



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/07227/2017
HU/07231/2017
HU/07233/2017

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 6th August 2018

Determination Promulgated
On 12th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MR B B

(2) MRS Z M

(3) MASTER T B

(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr B Amunwa (Counsel)

For the Respondent: Mr A McVeety (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Wedderspoon, promulgated on 8th February 2018, following a hearing at Manchester on 22nd January 2018. In the determination, the judge dismissed the appeal of the Appellants, whereupon the Appellants subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are a husband, wife, and their child. The first Appellant, the husband, was born on 22nd March 1983, and he arrived in the UK following the issue of a student visa on 27th July 2006, and entered the UK on 6th August 2006. The second Appellant,

his wife, was born on 19th June 1980, and she entered the UK illegally, using a passport she was not entitled to. The third Appellant, their son, was born on 25th December 2009 in the UK. All are citizens of Mongolia. The first and second Appellants have two other children, one born on 11th October 2012 and the other born on 27th March 2015. They are not in issue in these appeals. The present appeal arises on account of an application made for further leave to remain on the basis of family and private life, which was rejected by the Respondent Secretary of State.

The Appellants' Claim

3. The essence of the Appellants' claim is predicated on the position of the third Appellant, their child, who was born in the UK on 25th December 2009, given that he has been in this country now for more than seven years. The principal Appellants maintain that they have a genuine relationship with their minor children. They have only ever spoken in English to their children. They contest the Respondent's conclusion that it would not be unreasonable for the Appellants and their children to return to Mongolia because the children are young enough to adapt to change. The first Appellant also claims that it would be difficult for him to return to Mongolia and provide his children with education, who have always attended UK schools and not experienced Mongolian education. Moreover, he would not be able to obtain a job to privately educate his children there. He has no land or family left in Mongolia (paragraph 27).

The Judge's Findings

4. The judge heard evidence that the first and second Appellants only speak in English to their children (paragraph 31) and under cross-examination, it transpired that the second Appellant "had only visited Mongolia once since she travelled to the UK" (paragraph 33).
5. In her findings, the judge noted how the second Appellant, a mother of the third Appellant, had returned to Mongolia and visited her family after arrival in the UK. With respect to the third Appellant, their child, the judge observed that, "I am mindful of the relationship Appellant (3) has with his cousin who presently lives in the UK but he will have other family in Mongolia to develop relationships with there and will have the support of his parents and siblings" (paragraph 44). In relation to the first Appellant's concerns that he would not be able to provide for their education because he could not get a job in Mongolia, the judge observed that, "education is available in Mongolia. He [the third Appellant] is an intelligent child and could adapt to the educational system there" (paragraph 44). The judge then moved on to a consideration of the "**Razgar**" principles (at paragraph 45). Thereafter, the judge engaged in an extensive recital of the leading judgment in **AM (Malawi) [2015] UKUT 0260** (at paragraph 54) before coming to the following four firm conclusions. First, that the "best interests" of the children is that "they should be with their parents". Second, that they should be together "as a family unit". Third, that in this respect that the third Appellant, the child, "could adapt to education and life in another country". Fourth, that he has "extended family already living there" (paragraph 55). In short, the judge

concluded (at paragraph 59) that the removal of the Appellants would be proportionate to the legitimate aim of immigration control and that “children can adapt to change and in particular where they have the support of their parents and siblings” (paragraph 59).

6. The appeal was dismissed.

The Grant of Permission

7. Permission to appeal was granted on the basis that the judge, in assessing the best interests of the Appellant child, had made material errors of law. First, the third Appellant, the child, suffered from severe eczema, and his medical condition (see grounds at paragraphs 13 and 24), had not been considered at all. Second, the judge wrongly found that the third Appellant, the child, had actually visited Mongolia when he had not. Only his mother had. These matters, went to the proportionality of the decision that it was reasonable to expect their child to return, as a qualifying child, to Mongolia.

Submissions

8. At the hearing before me on 6th August 2018, Mr Amunwa, appearing on behalf of the Appellants, relied upon his well-crafted skeleton argument. He submitted that the overriding fact of significance in this case was that the third Appellant, was a qualifying child, having been born in the UK in 2009, and having never left this country to go to Mongolia. As such, the guidance of the Home Office fell to be applied.
9. This was the “Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: Ten Year Routes August 2015”. The guidance that is given here is to the effect that

“The requirement that a non-British citizen child has lived in the UK for a continuous period of at least the seven years immediately preceding the date of the application, recognises that over time children start to put down roots and integrate into life in the UK ...”.

The guidance goes on to say that in these circumstances, where the balance swinging more in favour of a child such that it would be generally unreasonable to expect the child to leave the UK, the position is that “strong reasons will be required in order to refuse a case with continuous UK residence of more than seven years”.

10. Second, Mr Amunwa relied upon the Tribunal decision recently in **SF (Guidance, post-2014 Act) Albania [2017] UKUT 120**. Here the Tribunal held (at paragraphs 10 to 12) that in the interests of consistent decision making,

“Where there is clear guidance which covers the case where an assessment has to be made, and where the guidance clearly demonstrates that the outcome of the assessment would have been by the Secretary of State, it would, we think, be the

normal practice for the Tribunal to take such guidance into account and to apply it in assessing the same consideration in a case that came before it”.

11. Third, in the present case, submitted Mr Amunwa, whereas there was extensive citation of the case law by the judge, there was little application of the principles in that jurisprudence to the facts of this case. The judge did not identify the “strong reasons” required to justify the removal of this first and second Appellants, together with their third Appellant child. The judge did not consider the level of ties that the third Appellant, the child, had with Mongolia, which were non-existent. The judge was wrong to have concluded that the third Appellant child had visited Mongolia when he had not done so. The judge did not consider the extent to which the third Appellant child was familiar with the cultural norms of Mongolia given that his parents only spoke to him in English and his entire schooling had been in this country. He did not consider how the third Appellant child would communicate in the Mongolian language, which was the official language in Mongolia. Neither, was it the case, that the judge had considered the fact that the Appellant had never attended school in Mongolia. In addition to this, although attention had been drawn to the leading case of **AM (Malawi) [2015] UKUT 0260**, that case was entirely different because the official language in Malawi is English, whereas the official language in Mongolia is Mongolian Chinese and so the fact that a returnee would have to be able to have some familiarity or knowledge of Mongolian was a matter that was distinctly different to what had been found in the case of **AM (Malawi)**.
12. For his part, Mr McVeety submitted that, although he had initially approached this appeal on the basis that there was no error in the judge’s determination, having heard the submissions of Mr Amunwa, he had come to the view that the determination did amount to an error of law. The plain fact here was that the third Appellant child was a qualifying child and “strong reasons” had to be identified for concluding why a child with a continuous UK residence of more than seven years should be refused leave to remain.
13. In reply, Mr Amunwa submitted that if this was the case, then this matter ought to be remitted back to the First-tier Tribunal because of the paucity of fact-finding by the judge below without which a proper proportionality assessment could not be made.

Error of Law

14. I am satisfied that the making of the decision by the judge did involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.
15. This is a case where the Appellant is a “qualifying child”. It is a case where guidance has been given (see above) that confirms that “strong reasons will be required” for someone with continuous UK residence of more than seven years to suggest why it would be reasonable to expect that child to leave the UK. The judge did not make any reference to these considerations.

16. Second, the importance of these considerations is made abundantly plain also in the recent decision in **SF (Albania) [2017] UKUT 120** which makes it clear that “the normal practice for the Tribunal” is to take such guidance “into account”.
17. Third, the judge made a factual error in concluding that the third Appellant child had actually gone to Malawi when that was not the case. This had implications for the proportionality assessment eventually undertaken.
18. Finally, in terms of the facts that the judge did find, such as that the third Appellant child has a cousin who he has an association with in the UK, it is insufficient to say that “he will have other family in Mongolia to develop relationships” (paragraph 44), just as it is insufficient to say that “education is available in Mongolia” when the Appellant is not found to have been conversant in the Mongolian language.
19. In short, an approach whereby it is said that “children can adapt to change” (paragraph 59) overlooks the essential nature of the developmental process that a young child, who has been here for over seven years, undergoes and the impact that this has on the eventual proportionality of the decision to remove that child, which ought to be countenanced only in circumstances where there are “strong reasons” for doing so.
20. I agree with both representatives before me that in the circumstances, the matter ought to be remitted back to the First-tier Tribunal for further findings of fact to be made before the proportionality assessment can be adequately undertaken.

Notice of Decision

21. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge Wedderspoon, pursuant to practice statement 7.2(b) of the Procedure Rules.
22. An anonymity direction is made.
23. The appeal is allowed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Dated

Deputy Upper Tribunal Judge Juss

8th September 2018