



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

Appeal Numbers: IA/15751/2014  
IA/15754/2014  
IA/15755/2014  
IA/15761/2014  
IA/15765/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 23 September 2015**

**Decision & Reasons Promulgated  
On 6 October 2015**

**Before**

**UPPER TRIBUNAL JUDGE GILL**

**Between**

**Narangerel Jamiyansuren  
Yeruul B**

**BB**

**AB**

**AB**

**(ANONYMITY DIRECTION NOT MADE)**

**Appellants**

**and**

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

**Respondent**

**Representation:**

For the Appellants: Ms N Nnamani, Counsel instructed by Ardens Solicitors

For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants, who are nationals of Mongolia, have been granted permission to appeal by Judge of the First-tier Tribunal Astle against a decision of Judge of the First-tier Tribunal Mill who, following a hearing on 25 March 2015, dismissed their appeals against a decision of the respondent of 12 March 2014 to refuse their application of 6 July 2012 for leave to remain in the United Kingdom on the basis of their rights to their private and family life under Article 8 of the ECHR, supplemented by further representations made on their behalf on 24 February 2014.
2. The first appellant, born on 5 September 1976, is the wife of the second appellant, born on 22 April 1976. They are the parents of the third appellant, born in Mongolia on 14 August 2001, and the fourth and fifth appellants born in the United Kingdom on 5 January 2007 and 11 September 2013 respectively.

### **Immigration history**

3. The first and second appellants arrived in the United Kingdom on 11 May 2003, aged 26 ½ years and 27 years respectively. They landed with a 24 hour in transit visa. They failed to continue on their journey and remained in the United Kingdom. The third appellant remained in Mongolia until April 2006, when a friend of the second appellant assisted in bringing him to the United Kingdom. He was 4½ years old on arrival in the United Kingdom.
4. At the date of the hearing before Judge Mill, the first and second appellants were aged 38½ years and 39 years respectively, having lived in the United Kingdom for 11 years 10 months. The third appellant was aged 13½ years, having lived in the United Kingdom for nearly 9 years. The fourth and fifth appellants were aged 8 years and 18 months respectively and had lived in the United Kingdom all of their lives.

### **Relevant legal provisions**

5. The version of para 276ADE that came into force on 28 July 2014 is as follows (emphasis added):

276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

- (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and
- (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
- (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
- (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
- (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); or
- (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.

6. The wording underlined above replaced the words underlined below in the version of para 276ADE that was in force immediately prior to 28 July 2014, which was as follows:

276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

- (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and
- (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
- (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
- (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

- (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); or
- (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 has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.

7. Exhibit EX.1(a) of Appendix FM provides:

**EX.1.** This paragraph applies if

- (a)
  - (i) the applicant has a genuine and subsisting parental relationship with a child who-
    - (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
    - (bb) is in the UK;
    - (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
  - (ii) it would not be reasonable to expect the child to leave the UK; or
- (b) ...

8. Section 117B of the Nationality, Immigration and Asylum Act 2002 (the “2002 Act”) provides as follows:

117A Application of this Part

- (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
  - (a) breaches a person’s right to respect for private and family life under Article 8, and
  - (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
- (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
  - (a) in all cases, to the considerations listed in section 117B, and
  - (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
- (3) In subsection (2), “the public interest question” means the question of whether an interference with a person’s right to respect for private and family life is justified under Article 8(2).

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.

### **Judge Mill's decision**

9. As the hearing before Judge Mill (hereafter, the "judge" unless otherwise stated) took place on 25 March 2015, he should have applied the version of para 276ADE that came into force on 28 July 2014. However, he applied instead the version that was in force on 27 July 2014. The difference between the two versions can be seen from the words underlined at [6] and [7] above. This means that the judge applied the "*no ties*" stipulation to the first and second appellants instead of considering whether there were very significant obstacles to the integration of the appellants in Mongolia. I raised this point at the commencement of the hearing. It was not mentioned in the grounds. Mr Wilding and Ms Nnamani agreed that, if I concluded that the judge did not materially err in law in reaching his finding that the first and second appellants did not satisfy the "*no ties*" stipulation, then the error in applying the wrong version of para 276ADE(vi) would not be material. Ms Nnamani said that she would not make an application for permission to amend the grounds.
10. The judge's findings may be summarised as follows:
- (i) The judge did not find the evidence of the first and second appellants credible or reliable.
  - (ii) He rejected their evidence that they had no continuing ties to Mongolia.
  - (iii) He did not believe their evidence that they had been able to maintain themselves in the United Kingdom on money they obtained by their working informally and occasionally, their receiving support from a Mr Nasim Ahmed, their receiving the proceeds from the sale of a property in Mongolia that fell into the ownership of the first appellant after her sister passed away and their receiving rental income from the subletting of a room in their property in the United Kingdom.
  - (iv) He rejected their evidence that their children only have a basic understanding of spoken Mongolian and that they were unable to read and write in that language. He said that there was little doubt that the third appellant will have a good understanding of the Mongolian language. Whilst he noted that the fourth appellant was 8 years old and had never lived in Mongolia, he did not accept that the fourth appellant had not, whilst living in the same family unit as the first, second and third appellants, acquired knowledge of the Mongolian language which was spoken in the household.
  - (v) He concluded that the first and second appellants did not satisfy the "*no ties*" stipulation in para 276ADE(vi).
  - (vi) The fifth appellant, being only 18 months old, could not benefit from the Immigration Rules. His circumstances therefore fell to be considered outwith the Immigration Rules. Given the fifth appellant's tender years, that he is undoubtedly primarily focused upon himself and his

immediate family, in particular the first and second appellants, he had not begun to establish any meaningful private life. Accordingly, there would be no breach of Article 8 by the removal of the fifth appellant with his parents.

- (vi) In relation to the third and fourth appellants, it was necessary to consider whether it would be reasonable for them to leave the United Kingdom either for the purposes of para 276ADE or paragraph EX.1(a) of Appendix FM. The judge said that this required careful consideration of all facts and circumstances and the carrying out of a proportionality test.
- (vii) The judge then considered the evidence concerning the third and fourth appellants and concluded that it would be reasonable for them to leave the United Kingdom. His reasons, in this respect, are set out at [37]-[41] of the determination.
- (ix) He then considered the Article 8 claims outside the Immigration Rules. He considered the circumstances of the third, fourth and fifth appellants and concluded that there were no compelling circumstances for any of the appellants' appeals to succeed outside the Immigration Rules on the basis that their removal would be in breach of their rights under Article 8.

11. I now quote [18]-[46] of the judge's decision:

18. ...

subsection (iv) of paragraph 276ADE can apply to the Third and Fourth Appellants.  
subsection (vi) of paragraph 276ADE can apply to the First and Second Appellants.

There is no provision within paragraph 276ADE which can apply to the Fifth Appellant.

Section EX, and paragraph EX.1(a) of Appendix FM could apply to provide a basis for the First and Second Appellants to obtain Leave to Remain as a parent. There is no practical difference to the test to be applied to that found within paragraph 276ADE(iv).

- 19. If I was not able to grant the Appeals in terms of the Immigration Rules I was invited to do so on the basis of Human Rights issues under Article 8 of the European Convention on Human Rights following the steps set out in R (Razgar) –v- SSHD [2004] UKHL 27.
- 20. In coming to a decision I take into account the public interest considerations as specified in Section 117B of Part 5A of the Nationality, Immigration and Asylum Act 2002 as amended.
- 21. The case of ZH (Tanzania) (FC) –v- SSHD [2011] UKSC 4 states that there *[sic]* a removal decision impacts on the welfare of a child, the best interests of the child must be *[sic]* "primary consideration". In making the proportionality assessment for the children under Article 8 the Immigration Authorities and the Courts must apply the best interests principle as a starting point. This is now reflected within Section 55 of the Borders, Citizenship and Immigration Act 2009. I have borne this in mind throughout my decision making.

#### Findings and Reasons

- 22. The First and Second Appellants are citizens of Mongolia. They both resided there until they were aged 27 years. They were both born and brought up in Mongolia and will be entirely familiar with traditions, culture, environment and social structure there. These natural integral ties will not have been lost and will continue to exist.
- 23. The First and Second Appellants both worked in Mongolia before coming to the UK. The First Appellant worked as a skilled seamstress/tailor and has continued that employment in the UK. She has not lost these skills. The Second Appellant has undertaken a broad spectrum of work throughout his adult life. He completed secondary school education in Mongolia. He subsequently worked in Mongolia in a wide variety of employments and has multiple skills. He was a

businessman for periods of time in Mongolia on a self-employed basis, travelling to China and buying goods, including clothing, to sell in Mongolia. Again he has continued to work in the UK. The First and Second Appellants supported themselves when residing in Mongolia. Given the respective nature of their employments, and in particular the wide-ranging nature of the Second Appellant's employment history, they will be well acquainted with the economy in Mongolia. Although they have been absent now from there for a period of some 12 years, I do not accept that such ties in terms of their understanding and knowledge of the economic circumstances of Mongolia and the labour market there given their knowledge and experience have been extinguished.

24. The evidence of the First and Second Appellants was to the effect that they have no surviving family in Mongolia at all. No evidence was provided to support this but even taking that at face value, I do not consider that this adds weight to any suggestion that they have no continuing ties to Mongolia. Having departed there at the age of 27 and having worked as stated they will have had friends and contacts. Even if these relationships have not been preserved attempts can be made to renew those or, alternatively, the First and Second Appellant will be able to use their skills and knowledge to form new contacts and friendships. They are not strangers to Mongolia with no knowledge of the way of life there. They have no disability or incapacity. They speak the Mongolian language.
25. In 2006, some 3 years after the First and Second Appellants arrived here they made arrangements for the Third Appellant, their eldest child, to come to the United Kingdom. Their explanation in this respect is that a friend of the Second Appellant assisted them. The First and Second Appellants clearly maintained relations with individuals in Mongolia in order to make such arrangements and for those arrangements to be fulfilled. The Appellants' evidence was to the effect that the First Appellant's elder sister died in 2007. Until then she lived in Mongolia. The impression formed was that there were continuing relations with her until then.
26. The First Appellant owned a property in Mongolia jointly with her sister until 2007. The Appellants stated in their evidence that the First Appellant's sister had passed away then. Steps had been taken by them to sell the property. In order to do so they must have had communications with others in Mongolia for this purpose. They must have had knowledge then about making arrangements in Mongolia for all the steps required to be taken in respect of the sale of a property and the obtaining of the sale proceeds. This exhibits an ability to perform tasks in Mongolia proficiently including the carrying out of business there.
27. I conclude on the basis of the totality of the evidence before me that the provisions of subparagraph (vi) of paragraph 276ADE are not established by the First and Second Appellants. They have not established that they have no ties to Mongolia. In coming to this decision I have had regard to the case of Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC). I have had regard to the commentary commencing at paragraph 122 where the phrase “no ties (including social, cultural or family) with the country...” is discussed.
28. I did not find the First and Second Appellants credible nor reliable. There were conflicting statements made by them in the evidence. The First Appellant stated that the Second Appellant was a taxi driver prior to coming to the UK. The Second Appellant advised that he was involved in a shoemaking business at that time. Under cross-examination the Second Appellant failed to disclose being a taxi driver until it was specifically suggested to him. He then stated that he had worked as a taxi driver but this had been for a brief period of time only shortly after the marriage. The oral evidence of the First and Second Appellants was somewhat at odds with their written witness statements available. The general proposition made by the First and Second Appellants is that they are supported by Mr Nasim Ahmed who provided a witness statement. They have now lived in the United Kingdom for 12 years. Throughout the course of their oral evidence they accepted they have both been working; the First Appellant continuing with her skills as a seamstress/tailor and the Second Appellant undertaking a variety of employments, mostly according to them on an informal basis. They pay and have been paying rent at a rate of £1,160 per month. They have been paying Council Tax in the region of £1,350 per annum and meeting all other utility bills and costs associated with running their home and maintaining their family, including three children. The suggestion by them that they have managed to do this by informally working occasionally and receiving support, together with having sold the property in Mongolia for

a sum equalling £10,000 in 2007, supplemented by subletting a room in their property is not credible.

29. During the Second Appellant giving evidence with the use of the interpreter an issue arose. Either the First Appellant, or one of those persons accompanying her as a supporter in Court, were suggesting audibly to the interpreter that she was not interpreting correctly. The interpreter, understandably, brought this to my attention and was upset and concerned. The interpreter declared clearly that she had, as a matter-of-fact, been interpreting accurately. I had no reason to conclude otherwise. I required to give a stern warning to those in the Court, including the First Appellant, that they required to remain silent or they would be ejected from the proceedings throughout the duration of the Second Appellant giving evidence.
30. The First and Second Appellants claimed that their children only have a basic understanding of spoken Mongolian and are unable to read and write in the language. I do not find this credible. Their eldest child, the Third Appellant, was 4½ years old when he came to the United Kingdom. Whilst the First and Second Appellants can speak some English their primary language is Mongolian and as such they required an interpreter for the purposes of the proceedings. Whilst the Third Appellant has been attending school in England and will now no doubt be fluent in speaking, reading and writing in English, there is little doubt that he will have a good understanding of Mongolian language. Whilst the Fourth Appellant who is now 8 has never lived in Mongolia, I do not accept that he has not whilst living in the same family unit as the First, Second and Third Appellants acquired a knowledge of Mongolian language which is being spoken in the household.
31. In addition to considering the Third, Fourth and Fifth Appellants' welfare as a primary consideration generally, I have had specific regard to the cases of EV (Philippines) & Ors –v- Secretary of State for the Home Department [2014] EWCA Civ 874, E-A (Article 8 – best interests of child) Nigeria [2011] UKUT 00315 (IAC), Azimi-Moayed & Ors (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC), and Zoumbas –v- Secretary of State for the Home Department [2013] UKSC 74.
32. I have approached the consideration of the Third, Fourth and Fifth Appellants' circumstances with regards to the Rules in the way which I am required to do for the purposes of considering their circumstances in a standalone way outwith the Rules for the purposes of Article 8 of the European Convention on Human Rights. This appears to be the appropriate thing to do. Consideration of whether it is reasonable for the Third and Fourth Appellants to leave the United Kingdom for the purposes of the Rules (either paragraph 276ADE or paragraph EX.1 of Appendix FM) require careful consideration of all facts and circumstances and the carrying out of a proportionality test.
33. The Third and Fourth Appellants have been in the United Kingdom and have lived continuously here for at least 7 years. Subparagraph (iv) of paragraph 276ADE and the provisions of paragraph EX.1 of Appendix FM require me to determine whether "it would not be reasonable to expect the child to leave the UK".
34. The Fifth Appellant is only some 18 months old and cannot benefit from the Rules. The Fifth Appellant's circumstances have to be considered outwith the Rules. The Appellants' representative did not place much weight upon the circumstances of the Fifth Appellant being a particularly persuasive factor in my decision-making and instead encouraged me to focus upon the circumstances of the Third and Fourth Appellants.
35. In coming to a determination for the purposes of subparagraph (iv) of paragraph 276ADE and provision EX.1 of Appendix FM and establishing whether it is reasonable or not to expect the Third and Fourth Appellants to leave the UK, I have carried out a full examination of all the circumstances pertaining to the Third and Fourth Appellants and looked at all the circumstances of the children including, for the purposes of consideration of the Article 8 considerations the steps set out in Razgar.
36. So far as the Fifth Appellant is concerned, I am satisfied that I ought to consider their circumstances under article 8 as no Immigration Rule is applicable. Given his young and tender years, he is undoubtedly primarily focused upon himself and his immediate family, in particular the

First and Second Appellants. He has not begun to establish any meaningful private life. There would be no breach of the ECHR by his removal with his parents.

37. In considering whether it would be reasonable for the Third and Fourth Appellants to leave the United Kingdom, I consider and compare their continued residence here in the UK in their family unit with the other alternative. The other alternative does not involve them relocating to Mongolia on their own but instead as part of the family unit which they are familiar with and part of with their parents, the First and Second Appellants, and their younger brother the Fifth Appellant.
38. I conclude that the Third and Fourth Appellants are adaptable to relocation in Mongolia. It is their best interests to be cared for by their parents. It is reasonable that they leave the UK. The evidence available suggests that they are sociable children who will be able to develop new friendships and relationships outwith their immediate family without difficulty. On the basis of my conclusions they will have a sufficient understanding of the Mongolian language to enable them to integrate into Mongolian society without difficulty. Whilst they are unlikely to be educated in English, they will be able to continue their education in Mongolia without any prohibitions. School education is available in Mongolia. English is taught in secondary schools. Tertiary education is available. The skills and hence ability to earn a living by the First and Second Appellants will support the Third, Fourth and Fifth Appellants in their education. They do not have any health problems or special educational needs or require any special provision in terms of their care or education.
39. I accept that the Third, Fourth and Fifth Appellants should not be punished for the wrong actions taken by the First and Second Appellants to remain in the United Kingdom illegally and to evade Immigration Authorities for a long period of time. I do not believe that their relocation to Mongolia would be any form of punishment. Whilst educational provision may not be of the same high calibre as that which they could benefit from in the UK, there are no risks of harm or serious detriment which can be reasonably anticipated on the basis of the evidence in respect of their physical, emotional or educational well-being.
40. The Fourth Appellant is currently continuing his primary school education. He is not at a crucial stage of his education. He has friends but his existing private life is not such that there would be any harsh effects of a relocation at his age. The arguments around the current timing of a relocation to Mongolia for the Third Appellant is more carefully balanced given that he is at secondary school and will be aged 14 later this year. Again friendships and interests can be pursued or new in Mongolia. The Third Appellant is not due to imminently be presented for any formal educational certificates or qualifications. He spent some years before coming to the United Kingdom in Mongolia. He will have some, albeit aged memories of his time spent there. His knowledge of English will no doubt assist and promote his future well-being and ability to achieve in Mongolia.
41. The First and Second Appellants are undoubtedly loving and caring parents to the Third, Fourth and Fifth Appellants. There is no suggestion that they are unable to meet the basic needs of the Third, Fourth and Fifth Appellants well. It is most likely that the First and Second Appellants would obtain accommodation and employment over a short period of time in the event of returning to Mongolia. It is reasonably foreseeable and most likely that the Appellants together would continue in a loving family unit of five in Mongolia with no serious hardship arising. The First and Second Appellants have parental responsibilities to promote the welfare of their children wherever they may be and they will be able to readily assist in ensuring the Third, Fourth and Fifth Appellants form ties and integrate in Mongolian society utilising their own knowledge and experiences.
42. For the purposes of subparagraph (iv) of paragraph 276ADE and the provisions of EX.1 of Appendix FM, it has not been established on the basis of the evidence that it would not be reasonable to expect the Third and Fourth Appellants to leave the United Kingdom. For the same reasons which I set out, it is not disproportionate for the Respondent to have concluded that the Third and Fourth Appellants be removed from the UK.
43. As I have already indicated so far as the Third, Fourth and Fifth Appellants are concerned, I have carried out a full consideration of their circumstances including the provision of the Rules for the Third and Fourth Appellants but also considering their circumstances along with those of the Fifth



Appellant outwith the Rules. There were no compelling or other reasons to consider the circumstances of the First and Second Appellants outwith the Rules.

44. None of the Appellants are British citizens. They have no right to future education and health care in this country. Section 117B sets out the public interest considerations which must be taken into account for the purposes of Article 8 in all cases. Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. Through no fault of their own, the Third, Fourth and Fifth Appellants' ability to remain in the United Kingdom throughout their lives has always been doubtful. The Fourth and Fifth Appellants happened to be born in the UK during a period when their parents were here without authority.

### **The grant of permission and the grounds**

12. Judge Astle considered it arguable that the judge gave insufficient consideration to the private life of the third appellant, the likely language difficulties for the third and fourth appellants and their best interests. She said that all the grounds may be argued.
13. There were three grounds of appeal.
14. Ground 1 was that the judge erred in his assessment of the reasonableness of relocation by the third and fourth appellants by taking into account that the children would be returning as part of a family unit with their parents and that this would render relocation reasonable. It is contended that, as para 276ADE is concerned with private life and not family life, the fact of return of a child in the company of its parents does not diminish the extent of the interference with the child's own private life, as distinct from family life, established in the UK. Accordingly, it is contended that the starting point for the consideration of para 276ADE in relation to the third and fourth appellants ought not to have been the fact that the children would be returning to Mongolia with their parents.
15. In any event, Judge Mill erroneously concluded at [30] and [38], that the children will have knowledge of the Mongolian language sufficient to be taught in that language and that their education would not be disrupted. The judge erred in concluding, at [38], that, using their "sufficient" understanding of the language, they would integrate into Mongolian society without difficulty.
16. In relation to the third appellant, the judge erroneously concluded that he would have memories of living in Mongolia. In any event, according to the judge's own assessment of the facts, the third appellant would have been more focused on his parents at the time and would not have started to engage with the community or education system in that country. The judge failed to direct his attention to the principles in Azimi-Moayed & Others (decisions affecting children; onward appeals) [2013] UKUT 00187 (IAC) and failed to consider, rather than just refer, to the case of E-A (Article 8 – best interests of children) Nigeria [2011] UKUT 00315 (IAC). In Azimi-Moayed, the court clearly considered that the seven-year period from the age of 4 years is likely to be more significant.
17. There was no assessment of the third appellant's private life save to say that he was not undertaking any formal examinations. The judge referred to the third appellant's involvement with the Royal Air Force Cadets which demonstrated that his social ties had clearly extended beyond his family unit and school community.
18. Accordingly, ground 1 contends that the judge had failed to adequately demonstrate that he had engaged with the evidence regarding the third and fourth appellants' individual private lives and adequately assessed whether relocation would actually be in their best interests and would promote their welfare.
19. Ground 2 concerned the judge's assessment of the first and second appellants' loss of ties to Mongolia. It is asserted that, having regard to the length of time the first and second appellants had been away from Mongolia, he erred in his assessment of their abilities to financially support

their children in Mongolia and their continuing ties to Mongolia. His findings that the couple would be able to sustain a family of five and obtain housing and financial support was equally flawed in the light of the lapse of time since they left the country and the fact that they had undertaken menial jobs whilst living in Mongolia.

20. Ground 3 was that the judge had erred in his assessment of s.117B of the 2002 Act. Section 117B states that little weight should be given to private life that is established by a person at a time when the person's immigration status was precarious. It is contended that it is evident, from consideration of s.117B(6), that s.117B(4) and (5), which the judge considered, do not relate to children. Even if precarious private life established by an adult may attract little weight under s.117B, s.117B(6) states that the public interest does not require the removal of an adult if he or she has established a genuine relationship with a child resident in the UK for more than seven years. In his consideration of the reasonableness of the third and fourth appellants relocating to Mongolia, the judge had failed to direct his attention to s.117B(6).
21. Further, or in the alternative, it is contended that the judge's finding at [45] of the determination, that the children would continue to be a significant burden on taxpayers due to the requirement to continue to educate them, was austere and flawed. If the appellants were granted leave to remain, they would be able to make the appropriate contributions as they would become self-sufficient like any other persons residing in the UK lawfully.
22. In addition, the judge's findings were "*at odds with*" the terms of the United Nations Convention on the Rights of the Child 1989 ("UNCRC") which, inter alia, requires state parties to take all appropriate measures to "*ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members*".

### **Submissions at the hearing**

23. As stated at [9] above, Mr Wilding and Ms Nnamani agreed that the judge had used the wrong version of para 276ADE(vi) in relation to the first and second appellants and that, if I concluded that he did not materially err in law in considering whether they satisfied the "*no ties*" stipulation in the previous version of para 276ADE(vi), the error in applying the wrong version of para 276ADE(vi) would not be material.
24. Ms Nnamani explained that the thrust of ground 1 was that the judge had erred in failing to focus on the private lives established by the third and fourth appellants in the United Kingdom. Instead, his starting point in assessing the private lives of the third and fourth appellants was that they would be returning to Mongolia with their parents. In relation to the third appellant, he erroneously focused on whether the third appellant's memories of Mongolia would assist him to re-integrate, whether the fact that he had been born in Mongolia and came to the United Kingdom at the age of 4½ years would be of assistance, and whether his education could be continued in Mongolia. Ms Nnamani submitted that the fact that the third appellant had some knowledge of the Mongolian language cannot diminish the private life that he has established in the United Kingdom.
25. I asked Ms Nnamani to draw my attention to the evidence that was before the judge about the private lives established by the third and fourth appellants in the United Kingdom. She referred me to the fact that there were birth certificates for each of the children in the bundles. On examining the file at the hearing, I found the following material:
  - (i) In relation to the third appellant, a letter dated 19 September 2013 from Quintin Kynaston Community Academy confirming that he is a student in full-time education at the academy, having been admitted into year 7 on 4 September 2012. (Since the hearing, I have seen a letter dated 20 May 2015, at page 32 of a bundle submitted under cover of a letter dated 27 May 2014, that says the same thing).

- (ii) In relation to the third and fourth appellants, a letter dated 20 September 2013 from Gateway Primary School confirming that the third appellant had attended the school from 5 June 2006 until 20 July 2012 and that the fourth appellant was attending the Gateway Academy, formerly the Gateway School, and had done so since 9 September 2010. (Since the hearing, I have seen a letter dated 20 May 2015, at page 31 of a bundle submitted under cover of a letter dated 27 May 2014, that says the same thing).
  - (iii) In relation to the third appellant, a letter dated 26 September 2014 from Quintin Kynaston School congratulating the third appellant on successfully securing a place on the Junior Prefect team.
  - (iv) In relation to the third appellant, a letter dated 17 November 2014 from Royal Air Force Air Cadets confirming that he was a member of the 4F Hampstead Squadron and had been since 15 September 2014.
  - (v) Three photographs of the third appellant with colleagues in the Royal Air Force Air Cadets.
  - (vi) In relation to the third appellant, a certificate dated July 2014 issued by Quintin Kynaston for his efforts in drama.
26. There were no witness statements from the children and no school reports. However, there were witness statements from the first and second appellants stating, inter alia, that all of the children had formed relationships with children at school and in the community and that the children do not know any culture other than the culture in the UK.
  27. Ms Nnamani acknowledged that the judge had referred to the letter from the Royal Air Force Air Cadets at [13] of the determination. However, she submitted that he failed to take it into account in his assessment at [22] onwards.
  28. Ms Nnamani submitted that, even if the third and fourth appellants have a working knowledge of the Mongolian language, this does not mean that they can be educated in the Mongolian language. The judge did not fully assess the facets of the private lives of the third and fourth appellants. The assessment of their best interests was flawed. He did not consider whether it would be in their best interests to return to Mongolia.
  29. Ground 2 challenged the judge's assessment of the "*no ties*" stipulation in para 276ADE(vi) in relation to the first and second appellants. When the first and second appellants were last in Mongolia, they had one child. They now have three children. The question was whether the judge had taken into account or was aware of all the relevant factors and whether they had been properly considered.
  30. Ms Nnamani accepted that ground 2 may be a disagreement with the judge's conclusion. When pressed, she confirmed that ground 2 was a rationality challenge.
  31. Ms Nnamani submitted that s.117B(5) does not apply to children. In ZH (Tanzania), the House of Lords held that children should not be blamed for the actions of their parents. It was therefore unlikely that s.117B(5) would apply to children. The judge's findings, at [44] and [45], that the children will continue to be a significant burden on taxpayers due to the requirement to continue to educate them, was a very austere finding.
  32. If the judge had directed his attention to s.117B(6), he would not have applied s.117B(5) to the children.
  33. The finding that the children would be a burden on the education system was also flawed because, if the appellants are granted leave, they would be able to make appropriate contributions. At [28], the judge had found that the first and second appellants had been working. Ms Nnamani

submitted that, if they were granted leave, it would be strange that they would be unable to take care of themselves financially and maintain their children.

34. Ms Nnamani submitted that, at [44], the judge *may* have said that little weight was attached to the children's private lives. She asked me to draw the inference that he *had* attached little weight to the private lives of the third and fourth appellants. She submitted that he was wrong to do so.
35. In relation to the UNCRC, Ms Nnamani submitted that the judge erred in referring to the fact that the children are not British citizens and therefore have no right to future education and healthcare in the UK. In doing so, he had unlawfully discriminated against the children on the grounds of their immigration status, contrary to the UNCRC.
36. I informed Mr Wilding that I did not need to hear from him, save in relation to Ms Nnamani's submissions on s.117B(5) and whether it applies to children.
37. Mr Wilding submitted that s.117B(5) applies to adults and children alike. It applies in the assessment of an Article 8 claim under the Immigration Rules as well as outside the Immigration Rules. It applies in deciding whether it is reasonable for children to relocate under para 276ADE(iv). Mr Wilding submitted that s.117B(5) does not detract from ZH (Tanzania). He drew my attention to MK (best interests of children) India [2011] UKUT 00475 (IAC), the Upper Tribunal said, at [25] that "*it is quite clear from leading cases, including ZH (Tanzania), that factors such as citizenship and immigration status can sometimes strengthen, sometimes weaken, the argument that the best interests of the child lie in remaining in the United Kingdom*".
38. However, Mr Wilding submitted that the judge had not followed this approach. He only considered s.117B outside the Immigration Rules. This is because he considered it at [43]. Accordingly, any error was not material because his approach was generous to the appellants and they still failed.
39. Mr Wilding submitted that, at [44], the judge said, "*Section 117B sets out the public interest considerations which must be taken into account for the purposes of Article 8 in all cases*". He then said "*through no fault of their own, the third, fourth and fifth appellants' ability to remain in the United Kingdom throughout their lives has always been doubtful*". Mr Wilding submitted that this does not mean that the judge gave little weight to their private lives because of their precarious immigration status. At [46], the judge concluded that it was reasonable for the third, fourth and fifth appellants to relocate. He incorporated his finding as to reasonableness. It was a fact that the ability of the third, fourth and fifth appellants to remain in the United Kingdom had always been doubtful.
40. In relation to the argument that the judge's finding that the third, fourth and fifth appellants if they remain in the United Kingdom, will continue to be a significant burden on taxpayers due to the requirement to continue to educate them was austere, Mr Wilding submitted that this was a facet of the public interest which the judge was entitled to take into account.
41. At [11] of the judgment in FK (Botswana) v Secretary of State for the Home Department [2013] EWCA Civ 238, Sir Stanley Burnton said:

"The second reason is that the maintenance of immigration control is not an aim that is implied for the purposes of article 8.2. Its maintenance is necessary in order to preserve or to foster the economic well-being of the country, in order to protect health and morals, and for the protection of the rights and freedoms of others. If there were no immigration control, enormous numbers of persons would be able to enter this country, and would be entitled to claim social security benefits, the benefits of the National Health Service, to be housed (or to compete for housing with those in this country) and to compete for employment with those already here. Their children would be entitled to be educated at the taxpayers' expense (as was the second appellant). All such matters (and I do not suggest that they are the only matters) go to the economic well-being of the country. That the individuals concerned in the present case are law-abiding (other than in respect of immigration controls) does not detract from the fact that

the maintenance of a generally applicable immigration policy is, albeit indirectly, a legitimate aim for the purposes of article 8.2.”

42. Mr Wilding submitted that it could not therefore have been discriminatory for the judge to have taken into account that the education of the third, fourth and fifth appellants would be a burden on the taxpayer, given that the Court of Appeal found that the benefits of social security, the NHS, housing and receiving education go to the economic wellbeing of the country which was a legitimate aim.
43. In response, Ms Nnamani submitted that the Tribunal held in AM (S 117B) Malawi [2015] UKUT0260 (IAC) that s.117B only applies outside the Immigration Rules. It does not apply in any assessment under the Immigration Rules.
44. I pointed out that the judge had only applied s.117B in conjunction with his assessment outside the Immigration Rules.
45. Ms Nnamani submitted that it would be very strange for little weight to be attached to the private lives of children, bearing in mind the Rule that, if a child has lived in the United Kingdom more than seven years, the issue is whether it would be reasonable for the child to relocate.
46. I announced that there was no material error of law in the judge’s decision for reasons to be given in writing.

### **Assessment**

47. I do not accept that the judge erred as contended in ground 1, for the following reasons:
  - (i) The judge’s determination has to be considered as a whole. When considered as a whole, in particular from [22] onwards, it is plain and beyond doubt, in my judgement, that the judge accepted that the third and fourth appellants had established private lives in the United Kingdom. He referred in terms to the third and fourth appellants attending school in the UK. He said (at [38] at his decision) that “*the evidence available suggests that they are sociable children*”. He must therefore have had in mind the evidence before him that they were attending school and, in the case of the third appellant, his activities with the Royal Air Force Cadets, evidence which he had referred to at [13] of the decision. It is difficult to see what else he could have been referring to at [38]. In relation to the fifth appellant, he said (at [36] of his decision) that he had not begun to establish any meaningful private life in the UK because, given his tender age, he was undoubtedly primarily focused upon himself and his immediate family, in particular, the first and second appellants. He was therefore distinguishing the fifth appellant from the third and fourth appellants and, in doing so, stating (although not in terms) that the third and fourth appellants had established private lives in the UK.
  - (ii) I therefore reject the contention that the judge erroneously started his assessment of the private life claims of the third and fourth appellants by considering whether they would be returning to Mongolia with their parents.
  - (iii) In any event, there was almost a dearth of evidence about the private life of the fourth appellant apart from the fact that he was attending school, as is evident from [25] above, evidence which the judge plainly considered. There was a little more evidence in relation to the third appellant, but even this was limited. There were no witness statements from the children and no school reports. The witness statements of the first and second appellants did not say much about the quality of the private lives of the third and fourth appellants beyond what the judge had dealt with. The parents said that their children were only aware of the culture in the UK and had developed ties with friends and the community. The judge said

that they were sociable children who will be able to develop new friends and relationships outside their immediate family without difficulty. That shows that he took into account such evidence as was before him about their private lives in the UK.

- (iv) I do not accept that the judge failed to consider the best interests of the third and fourth appellants. At [21] of the determination, he summarised ZH (Tanzania), stating that the principle that the best interests of children as a starting point must be considered in the proportionality assessment was reflected within s.55 and that he had borne this in mind throughout in his decision-making. At [31], he again referred to the cases of EA and Azimi-Moayed referring to the welfare of the third, fourth and fifth appellants as a primary consideration generally.
  - (v) The remainder of ground 1 amounts to no more than a disagreement with the reasoning of the judge and his findings. The judge was fully entitled to take into account the fact that the children would be returning to Mongolia with their parents. He was entitled to take into account that the third appellant will have some memory of Mongolia which will assist him and that both the third and fourth appellants will have the support of their parents who he found to be undoubtedly loving and caring.
48. I can dispose of ground 2 in brief terms. Ms Nnamani accepted that ground 2 was a rationality challenge, the threshold for which is high. The judge was plainly aware that the first and second appellants had had only one child to support in Mongolia when they were living in Mongolia and that they now have three children to support. It simply cannot be said that his finding that the first and second appellants will be able to sustain themselves and their children is irrational.
  49. In relation to ground 3, Mr Wilding and Ms Nnamani addressed me at length on the question whether s.117B(5) applies in an assessment of the Article 8 claims of children. Mr Wilding submitted that s.117B(5) applies to any assessment under the Immigration Rules as well as any assessment of an Article 8 claim outside the Immigration Rules, whereas Ms Nnamani submitted that the Upper Tribunal had held in AM (Malawi) that s.117B only applies to an assessment outside the Immigration Rules.
  50. I am inclined to the view that Mr Wilding is correct, that s.117B(5) applies in assessing any claim, whether under the Immigration Rules or outside the Immigration Rules and whether the assessment relates to children or adults. S.117B(5) is not limited in its terms to adults or to assessments carried out under the Immigration Rules. By virtue of s.117A(2), the court or tribunal must have regard to the considerations listed in s.117B “*in all cases*” when it is considering “*the public interest question*” which is defined in s.117B(3) as meaning “*the question of whether an interference with a person’s right to respect for private and family life is justified under Article 8 (2)*”.
  51. It is axiomatic that no Article 8 claim can succeed unless, in carrying out the balancing exercise that is part of proportionality, the conclusion is reached that the decision in question would be disproportionate. The guidance of the Upper Tribunal in AM to the effect that s.117B only applies outside the Immigration Rules would mean that, in a case in which it is decided that it is unreasonable for a child to relocate under EX.1 (a) or para 276ADE(iv), this conclusion would have been reached without any public interest considerations having been considered at all, with the result that the Article 8 claim of the child will have succeeded without any proportionality or balancing exercise having been conducted at all. That simply cannot be correct. To my knowledge, there is no example in any domestic or Strasbourg cases where it has been held that an Article 8 claim succeeds without the circumstances of the individual having been balanced against the state's interests.
  52. Having said that, the point is not of material relevance in this case. This is because the judge only took into account the s.117B considerations in relation to his assessment of the claim outside the Immigration Rules. He did not take it into account in deciding whether it was reasonable for the

third and fourth appellants to relocate to Mongolia. This much is clear from the fact that, having assessed the claims of the third and fourth appellants under para 276ADE(iv) of the Immigration Rules and stated his conclusion in that regard at [42], he turned to consider the position outside the Immigration Rules at [44]-[46]. It was only at [44]-[46] that he referred to s.117B. It is therefore plain that he only considered s.117B outside the Immigration Rules, which was generous to the third and fourth appellants, and yet they lost.

53. It simply cannot be inferred, as Ms Nnamani invited me to infer, that the judge at [44] of his decision gave little weight to the private lives of the third and fourth appellants. There is nothing in [44] which says so in terms. Furthermore, at [44], the judge merely made a series of factual statements, some of which applied to all the appellants and some to certain of them. It therefore simply cannot be said that the third sentence of [44] applied to all of the appellants.
54. I turn to the argument that the judge's finding at [45] of his decision that the third, fourth and fifth appellants, if they remain in the United Kingdom, will continue to be a significant burden on taxpayers due to the requirement to continue to educate them is austere. I am satisfied that there is no error of law in this regard. This argument is entirely hopeless, given paragraph 11 of the judgment of the Court of Appeal in FK (Botswana), quote at [41] above.
55. The final argument in relation to ground 3 was that the judge unlawfully discriminated against the children in holding their immigration status against them. Again, this argument is hopeless. It is axiomatic that the immigration laws of any country will draw distinctions between those who have an immigration status in the United Kingdom and those who do not. It simply cannot be discriminatory to take into account that a child does not have an immigration status in the UK in order to reach a decision on proportionality. In any event, given that the Court of Appeal decided that the benefits of social security, the NHS, Housing and receiving education are relevant to the economic well-being of the UK, it cannot be discriminatory to take into account the fact that the children in this case will be educated at state expense if they are allowed to remain. It is speculation to suggest that, if allowed to remain, their parents will be able to contribute sufficiently to the tax system to compensate for that expense, even if that were a valid argument which is not the case.
56. Accordingly, I have concluded that the judge did not err in law. The appeals to the Upper Tribunal are dismissed.

Signed  
Upper Tribunal Judge Gill

Date: 2 October 2015