Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05732/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5th September 2017	**On 12th September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

MR DULGUUNMURUN JAMSRANJAV
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K Reid, Counsel, instructed by Good Advice UK
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant, Mr Dulguunmurun Jamsranjav, against the decision of First-tier Tribunal Judge Keith sitting at Harmondsworth. In that decision, which was promulgated on 10th November 2016, Judge Keith dismissed the Appellant's appeal against refusal of his application for leave to remain in the United Kingdom on private and family life grounds.

2. The First-tier Tribunal did not make an anonymity direction and I therefore cannot see that any useful purpose would be served by making one now.

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3. The Appellant is a citizen of Mongolia who was born on 7th January 1995. The background to his appeal is accurately summarised at paragraphs 2 to 5 of the judge's decision:

> 2. The Appellant's father had previously entered the United Kingdom as a Tier 4 Student. The Appellant and his sister had lived with their grandmother in Mongolia. The Appellant subsequently applied for, and was granted, leave to remain as a dependent child of his father. He entered the United Kingdom on 10th June 2008, aged 13 years, with leave to remain until 8th May 2015.
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> 3. On 28th April 2015 the Appellant applied for indefinite leave to remain as a child of a settled person, specifically, his father. The Respondent refused his application on the same date.
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> 4. On 7th May 2015 the Appellant applied for leave to remain on the basis of his family and private life. With his application the Appellant's solicitors referred to the Appellant's sister having applied to register as a British citizen, as the child of her father, who had indefinite leave to remain. The Appellant had previously made an application for settlement on the same basis but this had been refused as both his parents were not settled in the United Kingdom at the time of his application.
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> 5. The Appellant referred to the fact that the rest of his family intended to remain in the United Kingdom as his sister was applying to become a British citizen and his mother was seeking to vary her leave to remain as the spouse of a settled person. It was unjustifiably harsh to expect the Appellant to return to Mongolia where he would be at risk of destitution. He was also in the middle of his university studies and had not yet obtained a degree, which would affect his chances of self-sufficiency in Mongolia.

4. At the time of the appeal before Judge Keith, the appellant was in the second year of a three-year degree course in which he was studying civil engineering. Although the appellant's mother had initially joined his father in the United Kingdom, she had subsequently returned to Mongolia and it appeared that her marriage to his father had effectively come to an end. The Appellant and his sister, however, chose to remain with their father in the United Kingdom and the Appellant now has little if any contact with his mother. On 8th May 2013, the Appellant's father was granted indefinite leave to remain in the United Kingdom and, in June 2014, he and the Appellant's sister applied to become British citizens. The appellant was however ineligible to make this application due to his age. At the time of the hearing before Judge Keith, he had been living in the United Kingdom lawfully for a period of eight years and was residing in the same household as his father and his sister.

5. The grounds of appeal do not make any complaint about the judge's primary findings of fact. Rather, they focus upon his analysis of the law as he applied it those findings.

6. The first complaint concerns whether the judge was right to consider that there were no compelling circumstances (falling outside the contemplation of the Immigration Rules) that merited consideration of Article 8.

7. The judge began by correctly observing (at paragraph 36) that the Immigration Rules limit applications for leave to remain for adult dependent relatives to those with physical or other analogous dependencies on their UK Sponsors. He thereafter framed the question as to whether it was justifiable to consider the application outside those Rules in the following way:

> The factual question in this case was whether there was such a dependency for which the Immigration Rules could not cater.

Thus stated, it seems to me that the question was posed too narrowly. The quality of the appellant's dependency (if any) upon his father and sister was but one factor in deciding whether there were compelling circumstances that warranted consideration outside the Rules. Other circumstances – which, through referred to in the passage setting out the appellant's immigration background (above), were not expressly considered – included the fact that the Appellant was the only one of the three who did not qualify for indefinite leave to remain under the Rules. He therefore faced the prospect of having to return to Mongolia alone if he was unable to persuade his father and sister to give up their settled status in the UK and prospects of British citizenship in order to accompany him to their country of origin. That, in my judgment, was a compelling circumstance that of itself merited consideration of the appeal outside the Rules. Nevertheless, this error does not seem to have been material to the outcome of the appeal, given that the judge did in fact consider the appeal outside the Rules. I therefore find that the failure to find compelling circumstances was not a material error of law. It is thus necessary to consider whether there was any other error of law in the analysis of the appeal outside the Rules.

8. The judge considered the existence of family life at paragraphs 36 and 37. At paragraph 38, he considered the issue of proportionality before, at paragraph 39, returning to the issue of private life.

9. The judge, quite rightly, did not assume the existence of family life given that the Appellant is now an adult. He therefore found it necessary to consider whether there was anything over and above the ordinary emotional ties that typically exist between adult family members. In considering that question, the judge said as follows:

> The Appellant was not, in reality, financially dependent (as distinct from his father providing him with financial support) and there was no reason to think that his relationship with his sister and father was anything beyond the normal relations of a university student living at home.

10. The judge expressed a similar sentiment in paragraph 37 when he said this:

> The Appellant's circumstances in this regard were entirely common – he lives at home while studying at university …

11. It is of course always possible to describe a person's situation as "typical" if it is defined by reference to his actual circumstances. It was thus no doubt accurate to describe the appellant's circumstances as typical of "a university student living at home". However, this was not a legally correct approach. The appropriate question was whether this particular university student was typical of the generality of adults who retain an emotional attachment to other adult members of their family. By posing the question that he did, the judge's reasoning was both syllogistic and circular. It thus inevitably led him to conclude that family life had not been established. I therefore hold it to have been perverse to find that the Appellant did not enjoy family life with his father and his sister. The question remains as to whether this error of law was germane to the outcome of the appeal.

12. At paragraph 39, the judge dealt with the issue of private life. It is difficult fully to understand whether or not he was accepting that private life existed. This is what he said:

> With regard to his private life, once again, I concluded that the Appellant's circumstances of his studies and friendships did not merit consideration outside the Immigration Rules. There was nothing preventing either continuing in Mongolia, where the Appellant has lived the majority of his life; where his mother lives; where he has friends; and where he is able to speak and study. In reality, this case centred on the Appellant's desire for a better standard of education and career prospects – those are factors which do not engage the Appellant's human rights.

13. Although not entirely clear, it seems to me that the judge was finding that the factors to which he alluded did not constitute a private life. If that is what the judge intended to convey, then I hold that this was also a perverse conclusion. Engaging in study, together with the consequent establishment of relations with tutors and fellow students alike, clearly does constitute private life. Again, the question remains as to whether this error of law was germane to the outcome of the appeal.

14. The next question that the judge was required to consider was whether the consequences of the Appellant's removal were sufficiently grave to engage the potential operation of Article 8. At the beginning of paragraph 38 the judge said this:

> Had I concluded otherwise (i.e. that Article 8 was engaged) I would have concluded that while the Appellant did have a family life it was not interfered with to a sufficient extent to engage Article 8 – the Appellant could continue to see his family life in the United Kingdom for visits or if he applies for a student visa; and that any such interference was lawful as being in accordance with the Immigration Rules. I would also have concluded that any such interference was proportionate, noting the need to maintain the purpose of the Immigration Rules, which did not prevent the

Appellant applying for a student visa, but which did prevent him from circumventing those Rules as a means of obtaining settlement.

15. The judge thereby effectively considered stages 2 through to 5 of the classic analysis of Lord Bingham of Cornhill in the case of **Razgar** [2005] UKHL 27. Taking those stages in turn, I am satisfied that the judge erred in holding that Article 8 was not engaged by the facts of this appeal. It is trite law that once private and family life is established, the threshold for engagement of Article 8 in removal cases is not an especially high one. Indeed, it is difficult to imagine a greater interference with private and family life than the removal of a person from the country where it has been established. This too, then, was an error of law. The cumulative effect of these errors will nevertheless not be material to the outcome of the appeal if the remainder of the judge's analysis (which he considered in the alternative) was sound.

16. The judge found that the decision was in accordance with the Immigration Rules and therefore in accordance with the law. That was not an error of law. Indeed, as Lord Bingham made clear, the answer to the third question will almost always be answered affirmatively.

17. The next question is whether there was a legitimate aim in the removing the appellant. Again, Lord Bingham made it clear that this question will usually be answered affirmatively. The legitimate aim in this context was the maintenance of the economic wellbeing of the country through the consistent application of immigration controls.

18. The final question, therefore, is whether the judge made a material error of law in conducting (in the alternative) his assessment of proportionality. If not, then the earlier errors of law that I have identified will have been immaterial to the outcome of the appeal.

19. The judge only dealt expressly with the issue of proportionality in the final sentence of paragraph 38, quoted above. That does not mean to say, however, that the other factors which he identified at the earlier stages of the analysis were not also relevant. In the final analysis, the question for the judge was whether the Appellant could reasonably be expected to enjoy private and/or family life in Mongolia. Relevant to this was whether the Appellant's private and family life in the UK had been established at a time when his immigration status was precarious or (as it is sometimes put) whether he had any legitimate expectation that he would be allowed to settle. However the question is framed, it is clear that the appellant was always aware that he might not be able to settle in the United Kingdom and that he might thus be required to continue his private and family life in Mongolia. Section 117B of the Nationality, Immigration and Asylum Act 2002 therefore required the judge to attach little weight to it. Thus, whilst the judge was wrong to conclude that the element of precariousness prevented the appellant from establishing the existence of private life, he was nevertheless right to hold that little weight was to be accorded to it in the final assessment of proportionality. So far as family

life is concerned, whilst the judge took them into account at the wrong stage of his analysis, he was nevertheless entitled to have regard to the fact that the appellant's formative years had been spent in Mongolia, that he had relatives who continued to reside in Mongolia, that he had a facility in the Mongolian language, that as national of Mongolia he had a legal right to reside in that country, and that there was no evidence to suggest that the time, effort and money he had expended upon his studies in the United Kingdom would be wasted or that he would be unable to continue with those studies in Mongolia. The judge was thus entitled to conclude that the Appellant's removal in consequence of the refusal of his application would strike a fair balance between his rights and interests on the one hand, and the public interest in the consistent application of immigration controls on the other.

20. It follows from the above, that whilst I have every sympathy with the Appellant's predicament, and despite the errors of law in the First-tier Tribunal decision that I have identified, this is not an appropriate case in which to exercise my discretion to set that decision aside.

Notice of Decision

The appeal is dismissed

Signed Date: 11th September 2017

Deputy Upper Tribunal Judge Kelly