



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

Appeal Number: IA/40789/2014  
IA/40844/2014  
IA/40873/2014  
IA/40881/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 15<sup>th</sup> February 2016**

**Decision & Reasons Promulgated  
On 27<sup>th</sup> April 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SAINI**

**Between**

**LINETTE MARIE AQUINO  
ABNER AQUINO  
[A M A]  
[A J A]**

**Appellants**

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

For the Appellant: Mr D Coleman, Counsel, Pasha Law Chambers Solicitors  
For the Claimant: Mr L Tarlow, Senior Presenting Officer

**DECISION AND REASONS**

1. The Appellants appeal against the decision of First-tier Tribunal Judge Fox dismissing the Appellant's appeals against the Respondent's decision to refuse them further leave to remain under the Immigration Rules with reference to Appendix FM and Article 8 ECHR, and challenging removal directions under section 47 of the Immigration, Asylum and Nationality Act 2006.
2. The Appellants appealed against that decision and were granted permission to appeal by Upper Tribunal Judge Bruce. The grounds upon which permission was granted may be summarised as follows:
  - (i) It is arguable that the judge erred in relation to the assessment of section 55 of the Borders, Citizenship and Immigration Act 2009 concerning the children's best interests, with particular reference to the Presidential decision in *JO and Others (section 55 duty) Nigeria* [2014] UKUT 00517 (IAC).
3. Aside from giving broad discretion to argue all grounds, Upper Tribunal Judge Bruce also noted that due to the passage of time the third Appellant child had now been in the UK for in excess of seven years. I shall return to this issue in conclusion.

#### **Error of Law**

4. At the close of submissions, I indicated that I would reserve my decision, which I shall now give. I find that there was an error of law in the decision, such that it should be set aside. My reasons for so finding are as follows.
5. This appeal centred upon the Appellants' desire that the Respondent's omission to consider her duty under section 55 of the Borders, Citizenship and Immigration Act 2009 be rectified given that she was charged with considering the welfare of every child and ensuring that her consideration took each child's welfare into account. Mr Coleman for the Appellants submitted that the decision letter for the parents contained a two-paragraph consideration which was generic, whereas the Refusal Letters for the children only demonstrated consideration of paragraph 276ADE(1) and contained no consideration of section 55 or their best interests or any exceptional circumstances. Mr Tarlow for the Respondent did not disagree with this summary.
6. Mr Coleman submitted that the judge should not have gone on to consider the section 55 matters for himself as the first instance matter as it was a question of the decision not being in accordance with the law given that the statutory duty had not been discharged by the Respondent. In particular, my attention was drawn to paragraph 39 of the determination which stated in its final sentence that "...there is no reliable evidence that the respondent's obligations are engaged under section 55".

Mr Coleman submitted that the Respondent did not have an obligation but a duty, which made this issue a question of producing an unlawful decision.

7. Mr Coleman further submitted that the Respondent was not represented at the hearing and there was no opposing party to object to the Appellants' submission that the matter be remitted for consideration of such matters. He further relied upon the Presidential decision of *JO and Others (section 55 duty) Nigeria* [2014] UKUT 517 (IAC) and highlighted that the First-tier Tribunal determination failed to refer to or show awareness of this decision and further submitted that the underlying decision being appealed was unsustainable in light of that decision.

8. So far as *JO and Others* is concerned its headnotes state as follows:

(1) The duty imposed by section 55 of the Borders Citizenship and Immigration Act 2009 requires the decision-maker to be properly informed of the position of a child affected by the discharge of an immigration etc function. Thus equipped, the decision maker must conduct a careful examination of all relevant information and factors.

(2) Being adequately informed and conducting a scrupulous analysis are elementary prerequisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations.

(3) The question whether the duties imposed by section 55 have been duly performed in any given case will invariably be an intensely fact sensitive and contextual one. In the real world of litigation, the tools available to the court or tribunal considering this question will frequently be confined to the application or submission made to Secretary of State and the ultimate letter of decision.

9. A further perusal of [6-14] of *JO and Others* demonstrates that the section 55 duty is not one to be taken lightly. To reinforce this simple point, the following extracts from [6] and [11] are of pertinence here:

In the field of immigration, therefore, the enactment of section 55 discharges an international law obligation of the UK Government. While section 55 and Article 3(1) of the UNCRC are couched in different terms, there may not be any major difference between them in substance, as the decided cases have shown. The final striking feature of section 55 is that it operates to protect all children who are in the United Kingdom: there is no qualification such as residence or nationality.

I consider that, properly analysed, there are two guiding principles, each rooted in duty. The first is that the decision maker must be properly informed. The second is that, thus equipped, the decision maker must conduct a careful examination of all relevant information and factors. These principles have a simple logical attraction, since it is difficult to conceive how a decision maker could properly have regard to the need to safeguard and promote the welfare of the child or children concerned otherwise. Furthermore, they reflect long recognised standards of public law. Being

adequately informed and conducting a scrupulous analysis are elementary prerequisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations. This balancing exercise is the central feature of cases of the present type. It cannot realistically or sensibly be undertaken unless and until the scales are properly prepared.  
(emphases found in original)

10. In that light, it is clear that when faced with a duty where the mandatory statutory language has not been complied with, such a decision is *prima facie* not in accordance with the law. In this instance, matters are somewhat worse given that the judge wrongly sought "reliable evidence" from the Appellants that the "obligation" concerning section 55 was engaged. That is clearly an erroneous assessment of a child's section 55 in light of *JO and Others*. Section 55 imposes a mandatory statutory duty which "operates to protect all children who are in the United Kingdom" with "no qualification such as residence or nationality".
11. In my view, Mr Coleman's submissions are supported firmly by [12], which mentions the guidance "Every Child Matters" and makes clear the type of decision that will be necessary when considering a section 55:

The second of the duties imposed by section 55 is, per subsection (3), to have regard to the statutory guidance promulgated by the Secretary of State. In considering whether this discrete duty has been discharged in any given case, it will be necessary for the appellate or reviewing Court or Tribunal to take cognisance of the relevant guidance emanating from the same subsection, juxtaposing this with the representations and information provided by the person or persons concerned and the ensuing decision. The guidance is an instrument of statutory authority to which the decision maker "must" have regard: there is no element of choice or discretion. The guidance was duly published in November 2009. It is entitled "Every Child Matters: Change for Children". Notably, at paragraph 2.7 it contains a series of "principles" which are rehearsed in the context of a statement that UKBA (the United Kingdom Borders Agency, the Secretary of State's agents) "must ... act according to ....." same. Three of these principles are worthy of particular note:

- (a) Ethnic identity, language, religion, faith, gender and disability are taken into account when working with a child and their family.
- (b) Children should be consulted and the wishes and feelings of children taken into account whenever practicable when decisions affecting them are made.
- (c) Children should have their applications dealt with in a timely way which minimises uncertainty.

I consider that these provisions, considered in tandem with the principles enunciated by the Supreme Court and the public law duties rehearsed above, envisage a process of deliberation, assessment and final decision of some depth. **The antithesis, namely**

**something cursory, casual or superficial, will plainly not be in accordance with the specific duty imposed by section 55(3) or the overarching duty to have regard to the need to safeguard and promote the welfare of any children involved in or affected by the relevant factual matrix. Ditto cases where the decision making process and its product entail little more than giving lip service to the guidance.**

(my emphasis)

12. For the Respondent, Mr Tarlow accepted that the decision could have been better written and indicated that certain matters would need to be read into the decision. However, he also accepted that the judge's assessment of the section 55 matters at paragraph 39 of his determination were an error, though not a material.
13. In my view, it is unattractive to have to read anything into a determination. It must stand unsupported otherwise it will fall. The determination in my view cannot stand in light of its directly contradictory stance to a Presidential decision on the very point which it seeks to decide. Mr Tarlow was quite right to accept that the judge's notions concerning section 55 were an error, however the error is clearly material as this matter runs through the heart of the appeal and goes to the very essence of the point on appeal that the Appellants sought to bring.
14. In light of the above passages I have referred to and the clear guidance in *JO and Others*, I find that the decision suffers from fundamental errors concerning the approach to the section 55 duty and in particular where a decision is lacking in substance as was the case here.
15. In light of my findings, I have not gone on to consider the remainder of the grounds nor the remainder of Mr Coleman's exhaustive submissions which analysed each paragraph of the determination in detail, including matters such as the children's inability to read or write in Filipino and whether they could continue studies in that country without disruption in light of that linguistic disadvantage.
16. In the light of the above findings, I set aside the decision and findings of the judge in totality.
17. If I found an error, Mr Coleman invited me to re-make the appeal, however I decline that invitation and remit that matter and the appeal for consideration by the First-tier Tribunal. I observe, as Upper Tribunal Judge Bruce has done, that due to the passage of time the third Appellant child has now been in the UK for in excess of seven years.

18. Consequently, if the First-tier Tribunal wishes to consider the substantive human rights of the children without an informed first-instance decision from the Respondent, the child would fall for consideration under section 117B(6) of the Nationality, Immigration and Asylum Act 2002. However, should the First-tier Tribunal be content to remit the matter to the Respondent to await a fresh decision, it may be that the Respondent takes the view that the child's private life ought to be considered anew under paragraph 276ADE(1) of the Immigration Rules.

**Decision**

19. The appeal to the Upper Tribunal is allowed.
20. The decision of the First-tier Tribunal is set aside and the appeal is remitted to the First-tier Tribunal, to be heard by a differently constituted bench.

**Anonymity**

21. The First-tier Tribunal did not make an anonymity order and I was not asked to make one and do not see reason to do so at present.

Signed

Date

Deputy Upper Tribunal Judge Saini