Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/09397/2015
HU/09408/2015
HU/09411/2015
HU/09415/2015
HU/09420/2015

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 16 January 2018	**On 15 February 2018**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A B O
R K
K O B
K A B
O W B
(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr I Richards, Senior Home Office Presenting Officer
For the Respondents: Mr Z Nasim instructed by Legal Rights Partnership

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the respondents (three of whom are children). A failure to comply with this direction could lead to Contempt of Court proceedings.

2. Although this is an appeal brought by the Secretary of State, I will for convenience refer hereafter to the parties as they appeared before the First-tier Tribunal

Background

3. The five appellants (whom I will refer to respectively as A1, A2, A3, A4 and A5) are all citizens of Uganda. They were born respectively on 29 October 1973, 29 November 1973, 8 July 2009, 26 September 2011 and 15 May 1999. A1 and A2 are husband and wife. A3 and A4 are their children who were both born in the UK. A5 is the child of A2 as a result of a previous relationship.

4. A1 arrived in the UK on 24 January 2000 as a student. He was granted leave to remain as a student which was periodically extended until 30 April 2009.

5. A2 entered the UK on 3 October 2003 as a Tier 4 Student with valid leave until 30 September 2005. That leave was subsequently extended until 31 October 2007. Between October 2007 and September 2008, A2 returned to Uganda for a nine-month period as her son, A5 (who was living in Uganda) was experiencing difficulties in school. A2 returned to the UK as a dependant of A1 on 11 September 2008 and was granted leave in line with A1 until 30 April 2009.

6. On 8 July 2009, A3 was born in the UK. He is now 8 years and 6 months old.

7. On 12 June 2009, A1 (together with A2 and A3 as his dependants) applied for further leave, albeit out of time, as a Tier 4 Student. Because of difficulties over his sponsor's licence, that application remained undetermined by the Secretary of State for some time. On 30 March 2010, A1, together with A2 and A3, made an application for leave outside the Rules under Art 8 of the ECHR. On 28 July 2010, the Secretary of State wrote to A1 pointing out that as he had made two applications, his student application had been "voided" on 21 July 2010 and consideration was being given to his application outside the Rules.

8. On 28 July 2010, the Secretary of State refused A1, A2 and A3 leave to remain outside the Rules. There was no right of appeal against that decision and removal decisions were served on 19 June 2012.

9. A1, A2 and A3 then appealed to the First-tier Tribunal. That appeal was heard by Judge Seifert on 20 August 2012. In a determination promulgated on 19 September 2012, he allowed the appeals of A1, A2 and A3 on the basis that their removal would breach Art 8 of the ECHR.

10. Thereafter, on 23 November 2012 A1, A2 and A3 were granted 30 months' leave to remain until 23 May 2015.

11. A4, who had been born in the UK on 26 September 2011, was also granted leave to remain in line with A1, A2 and A3 until 23 May 2015 although he was not a party to the appeal.

12. In February 2015, A5, who is A2's child by a previous relationship, entered the UK with entry clearance and was granted leave to remain in line with A1, A2, A3, and A4 until 23 May 2015.

13. On 22 May 2015, the appellants made applications for further leave to remain on human rights grounds. On 16 October 2015, those applications were refused by the respondent.

The Appeals

14. The appellants appealed to First-tier Tribunal. On 15 February 2017, Judge Rowlands allowed each of the appellants' appeals under Art 8 of the ECHR.

15. On 8 September 2017, the Secretary of State was granted permission to appeal by the First-tier Tribunal (Acting RJ Appleyard).

16. The appeal initially came before me on 7 November 2017. In a decision sent on 5 December 2017, I concluded that Judge Rowlands had erred in law in allowing the appellants' appeals under Art 8 and I set aside his decision. My reasons are fully set out in my decision dated 1 December 2017 and are not repeated here.

17. Having set aside the decision, I adjourned the appeals in order for a resumed hearing to take place before the Upper Tribunal in order to remake the decision under Art 8.

The Resumed Hearing

18. At the resumed hearing, the appellants were represented by Mr Nasim and the Secretary of State was represented by Mr Richards.

19. The appellants relied upon the evidence contained in the appeal bundle submitted at the hearing before Judge Rowlands. In addition, Mr Nasim sought to rely upon a recent report concerning A5 dated 28 December 2017 from a registered Speech and Language Therapist, Ms Clare O'Driscoll. I admitted that document, without objection from Mr Richards, under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended).

The Submissions

20. On behalf of the appellants, Mr Nasim relied upon his skeleton argument which he amplified in his oral submissions.

21. In summary, Mr Nasim submitted that the appellants' removal would be a disproportionate interference with their private life in the UK. He submitted that the starting point was Judge Seifert's decision in 2012 that their removal would be disproportionate and had led to the grant of 30 months' leave to each of the appellants. The appellants' position, he submitted, had only strengthened since then. He submitted that, applying s.117B(6) of the Nationality, Immigration and Asylum

Act 2002 ("the NIA Act 2002"), it was not reasonable to expect A3 (a "qualifying child") to leave the UK and consequent it was not in the public interest to remove his parents A1 and A2 and, of course, A4 and A5 could not then be removed either. More generally, however, Mr Nasim submitted that striking the 'fair balance' required in assessing the proportionality of removing the appellants as a family, the impact upon all of the appellants was such as to make removal disproportionate.

22. In support of his submissions, Mr Nasim relied upon Judge Seifert's recitation of the evidence (which had been accepted) and his findings at [25]–[40] of his determination.

23. Mr Nasim relied upon the residence of A1 and A2 in the UK for eighteen and fourteen years respectively. He relied upon their integration in the UK, together with that of their children, through their church and through the children's schooling and friendships. A2 was also employed working with children and young adults with severe autism.

24. Mr Nasim placed reliance upon the fact that A3 and A4 were born in the UK and had been living in the UK respectively for eight and a half years and six years and two months. Both had only been to Uganda for one short period of three weeks in 2012.

25. Mr Nasim also placed reliance upon the circumstances of A5. Although a young adult, he was a person who suffered from significant learning difficulties, was probably on the Autistic Spectrum and suffered from Attention Deficit Disorder (ADD). Mr Seifert placed reliance upon the witness statement of A1 at pages 1-8 of the bundle and of A2 at pages 9-10 of the bundle. In addition, he relied upon a number of medical reports relating to A5 at pages 15-21 of the bundle and Ms O'Driscoll's report dated 28 December 2017. He also relied upon a letter of support from the respective college and school of A5 and of A3 and A4 at pages 22-23 of the bundle.

26. As regards s.117B(6), Mr Nasim submitted that as A3 is a "qualifying child", applying the Court of Appeal's decision in R (MA (Pakistan) and Others) v SSHD [2016] EWCA Civ 705 there had to be "strong" or "powerful reasons" not to grant leave. Mr Nasim submitted that it was in A3's best interest to remain in the UK and that there were no strong or powerful reason which would justify requiring him to leave the UK and not be granted leave. As a consequence, Mr Nasim submitted that each of the appellants' appeals should be allowed.

27. More generally, he submitted that taking the evidence as a whole and addressing the ultimate issue of striking a fair balance between the individuals' interests and the public interest, the strength of the public interest was not such as to outweigh the impact upon the appellants as a family if removed to Uganda. Mr Nasim invited me to take into account Judge Seifert's decision in 2012 and, in his skeleton argument, made reference to the respondent's IDI Instructions Chapter 9 of Section 1 which cautioned against refusing applications where, previously, discretion to depart from

the Rules had previously been exercised. He also relied on the fact that the appellants had, in fact, been encouraged in their expectation of remaining in the UK, not only by the grant to them of 30 months' leave, but also the Secretary of State's decision to allow A5 to enter the UK and be granted leave in line with them.

28. On behalf of the respondent, Mr Richards accepted that s.117B(6), if it applied, was a 'trump card' in that the public interest would not require the removal of A1 and A2. However, Mr Richards invited me to find that it would not be unreasonable for A3 to be expected to leave the UK and live in Uganda. Although he had been here for eight and a half years, Mr Richards relied on the fact that he was not in secondary education. He submitted that the later that the seven-year period was in a child's life, the more it was in favour of that child to respect of his education in this country. He submitted that there was nothing unreasonable in removing A3 when he was in primary education and would be returning to Uganda with his whole family.

29. Looking at Art 8 more widely, Mr Richards submitted that the public interest could only be outweighed if there were "compelling circumstances" so as to produce an unjustifiably harsh consequence. He accepted that the appeals of A1, A2 and A3 had been allowed in 2012 and that they had subsequently been granted 30 months' leave which had arguably encouraged them to strengthen their roots in this country. That, he acknowledged, had further been encouraged arguably by the admission of A5 in 2015. Mr Richards invited me to have regard to the determination of Judge Seifert and any strengthening of the appellants' position subsequently in respect of Art 8. He invited me to weigh the whole of the evidence and give appropriate weight to the public interest. He submitted that it was a matter for my judgment whether or not the factors relied upon by the appellants amounted to "compelling circumstances" so as to make their removal disproportionate.

The Law

30. In these appeals, the appellants rely upon Art 8 outside the Rules. Mr Nasim did not suggest, either in his skeleton argument or in his oral submissions, that the appellants have any claim under the Rules whether based upon their family or private life in the UK. His focus was entirely upon Art 8 outside the Rules.

31. In that regard, I must approach the decision in a structured way applying the five-stage test in R (Razgar) v SSHD [2004] UKHL 27 at [17].

32. The appellants rely, in effect, upon an interference with their private life if removed to Uganda. As they will be removed as a family, there will be no interference with their family life as such.

33. The crucial issue, upon which both parties' representatives focused in their submissions, is that of proportionality. That issue requires a fair balance to be struck between the public interest and the rights and interests of the appellants protected by

Art 8.1 (see Razgar at [20]). In R (MM and Others) (Lebanon) v SSHD [2017] UKSC 10, the Supreme Court reminded us at [43] that the "central issue" is:

> "Whether a fair balance has been struck between the personal interests of all members of the family in maintaining their family [or private] life … and the public interest in controlling immigration".

34. I must take into account the "best interests of the children, namely A3 and A4 as a primary, but not determinative, consideration (see ZH (Tanzania) v SSHD [2011] UKSC 4 and Zoumbas v SSHD [2013] UKSC 74 at [10]).

35. In carrying out that balancing exercise in reaching a finding on proportionality, I must "have regard" to the consideration set out s.117B of the NIA Act 2002. S.117B is in the following terms:

> "**117B Art 8: public interest considerations applicable in all cases**
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to –
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

36. The public interest, including that reflected in the fact that the appellants cannot meet the requirements of the Rules, is entitled to "considerable weight" (see MM at [75]; and also Hesham Ali v SSHD [2016] UKSC 6 at [46] *et seq* and R (Agyarko and Another) v SSHD [2017] UKSC 11 at [46]–[48]. The search is for "sufficiently compelling" circumstances to outweigh the public interest because the refusal of leave would result in "unjustifiably harsh consequences" (see Agyarko at [48] and [70]).

37. In relation to s.117B(6), the proper approach was set out by the Court of Appeal in MA (Pakistan). First, the Court of Appeal recognised, that if s.117B(6) applied, because it would be unreasonable to expect a qualifying child to leave the UK, then the parents' removal would not be in the public interest and, as a result, their removal would breach Art 8 of the ECHR. Secondly, in determining whether it would "not be reasonable to expect" such a child to leave the UK, not only their circumstances must be taken into account, but also the public interest must be factored in. The Court of Appeal approved the approach in its earlier decision of MM (Uganda) v SSHD [2016] EWCA Civ 450 when considering, in the context of a deportation case, s.117C(5) and the requirement that the affect of deportation on a partner or a child must be "unduly harsh" in order for the public interest not to require deportation of a person sentenced to a period of imprisonment of less than four years. At [45] in MA (Pakistan), Elias LJ (with whom King LJ and Sir Stephen Richards agreed) stated:

> "In my judgment, if the court should have regard to the conduct of the applicant in any other matters relevant to the public interest when applying the 'unduly harsh' concept under Section 117C(5), so should it when in considering the question of reasonableness under Section 117B(6)."

38. However, in dealing with the application of s.117B(6) involving a "qualifying child" (whether as a British citizen or who has been resident in the UK for at least seven years), Elias LJ recognised (at [46]):

> "After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives would be more on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interest will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment."

39. Finally, as indeed Elias LJ pointed out, a child's "best interest" are not determinative of whether it would be reasonable to expect the child to leave the UK but are a significant factor such that there must be "powerful" or "strong" reasons why leave should not be granted. In other words, in order to show that it would be reasonable to expect the child to leave the UK.

Discussion

40. I turn then to apply the five-stage in Razgar.

41. First, I accept that the appellants' removal to Uganda will interfere with their private life in the UK sufficiently seriously to engage Art 8.1. I accept that all the appellants are imbedded in the UK. A1 has lived in the UK for eighteen years and A2 has lived here for fourteen years. A3 and A4 (who were each born in the UK) have lived respectively for eight and a half years and six years and two months. A5 has been in the UK since 2015. A1 was previously a student and is now himself employed as a driver for Uber. A2 is employed at a special boarding school for children and young adults with severe autism and is currently pursuing a Level 3 Diploma in Residential Child Care, sponsored by her employer. There is supporting evidence concerning A1 and A2's involvement in their local community and church and of the involvement of A3 and A4 at school and of A5 at his college where, as a result of his severe learning difficulties, it is readily apparent (not least from the recent report of Ms O'Driscoll) that A5 had significantly benefited from his attendance at college.

42. Mr Richards did not seek to argue the contrary and I accept that if the appellants were removed to Uganda there would be a sufficiently serious interference with their private life in the UK such that Art 8.1 is engaged.

43. As regards Art 8.2, the respondent's decisions are in accordance with the law and the appellants' removal is for a legitimate aim, namely the maintenance of effective immigration control (see s.117B(1) of the 2002 Act) as none of the appellants have any basis under the Immigration Rules to remain in the UK.

44. The crucial issue is, therefore, whether the appellants' removal is justified as being a proportionate interference with their Art 8 rights. That, as I have already pointed out, requires a balancing of their individual interests and rights against the public interest in effective immigration control.

45. In reaching my decision I bear in mind that the appellants do not argue they can succeed under any relevant 'Art 8 rule', in particular para 276ADE. A1 and A2 do not, therefore, argue that there are "very significant obstacles" to their integration in Nigeria. Of course, and I did not understand this to be disputed, the terms of para 276ADE(1)(iv) mirror those of s.117B(6) as applied to A3.

46. I must "have regard" to the considerations listed in s.117B of the NIA Act 2002. It was not suggested before me that the particular aspects of the public interest set out in s.117B(2) and (3) were engaged. It is not suggested that the appellants are not able to speak English. Further, there is evidence, which has not been challenged, that A2 is employed earning £20,000 (see para 15 of A1's witness statement) and also that A1 is a self-employed taxi driver for Uber. It was not suggested before me by Mr Richards, on behalf of the Secretary of State, that the appellants were other than "financially independent". But, of course, s.117B(2) and (3) can give no positive

impetus to the appellants' claim: at best they are neutral (see Rhuppiah v SSHD [2016] EWCA Civ 803 at [59] and [61]).

47. Turning now to s.117B(4) and (5), "little weight" is to be given to private life formed at a time when an individual is either unlawfully in the UK or his or her "immigration status is precarious". I have already set out the immigration history of the appellants, and particularly of A1 and A2 above. A1 has been in the UK since January 2000. His leave as a student expired on 30 April 2009. There have been a number of gaps, albeit relatively brief in length, in his periods of lawful leave which are set out at [44] of Judge Seifert's determination, namely between 31 January 2003 and 4 February 2003; 10 February 2005 and 25 February 2005; and 28 February 2006 and 25 April 2006. After 30 April 2009, when A1's leave as a student expired, he was next granted leave with effect from 23 November 2012 until 23 May 2015. His subsequent in-time application – the subject of these appeals – resulted in his leave continuing under s.3C of the Immigration Act 1971.

48. A2 has been in the UK since October 2003 but with a break when she returned to Uganda between October 2007 and 2008. Her leave, in effect, reflects that of A1.

49. There have, therefore, been times when A1 and A2 were not in the UK lawfully and, to that extent, it can be said that their private life was built up, at least in part, during periods to which s.117B(4) applied and, at least in principle, at other times their status was "precarious" such that s.117B(5) applied. However, it is recognised that the application of s.117B(5) (and also s.117B(4)) has to be context specific involving a "notional sliding scale" depending upon the circumstances (see, Treebhawan and Others (NIAA 2002 Part 5A – compelling circumstances test) [2017] UKUT 13 (IAC) at [45] and Rhuppiah v SSHD [2016] EWCA Civ 803). There are, in my judgment, good reason to attach significant weight to the private life of A1 and A2 in the UK. First, Judge Seifert accepted A1's explanation for the breaks in his continuous lawful residence set out at [46] *et seq*. The gaps were, in general, small and in a number of cases arose from initially invalid applications being made rather than initially out of time applications to extend leave. Further, shortly after A1's leave expired in April 2009, he applied in June 2009 for further leave as a student which remain unresolved because of problems with the licence of his sponsor college but which in March 2010 resulted in a new (or varied) application for leave under Art 8 which was ultimately successful, albeit that it required an appeal to the First-tier Tribunal and leave was only granted to the appellant thereafter from November 2012. That grant of leave of 30 months was, of course, in response to the new (or varied) application made two years and eight months earlier. Consequently, although there is a gap in the appellant's leave between April 2009 and November 2012, it is only right to recognise that the ultimate grant of leave stemmed from an application made initially in June 2009 and, in its ultimate form, in March 2010.

50. Secondly, all the appellants have been granted 30 months' leave outside the Rules under Art 8 and, I accept, this has created an expectation that their stay in the UK will be recognised by the UK Government. That expectation was enhanced by the

admission of A5, despite not complying with the Immigration Rules, on a compassionate basis in February 2015 as a dependant of A2. A1 and A2 have, in my judgment, effectively been led to believe that their family circumstances merited them being granted leave to remain in the UK. Those circumstances since Judge Seifert's decision and the grant of leave that followed, have not weakened but rather have been enhanced as the appellants have further set down roots and integrated into life in the UK. In those circumstances, it is right in my judgment to give significant weight to the private life the appellants have in the UK when considering the impact upon them of removal.

51. The positions of A3, A4 and A5 are, in my judgment, no worse and, indeed, it would be wrong to count against those appellants, given their ages and, in the case of A5, his learning difficulties that their private life was established and developed during any periods without leave (see Akinyemi v SSHD [2007] EWCA Civ 236) or whilst they had only temporary leave (see MA (Pakistan) at [103]).

52. I now turn to consider s.117B(6) upon which Mr Nasim placed considerable reliance. That requires me to determine whether it has been established that it would be reasonable to expect A3 to leave the UK. It is accepted that A3 is a "qualifying child" as a result of having been resident in the UK for at least seven years (see s.117D(1) of the NIA Act 2002) that A1 and A2 each have a "genuine and subsisting parental relationship" with A3.

53. A3 has lived in the UK for eight and a half years since his birth. He attends school and his progress there is attested to in the letter from his head teacher dated 18 November 2016 (at page 23 of the bundle). It was not suggested before me that A3 has not integrated into life in the UK by attending school and through friendships. He is also involved with the family's church and has been baptised and is close to his godparent (see A1's statement at para 11, page 4 of the bundle).

54. The evidence, which I accept, is that A3 has only visited Uganda for a period of three weeks in 2012. He has extended family in Uganda as set out in para 16 of A1's statement. His paternal grandfather is deceased and his maternal grandmother lives in the USA. However, he has a paternal uncle who runs a small fish farm and grows coffee beans who is, himself, married with two children. On the maternal side, he has a maternal grandmother and two uncles who are subsistence level farmers. The evidence is, and I accept it and it is unchallenged, that the appellants will have no home to offer their children and no savings to take with them to assist them (see para 17 of A1's statement) at page 6 of the bundle). I also accept the evidence (at para 17 and 18 of A1's statement at page 6 of the bundle) that A3 will have to adjust to a "completely new education system" although I bear in mind that he is at a relatively young age and is in primary school. I accept, as Mr Richards submitted, that the impact upon a child will be greater as he or she develops in age.

55. I also accept that the employment prospects of A1 and A2 are necessarily speculative in Uganda. There will, in my judgment undoubtedly be a damaging transition for the family, including A3.

56. Whilst I accept that it is generally in the best interests of a child to remain with his or her parents, in this context by returning with them to Uganda, I am also satisfied on the basis of all the circumstances I have set out above that the impact upon A3 of being uprooted from the UK and return to Uganda which, for intents and purposes is a foreign country to him, would not be in his best interests. That is a relevant but not determinative factor in assessing whether it would be reasonable to expect him to leave the UK. That taken with the length of his residence in the UK, requires as the Court of Appeal pointed out in MA (Pakistan), "strong" or "powerful reasons" to justify a conclusion that it would be reasonable for him to leave the UK.

57. I must consider the public interest and balance it against the impact upon A3 of being removed. Here, the public interest is engaged in that none of the appellants (but in particular A1 and A2) have any basis for remaining in the UK under the Immigration Rules. That said, however, their immigration history is important as I have set out above. A1 and A2 have, as I have already pointed out, been granted 30 months' leave on the basis of their circumstances and A5 was allowed to join them despite not meeting the entry clearance requirements under the Rules. They have, in effect, been led to believe that their circumstances justified them remaining in the UK as a family. Although A1 (and A2 as a result) has not always been lawfully in the UK, his lengthy residence since 2000 has, by and large, been with leave. The breaks in his leave have been brief in duration as I set out above. Equally, the last grant of leave was as a result of an application initially made in June 2009, even if it was only varied to an application under Art 8 in March 2010. Judge Seifert accepted A1's evidence concerning the evolution of that application, initially as a student and the consequent delay in determining it by the Secretary of State because of issues over the sponsor's licence, and it was not suggested before me that the position was otherwise. Consequently, although there appears, on the face of it, it had been a lengthy period when A1 did not have leave between April 2009 and November 2012, in fact the grant of leave recognised (as a result of a successful appeal) the merits of A1's application for leave at least as varied in March 2010.

58. It was not suggested before me that the public interest had any content beyond effective immigration control. There is, for example, no suggestion of any public interest based upon offending or deliberate evasion of immigration control in the UK.

59. Bearing in mind the approach in MA (Pakistan) which I set out above, I am satisfied that the impact upon A3 of being uprooted from the UK is sufficiently significant to outweigh the public interest. I find that it would not be reasonable to expect A3 to now leave the UK.

60. In the light of that finding, I am satisfied that s.117B(6) applies and that the "public interest does not require" the removal of A1 and A2 who are A3's parents.

61. If A1 and A2 (together with A3 as para 276ADE(1)(iv) applies) cannot be removed, it was not suggested before me that it was proportionate to remove A4 and A5.

62. I do, however, go on to consider the proportionality issue more generally.

63. In my judgment, when the circumstances of A4 and, in particularly, A5 are factored in, it is clear that there are compelling circumstances giving rise to unjustifiably harsh consequences sufficient to outweigh the public interest. Particularly important, in my judgment, is the position of A5. It is clear from all the documentation that A5 has severe learning difficulties and is probably on the Autistic Spectrum and suffers from ADD. The evidence is that he had difficulties in mainstream schools in Uganda where no provision for special education needs is made (see A2 statement at page 10 of the bundle). That evidence is not challenged before me. The evidence dating back to 2015, when A5 first entered the UK, is at pages 15-22 of the bundle, including letters from healthcare professionals and his college which he attends. That background is further amplified in the recent report by Ms O'Driscoll dated 28 December 2017. A5 plainly has communication and other difficulties in social contexts. The report states that A5:

> "presents as a young man with complex communication needs over and above his learning difficulties."

64. The report continues that A5's ability: "to express himself verbally is very limited in most circumstances."

65. Ms O'Driscoll continues that A5's

> "responses and observations of those working with him suggest that there may be psychological factors impacting on his communication that means he would benefit from further psychological assessment. [A5] is also likely to need support going into the future to maximise his opportunities for employment and socialising."

66. His wellbeing has improved as a result of attending the college (see A2's statement at page 9 of the bundle and a letter from the college at page 22 of the bundle). If he were to return to Uganda, even with family, I am satisfied that this would have a deleterious effect upon his education and wellbeing. It was those factors which led A2 to return to live in Uganda between October 2007 and September 2008 and subsequent to seek entry clearance for A5 to live in the UK. That entry clearance was, of course, subsequently granted even though A5 could not satisfy the requirements in the Rules as A2 was not settled in the UK. It is a reasonable inference that the needs of A5 were at the heart of the Secretary of State's decision to grant leave outside the Rules. As A5 is no longer a child, it is not strictly necessary to take into account his best interests as such. However, his interests are relevant as

reflecting on the impact upon him and his private life if he were to return to Uganda. I am satisfied that those interests would not be served by that occurring.

67. Carrying out the balancing exercise, Mr Nasim invited me to take Judge Seifert's decision as a 'starting point'. I do so to the extent that it represents an unassailable conclusion that in 2012 the removal of A1, A2 and A3 would breach Art 8 of the ECHR.

68. I accept Mr Nasim's submission that the position of the family, now taking into account also of A5, has only strengthened since that time. By contrast, the public interest had grown no stronger in fact.

69. Taking the circumstances as a whole, as I have set out above, the removal of the appellants is, in my judgment, not proportionate. I bear in mind the "best interests" of A3 and A4 and the impact upon A5 of removal. I also bear in mind the circumstances which the family, as a whole, would face in Uganda where, despite having extended family, they have no home and it is likely that their circumstances would be significantly adversely impacted upon. I bear in mind the circumstances, in particular, of A1 and A2 and their long residence in the UK including their immigration history as I have set out above. I have regard to the public interest in effective immigration control. In my judgment, weighing these factors against one and another, there are "compelling" circumstances such that unjustifiably harsh consequences will follow for this family if removed which are sufficient to outweigh the public interest and leads me to conclude that their removal would not be proportionate.

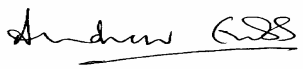
70. For these reasons, therefore, I am satisfied that the removal of the appellants would breach Art 8 of the ECHR.

Decision

71. The decision of the First-tier Tribunal to allow the appellants' appeal under Art 8 was set aside by my decision sent on 5 December 2017.

72. I remake the decision allowing each of the appellants' appeals under Art 8 of the ECHR.

Signed



A Grubb
Judge of the Upper Tribunal
12 February 2018

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeals, I am satisfied that a whole fee award payable for each appellant should be made of any fee that has been paid or is payable.

Signed

A Grubb
Judge of the Upper Tribunal
12 February 2018