



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/46981/2013

THE IMMIGRATION ACTS

Heard at Glasgow
on 2nd December 2014

Determination issued on
On 8th December 2014

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

KEHINDE ABIMBOLA JAMES-MIENE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr A Caskie, Advocate, instructed by Latta & Co., Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria, born on 19th February 1967. She has two sons: Precious James-Miene, born on 13th August 1996, and Peter James-Miene, born on 21st December 2001. At the time of the respondent's decision and at the time of the First-tier Tribunal hearing she was living with her children in Glasgow. Their father (also

of Nigerian origin) was living in Edinburgh, the relationship between the parents having broken down in 2005. The appellant came to the UK firstly without the children, who joined her in November 2009. They have had only limited contact with their father in recent years.

2. The appellant has a quite involved immigration and appeal history, which it is not necessary to rehearse again here. On 22nd October 2013 the respondent refused her further representations. She appealed, arguing her case under Article 8 of the ECHR, outwith the requirements of the Immigration Rules. First-tier Tribunal Judge Burns dismissed her appeal by determination promulgated on 25th February 2014.
3. The judge recorded at paragraph 20 that the questions posed were:
 - (a) whether it was in the best interests of the Appellant's two children to be returned with their mother to Nigeria or to remain with her in the UK and (b) was the decision to remove the family a proportionate one?
4. The judge found at paragraph 43 that removal of the appellant and her children was proportionate. However, at paragraph 44 he dealt with the specific question of Precious being due to sit school examinations in May or June. The judge thought that it would be disproportionate to remove him before he had the opportunity to do so, and allowed the appeal to that limited extent.
5. The appellant appeals to the Upper Tribunal on these grounds:
 3. The judge had before him the prior decision of Judge Clapham made in February 2013 ... to the main focus then was ... the Refugee Convention; the only mention of best interests of the children in a 10 page determination is at paragraph 36 ... the evidence before the judge in the present appeal was of a very different nature; see the detailed report of Dr Susan Baird which mentions [Peter's] symptoms of depression, anxiety, anger and challenging behaviour. The report states that Peter had become settled in Glasgow ... and had made clear he did not want to return to Nigeria. The judge also had before him a detailed statement from Peter setting out his views ... the arguable error in law is the failure to properly engage with that new, current evidence regarding the children's circumstances ... see paragraph 41 where Judge Burns refers to Judge Clapham's decision - "*The reports before me appeared simply to indicate that matters were not as fraught today as they had been when Judge Clapham wrote ...*" There is no consideration of the children's views contained in their statements ... it is incumbent on a judge to apply the most anxious scrutiny to the current evidence before him. It is not sufficient for a judge to rely on an earlier best interest assessment when a significant period of time has passed, in this case twelve months.
 4. There is no clear finding on the best interests of the child as distinct from proportionality ... other than the reference at paragraph 42 that the children's best interests lay in remaining with their mum ... an arguable error of failure to provide clear written reasons.
 5. At paragraph 43 the judge's analysis of best interests proceeds on the basis that the appellant had no leave to remain. This is not the correct starting point ... see *IE Petitioner* [2013] CSOH 142, paragraph 14 ... it is not disputed that it is open to decision makers to state their conclusions followed by reasons, or vice versa (as was pointed out in the Supreme Court decision of *Zoumbas*). However ... the determination in this case suggests that the judge treated immigration status as his logical starting point in assessing best interests, which was incorrect.

6. The judge clearly placed reliance on the mother's immigration history without considering that had nothing to do with the children – it is trite law ... that children cannot be held responsible for their parents' behaviour/immigration history ... the judge took into account an irrelevant matter when assessing best interests.
7. The judge's analysis of Article 8 and whether there is a distinct good arguable case is ... flawed ... this was a case with compelling circumstances not recognised under the Rules and therefore a separate Article 8 assessment was required.
8. As acknowledged by the judge, the route taken under Article 8 was not crucial, however ... if he had assessed best interests separately then arguably the Article 8 proportionality outcome could have been different ... both children had spent considerable time in the UK after the age of 4 ...

6. The SSHD also appeals to the Upper Tribunal, on the grounds which I summarise thus:

Respect for private life does not include a right to study; consideration of a child's rights through the prism of education is too narrow an approach; the children could exercise their right to education in Nigeria; their rights under Article 8 were not breached by a decision which refused them the opportunity to continue or conclude their studies.

7. Mr Caskie submitted that paragraphs 42 and 43 of the determination did not contain an analysis of whether it would be better for the children to be in the United Kingdom or in Nigeria. The evidence disclosed significant factors in favour of the children remaining in the UK. The judge recited evidence of Peter finding the transition to the UK a traumatic one. He had telephone contact with his father and visited him at least once in Edinburgh. To remove him with his mother would subject him to another possibly traumatic transition. Telephone calls over a distance of 40 miles would be a very different matter in the mind of a child to telephone calls over a distance of 4,000 miles. The judge referred to the evidence about the child being unsettled, but did not ask the question whether it was proportionate to subject him to another transition. Both children had given oral as well as written evidence. Mr Caskie acknowledged my observation that such evidence was led after prompting by the judge, as shown at paragraph 13. Nevertheless, he said that the judge failed to explain what weight he gave to that evidence. While the weight to be given to any item of evidence was a matter for the judge, in this case the weighting was simply unknown. Mr Caskie said that the grounds constituted in essence a reasons challenge. The judge carried out a proper best interests analysis at paragraph 44 on the specific point of Precious sitting his exams, and the Home Office grounds attacking that were simply inept. At paragraph 43 the judge fell into the error illustrated by *IE*. That case was in the bundles before the Supreme Court in *Zoumbas*, but the Court overlooked it, and reached its decision "*per incuriam* of *IE*". Although the appellant accepted that her case could not succeed under the Immigration Rules, the scheme of Appendix FM and the terms of Section EX.1 showed that this case must have amounted to a good arguable one for consideration outwith the Rules. The case of *MM (Lebanon)* [to which Mr Caskie did not refer directly] suggested that the question whether there is a good arguable case is an unnecessary step. Given the evidence and the judge's findings regarding a 12 year old boy, this case plainly had amounted to a good arguable case. The decision should be set aside and a further hearing ordered at which up-to-date evidence could

be brought. Although the older son is now an adult, he is attending college and still living with his mother. It might be appropriate for that further hearing to be in the First-tier Tribunal.

8. Further to the SSHD's grounds, Mr Mullen said that the child had already gone beyond school leaving age and so there was an element of choice in his taking his exams. There was no right to complete a course of studies. It was not proportionate to allow an appeal on that basis even if the period involved was a limited one. The judge in this respect had fallen into the error of taking the best interests of the child as *the* not *a* primary consideration. He compartmentalised the best interest consideration and took it out of the proportionality context. Although the error might be thought academic, time having gone by, the determination should not be allowed to stand on that point.
9. Turning to the appellant's grounds, Mr Mullen submitted that far from failing to engage with the evidence regarding the children it was the judge who caused it to be brought out at length. The judge considered the report by Dr Baird and was entitled to conclude that it did not amount to a stronger case regarding the best interests of the children than the one which had failed at an earlier date before another judge. The judge considered the evidence relating to the children's best interests in particular at paragraphs 14, 18, 21, 24 and 27. The conclusion at paragraph 41 was that Peter's difficulties had not disappeared, but to some extent had been mitigated. Although the conclusions were briefly expressed they were valid and proper and betrayed no lack of consideration of the evidence. The judge said at paragraph 42 that the best interests of the children lay in being with their mother, which was common ground, and dealt with the parties as a family unit. He noted at paragraph 43 that all three preferred to remain here. That was plainly the basis on which the interest of the children in being in the UK was approached, not an assumption that the mother must be removed. There was little evidence about their best interests being in the UK other than general benefits such as healthcare and education, which was similar to *Zoumbas*, as the judge went on to say. There was little to show that their best interests would be served by living closer to their father, there having been evidence of only one visit, a few telephone calls and strained relationships. There had been no evidence of the father's immigration status. Paragraph 43 was a sound answer to the question of whether the best interests of the children lay in the UK or Nigeria, followed by a proper resolution of proportionality. *Zoumbas* was the binding authority. *IE* did not establish any binding principle and was a case which turned on its own facts. The children in this case are not UK citizens. Insofar as Peter has been affected by trauma, the report by Dr Baird says that he does not wish to return to Nigeria, but does not suggest that he is receiving or requires any treatment. Any ongoing uncertainty derives from his mother's continued opposition to a series of immigration decisions and appeals which have gone against her. Uncertainty induced on that basis could do little to strengthen his claim to remain. The determination did not err, apart from allowing the appeal to the limited extent that it did, and should otherwise stand. Alternatively, if error were to be found, the appellants had available some further written evidence with a view to having it admitted if the case were to proceed to a fresh decision. There was no reason for the

case not to be resolved by admitting that evidence and hearing final submissions, in the Upper Tribunal and without adjournment.

10. Mr Caskie in reply dealt firstly with the question of disposal, if error were to be found. He said he had just been advised by his instructing solicitor that within the last two weeks they have had sight of the father's certificate of naturalisation as a UK citizen. That would enable the younger son also to register as a UK citizen. While of course that could not bear on the error of law issue, it might suggest that the pragmatic course, if error were to be found, would be not to conclude the hearing on the day.
11. As to the older child having attained school leaving age, Mr Caskie said that it was not apt to criticise a 17 year old for choosing to complete educational qualifications. Rather that was a course which the respondent should encourage. It was hardly an outrage to immigration control to allow a short period of time for a pupil to do so. The sentence, "The three of them would prefer to remain here", was an implied criticism of the children for the conduct of their mother. The best interest question did require compartmentalisation of the issues. The judge carried that out on the limited issue of the examinations, but failed to do so on a wider basis. It might be said that the judge engaged in an holistic assessment, but in so doing he failed to determine whether the best interests of the children were served by them returning to Nigeria or remaining in the UK. The Presenting Officer argued that on any view the Article 8 result would be the same, but that was to impose too low a test. The question was not whether the judge would probably have reached the same decision but for the error made, but whether he inevitably would have reached the same decision. There was no such near-certainty in this case, and that justified a rehearing.
12. I reserved my determination.
13. *IE* is a judicial review case, in which Lord Tyre reduced the a decision of the SSHD on the view at paragraph 14 that she had erred by treating the immigration status of the parent:

... and in particular her removal from the UK, as a factor in answering the question of what was in the children's best interests ... the respondent was not entitled to proceed upon a factual assumption that the petitioner would be removed when assessing what was in the best interests of the children.
14. *Zoumbas* is now reported at [2014] Imm AR 479. Lord Hodge, delivering the judgment of the court, said at paragraph 25:
 25. Finally, we see no substance in the criticism that the assessment of the children's best interests was flawed because it assumed that their parents would be removed to the Republic of Congo. It must be recalled that the decision-maker began by stating the conclusion and then set out the reasoning. It was legitimate for the decision-maker to ask herself first whether it would have been proportionate to remove the parents if they had no children and then, in considering the best interests of the children in the proportionality exercise, ask whether their well-being altered that provisional balance. When one has regard to the age of the children, the nature and extent of their integration into United Kingdom society, the close family unit in which they lived and their Congolese citizenship, the matters on which Mr Lindsay relied did not create such a

strong case for the children that their interest in remaining in the United Kingdom could have outweighed the considerations on which the decision-maker relied in striking the balance in the proportionality exercise (paras 17 and 18 above). The assessment of the children's best interests must be read in the context of the decision letter as a whole.

15. I note on this issue also *EV (Philippines) and Ors v SSHD* [2014] EWCA Civ 874 (which was not referred to in the discussion before me). Christopher Clarke LJ observed at paragraph 33, "... 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". He continued at paragraphs 34 to 37:

34. 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.
35. 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; (d) what stage their education has reached; (e) to what extent they have become distanced from the country to which it is proposed that they return; (f) how renewable their connection with it may be; (g) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (h) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.
36. 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.
37. 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.

16. Lewison LJ posed the issue thus at paragraph 50:

50. What, if any, assumptions are to be made about the immigration status of the parent? If one takes the facts as they are in reality, then the first of the immigration judge's findings about the best interests of the children points towards removal. If, on the other hand, one assumes that the parent has the right to remain, then one is assuming the answer to the very question that the tribunal has to decide. Or is there a middle ground, in which one has to assess the best interests of the children without regard to the immigration status of the parent?

17. Having considered the authorities he answered thus:

58. 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?

59. 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.
60. 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.
61. 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.
18. In this case, it was the judge who took the initiative to have full evidence before him. Mr Caskie suggested that he did no more than he had to, but I do not agree. The Tribunal is not generally required to seek out such evidence, especially where appellants are represented. This judge went the extra mile. He took great care over the specific point of the school examinations. Looking at the history of the case and at the determination as a whole, I am not persuaded that he took anything less than full account of the evidence regarding the children in general or the report about Peter in particular.
19. The statement that the appellant and her children would prefer to remain here is factually impeccable. It is a strained reading to say that it blames the children for the mother's faults.
20. The judge's comparison is plainly between on the one hand the children remaining here with their mother, and on the other hand leaving with their mother. There is no prior assumption that she must be removed, which would have left nothing else worth considering. The determination recognises that there might be advantages to the children in remaining. It posed the questions correctly at paragraph 20. I do not think it falls into an error of circular reasoning of the type possibly identified in *IE*.
21. Any sharper separation of the best interests and proportionality questions would not have led to a different result. Any question whether Article 8 outside the Rules involves a one-step or two-step approach is similarly academic. The judge said, "On any analysis one arrived at the same destination".
22. I find in the appellant's grounds no error of law which would entitle or require the Upper Tribunal to set aside the determination.
23. Nor do I find any such error in the Secretary of State's grounds (and the matter has been superseded by the passage of time in any event). The judge did not think that the child's educational or other interests were an overriding consideration. If he had,

he would have allowed the appeal outright. The outcome was within the scope of the Tribunal, and is supported by very specific reasons.

24. The determination of the First-tier Tribunal shall stand.
25. No order for anonymity has been requested or made.

A handwritten signature in black ink, reading "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

5 December 2014
Upper Tribunal Judge Macleman