Case No: C5/2013/2758

Neutral Citation Number: [2014] EWCA Civ 874
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
HHJ Moulden
IA/26810/26822/26828/26837/26842/2012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/06/2014

Before:

LORD JUSTICE JACKSON
LORD JUSTICE LEWISON
and
LORD JUSTICE CHRISTOPHER CLARKE

- -

Between:

EV (Philippines) and others	**Appellants**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Shivani Jegarajah and Bronwen Jones (instructed by **MTA Corporate Solicitors LLP**) for the **Appellant**
Susan Chan (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing date: 7th May 2014

- -

Judgment

LORD JUSTICE CHRISTOPHER CLARKE:

1. This is an appeal from a decision of the Upper Tribunal (UT) rejecting an appeal from the First Tier Tribunal (FTT) which had rejected the Appellants' appeal from the refusal of the Secretary of State ("SOS") on 6 November 2012 to accede to their applications of 25 March 2011.

2. The proceedings have a chequered history some of which it is necessary to set out.

3. On 12 June 2007 EV, who is a Philippine national, entered the United Kingdom with a work permit as a Skilled Care Worker and was given leave to remain until 8 February 2011. She was joined on 25 April 2008 by BV, her husband, as a dependent partner; and on 17 July 2009 by their three children – (a) KrV (born 15 April 2001), their daughter; (b) BV (born 16.5.02), their son; and (c) KaV (born 30 August 2004), another daughter; as dependants on EV's visa.

4. On 7 February 2011 the Appellants applied for indefinite leave to remain. If their applications were in the correct form they were made in time. However, on 8 March 2011 they were rejected on the ground that they were (allegedly) made on a form that was no longer valid.

5. On 25 March 2011 the Appellants made renewed applications for indefinite leave to remain as, in the case of EV, a Tier 2 General Migrant and, in the case of the others, as dependents. On 15 July 2011 those applications were refused by the SOS who said that there was no right of appeal. On 25 July 2011 notice of appeal was filed against that decision, disputing the contention that there was no right to do so. Thereafter three hearings had to be adjourned because no representative of the SOS appeared at them. On 10 February 2012 the SOS sent a representative to a hearing but without any file.

6. On 26 March 2012 FTT Judge Herlihy decided that the appellants had no right of appeal as the decision of 25 March 2011 was not within the definition of an "*immigration decision*" in section 82 (2) of the *Nationality, Immigration and Asylum Act 2002* since the Appellants had, as he held, no leave to remain when they made their applications on 25 March 2011. It appears that she was not aware of the fact that the applications of 7 February 2011 may well have been on valid forms.

7. Judge Herlihy recorded, as was the fact, that there had been a repeated failure by the SOS to comply with directions issued by the Tribunal. She urged the SOS, given the passage of time, to consider the further representations made by the Appellants' representative in December 2011 in respect of their Article 8 claim and to issue a fresh and appealable decision.

8. On 17 July 2012 the SOS gave notice to the Appellants of a decision to remove them and on 18 July 2012 she gave reasons for refusing their Article 8 based applications. An appeal was launched and on 19 September 2012 FTT Judge Turkington dealt with it by referring the applications of 25 March 2011 back to the SOS to enable full consideration of three matters: (i) the legality of the decision of 8 March 2011 returning the forms as no longer valid; (ii) the issues which arose under section 55 of the Borders, Citizenship and Immigration Act 2002; and (iii) the issues which arose under Article 8. As to (i) the judge observed that it now appeared that the forms used

were not invalid as a result of which the Appellants might have outstanding appeals under the Rules.

9. The upshot of this was that on 6 November 2012 the SOS withdrew the decision of 15 July 2011; refused the applications of 25 March 2011 afresh; and decided to remove the appellants. The last decision was invalid. There was an appeal to the FTT (Judge Walters) which was dismissed by a judgment promulgated on 3 May 2013 and a further appeal to the UT (Judge Moulden), which was dismissed by a judgment promulgated on 10 July 2013, which is the subject of the present appeal.

10. Permission to appeal was given by Gloster LJ on the issue as to whether, when there was a finding that it was in the children's best interests that their education in the UK should not be disrupted, the need for immigration control could have been, on the present facts, a countervailing consideration sufficient to displace the best interests of the child.

A killer point?

11. The Appellants were represented, pro bono, by Ms Shivani Jegarajah and Ms Bronwen Jones. They did not settle the skeleton argument which gave rise to permission to appeal to this court, which raised the point upon which Gloster LJ gave leave. They submitted – in a skeleton argument filed on 4 May 2014 - that there was a logically prior point which went to the lawfulness of the decisions of the SOS and which was determinative of the appeal. Judge Turkington had, they submitted, held that the applications of 7 February 2011 had been wrongly rejected on 8 March 2011. They were, accordingly, still pending. Moreover, because they were made in time, none of the Appellants were ever overstayers and still had residual leave to remain under section 3C of the Immigration Act 1971 since their valid appeal had never been decided upon or withdrawn. Further, the fact that their applications were in time made a critical difference in the way in which any question of whether their Article 8 rights were overborne by the requirement of effective immigration control should be answered. As a result the decision made by the SOS on 6 November 2012 was unlawful.

12. It is not wholly clear from the language used by Judge Turkington whether he was intending (a) to find (i) that the forms used on 7 February 2011were valid; (ii) the original application of 7 February 2011 was, therefore, made in time; and (iii) the application was wrongly rejected, and, on that account, to remit the case to the SOS for reconsideration; or (b) to remit the case for her to consider whether propositions (i) – (iii) were correct.

13. It is not necessary to decide this. The point is not open to the Appellants in this Court given the terms on which they obtained permission to appeal. Further, insofar as Article 8, with which this appeal *is* concerned, is concerned the Appellants have suffered no prejudice. The SOS made her decision in respect of the 25 March 2011 application. It is apparent from her reasons that that decision was not based on, or influenced by, any contention that the applications that she was considering were out of time or that that any of the Appellants was an overstayer. The Appellants cannot, therefore, complain that she considered the application of 25 March 2011 and not that of 7 February 2011, because they were not prejudiced on that account. Judge Moulder in the UT was right so to hold. Further, as he observed, the FTT was never asked to

consider the case on the basis that the application of 7 February 2011 was outstanding. In addition, insofar as the application of 7 February 2011 was on the basis that EV was entitled to remain as a Tier 2 (General Migrant) the claim had been conceded to be unmaintainable before the FTT; and the appropriateness of the concession was accepted by counsel before the UT. The contrary was not argued before us.

The First Tier Tribunal

14. The reasons for the rejection of EV's claim had been that her job was not one involving the requisite level of skill; and that she was not being paid a sufficient amount for her to achieve the necessary number of points to qualify. That she did not do so was because, although she had been recruited and sponsored on the basis that she would be employed at a level and paid at a rate which would have enabled her to qualify, her employers had wrongfully failed to employ her at the relevant rate. The judge accepted that ever since her arrival EV had been "*defrauded by the care home owner by being underpaid*" [54] although she had not informed the SOS of this.

15. In addition, the Appellants could not qualify under what was described in the judgment as "*the Immigration Rules version of Article 8*" because they had not been in the UK long enough. The Appellants' case thus fell to be considered under Article 8.

16. As to that the judge found that all the Appellants had established private and family lives together, and said that he would not consider allowing the appeal of the children but not the parents: [28] & [30]. The removal of the Appellants would amount to an interference with the exercise of their right to respect for their private lives with consequences of such gravity as potentially engaged Article 8 [31]. Such interference would however be in accordance with immigration law [32] and was necessary in the interests of the economic well being of the country through the maintenance of immigration control [33]. He then turned to the question of proportionality.

Proportionality

Employment and housing

17. As to that he found that EV had an M.SC degree in Nursing [16] such that she would have a reasonable chance of getting employment in the Philippines [17]. Jobs of the type that her husband had undertaken would be likely still to be available to him there [39]. He declined to accept that EV and her husband would be unable to find any form of employment in the Philippines [41]. It was not suggested that the family would have nowhere to live. The family home had been sold after EV had been here for a year; but there was no evidence as to what had happened to the proceeds [40]. Further, the husband's parents were still alive and it was reasonable to assume that there was an extended family [41].

The children and their education

18. As to the children, the judge held that it was obviously in their best interests to remain with their parents [29]. He rejected the proposition that when applying the

proportionality test the question was whether the educational system in the Philippines was worse than that in the UK [45].

19. The judge had an excellent report on the three children from the Deputy Head of their school in Kent (which KrV had just left for secondary education). In the light of that and other evidence, he found that all members of the family had established private lives and formed friendships in the community [52] and that it was in the best interests of the children that their education in the UK should not be disrupted [53]. He treated their best interests as "*a primary consideration*" [47] & [53]. He noted, however, that the education system in the Philippines was sufficiently good for EV to obtain an M.Sc [57] and that the children would not lack a proper education there [58].

20. But, so he held, the interference with private lives which the removal of the Appellants would cause was proportionate to the legitimate public end sought to be achieved and the economic well being of the country through the maintenance of immigration control and that interference must prevail [59].

The Appellants' submission

21. The Appellants submit that this conclusion cannot stand. Once the FTT had found that the best interests of the children lay in their continuing their education in the UK, only the most cogent countervailing considerations could justify the removal of the family and there were none.

22. This submission raises the question as to how, in a case involving the best interests of children, tribunals should approach the proportionality question.

The Borders, Citizenship and Immigration Act 2009

23. Section 55 of the *Borders, Citizenship and Immigration Act 2009* includes the following provisions:

> "***55 Duty regarding the welfare of children***
>
> *(1) The Secretary of State must make arrangements for ensuring that–*
>
> *(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and*
>
> *(b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.*
>
> *(2) The functions referred to in subsection (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 subsection (1).

…

(6) In this section –

- *"children" means persons who are under the age of 18;*"

24. In *VW Uganda v SSHD* [2009] EWCA Civ 5 Sedley LJ indicated what had to be shown if a removal was to be held disproportionate to a proposed interference with family life. In [31] he observed:

> "*... It is no longer necessary to follow [the AIT's] scholarly tracing of the concept of insurmountable obstacles in the Strasbourg jurisprudence or their endeavour to reconcile it with domestic case-law, because – as is common ground - the correct test is now to be found in EB (Kosovo). But recognition should be given, as Richard Drabble QC for both appellants readily accepted, to the conclusion at which the AIT arrived (§44) that, if a removal is to be held disproportionate,* "*what must be shown is more than a mere hardship or a mere difficulty or mere obstacle. There is a seriousness test which requires the obstacles or difficulties to go beyond matters of choice or inconvenience.* " *I would respectfully endorse this. The question in any one case will be whether the hardship consequent on removal will go far enough beyond this baseline to make removal a disproportionate use of lawful immigration controls. This in turn will depend, among many other things, on the severity of the interference. If the appellant's partner, for example, was familiar with Uganda, the consequences of removal might be that much less severe; but the impact on the rights attending his citizenship of this country would still weigh heavily in the scales.*"

25. In *ZH Tanzania (FC) v SSHD* [2100] UKSC 4, the Supreme Court considered 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's decision was one with which Lord Brown and Lord Mance agreed. She referred to Article 3 (1) of the *United Nations Convention on the Rights of the Child 1989*, 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*"

and observed that the spirit of this binding obligation in international law had been translated into national law by, *inter alia*, section 55.

26. As to the application of these principles she said [25] that it was clear from the recent jurisprudence that the Strasbourg Court would expect national authorities to apply Article 3 (1) of the UNCRC and treat the best interests of a child as "*a primary consideration*", adding:

> "*Of course, despite the looseness with which these terms are sometimes used "a primary consideration" is not the same as "the primary consideration " still less as "the paramount consideration*"".

27. At [26] she said:

> "*…As Mason CJ and Deane J put it in the case of Minister for Immigration and Ethnic Affairs v Teoh [1995] HCA 20, (1995) 183 CLR 273, 292 in the High Court of Australia:*
>
> > *"A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it."*
>
> *As the Federal Court of Australia further explained in Wan v Minister for Immigration and Multi-cultural Affairs [2001] FCA 568, para 32,*
>
> > *"[The Tribunal] was required to identify what the best interests of Mr Wan's children required with respect to the exercise of its discretion and then to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration."*
>
> *This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first. That seems, with respect, to be the correct approach to these decisions in this country as well as in Australia*."

28. At [29] and [30] she said this:

> "*[29] Applying, therefore, the approach in Wan to the assessment of proportionality under article 8(2), together with the factors identified in Strasbourg, what is encompassed in the "best interests of the child "? As the UNCRC says, it broadly means the well-being of the child. Specifically, as Lord Bingham indicated in EB (Kosovo), it will involve asking whether it is reasonable to expect the child to live in another country. Relevant to this will be the level of the child's integration in this country and the length of absence from the other country; where and with whom the child is to live and the arrangements for looking after the child in the other country; and the strength*

of the child's relationships with parents or other family members which will be severed if the child has to move away.

[30] Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child. The UNCRC recognises the right of every child to be registered and acquire a nationality (Article 7) and to preserve her identity, including her nationality (Article 8). In Wan, the Federal Court of Australia, pointed out at para 30 that, when considering the possibility of the children accompanying their father to China, the tribunal had not considered any of the following matters, which the Court clearly regarded as important:

> *(a) the fact that the children, as citizens of Australia, would be deprived of the country of their own and their mother's citizenship, 'and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle' (Vaitaiki v Minister for Immigration and Ethnic Affairs [1998] FCA 5, (1998) 150 ALR 608, 614);*
>
> *(b) the resultant social and linguistic disruption of their childhood as well as the loss of their homeland;*
>
> *(c) the loss of educational opportunities available to the children in Australia; and*
>
> *(d) their resultant isolation from the normal contacts of children with their mother and their mother's family."*"

29. At [33] she observed:

> "*Specifically, as Lord Bingham indicated in EB (Kosovo), it will involve asking whether it is reasonable to expect the child to live in another country. Relevant to this will be the level of the child's integration in this country and the length of absence from the other country; where and with whom the child is to live and the arrangements for looking after the child in the other country; and the strength of the child's relationships with parents or other family members which will be severed if the child has to move away.*"

30. In his judgment Lord Kerr said this:

> "*It is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, 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."

31. The appellants rely on this passage in Lord Kerr's judgment and submit that the best interests of the children have been found to be that they should remain with their parents and continue their education here; that that factor ranks above any other; and should dictate the outcome that the Appellants stay here since no consideration of substantial moment permits a different result.

32. There is a danger in this field of moving from looseness of terms to semantics. At the same time there could be said to be a tension between (a) treating the best interests of the child as *a primary consideration* which could be outweighed by others provided that no other consideration was treated as inherently more significant; and (b) treating the child's best interests as a consideration which *must* rank *higher* than any other which could nevertheless be outweighed by others. It is material, however, to note that Lord Kerr, as he made clear, was dealing with a case of children who were British citizens and where there were very powerful other factors – see [41] below -in favour of not removing them ("*the best interests of the child clearly favour a certain course"/* "*the outcome of cases such as the present*"). He also agreed with the judgment of Lady Hale. In those circumstance we should, in my judgment, be guided by the formulation which she adopted.

33. More important for present purposes is to know how the tribunal should approach the proportionality exercise if it has determined that the best interests of the child or children are that they should continue with their education in England. Whether or not it is in the interests of a child to continue his or her education in England may depend on what assumptions one makes as to what happens to the parents. There can be cases where it is in the child's best interests to remain in education in the UK, even though one or both parents did not remain here. In the present case, however, I take the FTT's finding to be that it was in the best interests of the children to continue their education in England with both parents living here. That assumes that both parents are here. But the best interests of the child are to be determined by reference to the child alone without reference to the immigration history or status of either parent.

34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.

35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has

been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.

37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hypothesi*, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully.

38. The need to carry out this sort of assessment is considered in the judgment of the Upper Tribunal in *MK India (Best interests of the child)* [2011] UKUT 00475 (IAC):

> "23. *There is in our view a fourth point of principle that can be inferred from the Supreme Court's judgments in ZH (Tanzania). As the use by Baroness Hale and Lord Hope of the adjective "overall" makes clear, the consideration of the best interests of the child involves a weighing up of various factors. Although the conclusion of the best interests of the child consideration must of course provide a yes or no answer to the question, "Is it in the best interests of the child for the child and/or the parent(s) facing expulsion/deportation to remain in the United Kingdom?", the assessment cannot be reduced to that. Key features of the best interests of the child consideration and its overall balancing of factors, especially those which count for and against an expulsion decision, must be kept in mind when turning to the wider proportionality assessment of whether or not the factors relating to the importance of maintaining immigration control etc. cumulatively reinforce or outweigh the best interests of the child, depending on what they have been found to be.*
>
> *24. The need to keep in mind the "overall" factors making up the best interests of the child consideration must not be downplayed. Failure to do so may give rise to an error of law although, as AJ (India) makes clear, what matters is not so much the form of the inquiry but rather whether there has been substantive consideration of the best interests of the child. The consideration must always be fact-sensitive and depending on its workings-out will affect the Article 8(2) proportionality assessment in different ways. If, for example, all the factors weighed in the best interests of the child consideration point overwhelmingly in favour of the child and/or relevant parent(s) remaining in the UK, that is very likely to mean that only very strong countervailing factors can outweigh it. If, at the other extreme, all the factors of relevance to the best interests of the child consideration (save for the child's and/or parent(s) own claim that they want to remain) point overwhelmingly to the child's interests being best served by him returning with his parent(s) to his country of origin (or to one of his parents being expelled leaving him to remain living here), then very little by way of countervailing considerations to*

do with immigration control etc. may be necessary in order for the conclusion to be drawn that the decision appealed against was and is proportionate."

39. The scenario postulated in the brackets in the second example (in which the best interests of the child are for him to remain either alone or with only one parent) may be a somewhat rare circumstance. It is, however, put forward as one end of a spectrum, and I would agree – as did this court in *JW (China) v SSHD* EWCA Civ 1526 - with the overall approach indicated by this decision.

40. As Pitchford LJ observed in that case:

> "*36 The assessment of the best interests of the child will involve a consideration of several different factors, many of which were identified at paragraphs 29 and 30 of Lady Hale's judgment. It seems to me inevitable that, when the Tribunal comes to make the final assessment of proportionality, it will be appropriate to afford different weight to different factors depending upon the effect of removal of the individual upon them. For example, in the case of an infant child who has acquired no family or private life in the United Kingdom independent of the mother, his or her best interest lies overwhelmingly in the preservation of the caring and nurturing relationship between mother and child. If there is no question of mother and child being separated, even if mother is required to return to her country of origin, that seems to me to be a relevant and important consideration when it comes to an assessment of the proportionality of the decision to remove.*"

41. These cases are inevitably fact specific. Thus in *ZH*, as Baroness Hale stated:

> "*31…..They are British children; they are British, not just through the "accident" of being born here, but by descent from a British parent; they have an unqualified right of abode here; they have lived here all their lives; they are being educated here; they have other social links with the community here; they have a good relationship with their father here. It is not enough to say that a young child may readily adapt to life in another country. That may well be so, particularly if she moves with both her parents to a country which they know well and where they can easily re-integrate in their own community (as might have been the case, for example, in Poku, para 20, above). But it is very different in the case of children who have lived here all their lives and are being expected to move to a country which they do not know and will be separated from a parent whom they also know well.*"

42. On those facts, as the Supreme Court accepted, the SOS was right to concede that despite the mother's appalling immigration history, there could be only one answer namely that it was disproportionate to remove the mother.

43. In the present case the FTT judge treated the best interests of the children as a primary consideration and concluded that their best interests lay in remaining with their parents and continuing their education here. He then considered whether the need to maintain immigration control outweighed that consideration.

44. In carrying out this assessment he took into account the fact (a) that the parents would be employable in the Philippines; (b) that the family would not be homeless; (c) that

there was an extended family to which they would have access; (d) that the family had only been in the UK for a limited time – 3 years 9 months at the date of the FTT decision at which time the children were 11,10 and 8; (e) that the children would not be without education in the Philippines. The fact that it would not be as good and that secondary education was not free was not determinative. In addition there was no question of any interference with the appellants' family life. Further, the family could have had no assurance of a guaranteed permanent settlement. The judge took account of the fact that EV had been underpaid by her employers and the chronology provided by the Appellants [13] which reveals the delays attributable to the Respondent.

45. His overall conclusion was that the need to maintain immigration control did outweigh the best interests of the children. In effect he found that it was reasonable to expect the children to live in another country. The Appellants submit that the judge did not analyse the weight to be given in this case to the need for immigration control. But, as it seems to me, in setting out and examining the factors relating to the Appellants, he was performing that exercise.

46. In my judgment he made no error of law. Nor did he fail to follow the correct approach in reaching his conclusions, which were open to him on the material that he had and the findings which he made. The UT was right so to hold.

47. I would dismiss the appeal.

Lord Justice Lewison

48. I agree, and add a few observations of my own. First, where permission to appeal is given on limited grounds, the appeal is limited to those grounds. Appeals in immigration cases are no exception. It was therefore wrong for counsel for the appellants to seek to introduce wholly new arguments shortly before the hearing of the appeal, without even applying either to amend the Appellant's Notice under CPR Part 52.8 or to widen the grounds on which permission to appeal had been granted.

49. Second, as Christopher Clarke LJ points out, the evaluation of the best interests of children in immigration cases is problematic. In the real world, the appellant is almost always the parent who has no right to remain in the UK. The parent thus relies on the best interests of his or her children in order to "piggy-back" on their rights. In the present case, as no doubt in many others, the immigration judge made two findings about the children's best interests:

    a. "The best interests of the children are obviously to remain with their parents" [29] and

    b. "… it is in the best interests of the children that their education in the UK [is] not to be disrupted" [53].

50. What, if any, assumptions are to be made about the immigration status of the parent? If one takes the facts as they are in reality, then the first of the immigration judge's findings about the best interests of the children points towards removal. If, on the other hand, one assumes that the parent has the right to remain, then one is assuming the answer to the very question that the tribunal has to decide. Or is there a middle

ground, in which one has to assess the best interests of the children without regard to the immigration status of the parent?

51. To attempt to answer this question it is necessary to revisit the well-known case of *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166. It is necessary to put that decision into its factual context. The appellant was the mother, who was a national of Tanzania. She had two children who were aged 12 and 9 respectively. They were British citizens. Importantly, so was their father. Accordingly, there was no question of removing the father. Nor did the Secretary of State have any power to remove the children. The only power the Secretary of State had was that of removing the mother alone. If, therefore, the children were to stay in the UK, they would be separated from their mother. On the other hand, if they followed her to Tanzania, they would be separated from their father, and deprived of the opportunity to grow up in the country of which they were citizens. That was the context in which the issues were discussed.

52. Lady Hale gave the leading judgment with which all members of the court agreed, although Lords Hope and Kerr also gave concurring judgments. She traced the course of the case law both domestically and abroad. She cited with approval the statement of Lord Bingham in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41; [2009] AC 1159:

> "*[The authority] will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and* ***that spouse cannot reasonably be expected to follow the removed spouse to the country of removal****, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child.*" (Emphasis added)

53. She added:

> "*Thus, of particular importance is whether a spouse or, I would add, a child can reasonably be expected to follow the removed parent to the country of removal.*"

54. She had made the same point in *Naidike v Attorney-General of Trinidad and Tobago* [2004] UKPC 49; [2005] 1 AC 538:

> "*The reason for deporting may be comparatively weak, while the impact on the rest of the family, either of being left behind or of being forced to leave their own country, may be severe. On the other hand, the reason for deporting may be very strong,* ***or it may be entirely reasonable to expect the other family members to leave with the person deported***." (Emphasis added)

55. Underlying these statements of principle is the real world fact that the parent has no right to remain in the UK. So no counter-factual assumption is being made, and the interests of the other family members are to be considered in the light of the real world facts. This is not an approach which is confined to domestic law. In *Üner v The*

Netherlands (2007) 45 EHRR 14, as Lady Hale pointed out, the Grand Chamber said that one of the factors to be considered was:

> "*the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled.*"

56. This, too, takes as the starting point the real world fact that the applicant has no right to be in the host country. Likewise in *Rodrigues da Silva, Hoogkamer v Netherlands* (2007) 44 EHRR 34 the court said that:

> "*Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the contracting state,* ***whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them****, whether there are factors of immigration control (eg a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion.*" (Emphasis added)

57. Finally, at [29] Lady Hale returned to the test. She said that:

> "*Specifically, as Lord Bingham indicated in EB (Kosovo), it will involve asking whether it is reasonable to expect the child to live in another country.*"

58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?

59. On the facts of ZH it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens.

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.

62. I can see no error of law which would entitle this court to set aside that decision. For these reasons, in addition to those given by Christopher Clarke LJ, I too would dismiss the appeal.

Lord Justice Jackson

63. I agree with both judgments.