



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2023-
005207**

First -tier -number: HU/53878/2023

THE IMMIGRATION ACTS

Heard at Field House

**Decision and Reasons
Promulgated**

On 12 January 2024

On 23rd of January 2024

Before

Deputy Upper Tribunal Judge MANUELL

Between

Mrs GERELTUYA YADAMSUREN

Appellant

and

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
(NO ANONYMITY DIRECTION)**

Respondent

Representation:

For the Appellant: Mr J Collins, Counsel
(instructed by J McCarthy, Solicitors)

For the Respondent: Mr E Terrell, Senior Home Office Presenting
Officer

DECISION AND REASONS

1. Permission to appeal was granted by First-tier Tribunal Judge Grimes on 7 December 2023 against the decision

to dismiss the Appellant's appeal made by First-tier Tribunal Judge Blackman in a decision and reasons dated on 31 October 2023. The Appellant and her two dependent children had been refused further leave to remain under Appendix FM as the partner and children of a person with Indefinite Leave to Remain in the United Kingdom.

2. The Appellant is a national of Mongolia, born on 5 October 1988. She last entered the United Kingdom on 23 January 2019 with leave to enter as the partner of Mr Khangarid Batburged, ("Mr Batburged"), born on 29 March 1983, a Mongolian national. The Appellant had been a student in the United Kingdom between 2008 and 2011. Their children were born on 7 March 2016 and 2 January 2019. They are also Mongolian nationals.
3. It was accepted on behalf of the Appellant and her children that they had not produced the specified evidence to show that the minimum income requirement had been met. They were thus unable to meet Appendix FM-SE of the Immigration Rules, which remained the position at the date of the First-tier Tribunal hearing. It was contended that the Appellant and her children should have been granted further leave to remain outside the Immigration Rules on proportionality grounds under Article 8 ECHR.
4. Judge Blackman found that Mr Batburged's life was "embedded" in the United Kingdom, where he had lived for 16 years. The children had spent a period of their lives in Mongolia but what they were used to and what they knew was life in the United Kingdom. They spoke English, as did their parents. Their welfare needs required them to live with both parents. There were no insurmountable obstacles to the continuation of family life in Mongolia. The public interest in the maintenance of immigration control outweighed the private interests of the family. There were no exceptional circumstances. Hence the appeal was dismissed
5. Permission to appeal was granted by Judge Grimes because she considered that it was arguable that that the First-tier Tribunal Judge had erred by failing to

properly or adequately engage with the real world scenario in which the children's father, settled in the United Kingdom, had made it clear that he would not return to Mongolia, and in failing to consider the effect of such separation on the family unit. It was plain that the judge had failed to appreciate that Mr Batburged had Indefinite Leave to Remain in the United Kingdom. This was also an arguable error of law which related to the anticipated separation of the family.

6. Mr Collins for the Appellant relied on the grounds of appeal submitted, the grant of permission to appeal and his skeleton argument. The judge's analysis of the Appellant's case outside the Immigration Rules under Article 8 ECHR was plainly faulty. The lengthy presence of Mr Batburged in the United Kingdom (and his personal history) had been overlooked. It had been accepted that the best interests of the two children were to be with both their parents. Separation would be an obvious problem. The public interest was negligible as there had never been any unlawful presence in the United Kingdom by any person concerned in the appeal, and no other factors were relevant. The decision should be set aside and remade in the Appellant's favour.
7. Mr Terrell submitted on behalf of the Respondent that the decision had been made with careful consideration of the evidence and that the judge had been entitled to find that there were no insurmountable obstacles to the continuation of family life in Mongolia. The Immigration Rules had not been met, as was accepted, and the correct legal framework had been applied. This was a case of choice for the family. It might be considered a tough decision but that did not make it wrong.
8. In reply, Mr Collins submitted that, as was pointed out in the grant of permission to appeal, the judge had failed to consider a real world scenario. The family would be unable to return to the United Kingdom if Mr Batburged left. There was no public interest anywhere near sufficient to tip the scales against the family.
9. Following the conclusion of submissions, the tribunal stated that it found material errors of law in the

decision, such that it was necessary to set it aside. It should then be remade in the Appellant's favour. This would be explained in the reserved decision which now follows.

10. The first and fundamental error of law (as noted by Judge Grimes) is that the judge failed to understand that Mr Batburged holds Indefinite Leave to Remain in the United Kingdom. The judge rightly found that Mr Batburged's life was embedded in the United Kingdom, but then failed to consider adequately or at all the reasons why it had not been possible for the Appellant to meet Appendix FM-SE of the Immigration Rules. The explanation, which had been in the evidence before the judge, was simple and obvious: Mr Batburged was a chef whose income had comfortably exceed the minimum income requirement as at the date when the Appellant had applied for entry clearance and had been granted leave to enter as his partner. Then in 2020 Covid 19 struck and national lockdown followed. Mr Batburged lost his employment, like numerous others in the hospitality and entertainment fields. He then found employment as a delivery driver, but at a much lower income. Mr Batburged was fully entitled to receive income support in such circumstances. His efforts to support himself and his family were in the public interest. That deserved weight in the Article 8 ECHR proportionality assessment, as did the important fact that Mr Batburged had been treated for serious illness in the United Kingdom and had every reason to remain present for future monitoring of his health. He was of course fully entitled to NHS care.
11. The judge had found that the Appellant also had a significant connection with the United Kingdom, having studied here for some five years and speaking English, and having been present at all times lawfully, whether as student or spouse, but the judge failed to factor that into the proportionality assessment, despite the length of the determination. The judge accepted that the children's lives were established in the United Kingdom. The evidence as a whole showed that the family had cut its ties with Mongolia, such that returning there would

involve an unusually high degree of upheaval and reversal of carefully made plans. Again that was overlooked in the proportionality assessment.

12. As Mr Collins pointed out, the judge failed to identify any specific public interest in the exclusion of the Appellant and her children, lawful entrants and residents, whose ability to meet Appendix FM-SE had been affected by the pandemic and for no other reason. It was difficult to see how the impact of the pandemic could be seen as anything than an exceptional circumstance, beyond the control of the Appellant.
13. The decision must accordingly be remade. A balance sheet approach, applying section 117B of the Nationality, Immigration and Asylum Act 2002 is appropriate. The Appellant is English speaking. She is not dependant on the state but rather on her partner. Her private life in the United Kingdom (and her family life) have been formed while she has had lawful leave to enter or leave to remain, so are entitled to full weight.
14. The adverse consequences of returning to Mongolia after all voluntary ties have been cut, including disruption and great expense, are by obvious and necessary inference severe. Unsettling the established lives of the two children, disrupting their education and forcing them to learn Mongolian would be against their best interests.
15. The other side of the balance sheet is the public interest. There is no immigration control issue as there has been no unlawful presence. There are no other public interest matters. The Appellant and her children will not be a burden on public funds as they are supported by Mr Batburged and the Appellant intends to work once she is permitted to do so.
16. It is plain that the Appellant and her children's private interests outweigh the public interest, if indeed there is any public interest at all. The appeal is accordingly allowed on Article 8 ECHR grounds, outside the Immigration Rules.

DECISION

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The Appellant's appeal to the Upper Tribunal is allowed.

There were material errors of law in the First-tier Tribunal's decision and reasons, which is accordingly set aside.

Following a summary rehearing, the original decision was remade.

The original Article 8 ECHR appeal is ALLOWED. A full fee award is made

Signed R J Manuell Dated 18 January 2024

Deputy Upper Tribunal Judge Manuell