



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

Appeal Number: IA/15606/2014

THE IMMIGRATION ACTS

Heard at: Field House

**Decision and Reasons
Promulgated**

On: 12th February 2015

On: 22nd April 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

**Tuvshintugs Purevgerel
(no anonymity direction made)**

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms Sharkey, instructed by Medivisas UK LLP

For the Respondent: Mr Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Mongolia. He is now aged 18. He was brought to this country when he was 11 years old, having entered with his mother on a valid visit visa. His mother thereafter left him in the care of his elder sister and her husband who is a Portuguese national.
2. On the 9th January 2014 an application was made on his behalf for

a residence card confirming his right of residence as the extended family member of an EEA national, namely his brother-in-law.

3. The application was refused on the 11th March 2014 on the ground that the Appellant had produced no evidence of dependency on his sponsor at any time, either in Mongolia or in the UK. In particular he had not shown that he was dependent upon his sponsor prior to entering the UK.
4. An appeal was brought to the First-tier Tribunal. Bafflingly, given that she had advised the Appellant to make the EEA application in the first place, on appeal Ms Sharkey immediately conceded that the Appellant could not succeed under the Immigration (European Economic Area) Regulations 2006 (“EEA Regs”). This is a position she has maintained in her present grounds of appeal. The appeal was pursued on Article 8 grounds only.
5. The First-tier Tribunal (Judge I Ross) noted the concession in respect of the EEA Regs and expressly found that the Appellant could not show himself to be an extended family member within the meaning of Regulation 8. He then effectively declined to make any findings on Article 8 ECHR on the ground that the Appellant had not made an application under either paragraph 276ADE or Appendix FM.
6. Permission to appeal was granted on the 28th July 2014 by Judge Pooler of the First-tier Tribunal who noted that in light of Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs) [2013] UKUT 00089 (IAC) the Judge should have considered Article 8.
7. At a hearing before me on the 7th November 2014 Mr Kandola for the Respondent agreed that this must be so. Article 8 was *prima facie* engaged, had been raised in the grounds of appeal and should have been dealt with. The decision of the First-tier Tribunal in respect of Article 8 ECHR is set aside. The findings on Regulation 8 of the EEA Regs are unchallenged and are therefore preserved.

The Re-Made Decision

8. I start with the Immigration Rules. The parties agreed that the only conceivable paragraph of the Rules that could apply to the Appellant was 276ADE; the parties were also in agreement that at the date of the appeal he could not meet the requirements therein. The Appellant was not under 18 and Ms Sharkey expressly conceded that he could not show that he faced “very serious obstacles to his reintegration” since he still speaks Mongolian, has his parents and the family home there. He arrived in the UK on the 19th November 2007 when he was aged

11 years, 2 months and four days old; it will not be until the 24th January 2019 that he will have spent more than half his life in the UK.

9. The Appellant does not qualify for leave to remain under the Rules. I am nevertheless satisfied that his case should be considered under Article 8. He has only very recently turned 18 and has spent almost seven and half years of his life in the UK. That is a significant period of time for a young person and I accept that he has established a substantial private life since he has been here. He has many friends and has done well in his education. I further accept that he enjoys a family life with his sister and brother-in-law. In the time that he has spent here his sister has acted *in loco parentis* and I accept her evidence that she would be “deeply heartbroken” if he had to return to permanently to Mongolia. The Appellant’s brother-in-law Antonio Gabriel has also written and I accept his evidence that he treats the Appellant as his own child and that he feels responsible for him. Although the Appellant has now reached 18 he is still in the family home, has not established an independent family unit and I accept that he is currently wholly financially dependent upon Mr Gabriel: there is no “bright line” crossed when one reaches majority and I am satisfied that the Appellant has a family life with his sister and Mr Gabriel. Accordingly I am satisfied that there would be an interference with the Appellant’s family and private life in the UK if he were to be returned to Mongolia.
10. The removal of persons who have no right to remain under the Rules is rationally connected to the legitimate aim Article 8 (2) of protecting the economy. The decision is one that is lawfully open to the Respondent.
11. I am bound, in considering proportionality, to consider the factors set out in paragraph 117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014):

117B Article 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.

12. I attach some weight to the fact that the Appellant has not had any leave to remain for the time that he has spent in the UK, but that is necessarily very limited since he was a child when he was allowed to overstay: I find it to be irrational to blame him for any lapse in his leave. I do attach some significant weight to the fact that he does not presently meet the requirements of the Rules, because I accept that maintenance of immigration control is in the public interest.
13. It is in the public interest that persons who seek leave to remain are able to speak English because they are better able to integrate. That this is so is amply demonstrated by the Appellant who speaks English beautifully and has indeed integrated well.
14. It is in the public interest that persons who seek leave to remain are financially independent. Since the Appellant is still so young it makes little sense to give this provision a strict reading. He may not be *self* sufficient but he has certainly never been a drain on the resources of the tax-payer. During the entire time he has lived in the UK with his sister he has been provided for and I accept and find as fact that he is presently financially dependent on his brother-in-law.
15. Section 117B (4) mandates that little weight should be attached to a private life established when an applicant is in the UK unlawfully. There can be no doubt that the Appellant established his friendships and relationships with his teachers whilst he was here with no leave but I am conscious that again, he cannot be blamed for that. He was a child of 11 when his leave lapsed. I

cannot be satisfied that it was the intention of parliament to attach “little weight” to the private life of a child in those circumstances: indeed this would be contrary to all of the policy guidance and ministerial statements relating to 276ADE(1)(iv). See for instance *The Grounds of Compatibility with Article 8 of the ECHR*, the Statement by the Home Office (13 June 2012) which accompanied the introduction of that paragraph: “a period of 7 continuous years spent in the UK as a child will generally establish a sufficient level of integration for family and private life to exist such that removal *would normally not* be in the best interests of the child” [at 27]. The current Immigration Directorates’ Instruction¹ states: “strong reasons will be required in order to refuse a case with continuous UK residence of more than 7 years”. In all of this guidance the government recognises that after a period of seven years a child will have put down roots and will have an established and valuable private life. I am not therefore minded to attach only a “little” weight to the private life that the Appellant established in this country between the years of 11 and 18. I have attached significant weight to it.

16. I am nevertheless satisfied that the Secretary of State can show the decision to remove to be justified. As Mr Avery observes, the Appellant’s case presents a “zero sum” outcome, since whatever he loses in the UK, he will gain in Mongolia, where he speaks the language, has both his parents with whom he can be reunited, his family home and access to education, albeit not of the quality that he may have access to in the UK. It is very difficult to say that the Article 8(1) rights that the Appellant enjoys in the UK should outweigh that which he could enjoy with his parents and extended family members in Mongolia. It cannot be said that this decision is unjustifiably harsh.
17. I appreciate that the Appellant has used his time in the UK well. He has worked hard and I am sure that he will have the bright future he deserves, wherever he lives. No doubt his family would wish to consider whether he would like to apply for entry clearance as an extended family member of his brother-in-law’s household in the UK. I accept that Mr Gabriel considers the Appellant “as a son” and that having provided for him financially for a number of years in the UK will continue to do so should he return to Mongolia. I have considered whether this factor should result in this appeal being allowed, applying Chikwamba by analogy. If I find that the Appellant would ultimately succeed in his EEA claim, upon making an application for entry clearance, there would arguably be little point in making him go through the process of return to Mongolia only to come back again. Two

¹ ‘Family Migration: Appendix FM Section 1.0b *Family Life (as a Partner or Parent) and Private Life: 10-Year Routes*’

factors weigh heavily against that route. Firstly at today's date the Appellant does not qualify as an extended family member because he could not show that Mr Gabriel supported him in Mongolia before his arrival: whether Mr Gabriel wishes to continue to support him once he has returned is a matter for him. Secondly recognition as an "extended family member" under Regulation 8 does not confer an automatic right of entry to the UK. Whether the Respondent wishes to exercise her discretion under Regulation 17(4) is entirely a matter for her.

Decisions

18. The determination of the First-tier Tribunal contains an error of law and it is set aside.
19. The decision in the appeal is remade as follows: "the appeal is dismissed on all grounds".
20. I was not asked to make a direction for anonymity and on the facts I see no reason to make one.

Deputy Upper Tribunal Judge Bruce
10th April 2015