Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: AA/02956/2014
AA/02957/2014
AA/02958/2014
AA/02959/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 13 November 2014	**On 17 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE PLIMMER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS FJS
MR LS
MASTER AS
MASTER IS
ANONYMITY DIRECTIONS MADE

Respondents

Representation:
For the Appellant: Ms Johnstone (Home Office Presenting Officer)
For the Respondents: Mr Corbon (Corbon Solicitors)

DETERMINATION AND REASONS

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1. The appellant ('the SSHD') appeals against a decision of First-tier Tribunal Judge O R Williams dated 30 June 2014 in which the respondents' appeals were allowed under Article 8 of the ECHR.

Background

2. The background to this case is lengthy but can be summarised for the purposes of this appeal. The third and fourth respondents are the young children of the first and second respondents. Judge Williams considered detailed medical evidence about the sickle cell anaemia conditions for both the third and fourth respondents together with the treatment available to them in the UK and in Gambia, their parents' country of origin. The third appellant came to reside in the UK in 2010 but the fourth appellant was born in the UK in 2012.

3. Judge Williams concluded that the removal of the children particularly in light of their medical conditions would prejudice their well-being and private life in a manner sufficiently serious to breach Article 8 of the ECHR and this would be disproportionate to the public interest [30].

4. The SSHD appealed against that finding and permission was granted on 23 July 2014 by Judge J M Holmes. He considered that there had been an arguable error of law because inter alia, the Judge did not apply the guidance contained on health cases in **SQ Pakistan v Pakistan** [2013] EWCA Civ 1251 and **Akhalu** [2013] UKUT 400.

5. The matter now comes before me to decide whether or not the determination contains an error of law.

Hearing

6. At the hearing Ms Johnstone refined her grounds of appeal in accordance with the observations made by Judge Holmes when granting permission to appeal. She submitted that the Judge had not identified and considered the full ambit of the public interest before concluding that the breach of the third and fourth respondents' private lives could not be outweighed by the public interest.

7. Mr Corbon helpfully submitted a bundle of relevant

authorities. These were mainly authorities that had been identified by Judge Holmes when granting permission. Mr Corbon submitted that all the relevant aspects of the public interest must have considered by Judge Williams and his determination was sufficiently reasoned and should be upheld.

8. At the end of submissions I reserved my determination, which I now give with reasons.

Legal framework

9. In this appeal both parties accepted that the respondents could not succeed under the Immigration Rules whether in Appendix FM or para 276ADE. Therefore, in order to succeed under Article 8 they needed to establish that there are "compelling" circumstances such that her removal would lead to "unjustifiably harsh" consequences. Both parties accept that the Judge directed himself properly regarding this approach [11, 18 and 19].

10. Both parties also accepted that the Judge was correct to solely consider Article 8 of the ECHR and that whilst **Zoumbas v SSHD** [2013] UKSC 74 sets out the appropriate approach to best interests it does not address the position of children with significant health or welfare concerns.

11. In **Akhalu** (supra), the Upper Tribunal, having analysed the relevant case law, recognises the potential application of Article 8 in a 'health' case but also acknowledges that it will be difficult nevertheless to succeed under Article 8 either because of the significant threshold to engage Article 8 or, if it is engaged, for the circumstances of the individual to be such as to outweigh the public interest. The Tribunal concluded at [43]:

> "The correct approach is not to leave out of account what is, by any view, a material consideration of central importance to the individual concerned but to recognise that the counter-veiling public interest in removal will outweigh the consequences with the health of the claimant because of a disparity of healthcare facilities in all but a very few rare cases."

12. The Tribunal endorsed a holistic approach to

proportionality having regard to disparity in health resources but concluded that any such disparity did "not weigh heavily" in an individual's favour but rather spoke "cogently in support of the public interest in removal" (see [45]–[46]).

13. **Akhalu** did not address the position where removal impacted on the health of a child, where its best interests would have to be considered. **SQ (Pakistan)** concerned a child who suffered from Beta Thalassaemia, a very serious medical condition for which he required treatment. The evidence was that, although healthcare was available in Pakistan, it was of a significantly lower quality than that available in the UK. The Court of Appeal was concerned with a judicial review Cart challenge to that refusal of permission to appeal. The Court of Appeal concluded that the FTT had wrongly excluded "health consideration and the discontinuance of the UK treatment" in assessing the child's best interests. As a consequence, the Court of Appeal remitted the case to the Upper Tribunal for a rehearing. **SQ (Pakistan)** therefore illustrates that in a 'health' case, Article 8 may have greater purchase where a child is affected.

14. That approach was followed in the more recent decision of the Court of Appeal in **AE (Algeria) v SSHD** [2014] EWCA Civ 653. That case involved an individual who had a six-year-old daughter with spina bifida, which resulted in her being very severely disabled, with severe learning difficulties and extremely complex needs. There also, the Court of Appeal remitted the appeal to the Upper Tribunal to consider the application of Article 8 on the basis that the Upper Tribunal had failed properly to consider the child's best interests. At [9], Maurice Kay LJ (with whom Black and Lewison LJJ agreed) said this:

> "What was required was a structured approach with the best interests of [M] and her siblings as a primary consideration but with careful consideration also of factors pointing the other way. Such factors include but are not limited to the over-staying of the children and their mother and the illegal entry and bogus asylum claim of the appellant father. The latter is no doubt what the UT had in mind when referring to 'the need to maintain immigration control'. Moreover, I do not consider that it would be inappropriate for the

future cost and duration of [M's] treatment and care in this country to play a part in the balancing exercise as matters relating to the economic well being of this country, given the strains on the public finances."

15. To summarise, whilst the circumstances of a child may (though not must) more readily engage Article 8.1, in assessing proportionality and taking into account as a primary consideration a child's best interests, the public interest must be weighed bearing in mind that, even under Article 8 and in cases involving children, the public interest reflected in the economic well-being of the country remains a powerful and weighty factor in 'health' or 'welfare' cases.

16. With those principles in mind, I turn to consider whether Judge Williams made an error of law.

Findings

17. The determination is a clearly written and well-structured one. As both parties accepted the Judge has correctly directed himself to the need for compelling circumstances in accordance with **Gulshan (Art 8 – new Rules – correct approach)** [2013] UKUT 640 (IAC) [11].

18. The Judge identified what he regarded to be compelling circumstances. He focused upon the children's health conditions. He was entitled to accept the medical evidence available from both Gambia and Alder Hey Hospital in Liverpool. Having accepted that evidence he was entitled to find that the children will not get the particular treatment "*that they require*" [29]. Although the Judge did not go into detail I have been taken to the detailed medical evidence before him. It is clear from the accepted medical evidence that the third respondent had already experienced frequent pain crises since its diagnosis after his arrival in the UK in 2010, that he has had substantive medical involvement since and that in order to prevent this from taking place again or minimise its risk he required a combination of medication and medical care including regular blood tests. The Judge therefore endorsed the medical evidence that without the particular treatment available in the UK (which would not be available in Gambia) there was a real risk that the children would suffer significant pain and suffering.

19. The SSHD has submitted that this finding is inconsistent with the evidence that the first respondent has two older children who have sickle cell anaemia living in Gambia. This was referred to in passing in the SSHD's decision letter and the first respondent confirmed this fact in her interview. Ms Johnstone invited me to find that as there was sufficient treatment available for two other children there would be treatment available for these two children. This does not appear to have been argued before Judge Williams. In any event, on the material available to this Judge regarding these children, they would not be able to obtain the treatment that they require in order to avoid pain and suffering. The diagnosis and impact of sickle cell is not uniform for all those with the condition.

20. The Judge was entitled to regard the children's health as relevant and important when assessing that their best interests were served by remaining in the UK where they had developed close links. Ms Johnstone pointed out that the Judge was mistaken when he said that the third appellant arrived in the UK in 2007 [13], and therefore got his length of residence wrong. The Judge's chronology clarifies the matter unequivocally [9]. Whilst the third appellant arrived with his mother as a visitor in 2007 he did not reside in the UK until 2010, since when he has resided here continuously.

21. Having considered the children's best interests the Judge was obliged to balance these with the public interest and the factors going the other way. Whilst the Judge mentions the public interest rather briefly under the heading 'balancing exercise' [30], his determination must be read as a whole. When it is I am satisfied that the Judge clearly had in mind the relevant factors underpinning the public interest. He was well aware that the Immigration Rules could not be met [11 and 18] and this was an important consideration as to where the balance ought to be struck. The Judge also expressly referred to the need to consider the economic well-being of the country as well as the Court of Appeal decision of **FK and OK (Botswana) v SSHD** [2013] EWCA Civ 238 [19]. In this case Sir Stanley Burnton made the point about the importance of the economic well-being of the country and the burden on the public purse at [11]:

> " …the maintenance of immigration control is not an aim that is implied for the purposes of article 8.2. Its maintenance is necessary in order to preserve or to foster the economic well-being of the country, in order to protect health and morals, and for the protection of the rights and freedoms of others. If there were no immigration control, enormous numbers of persons would be able to enter this country, and would be entitled to claim social security benefits, the benefits of the National Health Service, to be housed (or to compete for housing with those in this country) and to compete for employment with those already here. Their children would be entitled to be educated at the taxpayers' expense (as was the second appellant). All such matters (and I do not suggest that they are the only matters) go to the economic well-being of the country. That the individuals concerned in the present case are law-abiding (other than in respect of immigration controls) does not detract from the fact that the maintenance of a generally applicable immigration policy is, albeit indirectly, a legitimate aim for the purposes of article 8.2."

22. Whilst I accept the Judge could have been a little clearer on the public interest side of the scales toward the end of his determination, in my judgment he has sufficiently demonstrated that he has weighed the relevant public interest and this includes the costs of caring for these children on the NHS and educating them. Whilst the Judge has not referred to **Akhalu** and **SQ Pakistan** his approach is not inconsistent with those authorities. The importance of the point regarding the costs to the public purse has been set out clearly within **FK and OK** and this was plainly in the Judge's mind when considering the public interest. His approach to the balancing exercise might be described as rather generous but in my view he has not erred in law.

Decision

23. The decision of the First-tier Tribunal does not contain an error of law. I do not set it aside and I dismiss the SSHD's appeal.

Signed:

Ms M. Plimmer
Deputy Judge of the Upper Tribunal

Date:
14 November 2014