Hilary Term
[2011] UKSC 4
On appeal from: [2009] EWCA Civ 691

JUDGMENT

ZH (Tanzania) (FC) (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lord Hope, Deputy President
Lady Hale
Lord Brown
Lord Mance
Lord Kerr

JUDGMENT GIVEN ON

1 February 2011

Heard on 9 and 10 November 2010

Appellant
Manjit Gill QC
Benjamin Hawkin
(Instructed by Raffles Haig Solicitors)

Respondent
Monica Carss-Frisk QC
Susan Chan
(Instructed by Treasury Solicitors)

Interveners (for the Appellant's children)
Joanna Dodson QC
Edward Nicholson
(Instructed by Raffles Haig Solicitors)

LADY HALE (with whom Lord Brown and Lord Mance agree)

1. 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. Within this, however, is a much more specific question: 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? There is, of course, no power to remove or deport a person who is a United Kingdom citizen: see Immigration Act 1971, section 3(5) and (6). They have a right of abode in this country, which means that they are free to live in, and to come and go into and from the United Kingdom without let or hindrance: see 1971 Act, sections 1 and 2. The consistent stance of the Secretary of State is that UK citizens are not compulsorily removed from this country (eg Phil Woolas, *Hansard*, Written Answers, 15 June 2009). However if a non-citizen parent is compulsorily removed and agrees to take her children with her, the effect is that the children have little or no choice in the matter. There is no machinery for consulting them or giving independent consideration to their views.

The facts

2. The facts of this case are a good illustration of how these issues can arise. The mother is a national of Tanzania who arrived here in December 1995 at the age of 20. She made three unsuccessful claims for asylum, one in her own identity and two in false identities. In 1997 she met and formed a relationship with a British citizen. They have two children, a daughter, T, born in 1998 (who is now 12 years old) and a son, J, born in 2001 (who is now nine). The children are both British citizens, having been born here to parents, one of whom is a British citizen. They have lived here with their mother all their lives, nearly all of the time at the same address. They attend local schools.

3. Their parents separated in 2005 but their father continues to see them regularly, visiting approximately twice a month for 4 to 5 days at a time. In 2007 he was diagnosed with HIV. He lives on disability living allowance with his parents and his wife and is reported to drink a great deal. The tribunal nevertheless thought that there would not "necessarily be any particular practical difficulties" if the children were to go to live with him. The Court of Appeal very sensibly considered this "open to criticism as having no rational basis". Nevertheless, they upheld the tribunal's finding that the children could reasonably be expected to follow their mother to Tanzania: [2009] EWCA Civ 691, para 27. They also declined to hold that there was no evidence to support the tribunal's finding that

the father would be able to visit them in Tanzania, despite his fragile health and limited means: para 32.

4. As it happens, this Court has seen another illustration of how these issues may arise, in the case of *R (WL) (Congo) v Secretary of State for the Home Department* [2010] 1 WLR 2168 (Supreme Court judgment pending). Both father and mother are citizens of the Democratic Republic of Congo. Their child, however, is a British citizen. The Secretary of State intends to deport the father under section 3(5) of the 1971 Act and also served notice of intention to deport both mother and child. There is power to deport non-citizen family members of those deported under section 3(5) but there is no power to deport citizens under that or any other provision of the 1971 Act. It is easy to see how a mother served with such a notice might think that there was such a power and that she had no choice. Fortunately, it appears that the notice was not followed up with an actual decision to deport in that case.

These proceedings

5. This mother's immigration history has rightly been described as "appalling". She made a claim for asylum on arrival in her own name which was refused in 1997 and her appeal was dismissed in 1998, shortly after the birth of her daughter. She then made two further asylum applications, pretending to be a Somali, both of which were refused. In 2001, shortly before the birth of her son, she made a human rights application, claiming that her removal would be in breach of article 8 of the European Convention on Human Rights. This was refused in 2004 and her appeal was dismissed later that year. Also in 2004 she and the children applied for leave to remain under the "one-off family concession" which was then in force. This was refused in 2006 because of her fraudulent asylum claims. Meanwhile in 2005 she applied under a different policy known as the "seven year child concession". This too was refused, for similar reasons, later in 2006 and her attempts to have this judicially reviewed were unsuccessful.

6. After the father's diagnosis in 2007, fresh representations were made. The Secretary of State accepted these as a fresh claim but rejected it early in 2008. The mother's appeal was dismissed in March 2008. However an application for reconsideration was successful. In May 2008, Senior Immigration Judge McGeachy held that the immigration judge had not considered the relationship between the children and their father (it being admitted that there was no basis on which he could have found that they could live here with him), the fact that they had been born in Britain and were then aged nine and seven and were British. It was a material error of law for the immigration judge not to have taken into account the rights of the children and the effect of the mother's removal upon them.

7. Nevertheless at the second stage of the reconsideration, the tribunal, having heard the evidence, dismissed the appeal: Appeal Number IA/01284/2008. They found that there was family life between the mother and the children and between the father and the children, although not between the parents, and also that the mother had built up a substantial private life in this country (para 5.3). Removal to Tanzania, if the children accompanied the Appellant, would substantially interfere with the relationship with their father; staying behind would substantially interfere with the relationship with their mother (para 5.4). Removing the mother would be in accordance with the law for the purpose of protecting the rights and freedoms of others. The only question was whether it would be proportionate (para 5.5).

8. The Tribunal found the mother to be seriously lacking in credibility. She had had the children knowing that her immigration status was precarious. Having her second child was "demonstrably irresponsible" (para 5.8). However, the children were innocent of their parents' shortcomings (para 5.9). The parents now had to choose what would be best for their children: "We do not consider that it can be regarded as unreasonable for the respondent's decision to have that effect, because the eventual need to take such a decision must have been apparent to them ever since they began their relationship and decided to have children together." (para 5.10).

9. The Tribunal found it a "distinct and very real possibility" that the children might remain here with their father (para 5.11). This might motivate him to overcome his difficulties. People with HIV can lead ordinary lives. The daughter was of an age when many African children were separated from their parents and sent to boarding schools. The son, had he been a Muslim, would have been regarded as old enough to live with his father rather than his mother. Hence the tribunal could not see "any particular practical difficulties" if the children were to go and live with their father (para 5.15).

10. Equally, it would be "a very valid decision" for the children to go and live with their mother in Tanzania (para 5.16). It is not an uncivilised or an inherently dangerous place. Their mother must have told them about it. There were no reasons why their father should not from time to time travel to see the children there. They did not accept that either his HIV status or his financial circumstances were an obstacle. Looking at the circumstances in the round, therefore, "neither of the potential outcomes of the appellant's removal which we have outlined above would represent such an interference with the family life of the children, or either of them, with either their mother on the one hand or their father on the other as to be disproportionate, again having regard to the importance of the removal of the appellant in pursuance of the system of immigration control in this country" (para 5.20). They had earlier said that this was "of very great importance and considerable weight must be placed upon it" (para 5.19).

11. Permission to appeal was initially refused on the basis that, even if the Tribunal had been wrong to think that the children could stay here with their father, they could live in Tanzania with their mother. Ward LJ eventually gave permission to appeal because he was troubled about the effect of their leaving upon their relationship with their father: "how are we to approach the family rights of a broken family like this?" Before the Court of Appeal, however, it was argued that the British citizenship of the children was a "trump card" preventing the removal of their mother. This was rejected as inconsistent with the authorities, and in particular with the principle that there is no "hard-edged or bright-line rule", which was enunciated by Lord Bingham of Cornhill in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, [2009] 1 AC 1159, and is quoted in full at para 15 below.

12. Mr Manjit Gill QC, on behalf of the appellant mother, does not argue in this Court that the citizenship of the children should be dispositive in every case. But he does argue that insufficient weight is given to the welfare of all children affected by decisions to remove their parents and in particular to the welfare of children who are British citizens. This is incompatible with their right to respect for their family and private lives, considered in the light of the obligations of the United Kingdom under the United Nations Convention on the Rights of the Child. Those obligations are now (at least partially) reflected in the duty of the Secretary of State under section 55 of the Borders, Citizenship and Immigration Act 2009.

13. The Secretary of State now concedes that it would be disproportionate to remove the mother in the particular facts of this case. But she is understandably concerned about the general principles which the Border Agency and appellate authorities should apply.

The domestic law

14. This is the mother's appeal on the ground that her removal will constitute a disproportionate interference with her right to respect for her private and family life, guaranteed by article 8 of the European Convention on Human Rights:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for

> the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

However, in *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, [2009] AC 115, the House of Lords held that both the Secretary of State and the immigration appellate authorities had to consider the rights to respect for their family life of all the family members who might be affected by the decision and not just those of the claimant or appellant in question. Lord Brown of Eaton-under-Heywood summarised the argument which the House accepted thus, at para 20:

> "Together these members enjoy a single family life and whether or not the removal would interfere disproportionately with it has to be looked at by reference to the family unit as a whole and the impact of removal upon each member. If overall the removal would be disproportionate, all affected family members are to be regarded as victims."

I added this footnote at para 4:

> "To insist that an appeal to the Asylum and Immigration Tribunal consider only the effect upon other family members as it affects the appellant, and that a judicial review brought by other family members considers only the effect upon the appellant as it affects them, is not only artificial and impracticable. It also risks missing the central point about family life, which is that the whole is greater than the sum of its individual parts. The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed."

15. When dealing with the relevant principles in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, [2009] AC 1159, Lord Bingham of Cornhill said this, at para 12:

> "Thus the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It 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. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied in the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires."

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.

16. Miss Monica Carss-Frisk QC, for the Secretary of State, was content with the way I put it in the Privy Council case of *Naidike v Attorney-General of Trinidad and Tobago* [2004] UKPC 49, [2005] 1 AC 538, at para 75:

> "The decision-maker has to balance the reason for the expulsion against the impact upon other family members, including any alternative means of preserving family ties. 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."

The Strasbourg cases

17. These questions tend to arise in two rather different sorts of case. The first relates to long-settled residents who have committed criminal offences (as it happens, this was the context of *WL (Congo) v Secretary of State for the Home Department*, above). In such cases, the principal legitimate aims pursued are the prevention of disorder and crime and the protection of the rights and freedoms of others. The Strasbourg court has identified a number of factors which have to be taken into account in conducting the proportionality exercise in this context. The leading case is now *Üner v The Netherlands* (2007) 45 EHRR 421. The starting point is, of course, that states are entitled to control the entry of aliens into their territory and their residence there. Even if the alien has a very strong residence status and a high degree of integration he cannot be equated with a national. Article 8 does not give him an absolute right to remain. However, if expulsion will interfere with the right to respect for family life, it must be necessary in a

democratic society and proportionate to the legitimate aim pursued. At para 57, the Grand Chamber repeated the relevant factors which had first been enunciated in *Boultif v Switzerland* (2001) 33 EHRR 50 (numbers inserted):

> "[i] the nature and seriousness of the offence committed by the applicant;
>
> [ii] the length of the applicant's stay in the country from which he or she is to be expelled;
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> [iii] the time elapsed since the offence was committed and the applicant's conduct during that period;
>
> [iv] the nationalities of the various persons concerned;
>
> [v] the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
>
> [vi] whether the spouse knew about the offence at the time when he or she entered into a family relationship;
>
> [vii] whether there are children of the marriage, and if so, their age; and
>
> [viii] the seriousness of the difficulties which the spouse is likely to encounter in the country to which the appellant is to be expelled."

Significantly for us, however, the Grand Chamber in *Űner* went on, in para 58, "to make explicit two criteria which may already be implicit" in the above (again, numbers inserted):

> "[ix] 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; and

> [x] the solidity of social, cultural and family ties with the host country and with the country of destination".

The importance of these is reinforced in the recent case of *Maslov v Austria* [2009] INLR 47, para 75 where the Grand Chamber emphasised that "for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile".

18. The second sort of case arises in the ordinary immigration context, where a person is to be removed because he or she has no right to be or remain in the country. Once again, the starting point is the right of all states to control the entry and residence of aliens. In these cases, the legitimate aim is likely to be the economic well-being of the country in controlling immigration, although the prevention of disorder and crime and the protection of the rights and freedoms of others may also be relevant. Factors (i), (iii), and (vi) identified in *Boultif* and *Üner* are not relevant when it comes to ordinary immigration cases, although the equivalent of (vi) for a spouse is whether family life was established knowing of the precariousness of the immigration situation.

19. It was long ago established that mixed nationality couples have no right to set up home in whichever country they choose: see *Abdulaziz v United Kingdom* (1985) 7 EHRR 471. Once they have done so, however, the factors relevant to judging the proportionality of any interference with their right to respect for their family lives have quite recently been rehearsed in the case of *Rodrigues da Silva, Hoogkamer v Netherlands* (2007) 44 EHRR 729, at para 39:

> ". . . Article 8 does not entail a general obligation for a state to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a state's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the person involved and the general interest [the reference is to *Gül v Switzerland* (1996) 22 EHRR 93, at [38]]. 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 [the reference is to *Solomon v The Netherlands*,

> App No 44328/98, 5 September 2000]. Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 [the reference is to *Mitchell v United Kingdom*, App No 40447/98, 24 November 1998; *Ajayi v United Kingdom*, App No 27663/95, 22 June 1999]."

Despite the apparent severity of these words, the Court held that there had been a violation on the facts of the case. A Brazilian mother came to the Netherlands in 1994 and set up home with a Dutch national without ever applying for a residence permit. In 1996 they had a daughter who became a Dutch national. In 1997 they split up and the daughter remained with her father. It was eventually confirmed by the Dutch courts that it was in her best interests to remain with her father and his family in the Netherlands even if this meant that she would have to be separated from her mother. In practice, however, her care was shared between the mother and the paternal grandparents. The court concluded at para 44 that, notwithstanding the mother's "cavalier attitude to Dutch immigration rules",

> "In view of the far reaching consequences which an expulsion would have on the responsibilities which the first applicant has as a mother, as well as on her family life with her young daughter, and taking into account that it is clearly in Rachael's best interests for the first applicant to stay in the Netherlands, the Court considers that in the particular circumstances of the case the economic well-being of the country does not outweigh the applicants' rights under article 8, despite the fact that the first applicant was residing illegally in the Netherlands at the time of Rachael's birth."

20. It is worthwhile quoting at such length from the Court's decision in *Rodrigues de Silva* because it is a relatively recent case in which the reiteration of the court's earlier approach to immigration cases is tempered by a much clearer acknowledgement of the importance of the best interests of a child caught up in a dilemma which is of her parents' and not of her own making. This is in contrast from some earlier admissibility decisions in which the Commission (and on occasion the Court) seems to have concentrated more on the failings of the parents than upon the interests of the child, even if a citizen child might thereby be deprived of the right to grow up in her own country: see, for example, *O and OL v United Kingdom*, App No 11970/86, 13 July 1987; *Sorabjee v United Kingdom*, App No 23938/94, 23 October 1995; *Jaramillo v United Kingdom*, App No 24865/94, 23 October 1995, and *Poku v United Kingdom*, App No 26985/95, 15

May 1996. In *Poku*, the Commission repeated that "in previous cases, the factor of citizenship has not been considered of particular significance". These were, however, cases in which the whole family did have a real choice about where to live. They may be contrasted with the case of *Fadele v United Kingdom*, App No 13078/87, in which British children aged 12 and 9 at the date of the decision had lived all their lives in the United Kingdom until they had no choice but to go and live in some hardship in Nigeria after their mother died and their father was refused leave to enter. The Commission found their complaints under articles 3 and 8 admissible and a friendly settlement was later reached (see Report of the Commission, 4 July 1991).

The UNCRC and the best interests of the child

21. It is not difficult to understand why the Strasbourg Court has become more sensitive to the welfare of the children who are innocent victims of their parents' choices. For example, in *Neulinger v Switzerland* (2010) 28 BHRC 706, para 131, the Court observed that "the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken . . . of 'any relevant rules of international law applicable in the relations between the parties' and in particular the rules concerning the international protection of human rights". The Court went on to note, at para 135, that "there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount".

22. The Court had earlier, in paras 49 to 56, collected references in support of this proposition from several international human rights instruments: from the second principle of the United Nations Declaration on the Rights of the Child 1959; from article 3(1) of the Convention on the Rights of the Child 1989 (UNCRC); from articles 5(b) and 16(d) of the Convention on the Elimination of All Forms of Discrimination against Women 1979; from General Comments 17 and 19 of the Human Rights Committee in relation to the International Covenant on Civil and Political Rights 1966; and from article 24 of the European Union's Charter of Fundamental Rights. All of these refer to the best interests of the child, variously describing these as "paramount", or "primordial", or "a primary consideration". To a United Kingdom lawyer, however, these do not mean the same thing.

23. For our purposes the most relevant national and international obligation of the United Kingdom is contained in article 3(1) of the UNCRC:

> "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."

This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. The immigration authorities were at first excused from this duty, because the United Kingdom had entered a general reservation to the UNCRC concerning immigration matters. But that reservation was lifted in 2008 and, as a result, section 55 of the Borders, Citizenship and Immigration Act 2009 now provides that, in relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions "are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom".

24. Miss Carss-Frisk acknowledges that this duty applies, not only to how children are looked after in this country while decisions about immigration, asylum, deportation or removal are being made, but also to the decisions themselves. This means that any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be "in accordance with the law" for the purpose of article 8(2). Both the Secretary of State and the tribunal will therefore have to address this in their decisions.

25. Further, it is clear from the recent jurisprudence that the Strasbourg Court will expect national authorities to apply article 3(1) of UNCRC and treat the best interests of a child as "a primary consideration". 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". Miss Joanna Dodson QC, to whom we are grateful for representing the separate interests of the children in this case, boldly argued that immigration and removal decisions might be covered by section 1(1) of the Children Act 1989:

> "When a court determines any question with respect to –
>
> (a) the upbringing of a child; or
>
> (b) the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration."

However, questions with respect to the upbringing of a child must be distinguished from other decisions which may affect them. The UNHCR, in its Guidelines on Determining the Best Interests of the Child (May 2008), explains the matter neatly, at para 1.1:

> "The term 'best interests' broadly describes the well-being of a child. . . . The CRC neither offers a precise definition, nor explicitly outlines common factors of the best interests of the child, but stipulates that:
>
> - the best interests must be **the determining factor for specific actions,** notably adoption (Article 21) and separation of a child from parents against their will (Article 9);
>
> - the best interests must be **a primary** (but not the sole) **consideration for all other actions** affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3)."

This seems to me accurately to distinguish between decisions which directly affect the child's upbringing, such as the parent or other person with whom she is to live, and decisions which may affect her more indirectly, such as decisions about where one or both of her parents are to live. Article 9 of UNCRC, for example, draws a distinction between the compulsory separation of a child from her parents, which must be necessary in her best interests, and the separation of a parent from his child, for example, by detention, imprisonment, exile, deportation or even death.

26. Nevertheless, even in those decisions, the best interests of the child must be a primary consideration. 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.

27. However, our attention was also drawn to General Comment No 6 of the United Nations Committee on the Rights of the Child (2005), on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin. The context, different from ours, was the return of such children to their countries of origin even though they could not be returned to the care of their parents or other family members (para 85). At para 86, the Committee observed:

> "Exceptionally, a return to the home country may be arranged, after careful balancing of the child's best interests and other considerations, if the latter are rights-based and override best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the State or to the society. Non-rights based arguments such as those relating to general migration control, cannot override best interests considerations."

28. A similar distinction between "rights-based" and "non-rights-based" arguments is drawn in the UNHCR Guidelines (see, para 3.6). With respect, it is difficult to understand this distinction in the context of article 8(2) of the ECHR. Each of the legitimate aims listed there may involve individual as well as community interests. If the prevention of disorder or crime is seen as protecting the rights of other individuals, as it appears that the CRC would do, it is not easy to see why the protection of the economic well-being of the country is not also protecting the rights of other individuals. In reality, however, an argument that the continued presence of a particular individual in the country poses a specific risk to

others may more easily outweigh the best interests of that or any other child than an argument that his or her continued presence poses a more general threat to the economic well-being of the country. It may amount to no more than that.

Applying these principles

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 UNHCR 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."

31. Substituting “father” for “mother”, all of these considerations apply to the children in this case. 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.

32. Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults. As Jacqueline Bhaba (in ‘The “Mere Fortuity of Birth”? Children, Mothers, Borders and the Meaning of Citizenship’, in *Migrations and Mobilities: Citizenship, Borders and Gender* (2009), edited by Seyla Benhabib and Judith Resnik, at p 193) has put it:

> ‘In short, the fact of belonging to a country fundamentally affects the manner of exercise of a child’s family and private life, during childhood and well beyond. Yet children, particularly young children, are often considered parcels that are easily movable across borders with their parents and without particular cost to the children.’

33. We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother’s appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that. And the inevitable result of removing their primary carer would be that they had to leave with her. On the facts, it is as least as strong a case as *Edore v Secretary of State for the Home Department* [2003] 1 WLR 2979, where Simon Brown LJ held that “there really is only room for one view” (para 26). In those circumstances, the Secretary of State was clearly right to concede that there could be only one answer.

Consulting the children

34. Acknowledging that the best interests of the child must be a primary consideration in these cases immediately raises the question of how these 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."

35. There are circumstances in which separate representation of a child in legal proceedings about her future is essential: in this country, this is so when a child is to be permanently removed from her family in her own best interests. There are other circumstances in which it may be desirable, as in some disputes between parents about a child's residence or contact. In most cases, however, it will be possible to obtain the necessary information about the child's welfare and views in other ways. As I said in *EM (Lebanon)* v *Secretary of State for the Home Department* [2008] UKHL 64, [2009] 1 AC 1198, at para 49:

> "Separate consideration and separate representation are, however, two different things. Questions may have to be asked about the situation of other family members, especially children, and about their views. It cannot be assumed that the interests of all the family members are identical. In particular, a child is not to be held responsible for the moral failures of either of his parents. Sometimes, further information may be required. If the Child and Family Court Advisory and Support Service or, more probably, the local children's services authority can be persuaded to help in difficult cases, then so much the better. But in most immigration situations, unlike many ordinary abduction cases, the interests of different family members are unlikely to be in conflict with one another. Separate legal (or other) representation will rarely be called for."

36. The important thing is that those conducting and deciding these cases should be alive to the point and prepared to ask the right questions. We have been told about a pilot scheme in the Midlands known as the Early Legal Advice Project (ELAP). This is designed to improve the quality of the initial decision, because the legal representative can assist the "caseowner" in establishing all the facts of the claim before a decision is made. Thus cases including those involving children will be offered an appointment with a legal representative, who has had time to collect evidence before the interview. The Secretary of State tells us that the pilot is limited to asylum claims and does not apply to pure article 8 claims. However, the two will often go hand in hand. The point, however, is that it is one way of enabling the right questions to be asked and answered at the right time.

37. In this case, the mother's representatives did obtain a letter from the children's school and a report from a youth worker in the Refugee and Migrant Forum of East London (Ramfel), which runs a Children's Participation Forum and other activities in which the children had taken part. But the immigration authorities must be prepared at least to consider hearing directly from a child who wishes to express a view and is old enough to do so. While their interests may be the same as their parents' this should not be taken for granted in every case. As the Committee on the Rights of the Child said, in General Comment No 12 (2009) on the Right of the Child to be Heard, at para 36:

> "in many cases . . . there are risks of a conflict of interest between the child and their most obvious representative (parent(s)). If the hearing of the child is undertaken through a representative, it is of utmost importance that the child's views are transmitted correctly to the decision-maker by the representative."

Children can sometimes surprise one.

Conclusion

38. For the reasons given, principally in paragraphs 26 and 30 to 33 above, I would allow this appeal.

LORD HOPE

39. I am in full agreement with the reasons that Lady Hale has given for allowing this appeal.

40. It seems to me that the Court of Appeal fell into error in two respects. First, having concluded that the children's British citizenship did not dispose of the issues arising under article 8 (see [2010] EWCA Civ 691, paras 16-22), they did not appreciate the importance that was nevertheless to be attached to the factor of citizenship in the overall assessment of what was in the children's best interests. Second, they endorsed the view of the tribunal that the question whether it was reasonable to expect the children to go with their mother to Tanzania, looked at in the light of its effect on the father and the mother and in relation to the children, was to be judged in the light of the fact that both children were conceived in the knowledge that the mother's immigration status was precarious: para 26.

41. The first error may well have been due to the way the mother's case was presented to the Court of Appeal. It was submitted that the fact that the children were British citizens who had never been to Tanzania trumped all other considerations: para 16. That was, as the court recognised, to press the point too far. But there is much more to British citizenship than the status it gives to the children in immigration law. It carries with it a host of other benefits and advantages, all of which Lady Hale has drawn attention to and carefully analysed. They ought never to be left out of account, but they were nowhere considered in the Court of Appeal's judgment. The fact of British citizenship does not trump everything else. But it will hardly ever be less than a very significant and weighty factor against moving children who have that status to another country with a parent who has no right to remain here, especially if the effect of doing this is that they will inevitably lose those benefits and advantages for the rest of their childhood.

42. The second error was of a more fundamental kind, which lies at the heart of this appeal. The tribunal found that the mother knew full well that her immigration status was precarious before T was born. On looking at all the evidence in the round, it was not satisfied that her decisions to have her children were not in some measure motivated by a belief that having children in the United Kingdom of a British citizen would make her more difficult to remove. It accepted that the children were innocent of the mother's shortcomings. But it went on to say that the eventual need to take a decision as to where the children were to live must have been apparent both to the father and the mother ever since they began their relationship and decided to have children together. It was upon the importance of maintaining a proper and efficient system of immigration in this respect that in the final analysis the tribunal placed the greatest weight. The best interests of the children melted away into the background.

43. The Court of Appeal endorsed the tribunal's approach. When it examined the effect on the family unit of requiring the children to go with the mother to Tanzania, it held that this had to be looked at in the context of the fact that the children were conceived when the mother's immigration status was precarious:

para 26. It acknowledged that what was all-important was the effect upon the children: para 27. But it agreed with the tribunal that the decision that the children should go with their mother was a very valid decision. The question whether this was in their best interests was not addressed.

44. There is an obvious tension between the need to maintain a proper and efficient system of immigration control and the principle that, where children are involved, the best interests of the children must be a primary consideration. The proper approach, as was explained in *Wan v Minister for Immigration and Multicultural Affairs* [2001] FCA 568, para 32, is, having taken this as the starting point, to assess whether their best interests are outweighed by the strength of any other considerations. The fact that the mother's immigration status was precarious when they were conceived may lead to a suspicion that the parents saw this as a way of strengthening her case for being allowed to remain here. But considerations of that kind cannot be held against the children in this assessment. It would be wrong in principle to devalue what was in their best interests by something for which they could in no way be held to be responsible.

LORD KERR

45. I have read and agree with the judgments of Lady Hale and Lord Hope. For the reasons they have given, I too would allow the appeal.

46. 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.

47. The significance of a child's nationality must be considered in two aspects. The first of these is in its role as a contributor to the debate as to where the child's best interests lie. It seems to me self evident that to diminish a child's right to assert his or her nationality will not normally be in his or her best interests. That

consideration must therefore feature in the determination of where the best interests lie. It was also accepted by the respondent, however, (and I think rightly so) that if a child is a British citizen, this has an independent value, freestanding of the debate in relation to best interests, and this must weigh in the balance in any decision that may affect where a child will live. As Lady Hale has said, this is not an inevitably decisive factor but the benefits that British citizenship brings, as so aptly described by Lord Hope and Lady Hale, must not readily be discounted.