Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/17976/2016
HU/17978/2016
HU/17981/2016
HU/17996/2016

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 22 May 2018	**On 22 November 2018**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

KTMM
SM
KM
YM
(anonymity direction made)

Appellants

And

The Secretary of State for the Home Department

Respondent

For the Appellant: **Mr B. Chimpango, Crown & Law Solicitors**
For the Respondent: **Mr C. Bates, Senior Home Office Presenting Officer**

DETERMINATION AND REASONS IN RESPECT OF KM AND YM
'ERROR OF LAW' DECISION AND DIRECTIONS IN RESPECT OF KTMM AND SM

1. The Appellants are all nationals of Malawi. They are respectively a mother, father and their two adult sons. They appeal with permission[1] against the decisions of the First-tier Tribunal (Judge Bannerman) to dismiss their linked human rights appeals.

Anonymity Order

2. The appeal turns in part on medical evidence relating to the first and second Appellants. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify any of the Appellants or any member of their family. This direction applies to, amongst others, both the Appellants and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Background and Decisions of the First-tier Tribunal

3. The First Appellant was born in Malawi in 1986. She came to the UK in December 2002 in possession of a valid student visa. She thereafter varied that leave so as to extend it, but it is common ground that she has been without leave to remain in the UK since 30th November 2003.

4. The Second Appellant was born in Malawi in 1974. He arrived in this country in July 2004 with leave to enter as a visitor. He overstayed that visa and has had no basis to remain in this country since then.

5. The Third Appellant was born in Malawi on the 29th September 1993. He arrived in the UK on the 7th December 2005 and has lived here ever since, having overstayed the visit visa that was granted on arrival.

[1] Permission was granted by First-tier Tribunal Robertson on the 12th December 2017

6. The Fourth Appellant was born in Malawi on the 14th March 1995. He arrived with his brother in December 2005 and was also given leave to enter as a visitor which he subsequently overstayed.

7. The applications that led to the Respondent's decisions to refuse to grant leave to remain on human rights grounds were, as far as I can tell, made on the 23rd June 2016. The basis of those claims can be summarised as follows. The two sons of this family had lived in this country for a good part of their lives. They had grown up here, become accustomed to life in the UK and had established meaningful private lives. They submitted that it would be a disproportionate interference with their Article 8 rights to remove them at this point. The parents in the family averred that they too have each established private lives and that they would like to remain here with their sons. Their cases had the additional dimension that they have both been diagnosed with HIV and they fear that they would not be able to access adequate treatment for their condition should they be returned to Malawi. They are both receiving anti-retroviral therapy here.

8. The Respondent refused each of the four applications. The letters are all dated the 7th July 2016. The broad thrust of those refusals is that the family can be expected to re-establish themselves in Malawi without undue difficulty. They all speak Chichewa, a language widely spoken in Malawi and are familiar with the culture and norms of that country. None of the individual applicants could meet any of the competing requirements in paragraph 276ADE(1) of the Rules nor bring him or herself within the ambit of Article 8 'outside of the rules'. Nor could any of the applicants have recourse to Appendix FM, since the family life they share is with each other. In respect of the parents' medical condition the Respondent took the view that treatment would be available in Malawi.

9. The First-tier Tribunal dismissed all four appeals and each Appellant has been granted permission to appeal to this Tribunal. It is convenient that I deal with each appeal in turn.

10. I would preface my findings by saying this. Although the First-tier Tribunal did produce four separate decisions they are largely the same. The bulk of the evidence summary, and reasoning, appears to relate to the First Appellant, but it segues mid-paragraph into consideration of the evidence relating to her sons or husband - which it is, it is sometimes hard to tell. Testimony is introduced without identification of the witness. Many of the paragraphs make no sense at all. Overall these determinations give the unfortunate impression of having been drafted in haste and having been promulgated without being proof-read. Given the gravity of its consequences for the Appellants this is, to say the least, regrettable.

11. That said, the drafting and grammar are not matters directly raised in the appeal before me. Rather the appeal is pursued on the grounds that the Tribunal misdirected itself in law and misunderstood, or misapplied, the evidence before it.

Discussion and Findings

The Fourth Appellant

12. As I mention above, most of the determination relating to this appellant is taken up with evidence and findings about his mother. At paragraph 56 of the decision the representative's submission is recorded as being that the "tribunal could issue the discretion which the Secretary of State should have used to grant the application as it say against the rule 267ADE(v)" (*sic*). I take this to be a reference to paragraph 276ADE(1)(v). The determination does not return to consider that submission and the appeal is dismissed on Article 8 grounds without any substantive reasoning.

13. The grounds assert that the "gist" of the grounds of appeal as they related to the Fourth Appellant was indeed that by the time that the appeal was heard, he met the requirements of paragraph 276ADE (1)(v) of the Immigration Rules. That provides that leave to remain shall be granted where the applicant:

> (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment);

14. The Fourth Appellant was born on the 14th March 1995. He arrived in the UK on the 7th December 2005. That means that he had spent 10 years, 8 months and twenty-three days of his life at that point outside of the UK. The First-tier Tribunal decision was promulgated on the 25th May 2017, at which point the Fourth Appellant had spent eleven years, five months and 17 days of his life in the UK. On the day that the decision was made he was 22 years old. On that date he *prima facie* qualified for leave to remain with reference to paragraph 276ADE(1)(v).

15. I am satisfied that the failure to address this matter in the determination was an error of law that was plainly material to the outcome of the Fourth Appellant's appeal. No suitability issues had been raised in his case. There is no discretion built in to sub-paragraph (v) of the Rule. Either the Appellant has lived here for more than half of his life or he hasn't. As for the point that he had not so qualified at the date of application that is somewhat moot. The

qualification under the Rules was, absent any countervailing factors, determinative of the Article 8 appeal in that the Respondent could not possibly show the decision to be proportionate. If there was any doubt about whether the changed circumstances between application and appeal could be taken into account in the context of the rules the answer was to be found in paragraph 276AO:

> 276A0. For the purposes of paragraph 276ADE(1) the requirement to make a valid application will not apply when the Article 8 claim is raised:
>
> (i) as part of an asylum claim, or as part of a further submission in person after an asylum claim has been refused;
>
> (ii) where a migrant is in immigration detention. A migrant in immigration detention or their representative must submit any application or claim raising Article 8 to a prison officer, a prisoner custody officer, a detainee custody officer or a member of Home Office staff at the migrant's place of detention; or
>
> (iii) in an appeal (subject to the consent of the Secretary of State where applicable).

16. For the sake of completeness I find that the 'consent of the Secretary of State', an allusion to s85(6) of the Nationality, Immigration and Asylum Act 2002, was not applicable in this case. That would only arise if the Article 8 claim raised was based on a new matter. The fact that the Appellant had been here a bit longer was simply a development of existing facts and as such as not a 'new matter'.

17. I therefore set the decision of the First-tier Tribunal, insofar as it relates to the Fourth Appellant, aside. I remake the decision in his appeal by allowing it on human rights grounds.

The Third Appellant

18. The grounds as they relate to the Third Appellant are that the First-tier Tribunal failed to take make reasoned findings on his case. Mr Chimpango submitted that the Third Appellant had given extensive oral evidence about the extent to which he is now part of British society, and how his links to Malawi have correspondingly diminished. Mr Chimpango assured me that this evidence had been "pretty moving stuff". His submission was that in its consideration of Article 8 the Tribunal had failed to make clear findings on either Article 8

'outside of the rules' or on the only sub-paragraph of 276ADE(1) that might have conceivably applied to the Third Appellant at the date of the application or appeal, sub-section (vi):

> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.

19. Whilst Mr Bates accepted that the drafting of the determination left something to be desired he did point out that there does appear to be some text therein that relates to the Fourth Appellant. At paragraph 68 the determination reads (in the context of the First Appellant's case) that "her sons are now grown men who are able to effectively fend for themselves". At paragraph 74 the Tribunal records that it is "unconvinced" (itself an unhelpful phrase given the standard of proof) that neither brother can speak "the Malawi language". The conclusion is reached in the same paragraph that the Fourth Appellant is a young and able man who has succeeded in his education and school in the UK and is "clearly resourceful enough to make progress and settle in Malawi with family there and sporting interests with which to make new friends".

20. I have considered whether the scant references to the Fourth Appellant – approximately seven lines in total in his own determination – are sufficient to withstand the challenge made in this appeal. Although I have been unable to find any record in the file of the "pretty moving" oral evidence that he is said to have given, I have been able to read the Fourth Appellant's witness statement. Having done so I am satisfied that the decision must be set aside for a lack of reasoned findings. The Fourth Appellant has lived in this country since he was 12 years old. In those circumstances it was not fanciful for him to assert that there would be a substantial interference with his private life in the UK should he be refused further leave to remain here. It may not have been a case that would inevitably succeed, but he was entitled to have his evidence at least considered; if his case was to be rejected an explanation should have been given as to why.

21. I need not consider whether any of the Fourth Appellant's submissions on 276ADE(1)(vi) or Article 8 would ultimately have succeeded, since at the date of *my* decision the Third Appellant now qualifies, like his brother, for leave to remain pursuant to paragraph 276ADE(1)(v). The Third Appellant was born on the 29th September 2013 and by the date that he arrived here on the 7th December 2005 he had spent 12 years, 2 months and 8 days outside of the UK. As of todays date he has been here for 12 years, 5 months and 14 days. He

does not turn 25 until September. No 'suitability' concerns have been raised. I am satisfied that at the date of the appeal before me the Third Appellant therefore qualifies for leave to remain under paragraph 276ADE(1)(v) the Rules. As in the case of his brother (above) this determines the Article 8 appeal in his favour, since the Respondent cannot show the decision to refuse leave to be proportionate.

The First and Second Appellants

22. The case for the parents in these linked family appeals was based squarely on Article 8. That much is apparent from the grounds of appeal to the First-tier Tribunal and the summary of the cases in their respective determinations.

23. It follows that I need not deal in any detail with the grounds of appeal advanced to this Tribunal in respect of Article 3, but for the sake of completeness I find them to be without merit. Complaint is made that the Tribunal did not take the approach suggested by Paposhvilli v Belgium (Appl no 41738/10). In fact the Tribunal did direct itself to that Strasbourg case but found on the facts that even on that modified approach to Article 3 the test was not met. It is further suggested that the Tribunal erred in failing to apply the *ratio* of JA (Ivory Coast) & Anor v Secretary of State for the Home Department [2009] EWCA Civ 1353, which apparently says that where applicants have been living in the UK lawfully when they receive their diagnosis and start anti-retroviral therapy "they are supposed to be allowed to remain in the UK so that they can continue with treatment". That submission is baseless. First, that is not what JA (Ivory Coast) says. Second, on the papers before me it is unclear whether either Appellant was in fact living in this country lawfully when the UK assumed responsibility for their treatment

24. I am nevertheless satisfied that in all the circumstances the decisions relating to both of these Appellants must be set aside. Neither determination has followed the appropriate structure, ie examination first of the rule (in this case 276ADE(1)(vi)) and then Article 8. There rather appears to have been a conflation of the two with the tests under Article 3. I am in particular concerned that this structural defect has led to a failure to consider the Appellants' respective medical conditions in the context of the test 'very significant obstacles' to their integration. The fact that anti-retrovirals are available in Malawi is not a complete answer to whether these particular individuals would be able to access medication suitable for their needs, whilst managing to reintegrate themselves into Malawian society. That question required a holistic evaluation of where they might live, how they might survive economically and so on.

25. Further it does not appear to be in issue that the four members of this family continue to live together, and that although the sons of the family are now adults they retain a close relationship with their parents. Given the errors in approach to the appeals of the sons, it is at least arguable that the outcome in the parents' appeals would have been different but for those errors.

26. I therefore set the decisions in respect of the First and Second Appellants aside to be remade.

Decisions

27. The decisions of the First-tier Tribunal contain errors of law such that they much each be set aside.

28. The decisions in the appeals of the THIRD and FOURTH Appellants are remade as follows: the appeals are allowed on human rights grounds.

29. I will remake the decisions in respect of the FIRST and SECOND Appellants following a further hearing, to be resumed before me at a date to be notified. This has been necessitated by there being no record of proceedings in the file and so I am unable to take into account the evidence that was given at the first instance. The Appellants have leave to submit any further documentary evidence that they wish to rely upon but any such evidence must be served and filed no later than four days prior to the further hearing.

30. There is a direction for anonymity.

Upper Tribunal Judge Bruce
24th May 2018