Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/21499/2011
IA/21501/2011
IA/21504/2011

THE IMMIGRATION ACTS

Heard at Field House on 26 September 2013	**Determination promulgated on 27 September 2013** …………………………………

Before

UPPER TRIBUNAL JUDGE MACLEMAN
& UPPER TRIBUNAL JUDGE PITT

Between

RK and two children
(Anonymity order in force)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Ms K Cronin, Counsel instructed by Wesley Gryk, Solicitors.
For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

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1. The first appellant is aged 34. The second and third appellants are her children, a boy and a girl, aged nearly 8. All are citizens of the Democratic Republic of Congo, and not of the UK.
2. The respondent issued notices of decisions to make deportation orders against the appellants on 8 July 2011. The reasons are explained in letters to the first appellant, dated 25 May 2011, and to the second and third appellants, dated 2 June 2011.

3. A panel of the First-tier Tribunal comprising Judge Black and Dr Ravenscroft dismissed the appellants' appeals for reasons explained in a determination promulgated on 26 January 2012.

4. The appellants sought to appeal to the Upper Tribunal on various proposed grounds. Both the First-tier Tribunal and the Upper Tribunal refused their applications.

5. The Hon Mr Justice Collins granted permission to apply for judicial review (CO ref 2592/2012) on 1 June 2012, saying this:

> The FtT decision does not refer to paragraph 364 of the Immigration Rules and it is clear that the tribunal did have regard to section 55 [of the 2009 Act] and the best interests of the children. The problem arises in paragraph 92 [of the determination] where it is said that the presumption is in favour of deportation and it seems from the second sentence that the presumption applies to all the appellants i.e. the children are included. That is wrong – see paragraphs 365-367 of the Rules. Despite the failure to argue it and the taking of a thoroughly bad point, it is a point of law which can be raised and it may have influenced the First-tier Tribunal against the children.
>
> This is underlined having regard to the mother's HIV condition. The stage 2 medication point does not seem to have been addressed and the effect on the children [of their mother] being without proper medication and so very sick and perhaps unable to look after them properly may have been insufficiently evaluated.

6. On 5 July 2013 Upper Tribunal Judge Southern granted permission to appeal:

> For the reasons given by Collins J … and for the reasons … set out in the consent order which followed, the effect of which was to quash the earlier decision on the application for permission to appeal, I am satisfied that permission should now be granted.

7. The solicitors for the appellants responded conscientiously to directions issued with the grant of permission. In particular, the following further evidence is tendered:

> Report, with addendum, by Dr M Kodi, country expert, dated 3 September 2013, on (a) the situation for children in eastern Congo and (b) availability of second line HIV therapy in eastern DRC.
>
> Updating medical report by Dr J Ainsworth FRCP, the first appellant's medical consultant, dated 16 September 2013.

8. There is no response from the respondent to directions, although copy correspondence on file shows that the appellants' solicitors had pressed for clarification of the respondent's position.

9. Ms Cronin clarified for us that the husband and father of the family, also a DRC citizen, is subject to deportation, having exhausted his appeal rights, but remains in the UK with the appellants. This appears to be in line with the respondent's policy of usually dealing with a family as a unit. Ms Cronin suggested that we should approach the case as turning on whether all four family members stay in the UK, or are deported.

10. Ms Cronin provided us with her skeleton argument on the day. Having given Ms Holmes some time to consider it, she fairly and correctly conceded that she could not dissent from the gist of its submissions.

11. We advised that the appeal would succeed.

12. Error of law. The First-tier Tribunal fell into the misconception that the Rules could properly make a presumption in favour of the deportation of the children, compatibly with section 55 of the 2009 Act. As Ms Cronin emphasised, the interests of the child must be a primary consideration. While those interests may ultimately be outweighed, there can be no presumption in that direction. There was also a failure to address the "second stage medication" point, which carried the possible consequence of the children being deprived of maternal care.

13. Setting aside. The errors went to the heart of the case, so we set aside the determination, and proceed to remake the decision.

14. Public interest in deportation of the first appellant. She was sentenced in 2005 to 14 months imprisonment, cumulatively, for offences of fraud and dishonesty. The offences were serious. The presumption that the public interest requires her deportation is enhanced by the fact that her offences went directly against the integrity of immigration control.

15. Best interests of the children. The second and third appellants are not UK citizens, but they have lived here from birth, are being educated here, and are of an age to have developed other social links in their host community. It is in their best interests to continue living with the first appellant, and with both parents. They would have a major adaptation to make to life in the DRC, but adaptation would be possible, and it is not extraordinary for a child to have to cope with his or her family moving to a very different country. Their general prospects for the rest of their childhood would probably be rather worse in the DRC than in the UK, because of the different nature of the two countries, although that alone is not a criterion by which a case might usually succeed. The evidence about the first appellant's medical condition and availability of treatment shows a real prospect of the children losing their mother fairly soon after return. Paternal care

would continue. All in all, the best interests of the children would be served by their remaining in the UK. We find that remaining in the UK represents not a small but a substantial margin of advantage to them.

16. Proportionality. The first appellant and her husband have not re-offended over the long period since their respective convictions for related offences of dishonesty. The second and third appellants come close to the requirements of paragraph 276ADE of the Immigration Rules, as they now stand, for leave to remain on grounds of private life. It was not suggested that the appeals could succeed within the Rules, and Article 8 is not to be applied on a "near miss" basis, but the Rules do give us a yardstick for proportionality. The children have been here from birth to such an age that a strong case would be needed to justify removing them. The public interest in deportation of the first appellant is at the lesser end of the scale, while the adverse effects which that step would have on the best interests of the two children are relatively high.

17. Decision. The three appeals, as originally brought to the First-tier Tribunal, are allowed under Article 8 of the ECHR.

26 September 2013
Judge of the Upper Tribunal