



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/27149/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 4 March 2015**

**Determination Promulgated
On 13 May 2015**

Before

**THE HONOURABLE MR JUSTICE COLLINS
DEPUTY UPPER TRIBUNAL JUDGE FRANCES**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR HENRY KWAKU NIFAH
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr S Kandola, Home Office Presenting Officer

For the Respondent: Mr S Sayeed, Counsel instructed by Wilson Solicitors LLP

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of Judge Russell whereby he allowed the appeal of the appellant against the decision of the Secretary of State that he together with his wife and child should be removed to Ghana.
2. The immigration history of both parents is exceedingly poor. Essentially most of the time that they have been in this country, in the father's case

since May 2001 and in the mother's case since June 2003, has been without leave as overstayers and so in breach of the law.

3. There was an initial refusal by the Secretary of State of an application made in 2011. However, there was an application for a review, indeed for a reconsideration and the request was made in November 2011. That was in the mother's case. The Secretary of State delayed until June 2014 before making a decision.
4. The child involved in this case is a daughter who was born on 10 May 2007. The result of the Secretary of State's delay in dealing with the matter has meant that by the time the decision was eventually made in respect of the family, if we can put it that way, the child had reached the age of 7, and that is important for reasons which will become apparent. It is, to say the least, unfortunate that the Secretary of State has acted in what can only be said to be a thoroughly incompetent way in allowing time to pass.
5. Now there can be no question, and the contrary has not been argued, that if the parents stood alone in the sense that there was no child there could be no conceivable suggestion that removal was unjustified, indeed removal clearly was appropriate. The question that the First-tier Judge had and we have to consider is whether the position of the child means that the family must be allowed to remain.
6. The issue has been to an extent dealt with in the sense that Parliament has legislated in the 2014 Act by way of amendment adding additional Sections in the 2002 Act. What Parliament has done is to seek to identify the factors which the Tribunal and indeed the Secretary of State would have to take into account and apply in deciding whether in terms of Article 8 of the European Convention on Human Rights it would be proportionate in any given case to remove a particular individual or family.
7. Section 117A provides by Subsection (1):
 - '(1) This part [that is part 5A of the Act] applies where a court or Tribunal is required to determine whether a decision made under the Immigration Acts
 - (a) breaches a person's right to respect for private and family life under Article 8, and
 - (b) as a result would be unlawful under Section 6 of the Human Rights Act 1998.
 - (2) In considering the public interest question, the court or Tribunal must (in particular) have regard
 - (a) in all cases, to the considerations listed in Section 117B.

- (3) In subsection (2) 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)',

and that of course is the proportionality test that is applied in relation to any interference with private or family life.

8. The crucial Section for our purposes is 117B. Subsections (1) to (5) deal with the approach that is applicable in relation to deciding whether individuals should be removed.

'(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic wellbeing of the United Kingdom, that persons who speak English are able to integrate.'

That is not directly relevant in this case. (3), again, relates to economic wellbeing and is not material but (4) provides that:

'(4) Little weight should be given to

(a) a private life, or

(b) a relationship formed with a qualifying partner

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.'

Of course both those provisions relate to individuals and their private lives. It is not directly referable to family life.

9. The key Subsection is 6, and this provides:

'(6) In the case of a person who is not liable to deportation [pausing there, that simply distinguishes deportation from removal, this is a removal case] the public interest does not require the person's removal where -

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom',

A qualifying child is defined in Section 117D as meaning

'... a person who is under the age of 18 and who

(a) is a British citizen, or

- (b) has lived in the United Kingdom for a continuous period of seven years or more’,

Hence the importance, as we indicated at the outset, of the fact that by the time the decision was made and indeed before the First-tier Tribunal and before us the child had attained the age of 7.

10. Now it is to be noted that Subsection (6) of 117B does not say that it is not in the public interest to remove. What it says is that the public interest still exists but it does not require removal in circumstances set out in paragraphs (a) and (b).
11. That is the legal background and before Section 117B(6) was enacted the Supreme Court had made clear in **ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4** that in accordance with Section 55 of the Borders, Citizenship and Immigration Act 2009 the need to safeguard and promote the welfare of children in the United Kingdom was of fundamental importance. The approach was that this was sometimes said to be a primary consideration, not the primary consideration, but the best interests was the best way of looking at it and the best interests of the child would be a matter which had to be taken into account and had to be applied in any given decision.
12. However, it must be borne in mind, and this follows from the case of **Zoumbas v Secretary of State for the Home Department** where the First-tier Tribunal Judge indicated that there was no irrationality in the conclusion that it was in the children’s best interests to go with their parents to the Republic of Congo. The quotation goes on:

“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 stayed in the United Kingdom so that they could obtain such benefits as healthcare and education which the decision-maker recognised might 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 of an age when their emotional needs could 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. Most significantly, the decision-maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their wellbeing.”

We have not been informed as to the age of the children in the case of **Zoumbas** but these observations suggest that they must have been young children at that time.

13. The correct approach was considered by this Tribunal in **E-A (Nigeria) [2011] UKUT 00315 (IAC)** and the Tribunal there decided that:

- “(i) The correct starting point in considering the welfare and best interests of a young child would be that it is in the best interests of a child to live with and be brought up by his or her parents, subject to any very strong contra-indication. Where it is in the best interests of a child to live with and be brought up by his or her parents, then the child’s removal with his parents does not involve any separation of family life.
- (ii) Absent other factors, the reason why a period of substantial residence as a child may become a weighty consideration in the balance of competing considerations is that in the course of such time roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family unit. The degree to which these elements of private life are forged and therefore the weight to be given to the passage of time will depend upon the facts in each case.
- (iii) During a child’s very early years, he or she will be primarily focused on self and the caring parents or guardian. Long residence once the child is likely to have formed ties outside the family is likely to have greater impact on his or her wellbeing.
- (v) The Supreme Court in **ZH** was not ruling that the ability of a young child to readily adapt to life in a new country was an irrelevant factor, rather that the adaptability of the child in each case must be assessed and is not a conclusive consideration on its own.”

14. It is submitted on behalf of the respondent that the best interests of the child have to be looked at in isolation as it were and it is not, having regard to the way Section 117B(6) is set out, appropriate to look to see the faults, if there are any, of the parents. What the court has to consider in approaching reasonableness is solely what in any given case will be the best interests of the child. That is consistent with the approach suggested in paragraph 7.106 of the latest edition of Macdonald where it is said: “Where Parliament has unambiguously and expressly declared what the public interest requires the respondent’s view of the public interest has no relevance”, which means that the Secretary of State’s view should be disregarded if she contends that a person should be expelled notwithstanding that those circumstances are present. The reference to “reasonable to expect the child to leave the UK” is we think reference to the best interests of the child only and not to all considerations that might have a bearing on proportionality.
15. We do not believe that that is a correct approach. If in a given case, as is the case here, the removal of the parents is in accordance with the law and indeed is in the public interest, as it clearly is, then the interests of the child *prima facie* would lie in remaining with her parents. It is only if the child’s best interests in a given case, provided the child has been in this country for over seven years, is such as shows that the child’s interests in remaining with the parents is outweighed by the interests in remaining in this country that removal should not take place. There must be in a given case that balancing exercise carried out because, as we said, the public interest consideration remains in being, it simply via Subsection (6) is not

applied in a given case if, but only if it would not be reasonable to expect the child to leave the United Kingdom.

16. So consideration must be given in every case to the tension perhaps that exists between the interests of the child in remaining with his or her parents and the interests of the child because of the situation that has been built up in this country in remaining here. That will, as we say, depend upon the facts of the given case but those considerations must be borne in mind.
17. One goes back then to the findings of the First-tier Judge in those respects. He noted, as indeed was stated in a further decision of this Tribunal, **Azimi-Moayed [2013] UKUT 197 (IAC)** that seven years from age 4 was likely to be more significant to a child than the first seven years of life. Very young children were focused on their parents rather than their peers and were adaptable, and we bear in mind of course that we are here concerned with a child who has just attained the age of 7.
18. The key findings of the First-tier Tribunal Judge are in paragraph 35 of his decision, where he says this:

“There is no suggestion that the girl will be separated from her parents if they are removed to Ghana; the family will be removed as a unit. The appellant has been raised in a Ghanaian family and is a citizen of Ghana. She has family ties in Ghana. In summary, her social and cultural links remain, substantially, Ghanaian: that is not to say that she requires a high degree of assimilation in order to succeed on her appeal but is relevant to an enquiry about the reasonableness of removing her to Ghana.”

Pausing there, the appeal before the First-tier Tribunal, although it is headed in the name of the father, but it does not actually make any difference to the approach, so back to the citation:

“I reject the evidence that the disruption of her education would be ‘traumatic’ as a well-meaning but gross exaggeration. On the other hand, I accept that the removal of the appellant will represent some disruption to her education, which has recently started, and her wellbeing, by severing friendships and attachments to the wider community in the UK, which she has now begun to form. A period of seven years’ residence is identified in the Immigration Rules as the minimum that can be considered and the decisions of the Tribunal referred to above identify seven years as a guideline but not a rule when considering whether a child has begun to integrate into the UK, with seven years after infancy being identified as more significant.”

19. Then in the next paragraph the judge said this:

“In light of the foregoing, I find that the best interests of the appellant’s daughter lie on balance in remaining in the UK and that it would not be reasonable to expect her to remove to Ghana.”

20. It seems to us that there has been in that approach a failure to consider properly the countervailing interests for the child in remaining with her parents, who do not deserve to be able to remain in this country. Of course we recognise that, looked at in isolation, it might well be said that it was in the child's interests, perhaps even in the child's best interests if one looks at it in a certain way, to remain where she is. She has started her education, she has made friends and she has begun to integrate into society in this country. On the other hand, as the judge made clear, this was not a case in which there would be more than some disruption of her wellbeing. It seems to us in the circumstances that that failure to have regard to the other factors which are material in deciding whether removal is proportionate, because that after all is the test that has to be applied in relation to Article 8, is made out.
21. In our judgment, on the facts of this case it cannot be said that it would not be reasonable to expect the child to leave the United Kingdom because, as we say, in deciding what is reasonable regard has to be had to the test on proportionality which lies behind all decisions that have to be made in accordance with Article 8, and we do not believe that Section 117B(6) was intended to or does provide a lesser test than that which is required through the authorities that have been decided in relation to the assessment of proportionality in accordance with Article 8, and, as we say, where it is clear, as it is here, that the parents have no right whatever to remain in this country it would take a strong case in our judgment to show that it was not reasonable for a child, even a child who had been here for the qualifying period of seven years, to tip the balance, as it were, to allow the family to remain here.
22. We appreciate that in an individual case, and no doubt in this case too, that may appear to be a harsh decision but it is a state of affairs that has been brought about by the failure of the appellant to comply with the immigration law of this country, albeit, as we have said, it is most unfortunate that the Secretary of State's delay has created a more difficult situation for the child.
23. In those circumstances we shall allow this appeal and accordingly dismiss the appellant's appeal from the decision of the Secretary of State.

Notice of Decision

The appeal is allowed.

No anonymity direction is made.

Signed

Date **4 March 2015**

Mr Justice Collins