

Supreme Court judgment in ZH Tanzania v Secretary of State [2011] UKSC 4

The Supreme Court judgment in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 (published 1 February 2011) is a landmark human rights ruling on the human rights of children and the significance of their holding British citizenship in the immigration context. **Susan Chan** was junior counsel for the Secretary of State (led by Monica Carrs-Frisk QC of Blackstone Chambers) and had acted for the Secretary of State as sole counsel in the Court of Appeal.

The issue before the Supreme Court was when it was permissible to remove a non-citizen parent, in a case where her children were British citizens not subject to removal, but the children would have effectively no choice but to leave with the parent. Although there was no actual prospect of the appellant being removed, as the mother had been given leave to remain under a separate 'Legacy' exercise, the Court nevertheless wished to give guidance on the approach to be taken to children's interests in the immigration context, and the significance of their having British citizenship in an article 8 ECHR assessment.

The Appellant was a Tanzanian mother who had come to the UK in 1995 and made three unsuccessful claims for asylum (two in false identities). Her immigration history was described by the Tribunal as "appalling." She formed a relationship with a male British citizen and they had two children (now 12 and 9) who were at birth British citizens, through their father. The couple separated in 2005 and the children lived with their mother. The father continued to see the children regularly. As a result of his being diagnosed with HIV and drinking heavily, he indicated that he could not solely care for the children nor could he live in Tanzania. The Tribunal and Court of Appeal found that it was reasonable to expect the children to go with their mother if she were removed to Tanzania, and that the father could visit the children there. The Appellant's contention that the children's holding of British citizenship was a 'trump card' which should be determinative in an article 8 ECHR assessment, was rejected by the Court of Appeal.

In the Supreme Court, the Appellant moderated her stance on citizenship and argued that although the British citizenship of affected children would not necessarily be determinative, it was a factor which should be given special significance. The Supreme Court agreed, holding that "*Although nationality is not a 'trump card' it is of particular importance in assessing the best interests of any child.*" The children were British: "*not just through the 'accident' of being born 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.*" The fact that affected children held British citizenship was a factor of "*independent value, freestanding of the debate in relation to best interest*" and would weigh in the balance of any article 8 ECHR assessment.

The Supreme Court also considered the State's obligations to take account of a child's interests in immigration decisions, following the coming into force on 2.11.09 of section 55 of the Borders, Citizenship and Immigration Act 2007 which requires the Secretary of State to ensure that immigration functions are "*discharged having regard to the need to safeguard and promote the welfare of children who are in the United*

Kingdom.” This followed the lifting of the UK government’s reservation concerning immigration matters on 18.11.08, regarding its adoption of the United Nations Convention on the Rights of the Child 1989. The Supreme Court found that in immigration cases affecting children, the best interests of the child would be “*a primary consideration,*” although not necessarily “*the primary consideration*” as the children had argued. The child’s best interests were capable of being outweighed, but nonetheless, one had to consider their best interests first. The question was whether it was reasonable to expect the child to live in another country, taking into account the child’s integration in the UK; the length of absence from the other country; where and with whom the child was to live; the arrangements for looking after the child in the other country and the strength of family relationships which would be severed if the child had to move away. As for considerations which should *not* weigh against the children, although there might be a suspicion that they were conceived as a way of strengthening the mother’s case for being allowed to stay in the UK, this should not be held against the children.

As for giving the children a ‘voice’ it should not be assumed that their interests would be the same as their parents’ interest, though that might be the case. Consideration should be given to enabling the children to express their view in case where they were affected, if they wished to do so and were old enough.

As for the assessment under article 8 ECHR of the proportionality of removing the mother, the Secretary of State had conceded before the appeal was heard, that it would be disproportionate under article 8 ECHR to remove the mother. The Court indicated that the Secretary of State “*was clearly right to concede that there could be only one answer.*”