



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/15469/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 24 July 2018

Decision & Reasons Promulgated  
On 20 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

AJ  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. S. Harding, Counsel instructed by J. McCarthy Solicitors  
For the Respondent: Mr. L. Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Shand, promulgated on 31 January 2018, in which he dismissed the Appellant's appeal against the Respondent's decision to refuse to grant leave to remain on human rights grounds. His two sons are dependent on his appeal.
2. Given that the Appellant's sons are minors, I have made an anonymity direction.
3. Permission to appeal was granted as follows:

"Whilst the judge refers to the best interests of the children and to the respondent's policy it is arguable the judge materially erred in law in not indicating consideration

of the specifics of the guidance for children residing here seven years and section 117B(6) and the relevant case law.”

4. The Appellant attended the hearing. Early on during submissions Mr. Tarlow stated that he accepted that the decision involved the making of a material error of law. Taking into account this concession, and having considered the grounds of appeal and the decision, I set the decision aside to be remade.
5. The Judge in the First-tier Tribunal referred to the Appellant’s sons as the second and third Appellants, and for the sake of consistency I will refer to them as the same in this decision although they were dependent on their father’s appeal, and there were no appeals for them in their own right.

### **Error of Law**

6. At [45] the Judge states:

“For completeness I would mention here the submission made by Mr Harding that the respondent did not give effect to her own Policy. This submission seemed, as I understood it, to be tantamount to an argument that whenever a child who has a genuine and subsisting relationship with his or her parents has been in the UK for 7 years it is axiomatic that it is in the best interests of the child to remain there with their parents and that position is reflected in Immigration Directorate Instruction on Family Migration dated August 2015. It is not however the law that whenever a child who has a genuine and subsisting relationship with his or her parents has been in the UK for 7 years with it is axiomatic that it will be in the best interests of that child to remain there with their parents. Nor is that bald proposition adopted or reflected in section 11 of the Immigration Directorate.”

7. Mr. Harding, who had represented the Appellant in the First-tier Tribunal stated that this was not the submission he had made. As set out in the grounds, he said that he had submitted that the Respondent had to have “strong reasons” why a child would be expected to leave. However, without needing to get further into this issue, Mr. Tarlow accepted that the way in which the Judge had approached the issue of the best interests of the children was in error, and was reflected in, and flowed from, his incorrect assessment of the Respondent’s own guidance. The Judge did not make any findings to the effect that there were any strong reasons which would indicate that the second and third Appellants should not be allowed to remain.

8. I find that the Judge erred in his approach to the issue of the best interests of the second and third Appellants. At [44] the Judge states:

“Accordingly whilst I am satisfied that it is in the best interests of the second and third appellants to be with their parents and with each other as a family group the evidence does not demonstrate that it is in the best interests of the children that the family should stay in the UK.”

9. At [46] the Judge states:

“As I have found that it has not been established that it would be contrary to the best interests of the second and third appellants to leave the UK and go with their parents to Mongolia I can see no reason why it is unreasonable to expect either of the second or third appellants to accompany their parents to Mongolia.”

10. I find that the Judge has not considered the best interests of the second and third Appellants separately from their parents. He has found that “the evidence does not demonstrate that it is in the best interests of the children that the family should stay in the UK”, but he has not made a finding as to whether the evidence demonstrates that it is in the best interests of the second and third Appellants to stay in the United Kingdom. I find that this is a material error of law.

11. Accordingly, I set aside the decision to be remade.

### **Remaking**

12. No further substantive submissions were made by either representative. Mr. Tarlow relied on the reasons for refusal letter. Mr. Harding submitted that the first Appellant had told him that there had been no significant change in circumstances since the hearing in the First-tier Tribunal.

13. I have considered the documents in the Appellant’s bundle (101 pages), and the Respondent’s bundle (to F1).

14. The third Appellant was born in the United Kingdom on 18 March 2009. At the date of application he was seven years old. At the date of this decision he is nine years and four months old. The Respondent considered his private life under paragraph 276ADE(1), but considered that it would be reasonable for him to leave the United Kingdom in accordance with paragraph 276ADE(1)(iv).

### ***Immigration rules***

15. I have started my consideration of the appeal with consideration of the position of the third Appellant and whether he meets the requirements of paragraph 276ADE(1)(iv). I find that the third Appellant is under 18 and had been in the United Kingdom for seven years as at the date of application. In considering whether it is reasonable for him to leave the United Kingdom, I have considered his best interests in accordance with section 55 of the 2009 Act. These must be a primary concern in accordance with the case of ZH (Tanzania) [2011] UKSC 4.

16. I find that it is in the third Appellant’s best interests to remain with his parents, and the decision does not interfere with that. His father’s applications was refused. His mother was not included in the application and has no leave to remain. I find that the third Appellant is now nine years old and has lived in the United Kingdom since his birth.

17. I find that the third Appellant has never been to Mongolia. He has lived in the United Kingdom for all of his life. In his witness statement the first Appellant states that he has no family or friends in Mongolia who he could turn to for help were he to return there [7]. His wife states in her statement that she has family in Mongolia but they all live together in a one-bedroom flat [4]. She said that she spoke to them once a month and the first Appellant did not communicate with them. I find that the third Appellant has some extended family members in Mongolia, but I find that he has never met them. Given the circumstances as described by the first Appellant's wife, I find on the balance of probabilities that their family members would not be able to support them in any significant way.
18. I find that the third Appellant is at primary school. I find that he has been in formal education since 2013 when he started in Reception. Evidence was provided of his attendance and progress. There is no evidence of any educational problems and from the evidence of his parents in their witness statements, and from his music teacher (page 10), as well as the certificates in the bundle, he is doing well at school.
19. At the hearing in the first-tier Tribunal although a Mongolian interpreter had been requested, she was ill and therefore the hearings proceeded without the use of an interpreter. The Judge was satisfied that the first Appellant and his wife understood the proceedings. The Judge did not find as credible the evidence that the children were more fluent in English than Mongolian. I find on the balance of probabilities that the third Appellant can speak and understand some Mongolian. When he was in reception Mongolian was listed as his first language on his record of achievement (page 27). I find that he did also speak English, and of course he is educated in English.
20. I have no evidence that the third Appellant has any medical problems.
21. The third Appellant is not a British citizen, so requiring him to leave would not interfere with any rights as a British citizen.
22. Taking all of the above into account, bearing in mind that the third Appellant has lived in the United Kingdom for all of his life, over nine years, and has never been to Mongolia, and giving weight to the stability and continuity that remaining in the United Kingdom would provide, educationally, linguistically and culturally, I find that it would be in the third Appellant's best interests to remain in the United Kingdom.
23. I have considered whether it is reasonable for him to leave the United Kingdom despite the fact that I have found that it is in his best interests to remain here.
24. In doing so I have considered the circumstances under which the third Appellant has been living in the United Kingdom, and the immigration history of his parents. I find that the third Appellant has never had any leave to remain but I attach no blame to him for this because he is a minor.

25. I find that his parents have never had leave to remain having entered the United Kingdom illegally. There is no indication that the first Appellant made any attempt to regularise his status until this application was made in 2016. I find that the first Appellant was not truthful in his application as he claimed that he had separated from his wife. In his witness statement he said that he had been advised by his previous representatives that to make an application as a sole parent would have a greater prospect of success. He stated that he regretted the decision to follow that advice, apologised for doing so and stated that he had changed representatives [4]. While this was deceitful I find, given his situation, it is not entirely surprising that he followed the advice of representatives. He did not continue with this deceit at the appeal.
26. I find that the first Appellant has worked in the United Kingdom, although he was not entitled to do so. However, he has been open about this, which is to his credit. I find that he has paid taxes (pages 73 to 98). There is nothing in the evidence to suggest that the family has been in receipt of benefits, although I find on the balance of probabilities that they have benefited from use of the NHS and from the education system. There is no evidence that either of the third Appellant's parents have any criminal convictions.
27. I have taken into account paragraph [49] of MA (Pakistan) [2016] EWCA Civ 705 which states:
- "However, the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary."*
28. I have also taken into account the case of MT and ET (child's best interest; ex tempore pilot) Nigeria [2018] UKUT 00088 (IAC). The head note states:
- "1. A very young child, who has not started school or who has only recently done so, will have difficulty in establishing that her Article 8 private and family life has a material element, which lies outside her need to live with her parent or parents, wherever that may be. This position, however, changes over time, with the result that an assessment of best interests must adopt a correspondingly wider focus, examining the child's position in the wider world, of which school will usually be an important part."*
29. I find that in the case of MT and ET although the parent had a community order for using a false document to obtain employment, this conduct came "nowhere close to requiring the respondent to succeed" given the strength of the child's case [34].
30. I find that there are no "powerful reasons to the contrary" in the third Appellant's case which should be given more significant weight than his best interests. The only significant factor is the poor immigration history of his parents and I find that that alone does not outweigh the best interests of the third Appellant. I therefore find that it is not reasonable to expect the third Appellant to leave the United Kingdom, and I therefore find that he satisfies the requirements of paragraph 276ADE(1)(iv).

*Article 8 outside the immigration rules*

31. I have considered the Appellants' appeals under Article 8 outside the immigration rules in accordance with the case of Razgar [2004] UKHL 27. I find that the Appellants have a family life, together with the first Appellant's wife, the mother of the second and third Appellants, in the United Kingdom sufficient to engage the operation of Article 8. I find that the first Appellant has been here since 2006. The second and third Appellants have been here for all of their lives. I find that the Appellants have built up private lives in the United Kingdom sufficient to engage the operation of Article 8. I find that the decision is an interference in their private and family lives.
32. Continuing the steps set out in Razgar, I find that the proposed interference would be in accordance with the law, as being a regular immigration decision taken by UKBA in accordance with the immigration rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair immigration control in the interests of all citizens. Maintaining the integrity of the immigration rules is self-evidently a very important public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would be significant and that it would not be proportionate.
33. In assessing the public interest I have taken into account all of my findings above in relation to the immigration rules. I have taken into account section 117B of the Nationality, Immigration and Asylum Act 2002. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. I have found above that the third Appellant meets the requirements of the immigration rules, so the maintenance of effective immigration control will not be compromised by a grant of leave to remain.
34. I find that the first Appellant speaks English (section 117B(2)). I do not have evidence of the Appellants' current financial situation (117B(3)).
35. Sections 117B(4) and 117B(5) do not apply to family life. In relation to the Appellants' immigration status, while they have not had leave to remain, the second and third Appellants are minors so cannot be held responsible for their lack of status.
36. Section 117B(6) provides that the public interest does not require the person's removal where the person has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. This is the same test as set out in paragraph 276ADE(1)(iv). I find that the first Appellant has a genuine and subsisting parental relationship with the third Appellant. The third Appellant meets the definition of qualifying child. I have found above when considering paragraph 276ADE(1)(iv) that it is not reasonable to expect the third Appellant to leave the United Kingdom. I therefore find that the public interest does not require the first Appellant's removal. Clearly, given this, the public interest does

not require the removal of the second Appellant, who should remain with his father and brother.

37. Taking into account all of the above, and giving particular weight to the fact that I have found that the third Appellant meets the requirements of the immigration rules, and that section 117B(6) applies to the first Appellant, I find that the balance comes down in favour of the Appellants. I find, in carrying out the balancing exercise required, that the Appellants have shown on the balance of probabilities that the decision is a breach of their rights to a family and private life under Article 8 ECHR.
38. There is no appeal before me for the first Appellant's wife, the mother of the second and third Appellants, given the circumstances of the application. I find that it would not be in the best interests of the second or third Appellants for the family unit to be broken up, and for them to be separated from their mother, especially in circumstances where the third Appellant meets the requirements of the immigration rules in his own right.
39. I have made an anonymity direction.

#### **Notice of Decision**

40. The decision of the First-tier Tribunal involves the making of material errors of law and I set the decision aside.
41. I remake the decision, allowing the Appellant's appeals on human rights grounds, Article 8. The third Appellant meets the requirements of paragraph 276ADE(1)(iv).

#### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 9 August 2018

**Deputy Upper Tribunal Judge Chamberlain**

**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award. In circumstances where the application made to the Respondent did not set out the true situation of the Appellants, I make no fee award.

Signed

Date 9 August 2018

**Deputy Upper Tribunal Judge Chamberlain**