ILPA information sheet

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ZH (Tanzania) Supreme Court Judgment

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This information sheet gives information about the UK Supreme Court's judgment in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4. The Supreme Court is the highest court in the UK. This is the first judgment it has given dealing directly with immigration control and the best interests of children. The judgment is available at: http://www.supremecourt.gov.uk/docs/UKSC_2010_0002_Judgment.pdf

The facts

ZH is a Tanzanian national. She came to the UK in 1997, claiming asylum on her arrival. That was refused and her appeal dismissed. She subsequently made two further asylum claims under false names and claiming a false nationality. She made further claims for permission to stay. All of these claims were refused. The Secretary of State intended to remove ZH to Tanzania. The court agreed with the lower courts that ZH's immigration history was "*appalling*".

In the meantime, ZH had two children by the same father. Her daughter was born in 1998, and her son born in 2001. The father is and was a British citizen. The children are, therefore, also British citizens (as is any child born in the UK to a British parent or a parent who is settled in the UK). They have lived all their lives in the UK, and go to school in the UK. The relationship between ZH and the father came to an end in 2005, but he continues to spend considerable time with his children. However, he is of fragile health, receives disability living allowance and was diagnosed with HIV in 2007. It had once been suggested that the children could live with him without any practical difficulties. However, by the time the matter came before the Supreme Court, it was accepted that there was no basis to support that view or the view that he would be able to maintain contact by visiting them, if they moved to Tanzania with their mother.

The issues

Lady Hale gave the lead judgment (the other four Supreme Court judges agreeing). She said:

> "*The over-arching issue in this case is the weight to be given to the best interests of children who are affected by the decision to remove or deport one or both of their parents from this country.*"

Lady Hale identified a more specific question within this over-arching issue that arose in ZH's case:

> "*...in what circumstances is it permissible to remove or deport a non-citizen parent where the effect will be that a child who is a citizen of the United Kingdom will also have to leave?*"

The Supreme Court's decision

The Supreme Court noted that the European Court of Human Rights placed significant weight, when considering private and family life (Article 8 of the 1950 European Convention on Human Rights) in the context of immigration removals and deportations, on the best interests and well-being of children. (For more information on Article 8, please see the August 2008 "Article 8" information sheet.) Having considered the various international legal standards concerning children's best interests, the Supreme Court held that Article 3 of the 1989 UN Convention on the Rights of the Child was the key provision for UK law. Article 3(1) provides:

> "*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.*"

The Supreme Court recognised that this had effectively become part of the UK's domestic law governing the UK Border Agency with the introduction of section 55 of the Borders, Citizenship and Immigration Act 2009. (For more information, see the August 2009 "Children – New Statutory Duty" and January 2011 "Children's Best Interests" information sheets.) In giving effect to a child's best interests, the Supreme Court held that attention must be given to the child's British citizenship. The child's best interests will normally include "*the advantages of growing up and being educated in their own country, their own culture and their own language*". Although the Supreme Court was not dealing with the case of a non-British citizen, it should be noted that these advantages may also apply to a non-British citizen child if, for example, he or she has lived all or most of his or her life in the UK and is not familiar with the country of his or her, or his or her parent's, origin.

In conclusion, the Supreme Court held that the best interests of any child must be considered first. This does not mean that, in any particular case, the child's best interests cannot be outweighed by other matters, such as the interests of immigration control. This does not mean that, in a case such as that of ZH, a parent's immigration history or the precariousness of the parent's immigration status at the time family life was created (e.g. the birth of the children) will be irrelevant. However, decision-makers must be careful to avoid treating children as responsible for their parent's actions. Finally, the Supreme Court emphasised the importance of ensuring that children are given proper opportunity to have their views heard in matters affecting them – including actions by the UK Border Agency and in appeal proceedings.

Further comment

In giving a short judgment, agreeing with the lead judgment of Lady Hale, Lord Kerr expressed the importance of children's best interests in particularly strong and clear terms:

> "*...in reaching decisions that will affect a child, 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. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result.*"

There is no reason why this approach to the best interests of children should be limited to children of migrants in the UK, or limited to actions or decisions of the UK Border Agency or limited to actions or decisions concerned with immigration proceedings.