



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

Appeal Numbers: HU/16027/2018
HU/16036/2018
HU/16040/2018
HU/16042/2018
HU/16045/2018

THE IMMIGRATION ACTS

Heard at Manchester CJC

**Decision & Reasons
Promulgated**

On February 5, 2019

On February 26, 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

**BATBAYAR [B]
ERDENETUYA [B]
[D B]
[T¹ B]
[T² B]**

(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms Thomas, Solicitor

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

DECISION AND REASONS

1. On September 9, 2004 the first-named appellant entered the United Kingdom on a student visa which gave him leave to remain in the United Kingdom until July 31, 2005. That leave was subsequently extended in the same category until March 31, 2007. Two subsequent applications to extend his leave were rejected on April 17, and May 21, 2007. He then made an application as an extended family member of an EEA national on August 14, 2009 and he was issued with a residence card allowing him to remain in the United Kingdom until August 21, 2014 as long as he remained an extended family member of an EEA national. The evidence suggests that that relationship broke down.
2. On July 5, 2007 the second-named appellant entered the United Kingdom as a student with leave until November 25, 2007. Her leave was subsequently extended until August 4, 2010 and since that date she has resided here without leave.
3. The remaining appellants are the children of the first and second-named appellants and were each born in the United Kingdom. Their respective dates of birth are November 15, 2009, March 24, 2014 and May 18, 2016.
4. Applications for leave to remain on family/private life grounds in respect of the first four appellants were rejected on both June 25, 2015 and February 17, 2016. All the appellants have an application for leave to remain rejected on July 5, 2017. The appellants then lodged applications to remain on March 22, 2018 but these were all refused by the respondent on July 17, 2018. The appellants appealed those decisions on July 23, 2018 and their appeals came before Judge of the First-tier Tribunal Maxwell on November 9, 2018 and in a decision promulgated on November 19, 2018 he dismissed all their appeals.
5. Grounds of appeal were lodged on November 22, 2018 and Judge of the First-tier Tribunal Keane granted permission to appeal finding there were arguable errors of law and referred specifically to the question of whether the Judge had applied too high a test and for failing to have regard to Section 117B(6) of the 2002 Act.
6. No anonymity direction is made.

SUBMISSIONS

7. Turning to the submissions. Ms Thomas did not draft the original grounds of appeals but summarised the grounds of appeal on the following basis. She submitted that the Judge had, in paragraph 41 of the decision, applied too high a test and that the judge had not separated the assessment of the best interest of the children from the proportionality assessment which was required in line with the case of KO (Nigeria) [2018] UKSC 53. In expanding upon those grounds she argued that there was no evidence of criminality or evidence that either parent was subject to deportation and

consequently by referring to “unjustly harsh” the Judge had applied the test set out in Section 117C of the 2002 Act and such a test was reserved for persons who had a criminal history. The second issue raised related to his approach to the best interest of the children and in particular the third-named appellant. She invited the Tribunal to find that the Judge had imposed his own opinion on whether the children would be able to undergo a transition if required to go back to Mongolia and had failed to attach sufficient weight to the report that had been provided by Ms Redfern. In assessing what education was available for the children she submitted that the report, contained at page 309 of the appellant’s bundle. The Judge did not attach sufficient weight to the medical condition of the third-named appellant who had been admitted to hospital on an emergency basis as evidenced by the discharge form that was found in the appellant’s bundle. Whilst accepting there was no evidence by way of medical records of a follow up she submitted there was evidence that an inhaler was used and there was objective evidence describing pollution issues in Mongolia. Her general criticism of the best interest assessment was that it had not been undertaken independently of the overall assessment that the Judge had carried out.

8. Mr McVeety opposed the application and argued that the permission had been wrongly given, in his view, as the Judge granting permission referred to the test of unduly harsh whereas the Judge had been describing the situation as unjustly harsh and this should be read alongside the earlier conclusion and finding in paragraph 19 when the Judge made a finding that the appellants had produced little evidence to support the claim it would be unreasonable to expect them to return to Mongolia. He argued that the Judge from the outset acknowledged that the best interests of the children was a primary consideration rather than a paramount consideration and from paragraph 18 onwards the Judge had considered whether it would be unreasonable to require the children to return. He maintained that the report of Ms Redfern was generalised and that the Judge was entitled to reach the findings that he did in paragraph 18 of his decision. With regard to the issue of education he made the point that the article referred to concerned children under the age of 5 whereas the eldest child was over the age of 5. He submitted that the Judge had followed the guidance in KO correctly and had ultimately applied a real world scenario. He pointed to the fact that the Judge had considered the first-named appellant’s immigration history and had made findings regarding his EEA relationship. Finally, with regard to the issue of asthma he submitted this was a common medical condition and there was no evidence that the child could not receive treatment in Mongolia.

FINDINGS

9. This is an appeal on behalf of all the appellants who made an application for leave to remain. There is no dispute that neither the first-named

appellant nor the second-named appellant had any lawful leave at the date of application. It is also accepted that all three children were born in the United Kingdom. None of the children have any leave to remain.

10. This is a human rights appeal and the Judge had before him a large bundle of documents which he clearly had engaged with. At the commencement of his findings the Judge addressed the circumstances regarding the first-named appellant's relationship which existed before his relationship with the second-named appellant. The Judge was entitled to take those factors into account but for reasons I will hereafter give the Judge rejected their human rights appeals because he found it would not be unreasonable to require the children to accompany their parents back to Mongolia.
11. At paragraph 17 the Judge acknowledged that the parents would have a private life as they had a circle of friends living in the United Kingdom, who were supporting them, but the Judge also noted that they had maintained contact with their family in Mongolia.
12. From paragraph 18 onwards the Judge considered the position of the children. I received submissions from both representatives in relation to the report that had been prepared by Ms Redfern. That report is found on pages 43 to 57 of the appellant's bundle. The Judge considered this report. Ms Thomas takes issue with those findings.
13. The Judge noted that the assessment was based on one two hour assessment and within the report the author summarised the current circumstances of the parties and then at paragraph 5 of the report discussed the effect and impact on the family were they to be removed. Ms Redfern considered what was available in Mongolia and gave her opinion.
14. The Judge engaged with this report and ultimately concluded that the report merely highlighted the obvious point that moving children to a country which had a different culture and language could be disruptive. His finding that the "other obvious fact that most children who undergo such a transition do so successfully" is challenged by Ms Redfern on the basis that it was not within the Judge's remit to make such a finding. I disagree with that submission.
15. The Judge was entitled to consider all the evidence and concluded requiring the children to go to a foreign country was a reasonable requirement.
16. Mr McVeety submitted that children in foreign countries often accompanied their parents to the United Kingdom or any other foreign country and adjusted to their new surroundings. The same could be said to a scenario where children are required to go back to their parents' place

of birth. I therefore find nothing wrong with the phraseology used by the Judge in that report.

17. Moving on to the substantial part of the decision I find that the Judge did consider the issues relating to the children separately to a general assessment. Any reading of paragraphs 18 to 23 demonstrates this.
18. The Judge considered the issue of education, the child's medical condition and ultimately concluded that the best interests of the child (third-named appellant) would be for the family unit to remain together. The issue that he had to decide would be whether that should be in the United Kingdom or in Mongolia.
19. Ms Thomas challenges the approach in respect of the third-named appellant and in particular how the Judge dealt with the medical condition of asthma. There was limited evidence in the bundle before the Judge.
20. The hospital document referred to the fact that the child had been taken to hospital due to problems with asthma. At page 280 of the report there is a reference to the child having been discharged with a request for a follow up but there was no evidence in the bundle of any such follow up. The assessment on admission was that the child had had a one day history of nocturnal cough and an increased difficulty with breathing. There was an earlier episode in 2017 which had been treated without the necessity of being admitted to hospital.
21. I was referred to issues of pollution but there was no evidence before me that supported Ms Thomas' submission that sufferers of asthma were unable to access medical treatment such as inhalers even in Mongolia. There was also no evidence before the Judge that asthma prevented people from living in Mongolia. The Judge therefore took into account the poor air quality but made the obvious point that the appellants could live in an area which was "less polluted".
22. With regard to the issue of schooling this was addressed from paragraph 21 and whilst I accept children under the ages of 5 may have difficulties getting into their chosen school the fact remained that there was schooling available for such infants regardless of what the cost was. There were public and private schools available.
23. Having considered the children's situation the Judge reminded himself that Section 55 had to be at the forefront of his mind and that is exactly what he stated at paragraph 23.
24. Thereafter the Judge turned to the proportionality assessment and correctly set out the recent Supreme Court decision in KO. Having identified the relevant law the Judge went on to apply the law to the appellants' circumstances from paragraph 31 of his decision.

25. This was a decision in which the Judge took account of all the factors put forward on behalf of the family and he noted at paragraph 32 the physical health of the third-named appellant and potential exposure to significant air pollution. However, referring to his earlier findings he concluded that it would not be unreasonable to expect the third-named appellant to leave the United Kingdom with the other family members.
26. Contrary to how the grounds of appeal are drafted, the Judge did have regard to Section 117B(6) of the 2002 Act and he carried out a Razgar assessment of the evidence including reference to Section 117B factors.
27. Having identified that neither parent had any legal right to be in this country he concluded that for the purposes of maintaining effective immigration control it would be proportionate to remove the appellants.
28. Having considered the Judge's decision and the submissions advanced today I find the Judge made findings open to him and do not find there has been an error in law.
29. For these reasons I dismiss these appeals.

Notice of Decision

I dismiss the appeals and uphold the original decision.

Signed

Date 21 February 2019

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 21 February 2019

Deputy Upper Tribunal Judge Alis