IAC-HX-KM-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/01941/2013
IA/01942/2013
IA/01944/2013
IA/01945/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 June 2013	**On 25 June 2013**
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Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

MS ELENA ARUQUIPA CHARCA
MASTER DANIEL HUARACHI ARUQUIPA
MR IGNACIO MORALES HUARACHI
MISS NATALIE ABIGAIL HUARACHI
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr P Thomas
For the Respondent: Ms M Tanner

DETERMINATION AND REASONS

1. The appellants are all members of the same family and are citizens of Bolivia. According to the Reasons for Refusal Letter dated 4 January 2013 Owoyele Dada & Co applied on behalf of the third named appellant (with

the other appellants named as his dependants) for leave to remain on human rights grounds. The applications were refused by a decision dated 4 January 2013. Decisions to remove all the appellants are dated the same date. The appellants appealed the decisions and those appeals came before First-tier Tribunal Judge A J M Baldwin who dismissed the appeals under the Immigration Rules and on human rights grounds in a determination promulgated on 5 April 2013.

2. The appellants sought permission to appeal the decisions to the Upper Tribunal. Permission was granted. The judge granting permission found it arguable that the FTT Judge erred in law in that he failed to make adequate findings as to where the best interests of the two children involved lay and to treat their best interests as a primary consideration. The grounds submitted that the judge failed to give adequate reasons for finding that the best interests of the children did not require that they stay in the UK or for finding that their best interests were overridden by other considerations.

The Skeleton Argument

3. At the hearing before me I had all the documentation that was before the FTT Judge. In addition Mr Thomas, on behalf of the appellants, lodged a skeleton argument. That document broadly followed the grounds that were advanced in support of the application seeking permission to appeal to the Upper Tribunal. It refers to the appellants' background history. It asserts that it is a matter of common knowledge that Bolivia is a less developed country than the UK and that therefore economic conditions are worse including for children. As the evidence provided demonstrates Bolivian children face indigency, poverty, poor sanitation, malnutrition, high mortality (particularly for children under 5), difficulty accessing education, illegal labour, and physical and sexual abuse. The Judge refers to the Country Information about Bolivia reciting that many of these problems remain for the time being, with child poverty being more severe in rural areas and a high level of child mortality, malnutrition and anaemia.

4. However, I note that the judge stated also that primary education matriculation rose from c. 80% in the early 90s to 97% in 2001 though in rural areas water collection, required of children, can prevent them attending school, though this is free at primary level. 80 percent of children receive physical punishments, with 40 percent of teachers considering it necessary and effective. Important challenges in relation to healthcare remain despite all the initiatives, and in the larger cities it is estimated that c. 4,000 children and adolescents live on the streets with all the attendant risks.

5. In support of the argument that the FTT Judge erred in law more than five pages of argument follow under two headings. Firstly it is argued that the best interests of the children must be a primary consideration and the relevant test is whether those best interests are outweighed by other considerations. It is asserted that the judge did not establish what the

best interests of the children are. The judge while admitting that "it may be that" the children's mother "would much prefer her children to enjoy everything the UK has to offer" states that "the test is whether it would be disproportionate and unreasonable to expect them to relocate in Bolivia". It is said that the judge was not looking at the children's best interests at that point. The Judge refers to the test in **VW (Uganda) v SSHD** and **AB (Somalia) v SSHD [2009] EWCA Civ 5** which "requires more than mere hardship, mere difficulty, mere obstacles or matters of choice and inconvenience". That is said to be the wrong test. It will usually be against the best interests of the children to endure hardship, difficulty, obstacles or inconvenience, and in matters of choice the Tribunal should exercise anxious scrutiny as to which choice is in the child's best interests, following which of course they need to be weighed against other factors. That error has made a material difference to the outcome of the determination.

6. The second ground asks the question as to whether it is in the best interests of the children to be removed from the United Kingdom to Bolivia. Quotations are then given from background evidence regarding Bolivia and as far as the age of the children goes while their youth may mean they could adapt to the harsh conditions in Bolivia that also makes them more vulnerable to those conditions than older children would be. It is further argued that the findings and the objective evidence lead to only one rational conclusion and that is that it would be against the best interests of the children for them and their parents to be removed to Bolivia. It is said that this is strongly suggested by the IJ's observation that "it may be that their mother genuinely has very unpleasant memories of Bolivia and would much prefer her children to enjoy everything the UK has to offer" since it is likely that the mother's preference is aligned with her children's best interests.

7. Reference is then made to **EA (Article 8 – best interests of child) Nigeria [2011] UKUT 00315 (IAC)** where it was found that "it is in the best interests of the child to live with and be brought up by his parents". Although this is uncontroversial in the current appeals it is irrelevant. Neither side has made any suggestion that the parents and children should be separated. The issue is not the disruption of family life entailed by separation but whether the best interests of the children are to live in the UK with their parents or in Bolivia with their parents. A quotation is then taken from paragraph 6 of **EA (Nigeria)** but in that case as is emphasised in the skeleton argument "there is no evidence to suggest that the return of these children to Nigeria with their parents places them at any risk of harm or prejudice to their welfare". As that passage makes clear **EA (Nigeria)** was not decided on the basis of a comparison of conditions for children in Nigeria with conditions for children in the United Kingdom. In the current appeal submissions were made at considerable length both on paper and orally as to conditions for children in Bolivia as compared with conditions for children in the United Kingdom and that comparison was explicitly linked with the question of the best interests of

the children. The current appeals can therefore be properly distinguished from **EA (Nigeria)**.

8. It is further argued that if it is not in the children's best interests to be removed there are no compelling countervailing factors strong enough to override the best interests of the children in this case. The adult appellants have no criminal record and there is no suggestion that they are a danger to society. It is accepted that they have a poor immigration history but this should not be counted against the children. A quotation is then taken from paragraph 44 of **ZH (Tanzania)**, the last sentence of which states that it would be wrong in principle to devalue what was in their, (the childrens'), best interests by something for which they could in no way be held to be responsible.

9. I heard submissions from both representatives. I made a full note of them and have taken them into account in this decision.

My deliberations

10. I announced my decision at the conclusion of the proceedings that I found that the First-tier Tribunal Judge did not err in such a way that the Tribunal should exercise its powers to remake the decision in a different way.

11. The determination of the FTT Judge sets out the immigration history of the adults who both came to the United Kingdom as visitors separately in 2006 and 2007 each with six months' leave. They admitted that they had no intention to return to Bolivia and they took no steps to regularise their status until after Immigration Officers visited them in early 2011 and served notices of removal. The judge did not find plausible their claim that they knew no one who could advise them what to do to regularise their situation, not least because within the respondent's bundle is to be found a letter from The Cardinal Hume Centre which confirms that Mrs Charca was attending that centre from September 2010 – and it is that Centre which represents the appellants in this appeal. The judge found clear that the adult appellants made a very deliberate decision to remain unlawfully and that it would seem highly unlikely that the applications they eventually made were not triggered by the visit of the Immigration Officers. The judge notes that there is no suggestion that either of the adult appellants have any criminal convictions in this country and they appear well thought of by a number of people though whether those who have written are aware that the adult appellants are in a bigamous marriage remains unclear.

12. It is not in issue that the appellants could not meet the requirements of the Immigration Rules and that therefore this is a pure Article 8 ECHR claim outside the Rules. The FTT judge in paragraph 25 refers to that "and the interface with Section 55 of the Borders, Citizenship and Immigration Act 2009". The judge also refers to the relevant case law at paragraph 22 and even if he is criticised by the representative for the appellants for applying the "reasonableness" test in **VW (Uganda)** and **AB (Somalia)**

the fact is that the judge clearly directs himself correctly. He reminds himself that the correct starting point in considering the welfare and best interests of a young child is that it is in the best interests for the child to live with and be brought up by his or her parents. There is acknowledgement that the children's removal with their parents would not involve any separation of family life (see 22(i)). There is reference to a period of substantial residence in effect allowing roots to be put down, personal identities developed, friendships formed and links made with the community outside the family unit. There is recognition also that during a child's very early years he or she will be primarily focused on self and the caring parents or guardian. Long residence once the child is likely to have formed ties outside the family is likely to have greater impact on his or her wellbeing.

13. In paragraph 27 the judge makes specific reference to the welfare of the children being a primary consideration but recognises that the children are both under 5 years of age, are Bolivian and have Spanish speaking parents who are Bolivians who each spent over 30 years of their life in Bolivia. They all have relatives in Bolivia but none in the United Kingdom, save for each other. The judge looked at the education of the older child but found that there is no suggestion that she is not fluent in her parent's first and preferred language, that she is still very young and will only recently have begun to develop any life beyond that with her parents and her brother who is only 2 years old. Other aspects concerning the children, their parents and their comparative situations in the UK and in Bolivia are referred to in paragraphs 27 and 28.

14. Paragraph 29 recognises that if the elder child were older, and there was evidence of substantial integration into UK society by all members of the family, the outcome in the case might have been different. There is reference to it being neither disproportionate nor unreasonable to expect the family to relocate to Bolivia.

15. Although Mr Thomas on behalf of the appellants seeks to say that there are no compelling countervailing factors strong enough to override the best interests of the children in this case it seems to me that he ignores both the (admitted) poor immigration history of the appellants and that in considering the matter of proportionality the maintenance of an effective and firm immigration control is one of the legitimate aims of the respondent. It cannot therefore be every case where the best interests of the children "trump" that legitimate objective.

16. The judge has not ignored or failed to consider the background evidence in relation to Bolivia. That is set out at paragraph 15 of the determination. He notes that in 2010 Bolivia experienced unprecedented economic growth and had successfully avoided the most negative effects of the global economic crisis. The Government has made major efforts to close the social and economic gap between rural and urban populations, and UNICEF has been cooperating with the Government's initiatives to improve health, nutrition, education protection and access to sanitary services and

clean water for children, adolescents and women. The judge goes on to say that many of these problems remain and he refers to child poverty being more severe in rural areas etc. The judge notes in paragraph 27 that the adult appellants have spent most of their lives in Bolivia where each of them worked. Paragraph 13 refers to Mr Huarachi working as a chauffeur in Bolivia. It is implicit, if not expressed specifically, that this family through its past history and connections in Bolivia, and in particular the children, would not suffer in the way that many children do in that country who are from less advantaged backgrounds.

17. Whereas there are some criticisms of the determination that are valid overall this is a safe, thoughtful and thorough decision. The accusation that if the FTT Judge had applied the correct (best interests) test the conclusion he came to was "irrational" is completely unjustified in all the circumstances.

Decision

18. For the above reasons the decision of the First-tier Tribunal Judge is upheld, namely that these appeals are dismissed on all grounds.

19. An anonymity direction has not been made previously and there was no argument before me that one should be made. In the particular circumstances of the appeal I can see no need for one.

Signed Date

Upper Tribunal Judge Pinkerton