SS (Congo) and Others* [2015] Imm AR 1036. These decisions might have been relevant to the balancing exercise in cases that did not involve the assessment of the best interests of children. At the date of the First-tier Tribunal decision the correct approach in cases involving children was to assess where the best interests of the child lay and to treat them as a primary consideration. Assuming their best interests were to remain in the UK, it was then necessary to consider whether the cumulative effect of public interest considerations outweighed the best interests of the children: see *ZH (Tanzania) v SSHD* [2011] UKSC 4, *Zoumbas v SSHD* [2013] UKSC 74 and *EV (Philippines) and others v SSHD* [2014] EWCA Civ 874.

8. I am satisfied that the lack of clarity in the findings relating to the best interests of the children and the absence of any findings to show that appropriate weight was placed on their length of residence in the UK are

sufficient reasons to conclude that the decision involved the making of an error of law.

Remaking the decision

9. After a short break, I heard further submission relating to the substantive claim. Ms Ahmed said that she had checked the Home Office records and confirmed that the oldest child (the third appellant) was registered as a British citizen in March 2017. At the date of the hearing the youngest child (the fourth appellant) had been continuously resident in the UK for a period of nine years.

10. On behalf of the respondent, Ms Ahmed accepted that the best interests of the children lay in remaining in the UK with their parents. This was an eminently sensible concession given the circumstances of the case. Both children were born in the UK and have known no other life. They are settled and doing well at school. The appellants do not dispute that education and health care is available in Nigeria, but it is not at the same level and comes at greater cost. In principle, there is no reason why the parents could not provide for their welfare in Nigeria by finding work to support the family, but the evidence indicates that they might struggle to do so initially because of the father's disability. He does not currently have a prosthesis to assist his mobility and is reliant on a wheelchair. Although it is unlikely that the parents have lost all connection with Nigeria, which is after all their country of nationality, they have not been there for a number of years. It seems likely that the family might face some hardship while they try to re-establish themselves. The children's best interests quite clearly lie in remaining in the UK, where they have stability and access to better quality education and healthcare. In the case of the oldest child she also has the benefits that citizenship will now bring. The children are only 10 years and 9 years old and are still reliant on their parents for support. As such, I conclude that their interests lie in remaining as a family unit with their parents in the UK.

11. The first and second appellants do not meet the requirements of the immigration rules and can only rely on an assessment of their rights under Article 8 outside the rules. As a result of her status as a British citizen the oldest child can no longer be removed from the UK. The respondent has no power to do so. To separate the parents and the youngest child would inevitably interfere with their right to family life in a sufficiently grave way as to engage the operation of Article 8 (points (i) & (ii) of Lord Bingham's five stage approach in Razgar v SSHD [2004] INLR 349).

12. The state can lawfully interfere with an appellant's family life if it is pursuing a legitimate aim and it is necessary and proportionate in all the circumstances of the case. In cases involving human rights issues under Article 8, the heart of the assessment is whether the decision strikes a fair balance between the due weight to be given to the public interest in

maintaining an effective system of immigration control and the impact of the decision on the individual's private or family life. In assessing whether the decision strikes a fair balance a court or tribunal should give appropriate weight to Parliament's and the Secretary of State's assessment of the strength of the general public interest as expressed in the relevant rules and statutes: see *Hesham Ali v SSHD* [2016] UKSC 60.

13. Section 117B of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") sets out a number of public interest considerations that a court or tribunal must take into account in assessing whether an interference with a person's right to respect for private and family life is justified and proportionate.

14. The first appellant entered the UK clandestinely and has never had leave to remain. The second appellant entered the UK on visit visa and knowingly overstayed. They began a family in the full knowledge that they had no leave to remain in the UK and that their immigration status was precarious. There is no evidence to show that they have been financially independent. If they have worked, then it was without permission. At the current time, the evidence is that they are reliant on social services support and charitable assistance from the local community. There is evidence to show that both parents have had various health problems. They have struggled to establish a decent life in the in the UK, largely because of their illegal status. Without seeking to diminish the difficulties that they have faced, I must give weight to the fact that their health problems were treated at a cost to the taxpayer. The children were born in the UK and have been educated at a cost to the taxpayer. There is no evidence to show that the parents have contributed anything positive to the UK.

15. The parents remained in the UK unlawfully but there is no direct evidence to show abuses at the more serious end of the scale e.g. use of fraud or deception. However, some inference could be made about how the first appellant might have entered illegally, and given that he was already in the UK when the second appellant applied for a visit visa, whether she was truthful in the application for entry clearance. If the circumstances of the adult appellants were considered on their own I would have no hesitation in concluding that the public interest considerations outlined in section 117B(1)-(5) would outweigh their individual circumstances and that removal would be proportionate.

16. However, in assessing whether public interest considerations are sufficiently serious to outweigh the best interests of the children I have taken into account the statutory provisions contained in section 117B(6), which states that the public interest will not require a person's removal if he has a genuine and subsisting relationship with a 'qualifying child' and it would not be reasonable to expect the child to leave the UK. I have also considered whether the youngest child might satisfy the private life requirements contained in paragraph 276ADE(1)(iv) of the immigration

rules. In both cases the test is essentially the same i.e. whether it is reasonable to expect a ‘qualifying child’ to leave the UK.

17. Both children are ‘qualifying children’. The first because she is a British citizen and the second because he has been continuously resident for a period of seven years. It is not disputed that the parents have a genuine and subsisting relationship with both children. The crux of the appeal rests very much on whether it would be ‘reasonable’ to expect the children to leave the UK.

18. In *MA (Pakistan) v SSHD* [2016] EWCA Civ 705 the Court of Appeal expressed some doubt as to whether the ‘reasonableness’ test should include consideration of public interest factors, but declined to depart from the earlier decision in *MM (Uganda) v SSHD* [2016] EWCA Civ 450, which concluded that it did. In *MA (Pakistan)* Lord Justice Elias emphasised that significant weight should still be given to the interests of a child, especially with reference to the respondent’s published policy guidance: Immigration Directorate Instructions “Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10 Year Routes” (August 2015).

19. The guidance makes a distinction between qualifying children who have been continuously resident in the UK for a period of seven years and British children. This reflects the different rights that might arise from British citizenship in terms of immigration status, and in particular, under European law. The relevant section of the policy guidance relating to British children is as follows:

> “**11.2.3. Would it be unreasonable to expect a British Citizen child to leave the UK?**
> Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano.
>
> ....
> Where a decision to refuse the application would require a parent or primary carer to return to a country **outside the EU,** the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.
> In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.
> It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.
> The circumstances envisaged could cover amongst others:
>
> - criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
> - a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.

> In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation. If the decision maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the Office of the Children's Champion on the implications for the welfare of the child, in order to inform the decision."

20. The respondent's policy must be given due weight in assessing whether a decision strikes a fair balance between the competing interests. The respondent's policy accepts that it is unreasonable to expect a British child to be required to leave the UK, but in certain circumstances it might be proportionate to expect a family to be separated if the public policy considerations are sufficiently compelling <u>and</u> there is evidence to show that the child could stay with another parent or primary care giver in the UK or EU.

21. The respondent has no power to remove the oldest child because she is now a British citizen. Although the immigration history of the adult appellants is poor, in my assessment, it does not disclose the kind of behaviour that the policy envisages might justify removal of a primary care giver. The main difficulty for the respondent in this case is that there is no evidence to suggest that there is another primary care giver who could look after the British child if the rest of the family were to be removed from the UK. Regardless of the adult appellants' immigration history, the respondent's own policy shows that removal would be unreasonable in this case and that section 117B(6) applies in relation to the adult appellants.

22. In relation to a non-British child who has lived in the UK for a continuous period of at least seven years the policy states [11.2.4]:

> "The requirement that a non-British Citizen child has lived in the UK for a continuous period of at least the 7 years immediately preceding the date of application, recognises that over time children start to put down roots and integrate into life in the UK, to the extent that being required to leave the UK may be unreasonable. The longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse a case with continuous UK residence of more than 7 years."

23. Although the policy goes on to outline a number of other factors that might be relevant to the assessment, I find that it is not necessary to go through each and every one of them in view of my findings relating to the other appellants. The youngest child has been resident in the UK for a period of nine years and strong reasons will be needed to justify his removal. His sister is now a British citizen and the fate of her parents is tied to that status. If the family circumstances are considered as part of a 'real world' assessment, I find that it would be unreasonable to expect the fourth appellant to leave the UK if removal of other family members is

either not possible or disproportionate. At the date of the hearing, I conclude that he meets the requirements of paragraph 276ADE(1)(iv) of the immigration rules, which is said to reflect the respondent's view as to where a fair balance is struck.

24. I conclude that removal of the appellants in consequence of the decision would not strike a fair balance between the weight to be given to the public interest (as expressed in the relevant rules, statutes and policy) and the impact on the individuals involved in this case (points (iv) & (v) of Lord Bingham's five stage approach in *Razgar*).

Conclusions

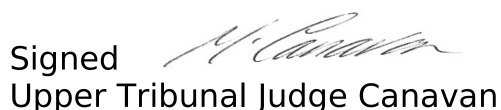
25. In relation to the first and second appellants, I conclude that the decision is unlawful under section 6 of the Human Rights Act 1998 so long as the parents continue to be the primary carers for the children. If at some point in the future the children form independent lives it might be appropriate to review the situation of the parents.

26. In relation to the third appellant, the respondent has no power to remove the child and the decision is unlawful under section 6 of the Human Rights Act 1998.

27. In relation to the fourth appellant the decision is unlawful under section 6 of the Human Rights Act 1998 because it would be unreasonable to expect him to leave the UK.

DECISION

The appeals are ALLOWED on human rights grounds.

Signed  Date 11 October 2017
Upper Tribunal Judge Canavan