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

**Appeal Nos: IA/00153/2016**
**IA/00155/2016**
**IA/00157/2016**
**IA/00159/2016**

**THE IMMIGRATION ACTS**

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| **Heard at: Field House** | **Decision and Reasons Promulgated** |
| **On: 20 November 2017** | **On: 05 December 2017** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MAILER**

**Between**

**MS DAISY GAKUNGA NDIRUI**
**MR AMOS MWANGI**
**MASTER DANIEL GACHIENGU MWANGI**
**MASTER SAMUEL NDIRUI MWANGI**
(NO ANONYMITY DIRECTIONS MADE)

Appellants

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation**

For the Appellants: Mr A I Corban, Corban Solicitors
For the Respondent: Ms Z Ahmad, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants are nationals of Kenya, born on 20 April 1983, 25 March 1977, 22 June 2008 and 11 August 2010 respectively. The first and second appellants are the parents of the third and fourth, both of whom were born in the UK.

2. They appeal with permission against the decision of the First-tier Tribunal Judge, promulgated on 7 October 2016, dismissing their appeals against the respondent's decision dated 18 December 2015 refusing their human rights applications for leave to remain in the UK.

3. An application for permission to appeal to the Upper Tribunal was initially refused. Following judicial review proceedings in the High Court, Mr Justice Mostyn quashed that refusal. Consequent upon that decision the Vice-President of the Upper Tribunal granted permission to appeal on 12 September 2017.

4. In quashing the decision to refuse permission to appeal, Mr Justice Mostyn observed that it was strongly arguable that mere lip service had been paid to the key consideration of the best interests of the children. It could be said that to make an analogy with an internal relocation to a Welsh speaking part of North Wales 'is absurd'.

5. Mr Corban, who also represented the appellants before the First-tier Tribunal, relied on his reasons for appealing.

6. He submitted that the appellants' "first child" - the third appellant - qualified for leave to remain pursuant to paragraph 276ADE(1)(iv) of the Rules. He had been in the UK for at least seven years since the date of his birth at the time of the hearing and the decision. In fact however, the third appellant was born on 22 June 2008 and the application on human rights grounds was made on 23 March 2015.

7. The requirement to be met by an applicant for leave to remain on the grounds of private life in the UK pursuant to paragraph 276ADE (1)(iv) are that at the date of application, the appellant is under 18 and has lived for at least seven years in the UK.

8. At the date of application, however, the third appellant had not lived here for seven years.

9. Nevertheless, he was a qualifying child pursuant to s.117B (6) of the Nationality, Immigration and Asylum Act 2002.

10. Mr Corban submitted that the Judge has referred to "general matters only" and did not undertake a properly informed evaluation of all the material facts and considerations in assessing the third appellant's best interests.

11. In the reasons for appealing dated 11 February 2017, it was contended at paragraph 4 that the Judge did not mention paragraph 276ADE(iv) let alone address the requirements. The Judge accordingly did not follow the guidance from PD and Others (Article 8 – Conjoined Family Claims) v Sri Lanka [2016] UKUT 108 (IAC). A predictive and evaluative assessment in relation to the child and the entire family was required within Article 8 and s.117B(6) of the 2002 Act.

12. Mr Corban submitted that the Judge did not engage with the "evidential aspects regarding the child's best interests". The third appellant was eight years and three months at the date of decision. He had lived here since birth. There was no indication that the Judge gave "anxious scrutiny" to that child's best interests.

13. He referred to his skeleton argument before the First-tier Tribunal in which he contended that on the basis of the third appellant's welfare and circumstances the appeal must be allowed. He referred to various decisions from the Tribunal including EA (Article 8 – best interests of the child) Nigeria [2011] UKUT 315 and

MK (Best interests of child) India [2011] UKUT 00475. An overall assessment is required. Consideration of the best interests of the child could not be reduced to a mere 'yes or no' answer as to whether his removal and/or the relevant parent was or was not in the child's best interests.

14. In considering a child's education, regard must be had not just to the evidence relating to any short term disruption of current schooling that will be caused by any removal but also to that relating to the impact on a child's educational development, progress and opportunities in the broader sense.

15. Mr Corban referred to paragraph [13] of the First-tier Tribunal decision. The Judge had earlier noted that the children are not at a crucial stage of development and there is nowhere to show that they should not be moved or that they could not cope with such a move. He stated that to put this into context, they could move within the UK with the adults to obtain work. This would involve the children changing schools, making new friends and adapting to a new area and to a different school regime. They could for example move to a Welsh speaking part of North Wales and, child protection issues aside, there is no mechanism by which this could be prevented by the children. Families with children move all the time and the suggestion that moving is to be avoided and a last resort cannot be maintained as an argument.

16. He submitted with respect to the third appellant that ties outside the family are also important matters to be assessed as part of private life. The conclusion that it was reasonable for the third appellant to be removed did not reflect the facts.

17. On behalf of the respondent Ms Ahmad accepted that the wording at [15] where the Judge stated that the requirement of unreasonableness has to require something more than the life that would be expected was not appropriate or correct.

18. She referred to the decision in AM (S.117B) [2015] UKUT 260. At [39] the Upper Tribunal, presided over by the Vice President, stated that there was no reason to infer that any interruption to the education of the elder child upon return to Malawi would be any more significant than that faced by any child forced to move from one country to another by virtue of the careers of their parents. Nor should the difficulties of a move from one school to another become unduly exaggerated. It would be highly unusual for a child in the UK to complete the entirety of their education within one school. The trauma, or excitement, of a new school, new classmates and new teachers is an integral part of growing up. In too many appeals the First-tier Tribunal is presented with arguments whose basic premise is that to change a school is to submit a child to a cruel and unduly harsh experience. Indeed the eldest child of this family has been required to move schools and move from one end of the UK to the other, as a result of the decision of her parents. The evidence does not suggest she suffered any hardship or ill effect from so doing.

19. Ms Ahmad also referred to MA (Pakistan) and others [2016] EWCA Civ 705. Lord Justice Elias stated at [22] that the crucial issue in these cases is how the Court should approach the question of reasonableness. He was referring to s.117B(6) of

the 2002 Act. The answer to the question as to what factors a Tribunal is entitled to take into account when applying the reasonableness test must be the same for paragraph 276ADE.

20. She referred to [45] of MA (Pakistan) where the Court noted that s.117C(5) is in substance a free standing provision in the same way as s.117B(6) and even so the Court in MM (Uganda) held that wider public interest considerations must be taken into account when applying the "unduly harsh" criterion. This must be equally so with respect to the reasonableness criterion in s.117B(6). Accordingly the only significance of s.117B(6) is that where the seven year rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted.

21. Ms Ahmad referred to the contention that it would be unreasonable to expect the third appellant to leave the UK having regard to the fact that he had been here since birth; has no experience of life in the home country; that he speaks only English and would have to learn a new language in Kenya; and that the only culture he has been exposed to is in the UK. He would have to adapt to a new culture in Kenya which will likely slow down his educational progress. His education would be severely disrupted because of the differences in the systems of education.

22. She submitted however that the Judge did look at these matters at [9]. He also set out the appellant's contentions relating to problems that they would face in Kenya. This included the education system and the fact that the children knew nobody in Kenya and it would be a new life. He also assessed the child's schooling in the UK at [12].

23. He had regard to the first appellant's assertion that she had spent all her adult life in the UK. He noted that she was 19 when she came and her husband was 25. They are now 33 and 39. Her parents were in Kenya. Her mother had dementia and they felt it would be difficult to adapt to a new life in Kenya. It would be like taking them to a new environment and they would be starting again. Medically the appellants "were all okay" [11].

24. In reply Mr Corban submitted that the Judge was reading a different requirement into the test of reasonableness and the best wishes of the child. He did not approach the matter properly. Findings should have been made in respect of the facts relating to the children.

25. He submitted that their findings of fact must be made when considering the best interests of the child under Article 8. It is only after such findings, that that s.117B (6) is applied. It is difficult to see what the Judge in this case considered. There has been no engagement with the circumstances relating to the best interests of the children.

**Assessment**

26. The First-tier Judge noted that the appellants had to show that the requirements of the Rules are made out on the balance of probabilities. The relevant date for consideration of the facts was the date of hearing.

27. He referred to the evidence as well as submissions as set out in the record of proceedings which he said were referred to where relevant in his decision. In the record of proceedings it is evident that the Judge referred to the evidence of the first appellant which she had set out.

28. The Judge noted at [4] that the grounds of appeal contended that the decision did not accord with paragraph 276ADE of the Rules and was Wendesbury unreasonable. The consequences would be disproportionate. He referred to the changes to the rights of appeal as at the date of decision. Applications of this type are governed by Appendix FM and paragraph 276ADE of the Rules. The best interests of the children are a primary consideration under s.55 of the 2009 Act which are to be weighed in the balance with other relevant factors when assessing proportionality. He referred to the provisions of s.117B of the 2002 Act [5].

29. He set out the immigration history of the first appellant from paragraph [6]. She entered the UK as a student on 28 October 2002 with leave to remain until October 2006. Extensions were granted until 30 September 2010. Since then she made a number of applications between 2010 and 2013. She was given an in country right of appeal in 2010 and 2013 which were exercised.

30. He referred to the appeal heard by Judge Astle where he dismissed the appeals in a decision promulgated on 10 December 2013. He noted that following Devaseelam, the decision of Judge Astele is the starting point – [6-7].

31. He noted the findings set out in Judge Astle's decision at [7]. The appellant did not qualify under paragraph 276ADE and in respect of the Article 8 claim the best interests of the children were to remain in the family unit and it would be proportionate to return them to Kenya. That decision was not challenged successfully and the appellants continued to remain illegally in the UK.

32. He noted that although there are positive findings made by Judge Astle, it was not to their credit that they had remained in the UK after failing in their various appeals. Other than a preference to live in the UK rather than Kenya, there was no obvious reason why they have not complied with their obligation and declared intention in the student application to return to Kenya [8].

33. The Judge referred to Mr Corban's reliance on cases set out in [10] including PD and others, supra, EV (Philippines) and MA (Pakistan). He noted that the position of the child is not to be considered in isolation from their parents' immigration history. Their best interests are, where possible, to be brought up in the family unit with their parents and clearly living here without his parents was not an option [10].

34. He set out the first appellant's evidence relating to problems they would face in Kenya. He noted her claim that she had spent all her adult life in Kenya and that the children had never lived anywhere else. Her parents were there but her mother had dementia. It would be difficult to adapt to life there. The appellant was 19 when she came and her husband 25. She had accordingly been here for 14 years at the date of the appeal.

35. It was noted that in Kenya, teaching is in English. She did not think that the education system was better in the UK and it was a question of lifestyle. The children knew nobody in Kenya and it would be a new life. It would be like taking them to a new environment and they would be starting again. Medically, however 'they were all okay' [11].

36. The Judge further noted that the children go to school where they are making progress and have developed friendships. In that respect there were documents relating to the children's education. Samuel is in a receiving school at [ ] and was four years old. There is a progress summary at pages 26-40.

37. There is also an annual school report in respect of Daniel by [ ] for 2012/13. He started school in September 2012. He has developed since he started. He is now more focused. There are reports both for Year 1 and Year 2. He achieved 100% school attendance between September 2015 and July 2016. He was accordingly in Year 3 during 2015 and 2016. He was reported to have made good progress (page 53).

38. The Judge referred to evidence of their education and life in the UK as set out in the bundle [12]. The evidence was not unusual. Nor were they at a crucial stage of development. There was no evidence to show that they should not be moved or that they could not cope with a move [12]. I note that this finding has not been challenged. It has simply been contended that the Judge has not undertaken a predictive and evaluative assessment in relation to the child and the entire family.

39. It is in that context that the Judge noted that relocation does occur even within a country and can entail dislocation and a need to adapt. It is difficult to see how that can be an objection to moving internationally, particularly when the family would be going on to where the adults grew up and where there are family members and it was the country of their nationality [14].

40. At [15] the Judge considered that if the child only had to show that they were attending school and doing well, making friends and having a social life with others, as would be expected, the test of reasonableness would add nothing and any and every child would succeed. There needed to be something within the evidence showing that the child's circumstances are such that the dislocation of removal would be unreasonable. That had to be in the context of moving as a family with the support of the parents [15].

41. He noted at [17] that in this case the children might do better in the UK but that did not answer the question that this case raises. There was nothing to show that the circumstances of the children are out of the ordinary. There was no evidence to show that with the support of their parents they would not be able to cope with the ordinary consequences of relocation or that relocation to Kenya could not be achieved.

42. The best interests of the children are to remain in the family unit. That could be achieved with the family going to Kenya and there is no evidence to show that that cannot, or should not happen [17].

43. He found that those conclusions meant that the family cannot succeed under paragraph 276ADE. There was nothing in the appellant's circumstances that would justify leave being granted outside the Rules. The family can return to Kenya and use the education and skills obtained in the UK to re-establish themselves [19].

44. I do not accept from this analysis that this Judge has given mere lip service to the consideration of the interests of the children. Nor is the analogy at [13] of the decision in any way "absurd."

45. I accordingly find that the Judge has adopted a correct approach to the issues raised in the appeal. He has properly considered the best interests of the children.

46. I am satisfied that the Judge was aware of the law which he was applying and properly concentrated on the issue as to whether it would be reasonable for a qualifying child to be removed.

47. The relevant statutory provisions were referred to and were applied. It was open to the Judge to reach the conclusions that he did, and for the reasons given.

**Notice of Decision**

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall accordingly stand.

No anonymity directions are made.

Signed Dated: 30 November 2017

Deputy Upper Tribunal Judge C R Mailer