Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05910/2014

THE IMMIGRATION ACTS

Heard at Glasgow
on 30 September 2014

Determination issued
on 1 October 2014

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

ZEESHAN RASHID

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr E MacKay, of McGlashan MacKay, Solicitors
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

No anonymity order requested or made

DETERMINATION AND REASONS

1) These are the grounds of appeal to the Upper Tribunal:

Ground 1

1 At paragraph 4 the judge records that the eldest child, who was born in and lived in the United Kingdom all his life, is 9 years old (dob 10 October 2014). As was submitted … that child has an unassailable right to register as a British citizen on his 10th birthday if he remains in the United Kingdom until 19 July 2014 (see s.1(4) British Nationality Act 1981) and therefore is the relevant date, as the 19th July 2014 is 89 days before the child's 10th birthday. That is a matter of law that is deemed to be within Judicial Knowledge. The judge should therefore have had regard to the fact that if the appellant successfully avoided removal for less than 4 months his child would be entitled to register as British.

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2 The judge should also have been aware the family returns process takes many months to effect removal. On balance the child is likely to be in the United Kingdom on 19th July 2014. The issue of best interests was therefore not about the disruption of sending his children to Pakistan but the double disruption of the children being sent to Pakistan and then returning with the other appellants on the basis of *Zambrano*. The judge left those matters out of account but they were material. In so failing the judge erred in law.

Ground 2

3 At paragraph 49 the judge makes references to *Zoumbas*. In *PW* (Petitioner) 2014 DSOH 64 (issued on the last day for lodging the present application) it was said in relation to the matter referred to in paragraph 49 of the decision in the present case:

> [29] Mr Komorowski (Counsel for the Secretary of State) advanced two somewhat contradictory arguments. First, he submitted that the decision of Lord Tyre was contrary to that of the Supreme Court in *Zoumbas v Secretary of State for the Home Department* [2013] 1 WLR 3690. In the course of discussion, I understood Mr Komorowski no longer to insist on that line. He reverted to his second argument, which was that in light of the decision in *Zoumbas*, whether or not that was consistent with *IE*, the law on this matter was now clear and therefore did not amount to an important point of principle or practice upon which clarification was needed.
>
> [30] It seems to me that ground 7 does raise an important point of principle or practice. The law does not appear to be clear, as evidenced by the fact that Mr Komorowski initially took *Zoumbas* to be contrary to *IE* before, so it appeared to me, accepting that it was not. In paragraph 39 of the FTT decision, the judge appears to accept that the best interests of the child "is a matter which has to be addressed first as a distinct enquiry" and that factors relating to the public interest and the maintenance of effective immigration control must not form part of that consideration. But that is not the same as recognising that the best interests [of] the child should not be assessed on the basis that the parent will necessarily leave the UK. If, as it seems to me there may be standing the apparent difference between *IE* and *Azimi-Moayed*, there is uncertainty on this point, or a difference of view, then it is something which must be clarified.

4 … in light of that passage the judge in the present case erred in law.

Ground 3

5 The judge erred at paragraph 50 in holding the primary focus of a 9 year old child is his parents.

Ground 4

6 The judge at paragraph 50 and 52 placed undue weight on the older child not being British when that child was within 4 months of having an unassailable right to British citizenship.

2) On 12 June 2014 I granted permission to appeal, giving the following reasons:

> Judges are not expected to conjure up every argument which might conceivably be made, in the absence of submission, particularly where an appellant has been professionally represented. While this grant of permission is not restricted, I doubt if there is a realistic prospect of error of law being found to arise from the judge's failure to take the lines proposed at grounds 1 and 4.

Ground 3 does not seem to be more than a disagreement.

The points which appear to me to require debate before answer are whether there is any tension between *IE* (Petitioner) [2013] CSOH 142 and *Azimi-Moayed and others* (decisions affecting children; onward appeals) [2013] UK UT00197 (IAC), and whether the citation from *PW* illustrates any error in the application of *Zoumbas* by the FtT Judge.

3) Regarding grounds 1 and 4, Mr Mackay said there was mention in the First-tier Tribunal of the right in due course of the eldest child to apply for UK citizenship, although no argument was developed on the basis of *Zambrano*. The judge did not mention the point, which was an error of law.

4) As to ground 2, Mr Mackay said that there is a conflict between *IE* and *Azimi-Moayed.* In *IE* at paragraph 14 Lord Tyre said that the SSHD was not entitled to proceed on the assumption of removal of the parent when assessing the best interests of the children. The judge in this case failed to assess to assess whether it would be in the children's best interests to remain on the assumption their parents would be here. That was logically the first question.

5) Mr Mackay had nothing to add to ground 3, and accepted that on its own it would not disclose material error. He submitted that grounds 1, 2 and 4 disclosed error such that the decision needed to be remade. That should be approached on the basis that the best interests of the children would not be served by removal of their parents. There was still a proportionality issue, but it was not reasonable to remove a 10 year old child who has been brought up here throughout his life, attends primary school, belongs to UK society, and will shortly be in a position to register as a citizen. Stability and continuity in educational provisions was desirable. There was no compelling reason to disrupt that length of residence and depth of ties.

6) Mr Matthews submitted that grounds 3 and 4 are only disagreement with the relative weight given to factual matters before the judge, and disclose no legal error. He criticised the proposition in ground 1 that a judge should not decide a case on the facts as they stood, when no member of the family was a citizen or entitled to register as such. A judge should decide as if his decision will be accepted and become effective, not on the assumption of further resistance and delay. A similar argument was rejected in *IE*. Ground 2 might gain some traction from *PW*, but that case was the subject of a reclaiming motion, and the point was resolved by *Zoumbas*. *IE* was referred to by both sides in the Supreme Court in *Zoumbas*, where the Court had not called upon the SSHD to reply. The point had not been overlooked, and *Zoumbas* did not leave any real doubt. The same challenge as in this ground of appeal was recorded at paragraph 3 (iv), and rejected at paragraphs 24 - 25. There was no conflict among the authorities binding the First-tier Tribunal, which correctly applied *Zoumbas* from paragraph 48 onwards of the determination. In assessing the best interests of the children, the judge correctly excluded the conduct of the parents. The judge was entitled to take that factor into account in the eventual proportionality assessment, and the immigration history was an unedifying one, including a

fraudulent asylum claim, an attempt to blame that on a solicitor, going to ground, and working unlawfully.

7) I asked Mr Matthews what would follow from a finding that the interests of the children should firstly have been assessed on the assumption their parents would remain. He submitted that while no doubt it would be in the best interests of the children to be with their parents, the proportionality assessment would eventually be the same.

8) Mr Mackay in reply said that as to the right to citizenship this case was stronger that *IE*, where that was not assured and lay years in the future. In this case the matter did not depend on any discretion but within a short time would become an entitlement. That was strong enough to be a factor in the proportionality assessment, even at the date of the First-tier Tribunal decision.

9) I reserved my determination.

10) I do not think the prospect of the elder child registering in the future as a British citizen is a significant matter which the judge failed to take into account. The point was canvassed, but a judge does not have to record every detail. It is correct in principle to decide cases on the facts as they stand at date of decision, not on the assumption that the result will be resisted into the future.

11) Neither in the First-tier Tribunal nor in the Upper Tribunal was there any attempt to substantiate the proposition that there is a principle stated in *Zambrano* which will entitle this family as a whole to return to the UK.

12) I do not think that *Zoumbas* leaves any significant doubt. The point now argued did not help the appellants in that case. The judge here meticulously applied *Zoumbas* at paragraphs 48 -53.

13) Even if the question should firstly have been asked, how would the interests of the children best be served if their parents remain here, I do not think that difference of approach would be an illuminating one. Without doubt the interests of the children would best be served by remaining with their parents either in the UK or in Pakistan, and the eventual proportionality issue is the same.

14) I am fortified in that view by a case in the Court of Appeal to which Mr Matthews made passing reference, *EV (Phillipines) v SSHD* [2014] EWCA Civ 874. The following is from the judgement of Christopher Clarke LJ:

1. More important for present purposes is to know how the tribunal should approach the proportionality exercise if it has determined that the best interests of the child or children are that they should continue with their education in England. Whether or not it is in the interests of a child to continue his or her education in England may depend on what assumptions one makes as to what happens to the parents. There can be cases where it is in the child's best interests to remain in education in the UK, even though one or both parents did not remain here. In the present case, however, I take the FTT's finding to be that it was in the best interests of the children to continue their education

in England with both parents living here. That assumes that both parents are here. But the best interests of the child are to be determined by reference to the child alone without reference to the immigration history or status of either parent.

1. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.
1. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.
1. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.
1. In the balance on the other side there falls to be taken into account 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 hypothesi*, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully.

2. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?

The next passage is from the judgement of Lewison LJ:

1. On the facts of *ZH* it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens.
1. That is a long way from the facts of our case. In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world.
2. In fact the immigration judge weighed the best interests of the children as a primary consideration, and set against it the economic well-being of the country. As Maurice Kay LJ pointed out in *AE (Algeria) v Secretary of State for the Home Department* [2014] EWCA Civ 653 at [9] in conducting that exercise it would have been appropriate to consider the cost to the public purse in providing education to these children. In fact

that was not something that the immigration judge explicitly considered. If anything, therefore, the immigration judge adopted an approach too favourable to the appellant.

15) The appellant has not shown that the determination of the First-tier Tribunal involved the making of an error on a point of law, and that determination shall stand.

1 October 2014
Judge of the Upper Tribunal