Upper Tribunal
(Immigration and Asylum Chamber)

JO and Others (section 55 duty) Nigeria [2014] UKUT 00517 (IAC)

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent
On 16th July 2014

Determination Promulgated

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Before

The President, The Hon. Mr Justice McCloskey

Between

JO, CU, AU and BU
[ANONYMITY DIRECTIONS MADE]

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellants: In person and unrepresented
Respondent: Ms Johnstone, Senior Home Office Presenting Officer

(1) The duty imposed by section 55 of the Borders Citizenship and Immigration Act 2009 requires the decision-maker to be properly informed of the position of a child affected by the discharge of an immigration etc function. Thus equipped, the decision maker must conduct a careful examination of all relevant information and factors.

(2) Being adequately informed and conducting a scrupulous analysis are elementary prerequisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations.

(3) The question whether the duties imposed by section 55 have been duly performed in any given case will invariably be an intensely fact sensitive and contextual one. In the real world of litigation, the tools available to the court or tribunal considering this question will frequently be confined to the application or submission made to Secretary of State and the ultimate letter of decision.

DETERMINATION AND REASONS

Introduction

1. The Appellants are citizens of Nigeria and members of the same family. The first-named Appellant is the mother (aged 32) of the other three Appellants who are aged 7, 5 and 4 respectively. The mother has resided in the United Kingdom since February 2005 and the three children were born here and have resided here throughout their lives. On 24th April 2011, the Respondent served on the Appellants formal notice that they were persons liable to be removed from the United Kingdom. No action was taken and, by letter dated 19th July 2013, the Appellants' representative made the case that the removal of his clients would infringe their rights under Article 8 ECHR. This was the stimulus for the series of inter-related decisions giving rise to the subsequent appeals.

2. By a series of linked decisions dated 05 September 2013, made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), the Appellants' applications for permission to remain in the United Kingdom were refused and, further, decisions were made to remove the Appellants from the United Kingdom. The Appellants duly exercised their right to challenge these decisions by appeal. By its determination promulgated on 10 March 2014, the First-tier Tribunal (the "*FtT*") dismissed the Appellants' appeals. Permission to appeal to this Tribunal was granted on the basis that the FtT's conclusions in respect of the Appellants' Article 8 ECHR claims were arguably vitiated by error of law.

3. There is but one material provision of the Immigration Rules in the present context. It is paragraph EX.1 of Appendix FM, which is in the following terms:

> "*This paragraph applies if –*
>
> *(i) The applicant has a genuine and subsisting parental relationship with a child who:*
> *(aa) is under the age of 18 years;*
> *(bb) is in the United Kingdom;*
> *(cc) is a British citizen or has lived in the United Kingdom continuously for at least the 7 years immediately preceding the date of application; and*
>
> *(ii) It would not be reasonable to expect the child to leave the United Kingdom….*"

It is common case that this provision of the Rules has potential application to the eldest child of the family, who was born in July 2006.

The Impugned Decision

4. The materials assembled on behalf of the Appellants and forwarded to the Secretary of State as part of their conjoined application for leave to remain in the United Kingdom consisted of a witness statement of the mother, a letter from the oldest child of the family, a series of letters from a number of supporters and acquaintances and various materials relating to the childrens' educational progress and achievements. What consideration and assessment of these representations and information was undertaken by the case worker/decision maker concerned? The only indication available is the following passage in the letter of decision:

> "*Consideration has been given to section 55 of the Borders, Citizenship and Immigration Act 2009. There is no evidence to suggest that we have departed from section 55 as the family unit will be kept intact when removed from United Kingdom* [***sic***]. *The family unit will be maintained and will be removed together to Nigeria. The child's father ….. has no valid leave to remain in the UK and is liable for removal. Child* [***sic***] *has no ties in the UK other than to the parents and siblings. Your client is clearly familiar with the life and education system in Nigeria having spent the majority of her formative years in that country.* ***She is able to support her children whilst they become used to living there.*** *Your client entered the country illegally and had no basis to stay here. Therefore the time accrued by your client was through [****sic****] illegally gained. Your client was reminded that they have no valid leave and that they should voluntary [****sic****] depart the UK, on 13 January 2011, which they have not. The child had also gained the time without any legal basis in the country.* ***Therefore*** *it would not be unreasonable to expect the child to accompany her mother back to Nigeria. Your client was always aware of her precarious immigration status in the UK and continued to disregard immigration rules by continuing to stay when she had no legal basis thus acquiring the length she has. Your client was not in a category that would lead to settlement. ….*
>
> *Your client therefore does not meet EX.1(CC) of Appendix FM of the Immigration Rules and it is considered that your client's removal is entirely proportionate and in line with Article 8(2) of the ECHR.*"
>
> [Emphasis added.]

The remaining text of the letter of decision is couched in relatively formulaic terms and of little moment in the context of these appeals.

5. It is clear from the determination of the FtT that the mother gave evidence of an irreparable fracture in relations between her and her mother and two younger siblings in Nigeria; she testified that she does not know whether they are still alive and, if so, where they live; the last communication occurred some seven years ago; she has no educational or vocational qualifications; she has made active voluntary contributions to activities in the childrens' school and the church with which they are associated; she has no resources of any kind; the family lives and depends on charitable donations and support for survival; she has no prospects of employment in Nigeria; and there is no prospect of the children being educated in the event of returning there.

Her evidence to this Tribunal was to like effect.

Section 55 of the Borders, Citizenship and Immigration Act 2009

6. I turn to consider the applicable legal framework. In the context of the present appeals, this is dominated by section 55 of the Borders, Citizenship and Immigration Act 2009 ("*the 2009* Act") provides:

> "*(1) The Secretary of State must make arrangements for ensuring that –*
>
> *(a) the functions mentioned in sub-section (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom ….*
>
> [this is the umbrella, administrative duty]
>
> *(2) The functions referred to in sub-section (1) are –*
>
> *(a) any function of the Secretary of State in relation to immigration, asylum or nationality;*
>
> (b) *any function conferred by or by virtue of the Immigration Acts on an Immigration Officer …*
>
> (3) *A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of sub-section (1).*

The latter is the crucial, case-by-case duty to be discharged by decision makers and caseworkers. It is formulated in terms of an unqualified duty. The genesis of section 55 is found in a provision of international law, Article 3(1) of the UN Convention on the Rights of the Child ("UNCRC", 1989):

> "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*"

In the field of immigration, therefore, the enactment of section 55 discharges an international law obligation of the UK Government. While section 55 and Article 3(1) of the UNCRC are couched in different terms, there may not be any major difference between them in substance, as the decided cases have shown. The final striking feature of section 55 is that it operates to protect all children who are in the United Kingdom: there is no qualification such as residence or nationality.

7. Section 55 has been considered by the United Kingdom Supreme Court in two cases. These decisions demonstrate, *inter alia*, the interaction between section 55

and Article 8 ECHR. While these provisions have separate juridical identities, they are clearly associated. Thus where the Article 8 family life equation involves children, section 55 is immediately engaged. In ZH (Tanzania) [2011] UKSC4, Baroness Hale emphasised that the best interests of the child must be considered first – see paragraph [26] – while Lord Kerr stated:

> "*[46] …….. A primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them.*"
>
> [Emphasis added]

As was recognised in Mansoor v Secretary of State for the Home Department [2011] EWHC 832 (Admin), the onward march of the Strasbourg jurisprudence has involved the progressive development of the best interests of the child principle under Article 8.

8. In ZH, Baroness Hale opined that Article 8 ECHR must be interpreted in such a way that the best interests of relevant children are a primary consideration, while recognising that they may not necessarily be the paramount consideration: [33]. Thus the rights of other, adult family members may be accorded lesser importance. In a passage in which the 1924 Geneva Declaration resonates strongly, she adverted to the "*strong public interest in ensuring that children are properly brought up*". Notably, echoing Lord Hope in the Norris case, she emphasised that there is "*no substitute for* [a] *careful examination …….* [of all the circumstances]" [34]. Thus:

> "[82] …. *The Court will need to know whether there are dependent children, whether the parent's removal will be harmful to their interests and what steps can be taken to mitigate this. …. In the more usual case, where the person whose extradition* [or removal or deportation] *is sought is not the sole or primary carer for the children, the Court will have to consider whether there are any special features requiring further investigation of the children's interests, but in most cases it should be able to proceed with what it has.*"

I draw particular attention to [35] – [37] of the opinion of Baroness Hale. The thrust of these passages is that the initial decision maker must be properly informed. In the context of discussing a pilot scheme to which the Supreme Court's attention had been drawn, Baroness Hale stated, at [36]:

> "***This is designed to improve the quality of the initial decision, because the legal representative can assist the 'case owner' in establishing all the facts of the claim before a decision is made.***"

Within these paragraphs one finds references to gathering evidence, asking the correct questions and interviewing the child concerned.

9. More detailed prescription of the correct approach to section 55 and its interaction with Article 8 ECHR has followed. In Zoumbas v Secretary of State for the Home Department [2013] 1 WLR 3690, the Supreme Court recently considered the interplay between the best interests of the child and Article 8 ECHR, rehearsing what might be termed a code devised by Lord Hodge comprising seven principles:

    (1) The best interests of a child are an integral part of the proportionality assessment under Article 8 ECHR;

    (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;

    (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

    (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;

    (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

    (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment; and

    (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

10. The passages highlighted above seem to me to support the proposition that in order to discharge the twofold, inter-related duties imposed by section 55 (i) to have regard to the need to safeguard and promote the welfare of any children involved in the factual matrix in question and (ii) to have regard to the Secretary of State's guidance, the decision maker must be properly informed. I consider this construction of section 55 to be dictated by its content, its evident underlying purpose, the aforementioned decisions of the Supreme Court and the well established public law duty to have regard to all material considerations. The outworkings of this discrete duty were expounded by Lord Diplock in Secretary of State for Education and Science v Metropolitan Borough Council of Tameside [1977] AC 1014, at 1065b, in a passage which has particular resonance in the context of section 55:

> "…… *It is for a court of law to determine whether it has been established that in reaching his decision* …… [the Secretary of State] *had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider …..*
>
> *Or, put more compendiously, the question for the court is did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?*"

Linked to this is another hallowed principle of public law, namely the duty of the public authority concerned to promote the policy and objects of the Act in giving effect to the relevant power or duty : Padfield – v – Minister of Agriculture, Fisheries and Food [1968] AC 997, at 1030b/d per Lord Reid. This overlay of public law duties, when applied to section 55, should serve to ensure fulfilment of the underlying legislative purpose in every case. These principles also give sustenance to the proposition that the duties enshrined in section 55 cannot be properly performed by decision makers in an uninformed vacuum. Rather, the decision maker must be properly equipped by possession of a sufficiency of relevant information.

11. I consider that, properly analysed, there are two guiding principles, each rooted in duty. The first is that the decision maker must be properly informed. The second is that, thus equipped, the decision maker must conduct a careful examination of all relevant information and factors. These principles have a simple logical attraction, since it is difficult to conceive how a decision maker could properly have regard to the need to safeguard and promote the welfare of the child or children concerned otherwise. Furthermore, they reflect long recognised standards of public law. Being adequately informed and conducting a scrupulous analysis are elementary prerequisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations. This balancing exercise is the central feature of cases of the present type. It cannot realistically or sensibly be undertaken unless and until the scales are properly prepared.

12. The second of the duties imposed by section 55 is, per subsection (3), to have regard to the statutory guidance promulgated by the Secretary of State. In considering whether this discrete duty has been discharged in any given case, it will be necessary for the appellate or reviewing Court or Tribunal to take cognisance of the relevant guidance emanating from the same subsection, juxtaposing this with the representations and information provided by the person or persons concerned and the ensuing decision. The guidance is an instrument of statutory authority to which the decision maker "*must*" have regard: there is no element of choice or discretion. The guidance was duly published in November 2009. It is entitled "Every Child Matters: Change for Children". Notably, at paragraph 2.7 it contains a series of "*principles*" which are rehearsed in the context of a statement that UKBA (the United Kingdom Borders Agency, the Secretary of State's agents) "*must ….. act according to …….*" same. Three of these principles are worthy of particular note:

(a) Ethnic identity, language, religion, faith, gender and disability are taken into account when working with a child and their family.

(b) Children should be consulted and the wishes and feelings of children taken into account whenever practicable when decisions affecting them are made.

(c) Children should have their applications dealt with in a timely way which minimises uncertainty.

I consider that these provisions, considered in tandem with the principles enunciated by the Supreme Court and the public law duties rehearsed above, envisage a process of deliberation, assessment and final decision of some depth. The antithesis, namely something cursory, casual or superficial, will plainly not be in accordance with the specific duty imposed by section 55(3) or the overarching duty to have regard to the need to safeguard and promote the welfare of any children involved in or affected by the relevant factual matrix. *Ditto* cases where the decision making process and its product entail little more than giving lip service to the guidance.

13. The question of whether the duties imposed by section 55 have been duly performed in any given case will invariably be an intensely fact sensitive and contextual one. In the real world of litigation, the tools available to the Court or tribunal considering this question will frequently, as in the present case, be confined to the application or submission made to the Secretary of State and the ultimate letter of decision, as the recent decision of the Court of Appeal in Baradaran v Secretary of State for the Home Department and Another [2014] EWCA Civ 854 graphically illustrates. These materials will, therefore, call for scrupulous judicial examination in every case. In this context, I concur with the statement of Wyn Williams J in R (TS) v SOSHD and Northamptonshire CC [2010] EWHC 2614 (Admin), at [24]:

> "…. *The terms of the written decision must be such that it is clear that the substance of the duty was discharged.*"

The question of whether the Secretary of State's decision is expressed in adequate and satisfactory terms will inevitably be contextual. Thus generalisations are to be avoided.

14. One of the more intriguing questions thrown up by section 55 is whether it has a procedural dimension in certain cases. Furthermore, does it impose a proactive duty of enquiry on the Secretary of State's officials in some cases? And how does the Tameside principle (*supra)* apply to decisions made in this sphere? Another interesting, related question is whether, in a given case, a failure to conduct meetings or interviews with an affected child and/or its parents, or others, a course specifically envisaged by the statutory guidance, will give rise to a breach of section 55. It would seem surprising if obligations of this kind could never arise under the aegis of section 55. This view finds cogent support in the opinion of Baroness Hale in ZH (*supra*), in a passage under the rubric "Consulting the Children", at [34]:

"*Acknowledging that the best interests of the child must be a primary consideration in these cases immediately raises the question of how they are to be discovered. An important part of this is discovering the child's own views. Article 12 of UNCRC provides:*

> *'1. States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
>
> *2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'"*

These questions do not, however, arise directly in the present case, mainly because the existence of the three children concerned was disclosed and a not insubstantial quantity of evidence relating to them was included in the application to the Secretary of State and having regard to what I consider to be the manifest infirmities in the impugned decision (*infra*). Thus I resist the temptation to embark upon an *obiter excursus*.

Consideration and Conclusions

15. As explained above, in a case of the present type much attention will unavoidably be focused on the terms of the decision under scrutiny. Viewed particularly from the perspective of section 55, the letter of decision in the present case invites the following analysis:

(a) There is no reference to any of the relatively extensive documentary materials submitted with the application of the four Appellants. Nor is there any engagement with the witness statement of the mother (the first Appellant), which describes "*family problems back home in Nigeria*"; her family's disapproval of her relationship with the father of her children (the other three Appellants); the discontinuance of communications with her family to the extent that the first Appellant does not know whether they are alive or dead and, if alive, where they live; the educational progress and prowess of the oldest child (the second Appellant); the integration of the family in United Kingdom life and culture; and the absence of any links with the mother's country of origin, Nigeria. None of these issues is addressed. They are effectively airbrushed.

(b) The decision letter refers to only <u>one child</u>. Though not entirely clear, it seems likely that this is the oldest of the three children. No mention is made of the other two. Furthermore, none of the children is identified by name or initials or otherwise.

(c) The text of the decision letter indicates that the consideration given to the oldest child was at best cursory. There is no engagement, even superficially, with the evidence presented with the application.

(d) The suggestion that the mother will be "*able to support her children while they become used to living*" in Nigeria was neither contained in nor supported by the information in the application to the Secretary of State or any other source of information and has been subsequently belied by the evidence given to both Tribunals. Furthermore, no analysis, even superficial, of what such "*support*" would entail is undertaken. The decision maker appears to have succumbed to conjecture. The public law misdemeanour thereby committed was the familiar one of leaving out of account material considerations and/or lapsing into the prohibited territory of irrationality. An alternative analysis, now firmly embedded in contemporary public law, is that material errors of fact were committed by the decision maker.

(e) The purported consideration of the best interests of the children makes no reference whatever to the statutory guidance, explicitly or implicitly. There is no indication that the decision maker was even aware of the guidance.

(f) The relevant passage conflates a series of issues, some of which have no proper bearing on the childrens' best interests: in particular, the mother's immigration history, her precarious immigration status when the children were born and the mother's failure to depart the United Kingdom sooner. This recitation of "proportionality adverse" factors occurs in a passage which begins with a reference to section 55, followed immediately by a blunt self-congratulatory conclusion.

(g) The passage in question also highlights a consideration of questionable propriety, namely the unlawful immigration status of the childrens' estranged father. Neither the combined applications being determined nor the ensuing decisions concerned this person.

The conclusion that the consideration given to the need to safeguard and promote the welfare of the three children concerned was woefully inadequate is irresistible.

16. I consider that the information submitted was not properly considered. No other analysis commends itself. Fundamentally, there is no analysis of the best interests of any of the children in the decision letter. Furthermore, I find no warrant for inferring that a proper best interests exercise was conducted by the decision maker or others, even though not expressed in the decision letter. The next question is whether the second of the duties imposed by section 55, namely to have regard to the statutory guidance, was discharged. This guidance features nowhere in the letter of decision, explicitly or implicitly. I consider that there is no basis for inferring that it was considered, properly or at all.

17. In its determination, the FtT did not subject the Secretary of State's decision to the kind of analysis conducted above. The section 55 duties feature nowhere in the determination and there is no mention, even oblique, of the statutory guidance. The FtT failed to consider whether the Secretary of State had complied with either duty. As my analysis makes clear, I consider that the FtT should have concluded that the Secretary of State's officials had failed to discharge the duties imposed by section 55 to have regard to the need to safeguard and promote the welfare of the children concerned and to have regard to the statutory guidance. It did not do so. This is the fundamental error of law infecting the FtT's decision.

18. The second clearly identifiable error of law in the decision of the FtT is the failure to recognise that the oldest child of the family, the second Appellant, was capable of succeeding under the Immigration Rules, as set out in [3] above. While this was acknowledged in the decision letters (and, as noted above, is accepted on behalf of the Secretary of State), the Judge failed to address this, as is clear from [16] of the determination and the ensuing passages. As a result of this error, the Judge gave no consideration to the relevant provisions of the Rules and the tests enshrined therein. Thus, in particular, the Judge did not review whether the Secretary of State's assessment of the requirement that "*it would not be reasonable to expect the child to leave the United Kingdom*", always one of the key questions under the rule in question, was in accordance with the law. I consider this error of law to be plainly material, since the outcome could have been different if it had been avoided.

DECISION

19. For the reasons elaborated above, I conclude that the decision of the FtT is infected by errors of law, the materiality whereof is beyond plausible dispute. Accordingly:

    (i) I set aside the decision under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

    (ii) Being satisfied that no further hearing is necessary, I re-make the decision in this forum, in accordance with section 12(2)(b)(ii). As the Secretary of State's decision was not in accordance with the law, for the reasons elaborated above, I allow the appeal.

20. It will now be incumbent on the Secretary of State to re-make the decision in accordance with this judgment.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Note:

This Determination has been corrected under rule 42 of the Tribunal Procedure (Upper Tribunal) Rules 2008 so as to rectify the accidental error in [2] of the version first promulgated suggesting that the Appellants' human rights applications had been certified as clearly unfounded under section 94(2) of the Nationality, Immigration and Asylum Act 2002. There was no such certification.

BMcC