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

Appeal Numbers IA/10119/2014
IA/10120/2014
IA/10121/2014

THE IMMIGRATION ACTS

Heard at Field House
On 14th November 2014
Prepared 21st November 2014

Decision and Reasons Promulgated
On 30th December 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

CHRISTONE JEREMIAH NYONDO

First Appellant

And

PHALLES CHMWEMWE NYONDO

Second Appellant

And

TAPIWA JOY NYONDO

Third Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity directions not made

**Representation:**
For the Appellant: Ms V Laughton (counsel, instructed by Lighthouse Solicitors)
For the Respondent: Mr P Armstrong (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellants are nationals of Malawi, the First and Second Appellants are the parents of the Third Appellant. The First Appellant entered the UK in 2007 as a student and was later joined by the Second Appellant, the Third Appellant was born on the 5th of December 2008 in the UK and has remained here since then. On the 14th of December 2013 the Appellants applied for leave to remain on a number of bases. The only relevant ground for these purposes is that the Third Appellant and the appropriateness of her return to Malawi which would involve disruption and where circumstances are very different.

2. The applications were refused and the Appellants appealed. The appeals were heard by First-tier Tribunal Judge Geraint Jones Q C at Hatton Cross on the 27th of May 2014. In a determination promulgated on the 2nd of June 2014 the appeals were dismissed. The Judge rejected an application to adjourn the hearing made to obtain further evidence in relation to the Third Appellant and the effect on her of moving to Malawi and also with regard to the need to look after her during the hearing. The Judge found that the Appellants removal would not be in breach of article 8 or section 55 of the Borders, Nationality and Immigration Act 2009.

3. The findings are referred to more fully below where relevant. In any event the Appellants sought permission to appeal to the Upper Tribunal in grounds of the 4th of June 2014. It was argued that the Judge erred in considering inappropriate authorities in making his decision to refuse to adjourn referring to the Civil Procedure Rules rather than the Asylum and Immigration Tribunal (Procedure) Rules 2005, rule 21. It was also argued that the Tribunal erred in failing to consider the evidence relating to the treatment of children with autism in Malawi and the effect of the Third Appellant leaving school and relocating to somewhere with very different, and negative, attitudes to such difficulties. Permission to appeal was initially refused but on renewal Upper Tribunal Judge Peter Lane granted permission on the 1st of October 2014 on both grounds.

4. At the hearing the Appellants were represented by Ms Laughton who had had appeared below. In the course of submissions reference was made the recent case of Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) and the relevant Tribunal rules. The submissions are set out in the Record of Proceedings and referred to where relevant below.

5. The relevant chronology relating to the Third Appellant is that she received her diagnosis concerning her educational needs on the 27th of June 2013. The applications to the Secretary of State were made on the 20th of December 2013, the Refusal Letter is dated the 4th of February 2014 and served 2 days later. The Notice and Grounds of Appeal are dated the 18th of February 2014, the Notice of Hearing is dated the 17th of March 2014 and contained directions for the service of evidence, the hearing took place on the 27th of May 2014.

6. The question is whether the Appellants were deprived of their right to a fair hearing. I agree with Ms Laughton that the Judge's references to the CPR were inappropriate, the relevant rules, the 2005 Procedure Rules were the only relevant rules for the Judge to consider. However the question remains whether the Appellants were denied a fair hearing.

7. The circumstances in Nwaigwe were different from those in this appeal. In that case it appeared that the Appellant had been taken ill shortly before the hearing and there were legal difficulties in obtaining supporting evidence. In this appeal the Third Appellant's issues have

been known about for a long time and pre-date the applications for leave to remain. The Appellants were not taken unawares by an unforeseeable change in circumstances, the matter on which evidence was sought related to an issue that had always been in existence, the Third Appellant's ability to cope with relocating to Malawi.

8. Given the age of the Third Appellant alone clearly she was reliant on the adults to prepare her case for her. All the Appellants had the benefit of legal representation and advice. They had since the just after the 17th of March 2014 that the hearing would be at the end of May, a period of over 2 months which was in addition to the time that had been available since the applications were first made.

9. It was implied by Ms Laughton that the appreciation of the value of such evidence was made late in the preparation of the case and that the Third Appellant ought not to be prejudiced by the failure of others on whom she relied. The difficulty with that as an approach is that it overlooks the time that has been available to the representatives and the nature of the evidence which concerns a point directly in issue, it is not a new matter or one that was difficult to foresee.

10. Was it unfair for the Judge to refuse to adjourn on the basis of a very late application when there had been a significant amount of time available? I find that the Judge was entitled to refuse the application and for the reasons given. Fairness is obtained by giving parties the opportunity to prepare and present their case, whether that opportunity is taken is a separate issue and a party cannot complain that a hearing was unfair when they did not make use of the time they had been advised of by properly served notices. As the Judge noted the origin of the proposed evidence had not been identified.

11. The Judge went on to note that the First and Second Appellants were well educated and that the First Appellant had held a position of Principal Economist in the Ministry of Agriculture in Malawi and that he now has a PhD. He also found that the First and Second Appellants were in a position to be able to pay for the private education that the Third Appellant would need in Malawi, there being no state education of the sort required. They do not appear to form a part of the more traditional side of Malawian society.

12. No one would pretend that a child with autism and the needs of the Third Appellant would find relocating easy, clearly any transition would be difficult for the Third Appellant and her parents. The Judge could have stated that it would be in the Third Appellant's best interests to remain in the UK but that would not answer the question that arises with the balancing exercise. Article 8 was dealt with in paragraphs 40 to 52. It is clear that the Judge had regard to the Third Appellant's significant problems and the family history, in Malawi and the UK. The finding that removal would be proportionate was a finding that was open to the Judge and for the reasons given.

## CONCLUSIONS

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

I do not set aside the decision.

Anonymity

The First-tier Tribunal made/did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

Fee Award

In dismissing this appeal I make no fee award.

Signed:

Deputy Judge of the Upper Tribunal (IAC)

Dated: 24th November 2014