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

Appeal Numbers: HU/00284/2018
HU/00287/2018
HU/00291/2018
HU/00293/2018

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 17 October 2018** | **On 12 November 2018** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY**

**Between**

**(1) I N, GEORGIA**
**(2) KA, GEORGIA**
**(3) A N, GEORGIA**
**(4) T N, GEORGIA**
**(ANONYMITY HAS BEEN DIRECTED)**

Appellants

**and**

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

Respondent

**Representation:**

For the Appellants: Mr MacKenzie, Counsel for Axiom Stone Solicitors, New Malden, Surrey

For the Respondent: Mr Whitwell, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants are citizens of Georgia born on 28 May 1983, 30 April 1983, 27 August 2009 and 25 May 2016 respectively. They appealed the respondent's decision of 28 November 2017 refusing them leave to remain in the United Kingdom on family or private life grounds under Article 8 of ECHR. Their appeals were heard by Judge of the First-Tier Tribunal Monson on 14 March 2018 and dismissed in a decision promulgated on 3 April 2018.

2. An application for permission to appeal was lodged and permission was granted by Upper Tribunal Judge Kekic on 31 August 2018. The first and second appellants are the parents of the third and fourth appellants. They are unmarried partners. The claim focusses on the best interests of the children and the fact that the elder child has lived in the United Kingdom for over 8 years. The application argues that there are no powerful reasons which require the child and the rest of the family to leave the UK. Nothing like this has been identified by the Judge and the Judge did not follow the correct approach. The permission states that there is merit in the contention that the Judge's reliance on the overstaying history of the adult appellants was arguably insufficient to amount to a powerful reason for removal, given that the third appellant is a qualifying child.

3. There is no Rule 24 response.

**The Hearing**

4. Counsel for the appellants submitted that the third appellant has been in the United Kingdom for 8½ years and is therefore a qualifying child and it would not be reasonable to expect her to leave the United Kingdom. He made reference to the case of ***MA (Pakistan & Others)*** [2016] EWCA Civ 705 and submitted that this case is presently being appealed in the Supreme Court.

5. Counsel submitted that the claim is not limited to the effect on the third appellant, all the family must be considered. I was referred to paragraph 46 of the decision which states that from an educational and emotional stability perspective it is in the third appellant's best interests to remain in the UK, but it goes on to state that the third appellant will have the support of her parents and grandparents in adjusting to life in Georgia and in the long term it will be beneficial for her to learn the language of the country of which she is a citizen. Being bilingual will open up opportunities for her which would otherwise not exist and will increase her potential employability.

6. He submitted that once a child has been in the United Kingdom for 7 years that child is a qualifying child, has put down roots and it would be disruptive for them to have to move to another country. He submitted that that child has strong expectations of being able to remain in the United Kingdom and it would be in their best interests for this to happen. He submitted that significant weight must be given to the fact that the third appellant is a qualifying child and that she should not have to return to Georgia unless there are powerful reasons for this, particularly as she has now been

in the United Kingdom for 8½ years and has never been in Georgia. Counsel submitted that the fact that the first two appellants have no right to be in the United Kingdom is not enough for the child to have to leave the United Kingdom with them. Their actions are not the fault of the child, but as the child has been here for more than 7 years it must be in her best interests to remain here with her family.

7. I was referred to the case of ***MT & ET (Nigeria)*** [2018] UKUT 00088 (IAC) which was promulgated on 19 March 2018 after this hearing but before the decision was promulgated. This deals with a child who has been in the United Kingdom from aged 4 until 14. It states that the fact that a child has been in the UK for 7 years needs to be given significant weight in the proportionality exercise. It goes on to state that this significant weight is because of its relevance when determining the nature and strength of the child's best interests and because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary. The child in that case had embarked on a course of study leading to the taking of GCSE's. Counsel submitted that the mother in that case had used false documents and there was more reason to dismiss that appeal than there is in this case. He submitted that in this case the third appellant's parents are overstayers and he submitted that that is not enough for the qualifying child to have to return to Georgia.

8. Counsel submitted that at paragraphs 41 and 42 of the First-Tier Tribunal's decision reference is made to the case of ***MA (Pakistan)*** and the Judge states that the only significance of Section 117B(6) is where the 7 year rule is satisfied. Then it is a factor of some weight leaning in favour of leave to remain being granted. The First-Tier Tribunal refers to the case of ***EV (Philippines)***. Counsel submitted that that case is not relevant. That case of **EV** states that the immigration history of the parents may be relevant. For example, if they are overstayers.

9. Counsel submitted that no powerful reasons have been given for removing this family and the fact that they will all be removed together does not mean that the best interests of the third appellant will be properly looked after. He submitted that there is no evidence of a crime or an immigration scam and that the Judge should have corrected himself by finding that the starting point is that the third appellant's status should have been regularised after she had been in the United Kingdom for more than 7 years. I was referred to the finding in ***MA (Pakistan)***, that it is likely to be highly disruptive to expect a child in the third appellant's position to leave the UK. He submitted that this child has put down roots, the fact that there are extended relatives in Georgia is not a sufficient reason for the family having to return there. He submitted that the fact that the third appellant has been in the United Kingdom for over 7 years but has not accrued 7 years residence since the age of 4 is irrelevant as that is not in the legislation. The fact that she will be going to Georgia with her family ignores the point of the 7-year rule and I was asked to find that the Judge has used too high a test and is contrary to the country guidance cases. He submitted that the fact that the third appellant's parents are here unlawfully is not sufficient for the claims to fail based on the country guidance case of ***MT & ET***. He again submitted

that the Judge has used the wrong approach and there is a material error of law in the decision.

10. The Presenting Officer made his submissions submitting that what is clear is that the Judge was aware of the said case of ***MA (Pakistan)*** and has quoted it at paragraphs 41 to 43 of his decision. He submitted that the Judge has given this case significant weight and has given serious thought to whether it is in the best interests of the third appellant to remain in the United Kingdom or to return to Georgia with her family.

11. With regard to the grounds I was asked to consider paragraph 44 of the findings. He submitted that the case of ***MT & ET*** deals with a child who is preparing to sit her GCSE's. The third appellant in this case is in the middle of her primary education. He submitted that the said case of ***EV (Philippines)*** is referred to at paragraph 48 of ***MA (Pakistan)***. This paragraph deals with how the proportionality test should be applied where wider public interest considerations are in play. In ***EV (Philippines)*** it is stated that in cases such as this the need for immigration control may outweigh the best interests of the child and it therefore is necessary to determine the relative strength of the factors which make it in their best interests to remain here and also to take account of any factors that point the other way. It then lists the number of factors which have to be considered, one of which is what stage the child's education has reached. The Judge clearly does not feel it is overwhelmingly in the child's best interests in this case that she should not return to Georgia. The Judge finds that the need to maintain immigration control may well tip the balance, especially if the other applicants have no entitlement to remain here. The case goes on to state that the immigration history of the parents may also be relevant. The case of ***EV (Philippines)*** is not a 7 year case but he submitted that the same principles will apply. He submitted that the Judge has considered whether there are any strong expectations of this family to remain in the United Kingdom. The Judge has clearly given significant weight to the third appellant's situation and has used this as the starting point.

12. The Presenting Officer submitted that what I have to decide is whether the Judge was right to say that the countervailing reasons in this claim are enough for dismissal of these appellants' claims. He submitted that the extended family in this case are in touch with the appellants and help to provide for them financially. He submitted that there are cultural reasons which would support the return of the appellants to Georgia. There are citizenship reasons and he submitted that although another Tribunal might have made a different decision the Judge in this case has given careful reasoning to his decision and there is no material error of law.

13. Counsel submitted that although the Judge was aware of the case of ***MA (Pakistan)*** powerful reasons are referred to therein and the best interests of the third appellant lead to a strong expectation of the family being able to remain in the United Kingdom. He submitted that the Judge in this case has not applied the correct principles and the case of ***EV (Philippines)*** is not a 7-year case. He submitted that significant weight has to be given to the third appellant's rights and at paragraph 47

the Judge states that he considers that the best interests of the third appellant lie in her returning with her parents and younger sibling to Georgia, or alternatively, if he is incorrect it is not overwhelmingly in the child's best interests to remain here as opposed to there being best interest considerations going both ways.

14. He submitted that although the facts in the said case of ***MT & ET*** are different, the same principle applies and this family is more respectable than the family in the said case of ***MT & ET***. He submitted that the Judge has not used the correct approach and has applied the principles in the wrong way.

15. I was asked to allow the appeal and remit it to the First-Tier Tribunal for rehearing only after the Supreme Court has completed its decision in the said case of ***MA (Pakistan)***.

**Decision and Reasons**

16. I have to decide if there is a material error of law in the First-Tier Tribunal's decision in this case. The first two appellants are overstayers. The third appellant has now been here for 8½ years. The fourth appellant is under two years old.

17. The third appellant is a qualifying child. The skeleton argument states that if the Tribunal is satisfied that it is not reasonable for her to be expected to leave the UK she will succeed under paragraph 276ADE(1)(iv) of the Rules. The skeleton argument also states that it would be difficult for the third appellant to meaningfully integrate in Georgia and that paragraph 276ADE(1)(vi) applies.

18. It cannot be said that the first two appellants immigration history is not relevant. It has to be taken into account when the best interests of the children are considered. The parents are overstayers. The first appellant has been working without permission. The case of ***EV (Philippines)*** is relevant although it is not a 7-year case. There has to be a proportionality assessment and public interest has to be taken into account.

19. I have carefully considered the First-Tier Tribunal's decision. It is clear that the Judge is aware of the length of time the third appellant has been in the United Kingdom or had been at the date of the decision. She has now been here for 8½ years and the Judge also noted her special needs. He has noted that the first and second appellant still have a relationship with both sets of parents in Georgia who help them financially to remain in the United Kingdom. The Judge has considered the medical evidence on the third appellant which is that she has normal hearing in her right ear and a mild hearing loss in her left ear. Her speech has now improved and she is being educated in a mainstream primary school and progressing well. The Judge also notes that there is a fully functioning healthcare system in Georgia. The objective evidence refers to the English-speaking schools in Tbilisi. The Judge then refers at paragraph 39 to the best interests of the children. He makes reference to the

case of ***Asemi Moayed & Others*** [2013] UKUT 197 (IAC) which states that it is not the case that the best interests principle means it is automatically in the interests of any child to be permitted to remain in the United Kingdom. It goes on to state that it is in the best interests of the children to be with both their parents. The Judge refers to reasonableness relating to the third appellant and refers to the said case of ***MA (Pakistan) & Others***. He notes that it is a factor of some weight leaning in favour of leave to remain being granted, that the third appellant has been in the United Kingdom for over 7 years. Reference is made by the Judge to the child putting down roots and reference is made of the possibility that it will be highly disruptive if the child has to leave the United Kingdom, but the Judge states that this may be less so when the children are very young, as the focus of their lives will be with their family. The child's best interests are a primary consideration and that is how the Judge has dealt with this. The Judge has referred to the case of EV (Philippines) and finds it is not overwhelmingly in the child's best interests to remain in the UK. A proportionality assessment has to be made. The Judge makes reference to the strong weight to be given to the need to maintain immigration control in pursuit of the economic wellbeing of the country and the fact that the appellants have no entitlement to remain.

20. The Judge fairly states that there are best interest considerations which are in favour of the third appellant remaining in the UK with her parents and younger sibling. However, the appellant is not, as in the case of ***MT & ET,*** at a crucial stage of her education. She is into her third or fourth year at primary school only and she has her extended family members in Georgia, including both sets of grandparents. At paragraph 46 the Judge gives reasons for finding that she should return to Georgia with her family and states that when proportionality is considered it would be reasonable to expect the third appellant to leave the United Kingdom as both parents have adverse immigration histories and neither parent has ever had a legitimate expectation of being able to carry on family and private life in the United Kingdom on a personal basis. At paragraph 49 the Judge states that there are strong reasons why public interest should prevail and that these outweigh the qualifying child's interests, making it reasonable to expect her to leave the UK. The Judge finds that paragraph 276ADE(1)(iv) and (vi) cannot be satisfied and this finding is properly reasoned.

21. I have considered the case of KO (Nigeria) UKSC 53. It is relevant to consider where the parents of a qualifying child are expected to be as it will normally be reasonable for the child to be with them.

22. The terms of the Rules cannot be satisfied relating to Article 8 and the Judge considers Article 8 outside the Rules, and the case of ***Razgar*** and Section 117B of the 2002 Act. With regard to public interest the appellants are unlawfully in the United Kingdom and place a burden on the taxpayer as the third appellant is being educated at public expense. The first appellant has been working illegally. The third appellant has been using free NHS services. The Judge then states that while the first and

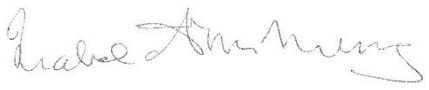
second appellants have a genuine and subsisting parental relationship with the third appellant it is reasonable to expect the third appellant who is a qualifying child to leave the country with them.

23. All the Judge's findings are explained. There are no errors of law in the decision. The Judge finds it is proportionate to the legitimate ends sought to be achieved, namely the maintenance of firm and effective immigration controls and the protection of the country's economic wellbeing, for this family all to return to Georgia.

**Notice of Decision**

I find that there is no material error of law in the Judge's decision. The decision promulgated on 3 April 2018 therefore must stand and the appellants' appeals are dismissed on all grounds.

Anonymity has been directed.



Signed Date 5 November 2018

Deputy Upper Tribunal Judge I A M Murray