1 February 2011

PRESS SUMMARY

ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4

JUSTICES: Lord Hope (Deputy President), Lady Hale, Lord Brown, Lord Mance, Lord Kerr

BACKGROUND TO THE APPEAL

This is a mother's appeal to the Supreme Court on the ground that her removal from the United Kingdom will constitute a disproportionate interference with her right to respect for her private and family life, guaranteed by article 8 of the European Convention on Human Rights.

The over-arching issue is the weight to be given to the best interests of children who are affected by the decision to remove or deport one or both of their parents from this country. Within this is a more specific question: in what circumstances is it permissible to remove or deport a non-citizen parent where the effect will be that a child who is a citizen of the United Kingdom will also have to leave?

There is no power to remove or deport a person who is a United Kingdom citizen: see Immigration Act 1971, section 3(5) and (6). They have a right of abode in this country, which means that they are free to live in, and to come and go into and from the United Kingdom without let or hindrance: see 1971 Act, sections 1 and 2. The consistent stance of the Secretary of State is that UK citizens are not compulsorily removed from this country. However, if a non-citizen parent is compulsorily removed and agrees to take her children with her, the effect is that the children have little or no choice in the matter. There is no machinery for consulting them or giving independent consideration to their views.

The mother is a national of Tanzania who arrived in the UK in December 1995. She made three unsuccessful claims for asylum, one in her own identity and two in false identities. In 1997 she formed a relationship with a British citizen. They have two children, now aged 12 and 9, who are both British citizens and have lived here all their lives. The parents separated in 2005 but the father continues to see the children regularly. After the father's diagnosis with HIV in 2007, the mother made further representations to the Secretary of State. These representations were accepted as a fresh claim but were rejected. The mother's appeal was dismissed by the Asylum and Immigration Tribunal and by the Court of Appeal. The Court of Appeal upheld the tribunal's finding that the children could reasonably be expected to follow their mother to Tanzania.

JUDGMENT

The Supreme Court unanimously allows the appeal. Lady Hale gives the leading judgment.

REASONS FOR THE JUDGMENT

The "best interests of the child" broadly means the well-being of the child. A consideration of where these best interests lie will involve asking whether it is reasonable to expect the child to live in another country. An important part of discovering the best interests of the child is to discover the child's own views. **[29], [34] - [37]**

Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child. The children in this case are British not just through the "accident" of being born here, but by descent from a British parent; they have an unqualified right of abode here; they have lived here all their lives; they are being educated here; they have other social links with the community here; they have a good relationship with their father here. It is not enough to say that a young child may readily adapt to life in another country. **[30] – [31]**

The intrinsic importance of citizenship should not be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults. **[32]**

In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But the children were not to be blamed for that. And the inevitable result of removing their primary carer would be that they had to leave with her. In those circumstances, the Secretary of State was clearly right to concede that there could only be one answer. **[33]**

Lord Hope observed that the fact of British citizenship will hardly ever be less than a very significant and weighty factor against moving children who have that status to another country with a parent who has no right to remain here, especially if the effect of doing this is that they will inevitably lose the benefits and advantages of this citizenship for the rest of their childhood. The fact that the mother's immigration status was precarious when the children were conceived cannot be held against the children in the assessment of whether their best interests are outweighed by the strength of any other considerations. It would be wrong in principle to devalue what was in their best interests by something for which they could in no way be held to be responsible. **[41], [44]**

Lord Kerr stated that the fact that a child is a British citizen also has an independent value, freestanding of the debate in relation to best interests, and this must weigh in the balance in any decision that may affect where a child may live. **[46] – [47]**