Michaelmas Term
[2013] UKSC 74
On appeal from: [2012] CSIH 87

JUDGMENT

Zoumbas (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lady Hale, Deputy President
Lord Kerr
Lord Reed
Lord Toulson
Lord Hodge

JUDGMENT GIVEN ON

27 November 2013

Heard on 28 October 2013

Appellant	*Respondent*
Mark Lindsay QC	Lorna Drummond QC
Stephen Winter	Andrew Webster
(Instructed by Drummond Miller LLP)	(Instructed by Office of the Advocate General)

LORD HODGE, delivering the judgment of the court

1. This is the judgment of the court. The appellant, Mr Zoumbas, challenges a decision by the Secretary of State for the Home Department dated 4 October 2011 that he did not qualify for asylum or humanitarian protection and that his further representations were not a fresh human rights claim under paragraph 353 of the Immigration Rules. He challenged the Secretary of State's decision for the manner in which she dealt with the best interests of his children in the light of the decision of this court in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166. He was unsuccessful in his judicial review application before both the Lord Ordinary, Lady Clark of Calton, and an Extra Division of the Inner House of the Court of Session.

2. The judicial review application and this appeal are concerned only with the fifth of the questions which Lord Bingham of Cornhill set out in para 17 of his speech in *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368. That is, in this case, whether the interference with the family life of Mr Zoumbas' family unit by his removal to the Republic of Congo was proportionate to the legitimate public end which the Secretary of State sought to achieve.

3. Before this court Mr Zoumbas made his challenge in three parts. First, he submitted that the Secretary of State had erred by failing to have regard to the interests of his children as a primary consideration in the proportionality assessment under article 8 of the European Convention on Human Rights ("ECHR"). This entailed, he submitted, a breach of the Secretary of State's duty under section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act"), which required her to make arrangements for ensuring that her functions in relation to immigration were discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. He suggested that this amounted to punishing the children for their parents' poor immigration history. Secondly, he criticised the Secretary of State's findings in relation to the best interests of the children. He asserted that (i) she had failed to make clear findings, (ii) it was irrational to conclude that the children's best interests would be served by their removal to the Republic of Congo, (iii) she had failed to carry out a careful examination of their best interests, and (iv) the findings assumed that he and his wife would be returned to the Congo. Thirdly, in a submission which depended on the success of either or both of the first and second submissions, he argued that the Secretary of State had erred in concluding under paragraph 353 of the Immigration Rules that further representations made by him did not have a realistic prospect of success before an immigration judge.

The facts

4. Mr Zoumbas and his wife have an unedifying immigration history. They are citizens of the Republic of Congo. He entered the United Kingdom illegally on 27 May 2001 using a French passport that did not belong to him. He claimed asylum and was granted temporary admission. The woman who became his wife entered the United Kingdom on 30 July 2002 using a forged French passport. She also claimed asylum. Their claims for asylum were refused and her appeal was dismissed. On 7 November 2003 they married. Mrs Zoumbas initiated an appeal under article 8 ECHR, which was refused. Mr Zoumbas' appeal against the refusal of his asylum claim was also refused. Their eldest child, Angemarcel Massengo Fleury, was born on 27 April 2004.

5. On 8 April 2005 Mr Zoumbas was considered for the family indefinite leave to remain exercise but was found not to be eligible. In October 2005 Mrs Zoumbas and Angemarcel were detained and removed to the Republic of Congo. That same month, Mr Zoumbas failed to report to the immigration authorities and was treated as an absconder. For several months the authorities did not know his whereabouts.

6. On 31 March 2006 Mrs Zoumbas and Angemarcel returned to the United Kingdom illegally using passports and a residence permit that did not belong to them. Mrs Zoumbas claimed asylum again and named her husband and Angemarcel as dependents in her claim. In about August 2006 Mr Zoumbas started to report to the immigration authorities again. On 25 May 2006 the Secretary of State refused Mrs Zoumbas' asylum claim. She appealed but her appeal was dismissed on 24 July 2006. She was granted a statutory review of her appeal but on 3 July 2007 the First-tier Tribunal refused her appeal after a reconsideration hearing.

7. On 3 February 2007 Mrs Zoumbas gave birth to a daughter, Rosangel Shekma Massengo Fleury, and on 14 April 2011 she gave birth to another daughter, Shaun Keziah Massengo Fleury. Mr and Mrs Zoumbas did not have permission to work. They received state benefits because Mr Zoumbas claimed that he was destitute. But between September 2008 and April 2010 credits of £27,693.75 from unidentified sources were paid into bank accounts of Mrs Zoumbas and of the older two children.

8. On 22 June 2010 Mr Zoumbas submitted further representations in which he asserted that there had been a change of circumstances because he, his wife and his children had been in the United Kingdom for several years and had established a family and private life which should be respected under article 8 ECHR.

Documents which accompanied his representations showed that the eldest child, Angemarcel, was at primary school, that Mrs Zoumbas was attending college, and that they were members of a church, all in Glasgow.

9. By letter dated 4 October 2011 the Secretary of State intimated to Mr Zoumbas her decision that his representations did not qualify him for asylum or humanitarian protection and that he did not merit a grant of limited leave to enter or remain in the United Kingdom. She also held that his submissions would not amount to a fresh claim under paragraph 353 of the Immigration Rules because they did not create a realistic prospect of success before an immigration judge. Mr Zoumbas has challenged that decision in his application for judicial review.

The legal framework

10. In their written case counsel for Mr Zoumbas set out legal principles which were relevant in this case and which they derived from three decisions of this court, namely *ZH (Tanzania)* (above), *H v Lord Advocate* 2012 SC (UKSC) 308 and *H(H) v Deputy Prosecutor of the Italian Republic* [2013] 1 AC 338. Those principles are not in doubt and Ms Drummond on behalf of the Secretary of State did not challenge them. We paraphrase them as follows:

(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.

11. These principles arise from the United Kingdom's international obligations under the United Nations Convention on the Rights of the Child, and in particular article 3.1 which 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."

That general principle of international law has influenced the way in which the Strasbourg court has interpreted the ECHR: *Neulinger v Switzerland* (2010) 28 BHRC 706, para 131.

12. Mr Lindsay for Mr Zoumbas also founded on a statement in the judgment of Lord Kerr of Tonaghmore in *ZH (Tanzania)* at para 46 in support of the proposition that what is determined to be in a child's best interests should customarily dictate the outcome of cases and that it will require considerations of substantial moment to permit a different result. In our view, it is important to note that Lord Kerr's formulation spoke of dictating the outcome of cases "such as the present" and that in *ZH (Tanzania)* the court was dealing with children who were British citizens. In that case the children by virtue of their nationality had significant benefits, including a right of abode and rights to future education and healthcare in this country, which the children in this case, as citizens of the Republic of Congo, do not. The benefits of British citizenship are an important factor in assessing whether it is reasonable to expect a child with such citizenship to live in another country. Moreover in *H(H)* Lord Kerr explained (at para 145) that what he was seeking to say was that no factor should be given greater weight than the interests of a child. See the third principle above.

13. We would seek to add to the seven principles the following comments. First, the decision-maker is required to assess the proportionality of the interference with private and family life in the particular circumstances in which the decision is made. The evaluative exercise in assessing the proportionality of a measure under article 8 ECHR excludes any "hard-edged or bright-line rule to be applied to the generality of cases": *EB (Kosovo) v Secretary of State for the Home Department* [2009] AC 1159, *per* Lord Bingham at para 12. Secondly, as Lord Mance pointed out in *H(H)* (at para 98) the decision-maker must evaluate the child's best interests and in some cases they may point only marginally in one, rather than another, direction. Thirdly, as the case of *H(H)* shows in the context of extradition, there may be circumstances in which the weight of another primary consideration can tip the balance and make the interference proportionate even where it has very severe consequences for children. In that case an Italian prosecutor issued a European arrest warrant seeking the surrender of a person who had earlier broken his bail conditions by leaving Italy and ultimately seeking safe haven in the United Kingdom and had been convicted of very serious crimes. This court held that the treaty obligations of the United Kingdom to extradite him prevailed over his children's best interests. The third principle in para 10 above is subject to the first and second qualifications and may, depending on the circumstances, be subject to the third. But in our view, it is not likely that a court would reach in the context of an immigration decision what Lord Wilson described in *H(H)* (at para 172) as the "firm if bleak" conclusion in that case, which separated young children from their parents.

The decision letter

14. In the letter of 4 October 2011, Ms G Dickin, the official acting on behalf of the Secretary of State, summarised Mr Zoumbas' submissions and listed the documents which he had produced in its support. She considered the first four questions which Lord Bingham set out in *R (Razgar)* at para 17. She held that Mr Zoumbas had established a private life and a family life in the United Kingdom and that his removal would interfere with his private and family life. It was implicit in her discussion that article 8 ECHR was engaged. She then concluded that the interference would be in accordance with the law and in pursuit of the legitimate aim of maintaining effective immigration control.

15. She introduced the consideration of the proportionality of the interference with the words:

> "Below is a consideration of why any interference is proportionate to the permissible aim".

She then referred to the family's unlawful residence and the fact that Mr Zoumbas and his wife had established their family life in the full knowledge that they both had no legal right to reside in the United Kingdom and could be removed at any time. She summarised the "appalling immigration history" of Mr and Mrs Zoumbas and the family's receipt of state benefits while receiving the unidentified credits which I have mentioned.

16. She considered in turn the proportionality of the interference with Mr Zoumbas' private and family life before discussing the article 8 rights of any family members who were not party to the proceedings in accordance with the guidance which the House of Lords gave in *Beoku-Betts v Secretary of State for the Home Department* [2009] AC 115. She concluded that there was no evidence of family ties in the United Kingdom other than Mr Zoumbas' wife and children who would be removed to the Congo with him, thus preserving his family life.

17. She then addressed the Secretary of State's obligation under section 55 of the 2009 Act to carry out her functions in a way which has regard to the need to safeguard and promote the welfare of children in the United Kingdom. She made it clear that the interests of the three children had been taken into account in the assessment of the proportionality of the interference with private and family life. She stated:

> "Full consideration has been given to the best interests of your three children, which is a primary consideration in the evaluation of the proportionality of a decision to remove a family.
>
> It is noted that you have not provided any information which pertains specifically to the best interests of your three children. A new immigration judge would conclude that although health care and education in Congo may not be of the same standard as in the United Kingdom, the children's best interests will be to remain with their parents and raised in their own culture. Furthermore, if you return together there is no reason to believe that relocation to Congo would have a particularly detrimental effect on your children."

18. She concluded that the balance of the competing interests was in favour of the family's removal (a) because of the need to maintain effective immigration control, (b) because they had built up a family life in the United Kingdom when their residence was precarious, and (c) because the immigration history involved findings of fabricated asylum claims, deception, fraud and absconding.

Discussion of the challenges

19. We are satisfied that there is no substance in the first of Mr Zoumbas' challenges which we have summarised in para 3 above. It rests on a mistaken construction of the Secretary of State's letter. There has been no failure to consider the best interests of Mr and Mrs Zoumbas' children in the article 8 proportionality exercise. Mr Lindsay accepted that the status of the well-being of the children as a primary consideration did not require the Secretary of State in every case to consider the children's best interests first and then to address other considerations which might outweigh those interests. There is nothing to bar the official who acts for the Secretary of State from considering the various issues, including the proportionality exercise under article 8 ECHR before drafting the decision letter. The official set out the Secretary of State's conclusion before explaining the reasons for that conclusion. It is important to read the decision letter as a whole and to analyse the substance of the decision. It is a misreading of the letter to assert, as Mr Lindsay did, that the Secretary of State had made a decision on proportionality before addressing the well-being of the children. The consideration of the children's best interests was, as the letter stated (para 17 above), a primary consideration in the proportionality exercise.

20. Mr Lindsay submitted in his written case that this appeal raised an issue of general public importance because the structure of the decision letter was one which the Secretary of State frequently used. Ms Drummond understandably submitted in her written case that there was no issue of general public importance. Be that as it may, the appeal demonstrates a misunderstanding of the effect of the decision in *ZH (Tanzania)* which can usefully be corrected.

21. If officials in the Home Department who draft such decision letters are using a template to give structure to the articulation of their decisions, we see nothing wrong with a template that provides for the statement of the Secretary of State's conclusion to be followed by her reasoning. What is important, as Lord Mance said in *H(H)* at para 98, is that the interests of the children must be at the forefront of the decision-maker's mind. In this context the fourth, fifth and sixth principles which we have listed in para 10 above are relevant. That leads us to consider the second of Mr Lindsay's challenges.

22. We are not persuaded that there is any lack of clarity in the Secretary of State's findings on the children's best interests or any indication that there had not been a careful examination of those interests. The decision letter sets out the Secretary of State's conclusions briefly. But that does not give rise in this case to any inference that there has not been careful consideration. The substance of Mr Lindsay's complaint was that the Secretary of State either had not considered or had failed to record her findings on matters which were disclosed in the documents

lodged in support of Mr Zoumbas' claim. Those matters were (a) that the children were born in the United Kingdom, (b) that they were English speakers and saw themselves as British, (c) that they had integrated well into the community in Glasgow, (d) that the eldest child was doing well at school, and (e) that two of the three children had never been to the Congo.

23. In our view, the Secretary of State does not have to record and deal with every piece of evidence in her decision letter. The decision-maker was clearly aware that the children were born in the United Kingdom as it is recorded on the fourth page of the decision letter. The letter also recorded that the children were aged seven years, four years, and five months respectively and referred to the evidence that the eldest child was at primary school. The decision-maker would also have been aware from the narrative of the family's immigration history that two of the children had not been to the Republic of Congo.

24. There is no irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as health care and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into United Kingdom society would have been predominantly in the context of that family unit. Most significantly, the decision-maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their well-being. We agree with Lady Dorrian's succinct summary of the position in para 18 of the Inner House's opinion.

25. Finally, we see no substance in the criticism that the assessment of the children's best interests was flawed because it assumed that their parents would be removed to the Republic of Congo. It must be recalled that the decision-maker began by stating the conclusion and then set out the reasoning. It was legitimate for the decision-maker to ask herself first whether it would have been proportionate to remove the parents if they had no children and then, in considering the best interests of the children in the proportionality exercise, ask whether their well-being altered that provisional balance. When one has regard to the age of the children, the nature and extent of their integration into United Kingdom society, the close family unit in which they lived and their Congolese citizenship, the matters on which Mr Lindsay relied did not create such a strong case for the children that their interest in remaining in the United Kingdom could

have outweighed the considerations on which the decision-maker relied in striking the balance in the proportionality exercise (paras 17 and 18 above). The assessment of the children's best interests must be read in the context of the decision letter as a whole.

26. As we have not upheld either of the first or second challenges, the third challenge cannot succeed.

27. We therefore dismiss the appeal.

28. It is of course the task of the Secretary of State and not this court to decide the content of any template for decision letters. But we venture the view that challenges, such as this one, would be less likely if her advisers were to express the test in the way in which it was expressed in *ZH (Tanzania)* and to expand the explanation of the separate consideration that was given to the interests of the children.