



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

Appeal Number: IA/35825/2014

THE IMMIGRATION ACTS

Heard at: Field House

**Decision and Reasons
Promulgated**

On: 10th April 2015

On 1st June 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

**Enkhjin Tserendorj
(no anonymity direction made)**

Respondent

Representation:

For the Appellant: Mr Kandola, Senior Home Office Presenting Officer

For the Respondent: Ms Osei-Kwatia, Counsel instructed by MR Solicitors

DETERMINATION AND REASONS

1. The Respondent is a national of Mongolia date of birth 20th October 1976. On the 5th January 2015 the First-tier Tribunal (Judge Callender-Smith) allowed her appeal against a decision to remove her from the United Kingdom pursuant to s10 of the Immigration and Asylum Act 1999. The Secretary of State now has permission¹ to appeal.

Background

¹ Permission was granted by First-tier Tribunal Judge Robertson on the 13th February 2015

2. Ms Tserendorj came to the United Kingdom in July 2007 with leave to enter as a student, which was subsequently varied and she became a Tier 4 (General) Student Migrant with leave until the 30th April 2011. An application to vary that leave further was refused because unfortunately for Ms Tsenderdorj her English language test result was not released in time for the Secretary of State to consider it as part of the application; the refusal was issued on the 7th April 2011 but the Home Office did not get the positive exam results until the 5th May 2011. Because at the date of the refusal Ms Tserendorj still had three weeks leave to remain the decision did not attract a right of appeal. Her solicitors requested reconsideration of the decision, sending six letters between May 2011 and March 2012, to which they received no reply. In April 2012 Emily Thornberry MP wrote to the Home Office requesting an update on the case; she received a letter stating that the matter was still under consideration. It was not until Ms Tserendorj made a further application 'outside of the rules' in May 2013 that she finally received a response. It was refused on the 17th June 2013 with no right of appeal. On the 24th March 2014 she made another application, on Article 8 grounds, and it was this which resulted in the Secretary of State's refusal letter and s10 decision, both of which are dated 27th August 2014.
3. When the matter came before the First-tier Tribunal the case put was firstly that Ms Tserendorj qualified for leave to remain under paragraph 276ADE(1)(vi) of the Immigration Rules. She submitted that she had no friends or family remaining in Mongolia. The Tribunal found that she did in fact have a brother, a widowed sister-in-law and an elderly grandmother. It accepted that she would face significant obstacles in reintegrating into Mongolian society because of animosity towards her on the part of some of these family members, but these obstacles could not be found to be "very" significant. She is an intelligent, determined and creative woman and she will manage. The appeal therefore failed under the Rules and there is no challenge to that decision.
4. The second argument advanced by Ms Tserendorj was that her removal from the UK would be a disproportionate interference with her Article 8 private life in the UK. The rule left no scope to consider the quality of her private life, which merited the Tribunal's attention. In summary her case was that since her arrival she had suffered a failed marriage which had included domestic violence, she had come through that with the (ongoing) support of good friends, and she had established a career as a successful fashion designer. Evidence from third parties attested to her talent in that area. The First-tier Tribunal found these matters, taken with the difficulties she would face in returning to Mongolia, to be compelling reasons why Article 8 'outside of the rules' should be considered. In its consideration of proportionality the Tribunal considered the weight to be attached to the public interest in controlling immigration control [at 65 and 66], the fact that Ms Tserendorj had apparently worked without having permission to do so [65], that it is in the public interest that people who seek leave to remain in the UK are able to speak English [66], which she can [67] and that it is in the public interest that people to seek leave to

remain are financially independent [68]. In respect of the latter the Tribunal accepted, in light of her “burgeoning work as a fashion designer”, that Ms Tserendorj has not been, and is not likely to become in the future, a burden to the state. The determination then turns to the question of what weight to attach to her private life, established whilst her status in the UK was precarious, if not unlawful. Of this the Tribunal focuses on the chronology, noting the delay on the part of the Home Office in dealing with any of the many letters sent by the solicitors and a concession made in the refusal letter:

“73. Finally I have to consider the weight that should be attached to her private life established at a time when her immigration status was precarious. Again the chronology is relevant. Also, at paragraph 51 of the [refusal letter] the Respondent states that her application for Leave to Remain as a Tier 4 Student was refused because – at the date of the application – she had not provided the required evidence that she had passed the relevant English language examination. Importantly it is then stated (with my italics inserted):

‘...However, in considering all the details of your client’s case we have taken into account that she sat her English exam on 19th March 2011 and that her pass certificate is in fact dated 22 April 2011 and that her leave did not expire until 30 April 2011. *The Home Office recognises that had your client’s then representatives waited to submit her application she may have been granted Leave to Remain.* Nevertheless the above information was not in fact submitted until 5 May 2011, after your client’s leave expired’

74. I find that the situation, despite what the Respondent asserts at paragraph 52 of the [refusal letter] is one that creates exceptional circumstances as to why the Appellant’s removal would amount to a disproportionate interference with her right to respect for private life and that the refusal to grant her leave outside the Immigration Rules would result in unjustifiably harsh consequences for her.

75. There are proper and exceptional reasons why the public interest in enforcing the removal of those unlawfully present in the UK should be moderated by the public interest in allowing the Appellant to remain for all the reasons I have explored and outlined above.”

5. The Secretary of State now seeks that this decision be set aside. It is submitted that the First-tier Tribunal erred in the following material respects:
- i) There is a failure to “adequately identify” any particular reason why Article 8 outside of the rules should have been considered;
 - ii) Beyond stating the accepted fact that the Ms Tserendorj has been in the UK for nearly seven years the determination fails to identify what if any aspects of her private life would engage Article 8;
 - iii) The fact that the solicitors were in contact with the Home Office did not stop Ms Tserendorj being here unlawfully. She was an overstayer once her leave expired;

- iv) The fact that she might have been given leave to remain had she waited to submit her application in April 2011 is not an “exceptional factor”;
 - v) The Judge fails to conduct a balancing exercise with reference to s117B of the Nationality, Immigration and Asylum Act 2002.
6. Mr Kandola submitted that in short, there was nothing exceptional in this case which warranted leave to remain outside of the Rules. It cannot be said that the Home Office had acted unreasonably in April 2011. The refusal was issued on the 7th April, and by the 22nd April the English test results were available. Her leave did not expire until the 30th, and so her representatives had had eight days in which to make a fresh in-time application. That they failed to do so did not create an exceptional circumstance.
7. Ms Osei-Kwatia pointed out that there was a peculiar chronology in this case and that the unfortunate events of April 2011, coupled with the failure of the Home Office to make an appealable decision for over four years, were relevant factors for the Tribunal to have taken into account. Ms Tserendorj had consistently - and persistently - tried to regularise her position. That all went in her favour. It was submitted that the decision was thorough, careful and open to the Judge on the evidence before him. He addressed the mandatory considerations set out in s117B of the NIAA 2002 (as amended by the Immigration Act 2014) and having done so was entitled to weigh in the additional factors of the delay on the part of the Home Office and the fact that this applicant would have been granted a further period of leave to remain in 2011 but for the ineptitude of her then representatives and the intransigence of the Home Office.

My Findings

8. Ground (i) as it is set out above has no merit. Although not cited the author of the grounds was apparently relying on the decision of Sales J (as he then was) in Nagre². It has now been made clear that Nagre was never intended to introduce an intermediary ‘threshold’ test before consideration of Article 8: there either is an Article 8 claim, or there isn’t: see MM³, Khalid and Singh⁴. Even if there was such an intermediary threshold test in this case there was a good reason to consider Article 8 in its unvarnished form; that is that paragraph 276ADE of the Immigration Rules is entirely silent on the nature and quality of a person’s private life in the UK.
9. As to the nature of the private life in question, the matter raised by ground (ii), the determination accepted that this was an appellant who had entered into a marriage in the UK, who had a “strong support structure

² Nagre [2013] EWCA 720 (Admin), see also Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 640 (IAC)

³ MM & Ors [2014] EWCA Civ 985, at 129

⁴ Khalid and Singh v SSHD [2015] EWCA Civ 74, at 64

with her British friends, family and the community” and who had “successfully adapted and integrated into British culture and tradition” [at 16]. That accepted evidence formed the backdrop to the Tribunal’s finding [at 63] that she had “clearly established and private life” in the seven years that she has spent here. Having read the determination as a whole I am not satisfied that the Tribunal failed to consider whether Ms Tserendorj has a private life in the UK.

10. Nor can ground (v) be sustained. It is apparent from the determination that the Tribunal properly directed itself to the public interest considerations set out in s117B. The fact that the outcome was not as the Secretary of State would have wished does not disclose an error of law. There was no failure to conduct a balancing exercise.
11. The real question is whether it was properly open to the Tribunal, on the evidence before it and the findings it had made, to conclude that the removal of Ms Tserendorj was a disproportionate interference with her private life. Here Mr Kandola focused his submissions on s117B (4) & (5). Between her arrival in 2007 and the expiry of her leave in 2011 her leave was “precarious”; as far as the Secretary of State is concerned her lack of leave ever since renders that period of stay “unlawful”. Ms Osei-Kwatia protested that someone who is repeatedly contacting the Home Office asking for a decision cannot properly be considered to be unlawful. It is a moot point, since either way the Act demands that “little weight” be attached to any private life established during such periods of residence. The Secretary of State submits that this being the case, it was not open to the Tribunal to find that this “little weight” could outweigh the very substantial weight to be placed on the public interest in removing persons with no further leave to remain under the Rules.
12. It is apparent from paragraph 71 & 73 of the determination that the Tribunal directed itself to the fact that her leave had – at the very least – been precarious throughout the entire period of her stay. It cannot therefore be said that the Tribunal failed to recognise this statutory provision. Nor, as I note above, can it be said that it failed to conduct a balancing exercise overall. Two additional, non-117B factors, are identified as significant. The first is the recognition by the Secretary of State that had Ms Tserendorj waited a week or two before submitting her Tier 4 application in April 2011 she may have been granted a further period of leave, the second being the failure of the Home Office to respond to repeated communications from a migrant doing her best to regularise her position. Mr Kandola submitted that it was in effect perverse for the Tribunal to have identified either or both of these matters as amounting to “exceptional circumstances”.
13. There is no requirement that Ms Tserendorj show “exceptional circumstances” and as such it was not incumbent on the Tribunal to identify any. The question before it was whether, taking all the facts of the case into account, it was disproportionate to remove her; that question had to be answered bearing in mind that the number of cases likely to

succeed 'outside of the Rules' was likely to be small. In this case it has not been shown that the Tribunal failed to take relevant information into account, or that it placed weight on any irrelevant factors. The fact that Ms Tserendorj was badly served by her representatives and that she then did her best for a number of years to regularise her position were factors that the Tribunal was entitled to consider, *along* with all of those matters set out in s117B as part of a rounded assessment. The test for showing the decision perverse is a relatively high one, and having read the determination overall I do not find this to be a decision that no reasonable authority could have come to. It is not a decision that many other members of the First-tier Tribunal would have reached, but that in itself does not infect it with an error of law.

Decision

14. The determination contains no error of law and it is upheld. I make no direction for anonymity.

Deputy Upper Tribunal Judge Bruce
25th May 2015