**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Appeal Numbers: HU/11478/2016
HU/11485/2016
HU/11488/2016
HU/11489/2016

**THE IMMIGRATION ACTS**

| **Heard at Birmingham Civil Justice Centre** | **Decision & Reasons Promulgated** |
|---|---|
| **On 16 January 2019** | **On 7 February 2019** |

**Before**

**DR H H STOREY**
**JUDGE OF THE UPPER TRIBUNAL**

**Between**

**MS EJI (FIRST APPELLANT)**
**MR SJM (SECOND APPELLANT)**
**MISS TSM (THIRD APPELLANT)**
**MASTER ESM (FOURTH APPELLANT)**
**(ANONYMITY DIRECTION MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellants: Mr A Pipe, Counsel instructed by TRP Solicitors
For the Respondent: Mr D Mills, Home Office Presenting Officer

**DECISION AND DIRECTIONS**

1. In a decision posted on 30 May 2017 Judge Parkes of the First-tier Tribunal (FtT) dismissed the appeal of the appellants, who are

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husband and wife and two children, all nationals of Tanzania, against the decision made by the respondent on 13 April 2016 refusing their applications for leave to remain. It is not in dispute that the third appellant was born in the UK in October 2017 and went to Tanzania in 2008/9 before returning after nine months on 16 April 2009, and that accordingly she has resided continuously in the UK for seven years at the date of the respondent's decision (and eight years by the date of the judge's decision). Nor is it in dispute that the fourth appellant was born in the UK in May 2013 and has resided here since. The fourth appellant was diagnosed with autism spectrum disorder in May 2016.

2. The judge's assessment of the third appellant's circumstances is best captured by quoting paragraph 17:

> "The best interests of the Third Appellant are principally to live with her parents and that will be the case whether they remain in the UK or return to Tanzania. The contents of the report in relation to the Third Appellant do not show anything that is significantly out of ordinary in regards either to her progress in the UK, the life that she has established and her hopes for the future and her concerns about what may happen in the event of removal to Tanzania. So far as she is concerned in remaining with her parents whilst she may prefer to be in the UK the evidence does not show that her best interests require her to remain in the UK and that her needs, familial, social and educational can be met adequately in Tanzania. I would add that it appears that the adults have not made any real effort to introduce the Third Appellant to the possibility of remaining in the UK and that of course is consistent with their stated aim of living in the UK come what may, this is discussed further below".

The summary of the judge's assessment of the fourth appellant is given at paragraph 23:

> "The desirability of the Fourth Appellant living in the UK and receiving the professional support identified is supported by the various reports in the bundle. His difficulties seem to have been apparent from a fairly early stage but only recently confirmed by the diagnosis referred to above. In addition to the general observations about the best interests of a child, and I note that although born in the UK he has not lived here for over 7 years, his best interests would probably be served by his continuing to receive the professional help in the UK that has been identified in terms of continuity but the evidence does not show that he could not receive appropriate support in Tanzania".

3. The appellants' grounds revolve around the one theme, the contention that the judge's approach to the position of the two children was flawed.

4. I heard excellent submissions from Mr Pipe and Mr Mills, both concise and to the point.

5. I am persuaded that the judge materially erred in law in his treatment of the position of the two child appellants. At the date of the hearing before the judge the respondent had in place a policy which stated that in the case of children who had resided continuously in the UK for at least seven years, it was necessary to assess whether there were "strong reasons" for not granting such children leave to remain. Further, in **MA (Pakistan)** [2016] EWCA Civ 705, the Court of Appeal considered that a similar approach was required under the applicable law.

6. It is demonstrably clear that the judge did not apply such an approach. At paragraph 30 he stated:

> "In short the adults have a very poor immigration history in which they have put personal convenience above any legal obligations that they have, in doing so they have not always acted in the best interests of their children. They have received significant benefits to which they have had no entitlement. If this case concerned only the first 3 Appellants then it would have no merit at all".

Even if the last sentence is considered as a carelessness and meant to apply only to the first two appellants, the judge in other paragraphs clearly proceeded on the basis that the third and fourth appellants could not establish unreasonableness unless able to show factors "significantly out of the ordinary" (paragraph 17) or "something more than the usual life that would be expected of a child of the relevant age" (paragraph 24). As regards the third appellant, this approach effectively reversed the presumption in favour of granting leave and the formulation at paragraph 24 did not even consider length of residence as a relevant factor at all (only comparable age). Whilst citing **MA (Pakistan)** at paragraph 24, the judge flatly disregarded its guidance.

7. The judge's treatment of the fourth appellant's circumstances in one respect compounds the difficulties already identified with the approach to both child appellants, in that it proceeded on the basis that length of residence (albeit in this child's case less than seven years) was irrelevant. In another respect it does not appear to have recognised the significance of the judge's own finding at paragraph 23:

> "The desirability of the Fourth Appellant living in the UK and receiving the professional support identified is supported by the various reports in the bundle. His difficulties seem to have been apparent from a fairly early stage but only recently confirmed by the diagnosis referred to above. In

addition to the general observations about the best interests of a child, and I note that although born in the UK he has not lived here for over 7 years, his best interests would probably be served by his continuing to receive the professional help in the UK that has been identified in terms of continuity but the evidence does not show that he could not receive appropriate support in Tanzania".

8. If the fourth appellant's best interests were "probably ... served by his continuing to receive the professional help in the UK" then that, on **KO (Nigeria)** ([2018] UKHL 53) principles, that factor should have been recognised to go a significant way in satisfying the reasonableness requirement. To contrary effect, the judge at paragraphs 30 and 31 treated the parents' "very poor immigration history" as one of the factors informing the question of reasonableness. Of course, **KO (Nigeria)** was not published at the date of the judge's decision but it declares the law as it must be understood to have always been.

9. Mr Mills indeed relies on this last verity to argue that the judge's decision, even if not consistent with **MA (Pakistan)** was consistent with **KO (Nigeria)**. However, in the first place I do not read Lord Carnwath's analysis to have ousted the approach of Elias, LJ to seven year child cases. Even if I prove to be wrong about that, I cannot see that there is anything in Lord Carnwath's reasoning to dispute the well-established public law principle that the respondent must be expected to follow her own published policy and failure to apply such a policy reduces the public interest that might otherwise lie against an applicant in an Article 8 case.

10. Further, and in any event, the judge plainly did contravene the approach to assessment of reasonableness enjoined by Lord Carnwath in **KO**.

11. For the above reasons I conclude that the decision of the judge should be set aside for material error of law.

12. Ordinarily in a case such as this it would be appropriate to re-make the decision in the Upper Tribunal. However, I am persuaded to exercise my discretion to remit the case to the FtT on the footing that:

    (i) it is now over eighteen months since the judge's decision and the appellants should have the opportunity through one of the parents (if not the third appellant as well) to update the children's and family's circumstances;

(ii) assessment of the fourth appellant's autism requires independent evidence updating the nature and extent of the professional health services he has been receiving in the UK.

13. To conclude:

The decision of the FtT Judge is set aside for material error of law.

The case is remitted to the FtT (not before Judge Parkes).

An anonymity direction is made.

**Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 3 January 2019

Dr H H Storey
Judge of the Upper Tribunal