Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19161/2012

THE IMMIGRATION ACTS

Heard at: Field House
On: 12th September 2013

Determination Promulgated
On: 17th September 2013

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Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Y.S
(anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr Pretzell, Counsel instructed by S.Z Solicitors
For Respondent: Mr Wilding, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of India. Until today his appeal was linked to those of his mother and younger brother who are appealing against decisions to deport them from the UK. For the reasons set out below this appeal can, for the moment, be dealt with in isolation.

2. The Appellant came to this country when he was 12 years old. He was given leave to enter as the dependent of his mother, who had leave to enter as a Highly Skilled Migrant. On the 12th March 2009 when their leave was still current, the Appellant's mother made an application to

vary that leave by extending it, again naming the Appellant as her dependent. On the 6th September 2010, having received no response to the earlier application, the Appellant submitted to the Respondent a 'FLR(O)' form. We are told that this was because he had turned 18 whilst waiting for the Respondent to deal with the HSMP application. What happened next is not entirely clear but the following facts can be extracted from the chronology.

3. The Appellant's mother was convicted of a criminal offence and was sentenced to a period of imprisonment. On the 12th October 2011 the Respondent made a decision to deport the Appellant's mother as a foreign criminal. The Respondent further made a decision to deport the Appellant and his minor brother as her family members. The family appealed against those respective decisions.

4. On the 21st October 2011 First-tier Tribunal Judge Grimmett found the deportation decision in respect of the Appellant to be 'not in accordance with the law': the Appellant was over 18 and as such could not be deported as his mother's dependant[1].

5. The Appellant was left with no immigration decision giving him a right of appeal and his representatives issued judicial review proceedings to remedy this. On the 1st May 2012 it was ordered by consent that the Respondent should consider the FLR(O) application and that should the application be refused "she will issue the Claimant with a notice to remove, thereby giving rise to an in-country right of appeal"[2]. On the 25th July 2012 the Respondent served on the Appellant a decision to remove the Appellant from the United Kingdom pursuant to section 10 of the Immigration and Asylum Act 1999. That gave the Appellant a right of appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 which he availed himself of. Section 10 reads:

> 10. Removal of certain persons unlawfully in the United Kingdom.
>
> (1) A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if—
>
> (a) having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave;
> (b) he has obtained leave to remain by deception; or
> (c) directions ("the first directions") have been given for the removal, under this section, of a person ("the other person") to whose family he belongs.

[1] Pursuant to section 5(4) of the Immigration Act 1971
[2] Consent Order at page 20 Appellant's bundle

6. The matter came before the First-tier Tribunal (Judge Khan and Mr Sandall) and was joined to the deportation appeals of the Appellant's mother and brother. It is recorded at paragraph 43 of the determination that Ms Pleas, appearing for the Respondent, expressly conceded that the Appellant was "not an overstayer". She accepted that the application on the 6th September 2010 had been an application to vary existing leave and that the Appellant therefore had statutorily extended leave by virtue of section 3(c) of the Immigration Act 1971. The Tribunal allowed the appeal on Article 8 grounds.

7. The Respondent sought leave to appeal to the Upper Tribunal and on the 10th June 2013 Deputy Upper Tribunal Judge Bruce found errors of law in the determination of the First-tier Tribunal in respect of all three members of the family and set the decision aside. Her full reasons for doing so are appended to this decision.

8. The matter was listed before us to be remade. At the outset of the hearing the panel enquired as to why this decision had been a decision to remove pursuant to section 10 if it was agreed that the Appellant had not overstayed. Mr Wilding was unable to assist. He confirmed that as far as he was aware the Appellant had not yet been served with an immigration decision in response to the application made on the 6th September 2010. He agreed with Mr Pretzell that notwithstanding the misleading terms of the consent order, the Respondent should in fact have served the Appellant with a refusal to vary his leave, since it would appear that none of the criteria in section 10(1)(a) –(c) were applicable to him. Mr Wilding initially suggested that the problem might be solved with reference to section 86(4) of the Nationality, Immigration and Asylum Act 2002 which provides that "a decision that a person should be removed from the United Kingdom under a provision shall not be regarded as unlawful if it could have been lawfully made by reference to removal under another provision". That however presented problems of its own since the only other provision that the Respondent could have used to make a decision to remove was section 47 of the Immigration, Asylum and Nationality Act 2006; that could not, for the reasons set out in Adamally and Jaferi (section 47 removal decisions: Tribunal Procedures) [2012] UKUT 00414 (IAC), be described as a "lawful decision". In light of that Mr Wilding conceded that the appeal should be allowed as 'not in accordance with the law' since section 10 does not permit the removal of a person with valid 3(C) leave.

Decision

9. The decision of the First-tier Tribunal contains an error of law such that it is set aside.

10. The appeal is allowed only on the limited basis that the decision is "not in accordance with the law".

Deputy Upper Tribunal Judge Bruce
13th September 2013

Appendix A: Error of Law Decision

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers:
DA/00867/2010
IA/39957/2010
IA/19161/2012

THE IMMIGRATION ACTS

Heard at: Field House
On: 20th May 2013

Determination Promulgated

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Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

NS
PS
YS

Respondents

For the Appellant:	Mr T Wilding, Senior Home Office Presenting Officer
For the First and Second Respondents:	Mr M Bradshaw, Counsel instructed by Irving and Co Solicitors
For the Third Respondent:	Ms L Akande, Counsel instructed by S.Z Solicitors

DECISION ON ERROR OF LAW

1. The Respondents are all nationals of India. NS (date of birth 4th June 1970) is the mother of PS (15th May 2000) and YS (5th September 1992). In a determination dated 6th February 2013 the First-tier Tribunal (Judge AW Khan and Mr GF Sandall) allowed their linked appeals against a series of decisions taken by the Appellant. Those decisions were respectively a decision to deport NS pursuant to the provisions of s32(5) of the UK Borders Act 2007[3], a decision to deport PS as her minor child[4], and a decision to remove YS from the UK pursuant to section 10 of the Immigration and Asylum Act 1999[5]. The Appellant now has permission to appeal against the decision of the First-tier Tribunal.

Background Facts and Matters in Issue

2. NS came to the UK as a Highly Skilled Migrant in 2005. Her sons, then aged nearly 5 and 12, were given leave to enter as her dependents. Their father was also in the UK as a HSM. On the 12th March 2009 NS made an application for further leave to remain as a HSM with the children as her dependents.

3. Those applications were outstanding when on the 3rd June 2009 she was convicted at Isleworth Crown Court of the offence of money laundering and sentenced to four years imprisonment. The background to that offence was that NS, her husband and another woman were all charged with a very substantial conspiracy to defraud, relating to their "professionally organised"[6] business of producing bogus documents for the purpose of circumventing UK immigration control. Over a million pounds passed through their various accounts in a two year period. NS was acquitted of the conspiracy charge[7], but convicted of personally laundering approximately £190,000, money which she knew to have come from the criminal enterprise. Her sentence meant that she faced automatic deportation from the UK pursuant to s32(5), but the trial judge added for good measure that he considered that her continuing presence in the UK was to the public

[3] The Deportation Order was signed on the 12th October 2010
[4] Served on the 25th October 2010
[5] An earlier decision to deport YS in line with his mother was found to be not in accordance with the law since he was over 18 at the date of decision: determination promulgated by Judge Grimmett of the First-tier Tribunal on the 15th February 2012 [IA/40211/2010]
[6] Sentencing remarks of trial judge HHJ McGregor-Johnson 3rd June 2009, 3B
[7] Her co-defendants were convicted. Her husband received a sentence of 7 years' imprisonment and the third defendant 8 years' imprisonment.

detriment and that she should be deported when she had finished her sentence.

4. The Appellant therefore signed a deportation order against NS, and sought to deport /remove her children in line with her.

5. On appeal the First-tier Tribunal rejected all arguments advanced by NS on asylum and human rights grounds. The Tribunal found that had her case been viewed in isolation, it would have upheld the decision to deport her. Her case however could still succeed if her sons, and specifically PS, who was still a minor, could show that his removal was a disproportionate interference with his Article 8(1) rights[8].

6. The Tribunal found itself "entirely satisfied" that PS's best interests lay in remaining with his mother, and remaining in the UK. The Tribunal noted that PS had been in the UK since he was nearly five and that he had virtually forgotten how to speak Hindi; it had regard to evidence including expert reports prepared by a clinical psychologist who concluded that his removal to India with his mother would be to his severe detriment[9].

7. Having made that finding the Tribunal went on to say this:

> "57. As far as the Second Appellant is concerned, he has now spent almost eight years of his life in the UK, a time more than half his life. The other exceptional circumstances relate to the findings of Dr Carswell and Dr Bartlett as set out above. The prognosis from all sources regarding the best interests of the Second Appellant, including reports from [his] School, clearly indicate that he should remain in the UK. We find that deportation to India with his mother would have such an adverse impact upon his future wellbeing that it would be disproportionate to seek to deport him. It is a fact that the Second Appellant's life is now in the UK and to uproot a 12 year old boy away from his school, his friends, his social circle, his uncle and aunt and his older brother, whose findings in this appeal we set out later, would be wholly wrong."

8. The determination then sets out pertinent conclusions of the judgement in ZH (Tanzania) [2011] UKSC 4 and goes on:

> "59. In closing submissions on behalf of the Respondent, the question posed that the Tribunal must therefore answer in the Second Appellant's case was whether the severity of the consequences of deportation on him were outweighed by the severity of the criminal conduct of the mother. As we have said before, looking at the First Appellant's case in isolation, her own Article 3 and Article 8 claim would not succeed in the light of the

[8] Paragraph 46 of the determination.
[9] Paragraphs 49-56

> gravity of her offending behaviour. However, having considered the effect of the Second Appellant's deportation to India along with the First Appellant, we find for all the reasons set out above, that the Second Appellant's Article 8 claim outweighs the criminal conduct of his mother. In coming to this conclusion we have also taken into account what the Tribunal said in **MF** in that even if a decision to refuse an Article 8 claim under the new rules is found to be correct, judges must still consider whether the decision is in compliance with a person's human rights under Section 6 of the Human Rights Act and in automatic deportation cases, whether removal would breach a person's Convention rights. Thus, in the context of deportation and removal cases, the need for a two-stage approach in most Article 8 cases remains imperative because the new Rules do not encapsulate the guidance given in **Maslov v Austria (Application number 1638/03) [2008] ECHR 546**. The Tribunal also said that when considering Article 8 in the context of an Appellant who fails under the new Rules, it will remain in the case, as before, that "exceptional circumstances" is to be regarded as an "incorrect criterion". In **Maslov** it was said that, amongst other things, the criteria in determining proportionality and expulsion included the best interests and wellbeing of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled and the solidity of social, cultural and family ties with the host country and with the country of destination. Clearly, in so far as the Second Appellant is concerned, we find that there would be serious difficulties in India for him and that as a result of the length of time he has been living in the UK, he has established solid social, cultural and family ties.
>
> **Conclusion**
>
> 60. In respect of the Second Appellant, he succeeds under Article 8 family and private life on the basis that his best interests must be to remain in the UK with his mother. It follows therefore that the First Appellant succeeds under Article 8 in like case".

9. The Secretary of State submits that the conclusion at paragraph 60 could not automatically follow from the analysis set out in paragraphs 59 and 57, nor from direct application of the uncontentious ZH factors considered in paragraph 58. Her complaint is that the Tribunal has treated PS's best interests as a 'trump card' and that it has failed to properly conduct the balancing exercise identified by the HOPO on the day, to weigh the best interests of the child (and any other relevant factors) against his mother's criminality (and any other relevant factor). That much is revealed, submits the Appellant, by the phrase "would be wholly wrong" at paragraph 57 of the determination, which appears to indicate that the Tribunal reached its decision on proportionality only having regard to the best interests of the child.

10. The Secretary of State does not challenge the finding that it is in PS's best interests to be with his mother, but does question the approach

taken overall, submitting that there was no analysis as to whether it would contrary to PS's best interests to go to India with his mother and brother; nor was there a proper analysis of all the relevant factors set out, for instance at paragraphs 32-53 of MK (Best Interests of the Child) India [2011] UKUT 00475.

11. The Respondents submit that the grounds of appeal present a slanted reading of the determination. They point to paragraphs 36, 38 and 56 where the Tribunal records the view of the Secretary of State, and 47 and 48 where the Tribunal sets out the detail of the First Respondent's offences, summed up at the end of 47:

> "This was, therefore, a very substantial conspiracy to defraud involving he submission of completely bogus documents and an extremely serious offence".

Although these paragraphs are not incorporated into the analysis section cited by the Appellant, it is submitted that the Tribunal clearly had them in mind when assessing proportionality: see the phrase "for all the reasons we set out above" in paragraph 59. As Mr Bradshaw puts it in his rule 24 response: "it is submitted that the determination must be looked at as a whole. Simply because conclusions have been reached in a particular order within a determination does not demonstrate that an incorrect approach has been followed"[10].

12. In the alternative the First and Second Respondents submit that if the Tribunal did err in the manner alleged in the grounds of appeal, the error is not material. There are clear findings on where PS's best interests lie, so the Respondents would in any case succeed in their appeal, since the "potential implications of removal for him are so significant as to outweigh the public interest in deportation of foreign criminals, despite the seriousness of the offence"[11].

13. Those are the matters in issue insofar as they relate to the deportation appeals of the First and Second Respondents.

14. In respect of the Third Respondent the Tribunal notes the concession of the Secretary of State that his appeal should be allowed if those of his mother and brother are successful. The Tribunal goes on however to set out why his appeal should also be allowed in isolation from the others. Factors weighing in his favour include the "serious errors" made by the UKBA in dealing with his case[12] including an "unacceptable delay" of 22 months[13], the fact that he had come here

[10] Rule 24 Response dated 28th March 2013, paragraph 9
[11] *Ibid* paragraph 21
[12] Paragraph 63 of the determination
[13] Paragraph 68

aged 12 and had established "considerable ties" during that time[14], that he had never overstayed, that he has studied, passed exams and hopes to go to university[15]. For those reasons the Tribunal conclude that YS was entitled to succeed under paragraph 353B of the Immigration Rules, and Article 8, finding "there is very little, if any, public interest in enforcing immigration control in this case upon the whole of the evidence"[16]. The Tribunal also consider it important to note that "but for the criminal conduct of their parents, both children would have had a legitimate expectation to remain in the UK on the basis that they had originally come here as dependants under the HSMP"[17]

15. The grounds of appeal allege that the Tribunal has failed to conduct a proper proportionality balancing exercise in respect of the Third Respondent. The determination sets out factors in his favour, and rejects some of those advanced in the refusal letter, but nowhere does it properly engage with the fact that this young man had no leave to remain in the UK. It is pointed out that he can have had no legitimate expectation that he would get further leave to remain as a HSMP dependant; even setting the criminality of his parents aside his mother had ceased to work as a teaching assistant, the capacity in which she had obtained that visa. The "unacceptable delay" mentioned in the determination was in fact attributable to the fact that his parents had been arrested, tried and convicted of serious crimes. Finally the finding that the Appellant succeeded "under paragraph 353B" was nonsensical since that (now deleted) provision conferred no substantive benefit on applicants.

16. The rule 24 response on behalf of YS submits that the Tribunal was entitled to find that the factors identified did cumulatively amount to a successful Article 8 claim. The Tribunal clearly delineated the factors in YS's case separately from his mother and brother, and since this was a s.10 removal there was no need in his case to weigh in the balance the prevention of crime and disorder. The legitimate Article 8(2) aims pursued in this removal were the economic well-being of the country and the rights and freedoms of others and the Secretary of State had not sensibly shown why the decision was necessary in that context.

17. Those are the matters in issue in respect of the Third Respondent.

[14] Paragraph 66
[15] *Ibid*
[16] Paragraph 69
[17] Paragraph 71

My Findings

18. I begin at the beginning, that is the findings on the best interests of PS. Mr Wilding accepted that it is in the best interests of PS to remain with his mother[18]. He took issue however with the Tribunal's finding that it was in his best interest to remain with her in the UK. The relevant part of the determination is at paragraphs 49-57. The criticism of the Tribunal's approach is that there was a failure to fully examine the criteria suggested in MK (India). Those criteria are: the child's perspective, the family context, citizenship, culture, religion and tradition, health, language, education and links outside the family, that is to say the child's own independent family life. It is submitted that the failure to have full regard to each of these factors left the determination's assessment of best interests incomplete, and therefore flawed.

19. The Tribunal clearly placed great emphasis on this part of the determination. Having found no countervailing factors to suggest that the child should be separated from his mother the Tribunal properly asked of itself, at paragraph 49, "where they should be living together, namely in India or in the UK". In answering that question the Tribunal clearly did take into account the opinion of PS himself, having summarised the contents of his witness statement[19],(although not, I note, PS having told Dr Carswell that he would rather remain with YS in the UK than go to India with his mother[20]). It can also be said that the Tribunal had regard to his health, in that mention is made of the counselling he receives for anxiety[21]; so too does the Tribunal consider the impact that moving to a different culture will have on PS, who is socially settled in the UK[22]. All of these factors suggested to the Tribunal that his deportation was contrary to his best interests. There was however no consideration given to the fact that he remains a citizen of India, who shares in the religion and traditions of that country. Emphasis was placed on the fact that he speaks little Hindi, but apparently no consideration given to the fact that in many schools in India tuition remains in English: see for instance paragraph 40 of MK (India). The fear expressed by his mother that he would be teased because he would be from a higher caste than the other state school pupils appears to have been accepted without consideration of whether it was likely to be true (for instance whether it was supported by country background material) and more importantly without considering why he could not attend a private school, given the

[18] That being the finding of the First-tier Tribunal set out at paragraph 49 of the determination
[19] Paragraph 54 determination
[20] Paragraph 11.1 report of Dr Carswell dated 31st March 2012
[21] Paragraph 53 determination
[22] Paragraph 52 determination

Tribunal's earlier conclusions that NS would be able to work and that she had the support of her family. For that reason the Tribunal's findings on language and education were arguably incomplete. However the real difficulty with the analysis arises in respect of the family context.

20. Unlike in MK it was not immediately obvious who this child would be going to India with. It was a safe assumption that it would be with his mother, but since the positions of YS and his father were uncertain, there could be no such assumption about them. In respect of the latter the Tribunal appears to have omitted him from the equation altogether, and it is hard to see how it could have done anything else, given that he was subject to entirely separate deportation proceedings the outcome of which was unknown. In respect of YS the Tribunal has proceeded on the basis that he would be staying here (see paragraph 51); conversely the Tribunal appears to proceed, in YS's appeal, on the basis that PS and NS will also be staying. Nowhere is any consideration given to whether it would be contrary to PS's best interests to go and live in India with his mother *and* brother. Had that analysis been made, it may have led to a different outcome in all three appeals. For instance, great reliance is placed in the determination on the reports prepared by Chartered Clinical Psychologist Dr Carswell. Whilst Dr Carswell does conclude that PS "would experience a substantial detriment were he to be returned to India with his whole family"[23] this conclusion was based on his mother's self-reporting that the family would face destitution, limited access to education and opportunities and a significant reduction in their standard of living: she had also told the doctor that she would face social stigma and be ostracized because of her conviction and her status as a divorced woman. These were all matters that were expressly rejected by the First-tier Tribunal at paragraph 45 of the determination where it was found that she would have the support of her family, she would be able to work, and that she would face no stigma. There was therefore little sustainable support in Dr Carswell's report for the proposition that there would be severe detriment to PS if he was removed to India with his brother as well as mother. The failure to address this question was a failure to take relevant matters into account and amounts to an error of law.

21. I now turn to deal with the central ground of appeal in respect of the First and Second Respondents, that the Tribunal's assessment of proportionality was incomplete. Mr Bradshaw is correct to say that the Tribunal had regard to the criminal offence committed by NS. That much is apparent from paragraphs 46 and 47 as well as the view,

[23] Paragraph 10.4 report dated 31st March 2012

apparently expressed at hearing as well as in the determination, that she stood no prospects of success on her own. The question is whether the Tribunal members properly directed their minds to whether that criminality was outweighed by their findings on the welfare of PS. It is clear from the face of the determination that they had the question in mind, since it is repeated at intervals throughout the determination (see for instance at paragraph 36, 41, 56, 59), but it is not clear whether they actually engaged with it. Having set out in detail, over 11 paragraphs, why they found it to be in PS's best interests to stay in the UK, the Tribunal conclude, at paragraph 60: "he succeeds under Article 8 family and private life on the basis that his best interests must be to remain in the UK with his mother". That is an error of law. PS, and NS, cannot succeed in their appeals simply because it is in his best interests to be here with her. It may be that those findings on best interest would, following proper analysis, yield the same results for the Respondents, but on the face of this determination that analysis was not conducted. As in ZS (Jamaica) & Anr [2012] EWCA Civ 1639 the Tribunal has treated best interests of a minor appellant as being *the*, not simply *a* primary consideration, and having done so failed to have regard to the countervailing factors. It was in no way inevitable, as submitted by Mr Bradshaw, that the findings on best interests would outweigh the competing interests of the state. For that reason the determination cannot stand in respect of the First and Second Respondents.

22. In respect of the Third Respondent it is in my view inevitable that the decision in his case must too be set aside, because it is infected with the same error as that of his mother and brother. At paragraph 62 the Tribunal asserts that it has considered his case separately from theirs (as well as allowing it on a linked basis) but in the very next sentence find that his Article 8(1) family life is based on his relationship with his little brother. There is no separate finding on whether the Article is engaged on the basis of his private life, distinct from his family. I therefore need not deal with the remaining reasoning in the determination and the criticisms thereof. The decision insofar as it relates to the Third Respondent is also set aside in its entirety.

Decision and Directions

23. The decision of the First-tier Tribunal contains an error of law such that it is set aside in respect of all three Respondents.

Deputy Upper Tribunal Judge Bruce
10th June 2013