27 November 2013

PRESS SUMMARY

Zoumbas (Appellant) v Secretary of State for the Home Department (Respondent)
On appeal from the Inner House of the Court of Session, [2012] CSIH 87
[2013] UKSC 74

JUSTICES: Lady Hale (Deputy President), Lord Kerr, Lord Reed, Lord Toulson, Lord Hodge

BACKGROUND TO THE APPEALS [4-9]

The appellant and his wife are nationals of the Republic of Congo currently living in Glasgow with their three children, now aged 9, 5 and 2. Mr Zoumbas entered the UK illegally in May 2001 using a French passport that did not belong to him. He married Mrs Zoumbas in November 2003 after she had entered the previous year using a forged French passport and both their asylum claims had been refused. Their appeals were unsuccessful **[4]**. In October 2005 Mrs Zoumbas and the couple's daughter, Angemarcel, were detained and removed to Congo. For the following ten months, Mr Zoumbas was treated as an absconder having failed to report to the authorities **[5-6]**.

In March 2006, Mrs Zoumbas and Angemarcel returned to the UK using fake passports and a residence permit that did not belong to them. Mrs Zoumbas claimed asylum, naming Mr Zoumbas and Angemarcel as dependents. Her claim was refused and her appeal finally dismissed on 3 July 2007 **[6]**. The couple did not have permission to work but received state benefits because Mr Zoumbas claimed he was destitute. However, between September 2008 and April 2010, credits of over £27,000 from unidentified sources were paid into bank accounts of Mrs Zoumbas and of the older two children **[7]**.

In June 2010, Mr Zoumbas submitted further representations asserting that there had been a change in circumstances because the family had established a family life which should be respected under article 8 of the European Convention on Human Rights (ECHR) **[8]**. In a letter dated 4 October 2011, the Secretary of State intimated her decision that his representations did not qualify him for asylum or humanitarian protection and that he did not merit a grant of limited leave to enter or remain. She also held that his submissions did not amount to a fresh claim under paragraph 353 of the Immigration Rules because they did not create a reasonable prospect of success before an immigration judge **[9]**. Mr Zoumbas challenged that decision for the manner in which the Secretary of State dealt with the best interests of his children. His petition for judicial review was refused, and his appeal to the Inner House dismissed.

Before the Supreme Court, Mr Zoumbas made his challenge in three parts **[3]**. **First**, he argued that the Secretary of State had failed to have regard to the best interests of his children as a primary consideration in the proportionality assessment under article 8 ECHR, and that this was also a breach of section 55 of the Borders, Citizenship and Immigration Act 2009. He submitted, relying on what Lord Kerr said in the Supreme Court's judgment in *ZH (Tanzania)*, that what is determined to be in the child's best interests should ordinarily dictate the outcome of cases **[12]**. **Second**, he criticised the Secretary of State's findings in relation to the best interests of the children, including by arguing that it was irrational to conclude that these would be served by the children's removal to Congo. The findings had assumed that he and his wife would be removed. **Third**, he contended that the Secretary of State was wrong to conclude that his further representations did not have a realistic prospect of success before an immigration judge.

JUDGMENT

The Court unanimously dismisses the appeal.

REASONS FOR THE JUDGMENT

Delivering the Court's judgment, Lord Hodge sets out seven principles relevant in the case **[10]**, which counsel for Mr Zoumbas had enumerated. He notes that Lord Kerr's formulation spoke of dictating the outcome of cases "such as" *ZH*, and in that case the Court was dealing with British citizens, unlike the children in this case. The benefits of British citizenship are an important factor in assessing whether it is reasonable to expect a child with such citizenship to live in another country. Moreover, Lord Kerr had explained that what he was seeking to say was that no factor should be given greater weight than the interests of a child **[12]**. Further, the decision-maker is required to assess the proportionality of the interference in the particular circumstances in which the decision is made – an evaluative exercise that excludes any hard-edged or bright line general rule **[13]**.

In this case, the Secretary of State accepted that Mr Zoumbas had established a private life and a family life in the UK. She then concluded that the interference would be in accordance with the law and in pursuit of the legitimate aim of maintaining effective immigration control **[14]**, having referred to the family's unlawful residence, the fact that family life had been established in the full knowledge that they had no right to reside in the UK and could be removed at any time, and the couple's "appalling immigration history" and the unidentified bank credits **[15]**. Family life would be preserved as the whole family would be removed with Mr Zoumbas **[16]**.

The first part of Mr Zoumbas' challenge rests on a mistaken construction of the decision letter. It had been accepted that the status of the well-being the children as a primary consideration did not mean that it had in every case to be considered first with other possible countervailing issues considered thereafter. It is important to read the letter as a whole and to analyse the substance of the decision **[19]**.

There is nothing wrong with the Secretary of State's use of a template letter in which her conclusion is followed by her reasoning – what is important is that the best interests of the children are at the forefront of the decision-maker's mind **[21]**. That the conclusions on best interests are set out briefly does not mean they were not considered carefully, and the Secretary of State does not need to record and deal with every piece of evidence in her letter **[22-23]**. The Court suggests that challenges such as the present would be less likely if her advisers were to express the test in the way it was expressed in *ZH (Tanzania)*, and to expand the explanation of the separate consideration given to the interests of the children **[28]**.

As for the second part of the challenge, it would be possible to conclude, other things being equal, that it would be in the children's best interests to stay in the UK. But other things are not equal, including that the children are not British citizens **[24]**. The Court rejected the criticism that the assessment of best interests was flawed because it assumed that the parents would be removed. 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 **[25]**. The third part of the challenge cannot succeed, the first two parts having failed **[26]**.

References in square brackets are to paragraphs in the judgment