Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01883/2015

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 30 March 2016	**On 12 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

Mrs NABILA BANU ABDULGAFAR
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Dixon, Counsel instructed by David Williams
For the Respondent: Mr Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes before me pursuant to permission having been granted by First-tier Tribunal Judge Hodgkinson dated 22 September 2015. The appeal relates to a decision of First-tier Tribunal Judge C Burns sitting at Sheldon Court, Birmingham whereby a Decision and Reasons was promulgated on 29 June 2015. The Judge at

the First-tier Tribunal had dismissed the appeal on all grounds in respect of this Appellant and three other Appellants. As noted in the grant of permission, only this Appellant has appealed against that decision.

2. The grounds of appeal contend that the Judge failed to take into account the devastating effect of the Respondent's removal directions. The family would be "torn apart" because the Appellant would be removed to Kenya whereas her husband and children would be returned to Pakistan. It would not be in the best interests of the children for the children to be separated from their mother and a breach of section 55 Borders, Citizenship and Immigration Act 2009.

3. At the hearing before me Mr Dixon said that this was an Article 8 case. It was a case outside of the Rules concerning a decision of Judge Burns. He said it was a relatively unusual case. The Respondent's decision would mean removal to two different countries; the mother to Kenya and the husband and sons to Pakistan. The Judge had not analysed or considered properly or at all that conundrum. Mr Dixon said it was more serious because the father had never lived in Pakistan. He has no immediate connection to Pakistan. The mother's position is not quite the same. She left as a late teenager. It adds context to the problem. That was the core of the challenge and it was submitted it was a material error of law.

4. The Judge does have in mind Pakistan or Kenya and at paragraph 46 he came close to considering these issues. If they were to live in India then there was no consideration of whether the father could reasonably live in Kenya. Mr Dixon said maybe there would be a residence requirement. Alternatively in respect of Pakistan, the Judge does envisage a split there. There was no rigorous consideration of the effect of splitting. It is the removal which engages Article 8. But for the removal there is no Article 8 question. Here the removal is inherently one of splitting. The point is made good when looking at **Zoumbas**.

5. In his submissions Mr Richards said that he relied on the Rule 24 Reply. This is a case with parents of different nationalities. It would not have been appropriate to give removal directions to Kenya if the party is not of that country. It does not mean that there is a split in the family. It is for the family to decide whatever arrangements they seek to make. The Judge clearly did have in mind the different countries of nationality and he dealt with the same more than adequately at paragraphs 46 and 47 of his decision. There was simply no error of law and the decision ought to stand.

6. In reply Mr Dixon said that in principle the Secretary of State cannot give Removal Directions to a country where she does not reasonably consider there can be removal to. He agreed that there was only one Appellant before me and that the other three Appellants had not appealed.

7. As for whether there was any evidence put before the Judge that the husband/children could not live in Kenya, Mr Dixon said he would need to take instructions. Having done so he said that in terms of whether the father could legally

enter and reside in Kenya, his instructions were that this was not expressly canvassed by the Appellant before the Judge. Mr Dixon said that the best interests factors in terms of splitting and removing was essentially related to education. He said that again **Zoumbas** was really important.

8. Mr Dixon said indirect contact is generally not feasible. It depends on the extent of the contact. There was nothing in the determination to say that the relationship with the grandparents was not close. **Beoku Betts** is still relevant. Those two taken together do amount to a material error of law. In any event there was no sufficient consideration as to the extent to which these parents have meaningful ties to their respective countries. In response to the case of **EV (Philippines)** the issue is not just that they are over stayers. There cannot be a best interests analysis in this way. They cannot even speak the language of their parents. They speak English. The matter for the children is that they be removed only to a country where there's reasonable communication. There is also the issue of the other family members. I was invited to allow the appeal.

9. I had reserved my decision.

10. It is worth highlighting that at paragraphs 12 and 13 of the Judge's decision it was conceded that the Immigration Rules could not be met. This was therefore an appeal solely related to Article 8 considerations. The basis upon which that was put before the Judge is set out at paragraph 10 of the Judge's decision. The decision also makes it clear that this Appellant knew she had no leave to remain between 2002 and 2014 albeit she had asked someone in her younger years to seek to resolve this. As for the husband, he had no legal status since 2009. Therefore the children, born in the United Kingdom, had no legal status either. The children are aged 6 and 4.

11. The Judge said he found both witnesses to be credible but that they knew that they had no legal basis upon which to remain in the United Kingdom. The couple had entered into an Islamic form of marriage in October 2007. The Judge did not accept the Appellant's evidence that she would not be able to find work in Kenya. That finding has not been appealed. The Appellant has epilepsy but that is being treated. It would also be treatable in Pakistan or Kenya. There are other relatives in the United Kingdom. The husband works. The couple get assistance from his mother. She is British. She rents out a property in Dorset and gives that money to the husband so he can take care of his family. There is no evidence that this could not continue.

12. The Judge referred to the correct authorities when considering Article 8 outside of the Rules over several paragraphs at 37 to 47. The Judge rightly said that the burden of proof was on the Appellants.

13. It is a feature of this case that only this Appellant has appealed. I do not know why that is so. In one sense it restricts the way in which the appeal can be pursued, but I have decided to consider the broader question of the family as a whole. Even doing

so, it does not lessen the impact of the burden of proof. As I indicated during the hearing to Mr Dixon, the Upper Tribunal's decision in **MK (section 55-Tribunal options) Sierra Leone** [2015] UKUT 00023 (IAC) makes it clear that it is for an applicant to bring matters to the attention of the Secretary of State. That includes in respect of section 55 Borders, Citizenship and Immigration Act 2009 matters. Indeed that is clear from the first part of the headnote in **MK**,

"*(i) Where it is contended that either of the duties enshrined in section 55 of the Borders, Citizenship and Immigration Act 2009 has been breached, the onus rests on the appellant and the civil standard of the balance of probabilities applies. There is no onus on the Secretary of State.*"

14. What this means is that I am unable to accept Mr Dixon's submissions that somehow even though there was apparently no evidence put before the Judge as to why the husband and children could not live in Kenya as residents and to attend school/work, that it was nonetheless a material error of law for the Judge not to consider this. In my judgment it is clear that it was for this Appellant and the others to have put evidence before the Judge to show that it would not be possible for that to occur. Indeed the Judge went further to explain that he had considered the Country of Information evidence which had been provided which showed that there was sufficient opportunities for work and education in Kenya. The important aspect being that it was for the family, including this Appellant, to decide whether they would decide to live in Kenya, Pakistan or elsewhere.

16. It is manifestly not an error of law to fail to consider factors which were not put before the Judge.

17. Looking at the case in the broadest since and perhaps well beyond the basis of the appeal which this Appellant brings, the argument is that the educational system that the two children have experienced in this country ought to enable them to remain within that system. That too was clearly and fully dealt with by the Judge. He noted at paragraph 43 that these were young children at the time of the hearing before him. They being at very early stages of education. At paragraph 41 the Judge's rejection of the submission that the children were entrenched in education in this country has not been appealed. In any event that is correct because the children are so young.

18. The Court of Appeal's decision in **EV (Philippines) v Secretary of State for the Home Department** [2014] EWCA Civ was mentioned during the hearing. Lewison LJ made it clear that,

> "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."

19. In this case both parents are over stayers and have been for very many years. They have open to them the option of apparently being able to live in Kenya or Pakistan. The children have the benefit of parents who can work if they wish. Alternatively they have the option of funding via the husband's mother who has been providing financial assistance via her property in Dorset. The children can receive education in Kenya or Pakistan. Medical treatment for epilepsy is available in either country too. The Supreme Court's decision in **Zoumbas** [2013[UKSC 74 does not strengthen the Appellant's case in any way. This too is a case in which the family unit can remain a family unit. They have the advantage of being able to choose from two different countries. It is for them to decide which of the two countries they wish to live in. I reject the submission that because there had to be the setting of Removal Directions that that means there will be a splitting of the family. There will be no such thing because Removal Directions are set for the country of nationality. It does not mean that the person removed is prohibited from going to a third country. I note too that the children in **ZH (Tanzania)**, the leading case in respect of the best interests of children, the Court was dealing with British children. That is not so in this case which does not assist the Appellant's contentions.

20. It is obvious that the Appellant would prefer to remain in the United Kingdom and so would her husband and their children. Similarly the extended family members and friends, other worshippers at the Mosque that the husband attends and perhaps his work colleagues would also like for the family to remain in the United Kingdom. None of that was sufficient to engage **Beoku Betts** in a way in which there can be shown to be an error of law in the Judge's decision. In the end the **Huang** requirements and the **Razgar** proportionality assessment led the Judge to a decision which was adverse to the Appellant and her family, but not one which shows a material error of law.

21. In my judgment there is no material error of law in the Judge's decision. He has fully dealt with all matters that were placed before him and has applied the correct law.

Notice of Decision

The First-tier Tribunal's decision does not contain a material error of law and therefore stands.

The appeal remains dismissed (for the avoidance of doubt there was no appeal by the other three family members originally before the Judge so their appeals also remain dismissed).

No anonymity order is made.

Signed Date 30 March 2016

Deputy Upper Tribunal Judge Mahmood