

The Best Interests of Children following ZH (Tanzania)

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Introduction

1. *ZH (Tanzania) v SSHD* [2011] UKSC 4, 1 February 2011, is a landmark ruling from the Supreme Court. It is a case primarily about children and their best interests and also about their nationality. Baroness Hale put the issue as follows:

[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?

2. The court's answer on this question has profound beneficial implications for the development of children's rights particularly, but not solely, in an immigration context. This short presentation will consider some of the issues arising, particularly in the light of the CJEU's recent decision in *Gerardo Ruiz Zambrano v Office national de l'emploi* C-34/09.
3. The facts of ZH were as follows. ZH arrived in the UK in 1995. Over the next ten years she made three claims for asylum, two using false identities, a human rights claim and two applications for leave to remain, all of which were unsuccessful. In 1997 she formed a relationship with a British citizen and they had two children, born in 1998 and 2001, who both had British citizenship through the father, KP.
4. In 2005 ZH and the children's father separated. The children continued to live with their mother, although the father continued to have regular contact with them. After the father was diagnosed as being HIV positive in 2007, ZH made a fresh claim under the Human Rights Act 1998, claiming that her removal from the United Kingdom would 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. The Secretary of State rejected the claim and ZH's appeal to the Asylum and Immigration Tribunal was

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dismissed after a reconsideration. The Court of Appeal dismissed ZH's further appeal.

The Court of Appeal's judgment

5. The Court held:
 - a. The fact of the children's British citizenship was relevant but not dispositive in the favour of the family's interests' against deportation;
 - b. The Tribunal's finding that the children could live with their father KP was indeed susceptible to criticism that it had no rational basis, but that did not lead to the conclusion that the whole decision could not stand;
 - c. The Tribunal were entitled to conclude that KP could visit the children in Tanzania;
 - d. Notwithstanding the effect on KP's health of visiting Tanzania, the Tribunal were entitled to consider that option in the context of his own choice to form a relationship and have children with someone whose status was in the United Kingdom was so precarious.

6. In the light of what followed, and perhaps even more so in the wake of the Court of Justice of the European Union's judgment in *Gerardo Ruiz Zambrano v Office national de l'emploi* C-34/-09, the Court of Appeal's judgment is surprising for its summary rejection of the rights of the children as British nationals. The Court said:

[17] That their British citizenship is a trump card determining the conclusion is a submission of law that seems to me wholly inconsistent with the approach of both the House of Lords and this court to the problems which have arisen in relation to consideration of art 8. All the jurisprudence by which this court is bound seems to me to point to exactly the opposite conclusion, namely that whilst the British citizenship of the children, whose art 8 rights are certainly in issue, is an important factor, it is not dispositive. This is not the case for a full review of all the authorities; it is, in my view, sufficient to point to certain features of the dicta in the by now oft-cited cases which demonstrates the falsity of Mr Hawkin's submission.

[18] In EB (Kosovo) v SSHD [2008] UKHL 41, [2008] 4 All ER 28, [2008] 3 WLR 178, Lord Bingham spoke of the absence of any hard-edged or bright-lined rule to be applied to the generality of cases. He emphasised the difficult evaluative exercise which art 8 requires. In para 12 he said:

"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."

[19] The very premise upon which those important dicta are based is that there is no dispositive factor based upon the citizenship within this country of the spouse who may have to follow the removed spouse or the children whose relationship may be severed. If the citizenship of the spouse was dispositive, or of the children, then there would be no necessity to consider the question as to whether they could reasonably be expected to follow the removed parent or the removed spouse.

7. The judgment made no reference to the requirements of Article 3.1 of the United Nations Convention on the Rights of the Child.

The Supreme Court's judgment

8. Allowing ZH's appeal the Supreme Court focussed on the best interests principle in international law. It reasoned as follows.

The best interests' principle

- a. Article 3.1 of the United Nations Convention on the Rights of the Child (UNCRC) imposes a binding obligation in international law. Article 3.1 reads:

"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".

- b. The spirit of Article 3.1 has been translated into domestic law. Firstly, section 11 of the Children Act 2004 has placed a binding obligation upon a range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. Secondly, the duty has been extended, through the lifting of reservations to the UNCRC, and the adoption of s.55 of the Borders, Citizenship and Immigration Act 2009 to include the immigration authorities and the Secretary of State, so that they too are required to discharge their functions having regard to the need to safeguard and promote the welfare of children. That obligation applies not only to how children are looked after in the United Kingdom but also to

decisions made about asylum, deportation and removal from the United Kingdom (ZH §23).

The principle and Article 8 of the European Convention on Human Rights

- c. Any such decision which is taken without having regard to the need to safeguard and promote the welfare of any child involved would not be in accordance with law for the purposes of article 8.2 of the ECHR (ZH §24).

The practical application of the best interests' principle explained

- d. In certain decisions *directly* affecting a child's upbringing, such as adoption or separation from a child from a parent against their will, the best interests of the child will be the *determining* factor. However, in all decisions *indirectly* affecting a child's upbringing national authorities are required to treat the best interests of the child as a primary consideration. This is done by first identifying what the best interests of the child require and then assessing whether the strength of any other consideration, or the cumulative effect of other considerations, outweighs the child's best interests (ZH §26, 33, 46).

The significance of nationality

- e. Although a child's British nationality is not a decisive factor it is nevertheless of particular importance in assessing the child's best interests and is relevant in deciding whether it will be reasonable to expect the child to live in another country (ZH §30).
- f. Having regard to the benefits of British citizenship, the facts that the ZH's children were British by descent from their British father with whom they had a good relationship, had an unqualified right to live in the United Kingdom where they had always lived, were being educated and had social links with the community, the best interests of the children were not outweighed by the countervailing considerations of the need to maintain firm and fair immigration control, ZH's "appalling immigration history" and the precariousness of her position when the children had been conceived, for none of which the children could be blamed. Accordingly, ZH's removal would constitute a disproportionate interference with the children's rights under article 8 to respect for their family life (ZH § 30–33, 38, 39, 45).

United Nations Convention on the Rights of the Child 1989

- 9. Art 3.1 states:

"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."

10. This has been translated into domestic legislation in section 11 Children Act 2004 (ZH §24). Following the lifting of the UK's reservation to the Convention, s.55 of the Borders Citizenship and Immigration Act 2009 was implemented. This provides a duty to have regard to the need to "*safeguard and promote the welfare of children*".

11. Compare this with the broader obligation in 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."*

12. This involves no question of balancing "a primary consideration" against other interests, at least where matters *directly* concerning the child's *upbringing* are in issue.

13. The interveners submitted that a decision to remove the British children's mother from the UK was likely to amount to a question with respect to the children's *upbringing*. Hence the children's welfare would be the paramount consideration for the Court.

14. This was rejected by the Court by reference to United Nations High Commission for Refugees Guidelines on Determining the Best Interests of the Child (May 2008) in which a distinction is made between decisions such as those relating to adoption or to the separation of a child from his or her parents against their will (these are covered by Articles 21 and 9 of the UNCRC), for which the children's welfare will be the determining factor, and:

"all other decisions affecting children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3)."

15. Baroness Hale pointed out that a decision about where a child's parent is to live is not a decision which affects the child's upbringing *directly*; while a decision as to which parent the child should live is such a decision.

16. Further support for the submission that "a primary consideration" did not simply mean considering the child's best interests among others was provided by General Comment No 6 of the United Nations Committee on the Rights of the Child (§ 27 & § 28). While the Court did not accept this argument – it thought that it was difficult to regard the interests of immigration control as not amounting to "rights based interests" - it seems that the argument that a

child's best interests can be outweighed by the economic interests of country will be unlikely to succeed.

17. The Appellant submitted that the Court should place the best interests of the child centre-stage and consider those first, before assessing whether those interests could be overridden by some sufficiently powerful factor. The Court adopted this approach (at §26). In so doing it followed the approach of the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 and of the Federal Court in *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133 – “the important thing is to consider those best interests **first**” (emphasis added).
18. It is plain from Lord Kerr's speech that the phrases “a primary consideration” or “a primacy of importance” can be determinative:

“[46] 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.”

Article 8 and the practical approach to the application of the best interests principle

19. As for the interface between Article 8 and the UNCRC, the Grand Chamber of the European Court of Human Rights in *Neulinger v Switzerland* (2010) 28 BHRC 706 has recently emphasised again the requirement for the ECHR to be interpreted in harmony with the general principles of international law (§ 21)².
20. The Supreme Court set out the correct approach in Article 8 as followed::

“[33] In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means

² It is not just the UNCRC which bites with respect to the weight to be afforded to children's interests in any Article 8 case – prominent in the *Neulinger* case was the European Union's Charter of Fundamental Rights, which became legally binding with the entry into force of the Lisbon Treaty on 1 December 2009 and which contains the following Article:

“Article 24 – The rights of the child

- 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*
- 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*
- 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.”*

that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations.”

21. The countervailing factors in ZH’s case of course were her appalling immigration history, and the fact that she had conceived the children her immigration status was precarious. But this could not outweigh the children’s best interests because they were blameless (ZH §33).
22. The Tribunal had of course accepted that the children could not be blamed for the “sins” of their parents, but it lost track of the significance of this fact when performing the balancing exercise. This was a fundamental error also perpetrated by the Court of Appeal in upholding the Tribunal’s determination. This is highlighted by Lord Hope at §42 and §44:

“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.”

23. Finally, Lord Kerr has set out in emphatic terms at §46 how the child’s best interests will “customarily” resolve the outcome of these kinds of cases. It will take “considerations of substantial moment” for the result to be otherwise.

The significance of nationality

24. As Baroness Hale notes in §20 the Defendant’s argument that previous attempts to resist deportation on Article 8 grounds on the basis of the proposed deportee having children who had acquired UK nationality had failed. She notes the European Commission of Human Rights’ decision that the application in *Poku v UK* (1996) 22 EHRR CD4 was inadmissible included the following remark:

*“The Commission recalls that in this case all the applicants, save Ama Poku, are either British citizens or have a permanent right to remain in the United Kingdom. The Commission notes however that in previous cases the factor of the citizenship has not been considered of particular significance (e.g. No. 11970/86, dec. 13.7.87, unpublished, where the Commission found it compatible with Article 8 to expect children of unlawful overstayers to follow their parents even if they had acquired theoretical rights of abode in the deporting country; and Nos. 23938/94 Sorabjee v. United Kingdom, dec. 23.10.95 and 24865/94 Jaramillo v. United Kingdom, dec. 23.10.95, where the Commission found no material distinction as to whether the children had acquired citizenship by *ius soli* or *ius sanguinis*).”*

25. However, the Court also noted the Appellant’s argument that early Strasbourg decisions were not all one way: see *Fadele v UK* (1991) 70 DR 159. Moreover, there has been a shift. The Court noted that what has changed is made clear in the judgment in *Da Silva v Netherlands* (50435/99) [2006] 1 F.C.R. 229 – a shift away from the Commission’s previous focus upon “the

sins of the parents” to a recognition that the best interests of the child concerned had to be considered first (§ 19).

26. Adopting the approach of the Federal Court in *Wan*, the Court gave short shrift to the familiar UKBA argument that children can adapt to their parents’ country of origin and may return later to take up their British nationality:

“[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.”

27. It is this emphasis on what citizenship means – the quotation from *Wan* in §30 listing its component advantages “socially, culturally and medically” – which is important and which, according to Lord Hope, was missed by the Court of Appeal (§41). Instead the focus was upon the children’s mere status as British nationals.

UKBA guidance implementing Article 3.1 of the UNCRC

28. In November 2009 the United Kingdom Border Agency issued “*Every Child Matters*”³ - statutory guidance with respect to its duties in respect of section 55 of the Borders Citizenship and Immigration Act 2009. At paragraph 4 the guidance states:

“4. Section 55 is intended to achieve the same effect as section 11 of the Children Act 2004 (the 2004 Act) which places a similar duty on other public organisations. As well as providing a driver for improvement within the UK Border Agency, the duty will also help to improve inter-agency working in respect of children. Section 55 applies to the carrying out of the relevant functions anywhere in the UK.”

29. At paragraph 2.7 “*Every Child Matters*” states:

“2.7. The UK Border Agency must also act according to the following principles:

...

³ This guidance came after the UKBA’s *Code of Practice for keeping children safe from harm*, in force from 6 January 2009 (and before the commencement of section 55 of the Borders Citizenship and Immigration Act). In the *Code* the UKBA acknowledged that:

“1.4. This Code reflects the outcome of a consultation held in April 2007 but it is not intended that this Code shall be the last word on the subject. In addition, the Government is including provision in the Borders, Immigration and Citizenship Bill for immigration and nationality functions to be carried out having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. This will be equivalent to the duty contained in section 11 of the Children Act 2004.”

“In accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children”

30. In September 2010 the UKBA issued guidance entitled *“Processing an asylum application from a child”*. That guidance emphasises the UK’s commitment to the rights protected the UNCRC. However at paragraph 17.8 it states:

a. *“The best interests of the child, whilst a primary consideration, is not the sole consideration when considering whether a child should be granted leave to remain or return to the country of origin. Other factors, including the need to control immigration, are also relevant.”*

31. The “riders” are glaring. The UKBA still does not appear as at 16 May 2011 to have amended these documents since the judgment in *ZH* with which they are not compatible. Perhaps this is because, as was stated on the Secretary of State’s behalf in *R (SM) v Secretary of State for the Home Department & FM (Interested Party)* [2011] EWHC 338 (Admin) (23 February 2011) the Secretary of State has not yet had the time to amend them:

“A letter dated 9 February 2011 from the Treasury Solicitor’s Department stated that the defendant “has not yet had time to consider the full implications of the judgment and how it is likely to impact on current decision-making processes”

32. It seems likely that amendments will be made to these guidance documents because of the judgments which have followed *ZH* and because Counsel for the Secretary of State acknowledged this at the time of the hearing before the Supreme Court:

“[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 earlier judgment in *TS*

33. *ZH* was foreshadowed by Mr Justice Wyn Williams’ judgment in *R (on the application of TS v Secretary of State for the Home Department* [2010] EWHC 2614 (Admin), in which the Secretary of State’s decision to remove a sixteen year old boy to Belgium in accordance with the Dublin II Regulation. The decision was unlawful due to the Secretary of State’s failure to abide by the requirements of section 55 before reaching his decision to remove. However, *ZH* goes further than does *TS*.

Judgments post ZH

34. Since 1 February the Administrative Court has directly applied the judgment in ZH in a number of cases. In *R (Reece-Davis) v Secretary of State for the Home Department* [2011] EWHC 561 (Admin) (25 February 2011) Mr Justice Mitting considered an application for judicial review of the Secretary of State's refusal to accept that representations made by the Claimant after she had lost an appeal in 2008 against a refusal of leave to enter amounted to a fresh asylum/human rights claim.
35. The Claimant was a Jamaican national who had lived in the UK with successive grants of leave to remain as a student from 1998 until 2007, when she and her husband, also a Jamaican national, and their two children, born in the UK in 2003 and 2005, returned from a family holiday in Jamaica. Upon their return the Claimant's leave to remain as a student was cancelled and she was refused leave to enter. When her appeal was dismissed the Immigration Judge cited numerous breaches of the requirements of the Immigration Rules relating to students by the Claimant – and noted that she had also received “no less than £54,364 in tax credit alone, between October 2003 and January 2008” – which she wouldn't have received if she had not said on the relevant application form that she was a British citizen. She was not a British citizen. Neither is her husband or either of her children.
36. The judge found that much had changed since the Immigration Judge's determination in 2008. Since then section 55 of the Borders Citizenship and Immigration Act had been enacted, and more recently the Supreme Court had issued its judgment in *ZH (Tanzania)*. He focussed upon the children's situation and said:

“The last two sentences of Lord Hope's judgment⁴ raise the dilemma that now faces the Secretary of State starkly, both in this case and, I have little doubt, in very many others. Does the fact that the best interests of the children would not be served by their removal, together with their parents to their parent's home country, trump the legitimate need to maintain a firm and fair system of immigration control? Where the immigration history of the parents, or of one parent, is poor, is that a factor capable of outweighing the best interests of the children when taken together with the need to maintain immigration control? These are questions that have not yet been addressed in the case law, since the enactment of section 55 and the withdrawal of the reservation of the United Kingdom to the Convention. They are raised starkly on the facts of this case”.

37. *Reece-Davis* demonstrates that *ZH* is primarily a case about the rights and best interests of children, and secondarily a case about the significance of the British nationality of the children of someone who is facing removal from the UK. However in *R (SM) v Secretary of State for the Home Department & FM*

⁴ i.e. “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.”

(Interested Party) [2011] EWHC 338 (Admin) (23 February 2011), as in *ZH* both the British nationality of one of the Claimant’s five children and the best interests of all of them were pressing issues. The Claimant, who was detained pending his removal to sought judicial review of his detention on the basis, among other things that one of his five children was a British national.

38. The judgment includes a helpful “before and after” analysis:

“Before that decision [ZH] the importance that is to be attached to the factor of citizenship in the overall assessment of what is in the best interests of a child was not as appreciated: see [69]. The consequence was that in many cases the United Kingdom authorities considered it reasonable to expect children who were British citizens to go with their non-British parent when the parent was removed and to return when adult. Sometimes this was the result of concentration on the lack of status of one or both parents.

100. That approach is now seen to be erroneous. The effect of a decision such as that in ZA (Tanzania) [sic] is often characterised as changing the law, and, in popular discourse that may be so. But, strictly speaking, as a result of the common law principle that judicial decision-making is declaratory, it is in fact not the law that has changed but our understanding of what the law is.”

39. *ZH* is also likely to have a major impact on decision-making on many different fields of law, including local authority practices in community care, education, mental health, and other cases such as those involving deprivations of liberty, to name but a few examples. It has already been considered in a number of decisions, particularly on unaccompanied minors⁵. See for example also the following additional cases:

- *DS (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 305 – the Secretary of State is under an obligation from the outset to attempt proactively to “trace” the family members of an unaccompanied child asylum seeker. This obligation is imposed by Article 19.3 of the Reception Directive (European Community Directive 2003/9/EC). The Secretary of State must also consider the best interests of a child affected by an immigration decision. The obligation is imposed by section 55 of the 2009 Act and for the reasons set out in *ZH*. The tracing obligation need not await the outcome of the asylum claim and does not mean that the consideration of the asylum claim can be delayed. Even if the Secretary of State does not consider

⁵ The Children’s Commissioner has recently (February 2011) issued a report *Landing in Kent – the experience of unaccompanied children arriving in the UK* (see http://www.childrenscommissioner.gov.uk/content/publications/content_465) . The report details the experiences of about 30 UASCs who were “processed” via the Millbank Reception and Assessment Centre in Kent. It contains full reference to the obligations of decision makers under the UNCRC. The Commissioner includes her recommendations to the UKBA.

the s.55 duty (perhaps because it was not in force at the time), the Tribunal must do so.

- *R (on the application of HH) v Westminster City Magistrates' Court* [2011] EWHC 1145 (Admin) – in which *ZH* was considered in an extradition context and where, unusually, the children of the appellants were separately represented through the Official Solicitor.
- *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439 – in deciding whether to grant an interim injunction against a newspaper in a privacy case, the best interests of the children of the appellant were relevant.
- *R (on the application of NXT) v Secretary of State for the Home Department* [2011] EWHC 969 (Admin) – *ZH* applied in the context of immigration detention of a mother of three children.
- *EM (Zimbabwe) v Secretary of State for the Home Department* [2011] UKUT 98 (IAC) – see para 308 – the best interests of children of Zimbabwean asylum seekers who had stayed in the United Kingdom while the Country Guidance litigation was ongoing, were relevant to their Article 8 claims.

Article 12 of the UNCRC

40. *ZH* and the authorities referred to above demonstrate a shift in approach where the child ceases to be a mere appendage of his or her parent “below the eye level of the Court” – as was submitted on *ZH*’s behalf to the Supreme Court.
41. As the court pointed out, a British child cannot be removed or deported. 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.
42. In the new era following *ZH*, the child has a legal presence and a legal voice. This is emphasised at §34 to §37 by reference to article 12 of UNCRC which 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."

43. The duty in Article 12 of the UNCRC has been the subject of a recent and important General Comment No 12 by the UN Committee on the Rights of the Child. It is essential that children's views are taken into account, particularly where their interests and those of their parents may conflict. The guidance in *ZH* on this issue reinforces the point made in *EM (Lebanon)* [2009] 1 AC 1198 §48-49 on the need to give children separate consideration.
44. Plainly the Supreme Court has apprehended that initiatives such as the ELAP pilot scheme should cohere with the obligation in Article 12.
45. An example of a divergence between the views of children and those in parental control is provided in the context of education law in *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] 2 WLR 719, [2006] ELR 273, [2006] UKHL 15. In that case Baroness Hale observed:

“It is not at all surprising to find adolescents making different moral judgments from those of their parents. It is part of growing up. The fact that they are not yet fully adult may help to justify interference with the choices they have made. It cannot be assumed, as it can with adults, that these choices are the product of a fully developed individual autonomy. But it may still count as an interference. [with Article 9 of the ECHR] I am therefore incline to agree ... that there was an interference with Shabina Begum's right to manifest her religion.”

46. So far as the representation of children in Tribunal and court proceedings is concerned, see *R (HH) v Westminster City Magistrates' Court* [2011] EWHC 1145 (Admin) in which the children were, in light of *ZH*, permitted to intervene in extradition proceedings although the Court noted that in most extradition cases the extraditee would be able to present such matters as were necessary to protect the best interests of children without the need for separate representation.

Back to the nationality issue

47. In addition to *ZH* decision makers will now also have to take account of the equally significant judgment of the Court of Justice of the European Union's Grand Chamber judgment in *Gerardo Ruiz Zambrano v Office national de l'emploi* C-34/-09, delivered on 8 March 2011.
48. Mr and Mrs Zambrano are Colombian nationals. They arrived in Belgium in 1999 with their three year old son. They applied for asylum. Although their asylum applications did not succeed the Belgian authorities stayed their removal to Colombia because of the state of turmoil prevalent in that country. They therefore had no legal status in Belgium but also could not be removed. Mr Zambrano's attempts to obtain regularization of his status failed. He

obtained employment without possessing the necessary work permit and was sacked when his workplace was raided by the authorities.

49. However, in 2003 the couple had a second child, Diego on 1 September 2003, and a third, Jessica, on 26 August 2005. Under Belgian nationality law a child born in Belgium who would otherwise have no nationality acquires Belgian nationality.
50. As Belgian nationals Diego and Jessica are of course also Citizens of the European Union (EU), and therefore entitled to the rights of free movement (both for themselves and for their family members) which are listed in the Citizens' Directive⁶.
51. The Court of Justice of the European Union had to decide what the implications of Diego and Jessica's EU citizenship were for their parents. This wasn't the first time that the Court had had to consider how a parent could benefit from his or her child's status in European law. Similar issues arose in *Case C 200/02 Zhu and Chen* [2004] ECR I 9925 and in *Case C 413/99 Baumbast and R* [2002] ECR I 7091.
52. However, in both of those cases the parents derived their rights of residence from the child's right provided by the Citizens' Directive to move freely within the European Union. Both Diego and Jessica however had not moved anywhere – they were Belgian nationals living in Belgium.
53. The focus of the Court was not therefore on the Citizens' Directive – instead it was on Article 20 of the Treaty on the Functioning of the European Union. This article gave them the right to live in Belgium. It also gave them the right to have residence documents issued to their parents because this was necessary for the children to enjoy their rights as citizens of the Union. Finally it gave their parents the right to a work permit.
54. Emphasising that as it had already said frequently

"citizenship of the Union is intended to be the fundamental status of nationals of the Member States"

the Court explained its conclusions as follows:

"44 It must be assumed that such a refusal [to grant residence permits to the children's parents] would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the

⁶ (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States)

Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union."

55. The application of this reasoning to the facts of a *ZH (Tanzania)* may suggest that a person in ZH's position must be given a residence permit for the UK under European law, since she is the mother of British citizens.
56. The judgment of the Court of Justice of the European Union is predicated on the children being the dependant minor children of their "third country" national (which simply means non-European Union national) parents. If they were not dependent upon their parents the parents would not acquire the right to residence permits and the right to work in this way.
57. But it is difficult to envisage a situation when minor children would not be considered to be dependant upon their parents. Even more interestingly, although this case is about children, it may be possible to argue in some cases that the rights conferred by Article 20 of the Treaty on the Functioning of the European Union should equally apply to the third country spouse of a British national. If that is right, the third country spouse would acquire a residence permit because of the importance of his British spouse's right to "exercise the substance of the rights conferred on him or her by virtue of his or her status as a citizen of the Union"⁷. All of these apparent consequences will have to be tested in UK and later European cases.
58. The facts of *Zambrano* are a good illustration of how, in the course of the time it takes to resolve asylum and risk/returnability issues, what started out as a refugee case ends up becoming a very different kind of case raising EU citizenship and rights issues.
59. It is also not difficult to envisage cases of refugee children changing in different ways over the course of time, so as to make the best interests and citizenship issues important in ways which may not previously have been contemplated. For example:
 - The child – perhaps already near the age of majority – matures and forms a relationship with a British citizen and/or has a child.
 - The parents of the child may divorce and commence new relationships.
 - A traumatised refugee child placed with a British foster family becomes highly emotionally dependent and/or integrated within the family.
 - See also cases like that of Ukrainian-born Eleanora Suhoviy who arrived in the United Kingdom in 1994 as a bewildered 12-year-old who spoke not a word of English, and had to adapt to life at an inner-

⁷ In this regard, of the very recent decision of the CJEU in *McCarthy v UK* which however is likely to be restricted to its own particular facts (involving no children, no movement across borders and no indication of a sufficient link with EU law).

city school. Section 55 and best interests' arguments were simply not available at that time. Twelve years later she graduated from Oxford and her human rights appeal was allowed by the Tribunal, who accepted the evidence that she was "a product of British society and its values".

Conclusion

60. It is to be hoped that decision-makers will now approach children's interests and rights in a manner which recognises their independent right to be treated as autonomous individuals and not as mere appendages of their parents.