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Removal from the United Kingdom and the Rights of Children

The Supreme Court Pronounces

The Supreme Court has recent given judgment in the case of ZH (Tanzania) v. Secretary of State for the Home Department [2011] UKSC 4. The main judgment was delivered by Lady Hale, the only woman member of the Court, with whom Lord Brown and Lord Mance agreed. The case is the final stage in a long history of litigation in which the appellant, a woman from Tanzania, has resisted removal. The unsavoury facts of her history are set out in the following paragraphs from Lady Hale's judgment.

> ***'2 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 and a son J, born in 2001. The children are both British citizens, having been born here to parents, one of whom is a British citizen. They have lived here all their lives, nearly all the time at the same address. They attend local schools.***
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> ***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 parents and his wife and is reported to drink a great deal. The tribunal [i.e. the Asylum and Immigration 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 the Court upheld the tribunal's finding that the children could reasonably be expected to follow their mother to Tanzania. 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.....***

5 The mother's immigration history has rightly been described as "appalling". She made a claim for asylum 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, which guarantees right to respect for private and family life. 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. [These were rejected but] an application for reconsideration was successful. A senior immigration judge held that the immigration judge who had first heard the appeal had not considered the relationship between the children and their father. .He had failed to consider the fact that they were born in Britain, were then aged seven and nine 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 The case next went to the Court of Appeal, which ruled that it would not be unreasonable for the children to go to Tanzania with their mother, or alternatively to stay with their father in the UK. Although he has been diagnosed as infected with HIV that does not prevent him from living a normal life. This decision was reversed by the Supreme Court. It obviously helped that the Home Secretary, Theresa May, conceded that it would be disproportionate to remove the children from the UK, but she nevertheless sought guidance from the Supreme Court, which delivered full judgments considering relevant domestic case law as well as Article 8 of the European Convention on Human Rights and decisions of the European Court of Human Rights in Strasbourg. The Court also considered the United Nations Convention on the Rights of the Child and section 1(1) of the Children Act 1989, the effect of which is that in any case involving the welfare of children their interests are paramount. Reference was also made to section 55 of the Borders, Citizenship and Immigration Act 2009, which has hitherto attracted little attention. The section requires the Home Secretary to ensure that specified functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. The functions are those of the Home Secretary or of any immigration officer relating to immigration, asylum or nationality.

8 Lady Hale summarised in paragraph 31 of her judgment those aspects of the evidence relating to the two children which led her to conclude that the appeal of the mother should be allowed:

"They are British children, they are British.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. [They cannot] be expected to move to a country which they do not know [when this results in their being] separated from a parent whom they also know well."

It is relevant to mention the significance of the British citizenship of the children. Being British they cannot be deported from the United Kingdom. The case arose as an appeal against the mother's deportation and the main issue was whether the fact that her two children were here was a material factor in that appeal and meant that she should be allowed to remain or to depart and take the children with her. In view of the emphasis in the statutory authorities and decided cases on the primacy of the welfare of the children, it must be questionable whether the nationality of the children is as important as Lady Hale suggests. It remains to be seen in some future decision whether children of a different nationality would be treated with the same degree of indulgence.

9 In paragraph 33 Lady Hale acknowledges 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 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…In those circumstances, the Secretary of State was clearly right to concede that there could be only one answer."***

Comment

10 This is yet another case in which the need to maintain firm immigration control has been subordinated to the European Convention on Human Rights, though it is fair to point out that domestic legislation unconnected with the Convention was also an important factor. Section 1(1) of the Children Act 1989 states that when a court determines any question with respect to the upbringing of a child or the administration of a child's property, "the child's welfare shall be the court's paramount consideration." That is a section of general application, but it is reinforced by section 55 of the Borders, Citizenship and Immigration Act 2009, referred to in paragraph 7 above, which imposes specific obligations on the Home Secretary in relation to children in the discharge of her duties. The mother has striven by constant resort to legal remedies and no doubt at enormous cost to the taxpayer to be allowed to stay in the United Kingdom. After the mother had two children early on and continued to battle for 15 years the Home Secretary has capitulated and the mother has succeeded. So far as she is concerned, having regard to her record, there could hardly be a less deserving case.

11 A matter on which the Home Office appears to have failed to take any action was the mother's two fraudulent asylum applications. She had arrived in 1995 and applied for asylum in her own name, An appeal against refusal of asylum was dismissed in 1998, shortly after her first son was born. The two fraudulent applications were made between 1998 and 2001. The mother could have been prosecuted for attempting to pervert the course of justice and no doubt various other offences. Proceedings for removal could and should have been started then. The mother made a human rights application in 2001 which was refused and an appeal against refusal was dismissed in 2004. By this time she had two children, and had there been an attempt at removal then, her arguments for being allowed to stay here with her children would certainly not have been as persuasive as they eventually were six years later. The first impression that the judgment of the Supreme Court gives is that failed asylum seekers and other illegal immigrants need only develop relationships and have children to be able to stay. In this case the ages of the children and the fact that they had only ever lived in the UK were vital factors. The outcome could well have been different if the children had been under the age of 4 or 5 and it is also possible, as noted above, that the outcome might have been different if their nationality had not been British. **But the most important lesson to be learned from this decision is that failed asylum seekers and those whose immigration appeals have failed should be removed far more promptly than hitherto and not be allowed to stay for years and acquire rights which make it ever more difficult to remove them.**

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NOTES

1. There is a comprehensive review of recent case law relating to the welfare of children, including the case discussed in this article, in an article by Jane Coker, immigration judge, in the Solicitors Journal.
   http://www.solicitorsjournal.com/story.asp?sectioncode=3&storycode=18259&c=1&eclipse_action=getsession