Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23014/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 June and 17 July 2014	**On 4 September 2014**

Before

UPPER TRIBUNAL JUDGE LATTER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SIRINTHA JOLLEY

Respondent

Representation:

For the Appellant: Mr P Nath, Home Office Presenting Officer (06 June 2014)
Mr I Jarvis, Home Office Presenting Officer (17 July 2014)
For the Respondent: Mr N Garrod, instructed by Cameron Clarke Law Firm, solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal (F-tTJ C M A Jones) allowing an appeal by the applicant against the respondent's decision made on 29 May 2013 refusing her leave to remain as a spouse and making a removal decision. In this decision I will refer to the parties as they were before the First-tier Tribunal, the applicant as the appellant and the Secretary of State as the respondent.

Background

2. The appellant is a citizen of Thailand, born on 17 May 1985. She first met her husband in December 2009 and they were married in Thailand on 28 September 2010. Their son was born there on 21 January 2011 by which time his father had returned to the UK. On 10 December 2011 the appellant and her son travelled to the UK. She had obtained entry clearance as a visitor and her son travelled on his British passport. The appellant returned to Thailand with her son in May 2012 and Mr Jolley travelled there in June 2012 for six months when he tried to obtain work as an English teacher but this did not work out. In December 2012 the family returned to the UK, the appellant having obtained entry clearance as a visitor for six months. She was due to return to Thailand by 25 April 2013 but on 22 April 2013 she applied for variation of her leave to enter. That application was refused as she was unable to meet the requirements of the Immigration Rules under the partner route as she could not meet the immigration status requirement set out in E-LTRP.2.1 or under the parent route by virtue of E-LTRPT.3.1(a). The respondent went on to consider private life under the provisions of para 276ADE but found that she was not able to meet any of the conditions set out in that rule.

3. In her grounds of appeal the appellant confirmed that she had spent 26 years of her life in her home country of Thailand but was now married to a British citizen, their son was also British and needed both his mother and father together. She said that a lot had happened in her life; her mother died when she was 10. She had been married to a Thai national for five years but had divorced him in June 2009. She did not see a future for herself, her husband and son if they had to live separate lives in different countries.

4. In the First-tier Tribunal the judge heard evidence from the appellant and her husband. She described the appellant as a wholly credible witness and commented that the facts of the case were not in dispute [15]. She found she could not meet the requirements of para 276ADE. She went on to consider the provisions of Appendix FM finding that the appellant did not fall for refusal under S-LTR. She held that it was clear that the appellant fulfilled all the requirements of E-LTRP.1 but said that E-LTRP.2.1 stated that an applicant must not be in the UK as a visitor as was the appellant unless exception EX.1 applied. She found that it did. She also went on to consider whether it would be reasonable to expect their son to leave the UK in the light of the provisions of s.55 of the Borders, Citizenship and Immigration Act 2009.

5. The judge noted that he was a British citizen living in the UK and his citizenship carried with it the rights to free education and health care which would only be available in Thailand at a cost. She referred to the judgment of the Supreme Court in ZH (Tanzania) v Secretary of State [2011] UKSC 4 that nationality was not a trump card but was of particular importance in assessing the best interests of a child. It had been argued that the appellant should return to Thailand and make an

application for entry clearance but in this context the judge referred to Chikwamba [2008] UKHL 40 and to the comment by Lord Brown that:

> "… only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad."

In summary, the judge found that it would not be reasonable in the light of Article 8 and the decisions in Chikwamba and ZH (Tanzania), to expect the child to leave the UK, that EX.1 applied and therefore the appeal was allowed [19].

6. Permission to appeal was granted by the First-tier Tribunal on the ground that it was arguable that the judge had erred in law by allowing the appeal firstly under the Immigration Rules despite that fact that the appellant did not meet the mandatory eligibility criteria and secondly on Article 8 grounds without setting out any specific compelling circumstances for so doing.

Submissions

7. Mr Nath submitted that the judge had been wrong to allow the appeal under Appendix FM as the appellant was unable to meet the immigration status requirements. Paragraph EX.1 did not apply to an appellant who was in the UK as a visitor. He referred to and relied on the Tribunal determination in Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 63. So far as Article 8 was concerned he submitted that the judge had not given adequate reasons for her decision and had failed to consider the guidance in the Tribunal determination of Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 640 or whether there were compelling circumstances not sufficiently recognised under the Rules.

8. Mr Garrod submitted that contrary to the submissions of the respondent the judge had referred to numerous examples of compelling circumstances particularly in relation to the child of the family. She had considered ZH (Tanzania) and had referred to the Court of Appeal judgment in MF (Nigeria) [2013] EWCA Civ 1192 in [20] of her determination. She had explained why she regarded those circumstances as compelling. The fact that she had not labelled them as such had no material bearing on the outcome of the appeal. He referred to and relied on Mukarkar v Secretary of State [2006] EWCA Civ 1045 and in particular to [40] where Carnwath LJ said that the mere fact that one Tribunal had reached what might seem an unusually generous view of the facts did not mean that it had made an error of law. So far as the argument about whether EX.1 applied in the present case, he did not seek to make any submissions beyond the assertion in the Rule 24 response that it was for the respondent to prove that EX.1 did not apply in the present case.

Consideration of whether there is an Error of Law

9. The issue for me at this stage of the appeal is whether the First-tier Tribunal erred in law such that its decision should be set aside. I shall deal firstly with the position under the Immigration Rules and Appendix FM. The immigration status requirements for leave to remain as a partner are set out in E-LTRP.2.1 which reads as follows:

> "E-LTRP.2.1. The applicant must not be in the UK –
> (a) as a visitor;
> (b) with valid leave granted for a period of 6 months or less, unless that leave is as a fiancé(e) or proposed civil partner, or was granted pending the outcome of family court or divorce proceedings; or
> (c) on temporary admission or temporary release (unless paragraph EX.1. applies).
> E-LTRP.2.2. The applicant must not be in the UK in breach of immigration laws (disregarding any period of overstaying for a period of 28 days or less), unless paragraph EX.1. applies."

The Tribunal decision in Sabir has made it clear that paragraph EX.1 is not a free standing paragraph but only applies in the circumstances set out in the Rules. I am satisfied that the drafting of E-LTRP.2.1 makes it clear that EX.1 only applies to sub-paragraph (c) and does not apply either to (a) or (b). It must therefore follow that the judge erred in law by finding that it was open to the appellant to rely on EX.1 despite the fact that she had made her application as a visitor and to allow the appeal on that basis.

10. So far as the appeal under Article 8 is concerned, I am also satisfied that the judge erred in law. She was clearly right to take into account the child's interests as a primary consideration in the light of s.55 of the 2009 Act and the judgment of the Supreme Court in ZH (Tanzania) but she failed to assess proportionality in the context of the Immigration Rules or to take into account the public interest in maintaining an effective system of immigration control. In EB (Kosovo) [2008] UKHL 41 Lord Bingham said at [10]:

> "10. In Huang [2007] 2AC167, para 16, the House acknowledged the need, in almost any case, to give weight to the established regime of immigration control:
>
> > "The authority will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under article 8(2). There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit

> serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on." "

11. It is not suggested that any issue arises of committing serious crimes but nonetheless this is a case where entry clearance was granted as a visitor and it is clear from the entry clearance application that the stated intention was to stay for ten weeks and to leave the UK on 27 February 2013. Further, when assessing proportionality no consideration appears to have been given to the fact that the appellant could not meet the maintenance or language requirements of the Rules. She is therefore in a different position from the appellant in Chikwamba where the Court proceeded on the basis that the only requirement of the Rules which could not be met was the necessity of making an application outside the UK.

12. I am satisfied that these errors had a material bearing on the outcome of the appeal and in these circumstances the proper course is for this decision to be set aside. Mr Nath submitted that I should proceed to re-make the decision on the basis of the evidence before the First-tier Tribunal but Mr Garrod argued that the appellant should have a further opportunity of adducing up-to-date evidence. In the light of the fact that the best interests of a young child are involved, I am satisfied that the right course is to adjourn and for the appeal to be re-listed for the decision to be re-made at a resumed hearing.

13. I gave directions that: (i) the appellant have permission to file further witness statements and documentary evidence within 21 days of the date of hearing and (ii) skeleton arguments be filed 7 days before the date of the resumed hearing.

Further Evidence

14. The appellant relied on the documentary evidence filed at the First-Tier Tribunal (1A) with a further bundle of documents (2A) filed for this hearing.

15. The appellant gave oral evidence. She adopted her statement of 28 June 2014 in 2A. This confirms that she has been in the UK since 14 December 2012 having arrived on a family visit visa. She was due to leave in April 2013 but due to her situation she was unable to return to Thailand with her son as she believed they would be destitute. Her father had died in 2012 and as her mother had also passed away, leaving her with a brother and sister but she did not have contact with them. She would have no home to go to. Her husband found work in February 2013 so he did not have enough funds to support her back in Thailand and could not meet the requirements for a spouse visa. From June 2013 her husband had been in full time employment and was earning a salary of around £25,000. Her son was now in school five days a week and had many friends. She and her husband had been renting their home for 10 months. She confirmed that their son was born on 21 January 2011. He was British and was now registered with a doctor in the UK.

16. In cross examination she said that she had applied for her last visit visa on 16 October 2012. Her husband had then been teaching in Thailand. She was not in contact with her brother and sister. When she made the application, she wanted to come for a visit for Christmas. She had made a previous visit in 2011 and had returned in May 2011 with her son. Her husband had been in Thailand from June to December 2012. If she returned she would not be able to stay with anyone. They had stayed in Bangkok in an apartment rented by her husband. She had no one in Thailand and would not be able to go to the south of the country; she was scared to live there because of Muslim people. She had previously worked in a Tesco's near Bangkok. She said that her husband's family would not be able to help him look after their son. Her mother was not very well: she had problems with her hip. Initially in 2012 they had lived with her but they had now moved out to rented accommodation.

17. Mr Arron Jolley gave evidence. He is British. He said that he could not look after their child because he had to work. His mother had arthritis and she would struggle to take care of him. Initially, when he returned to work he had worked on a sub-contracting basis and had been earning £18,200. He now had a better income. He would not be able to support his wife in Thailand. He could not go with them and pay for a house. He said that he had not had the funds to pay for a spouse visa; he had not had the money to pay for it at the time. When his wife was supposed to return to in April 2013, she just could not go home. They did not have the money.

18. In cross examination he said that when the visit visa was obtained in October 2012, he was in Thailand. He had been working as an English teacher but had had financial difficulties. His wife was not in contact with her brother and sister and would be destitute on return. He thought when he got back to England that he would be able to save the money and get a spouse visa but initially he found it difficult to get work. His mother had rheumatoid arthritis. He did not think that his son could be away from his mother. He had a brother in the UK but he worked full time. He said that his son was half British and half Thai and it would be hard for him to mix with Thai children because of their attitude to him as a mixed race child. He accepted that it could be a good living in Thailand if you had money.

Submissions

19. Mr Jarvis submitted that the appellant had not been able to meet the requirements of the Rules. There were detailed types of evidence required as set out in Appendix FM-SE. On the evidence produced at the hearing, those requirements would not be met. He submitted that whilst the judgement in MM (Lebanon) v Secretary of State [14] EWCACIV 985 at [130] might indicate a slight deviation away from the approach in Gulshan, it did not change the thrust of cases such as Nagre [2013] EWHC 720 and Haleemudeen [2014] EWCA Civ 558. He submitted that the Rules were now not simply the starting point for the assessment of article 8 but were a declaration of how the respondent saw the public interest and a failure to meet the

requirements of the Rules was now of much more significance in the assessment of proportionality. It was not simply a case of the appellant being unable to meet the formal requirements of the Rules. She was unable to rely on Appendix EX.1 because her application was made following the grant of entry clearance as a visitor. It now appeared to be the position that when that application was made in 2012, it was clear that the family did not see their life as being in Thailand. Further, in October 2012 other parts of the Rules for entry clearance as a spouse could not be met including the maintenance and English language requirements. When the further application was made in April 2013 the requirements of the Rules could still not be met. Essentially it was being argued that the appellant could now meet the spirit of the rules but the requirements of FM-SE were not simply technical matters: there were as much part of the Immigration Rules as Appendix FM.

20. He submitted that the issue was whether there were compelling or exceptional features requiring further consideration under article 8. On the issue of the best interests of the child he referred to the judgment in EV (Philippines) v Secretary of State for the Home Department) [2014] [EWCA Civ 874] and in particular [30] and [32] on the importance of the child's position. It was the respondent's argument that the principle in Chikwamba was now of very limited application. This was not a case where the only requirement of the Rules which could not be met was a procedural requirement of having to make the application from abroad. The appellant was unable to meet a number of substantive requirements. It was not unreasonable to expect the appellant in the circumstance of this application to return to Thailand to make an application in accordance with the Rules supported by the evidence specified.

21. Mr Garrod submitted that the provisions of s.55 of the 2009 Act provided the compelling circumstances under article 8. The importance of the interests of a child was apparent from the judgment of the Supreme Court in ZH (Tanzania) v Secretary of State for the Home Department and Zoumbas [2013] [2014] UKSC 74. The primary issue was the impact of s.55 on the application of article 8. The relationship between the Rules and the appellant's circumstances were subsidiary issues. The intention when the appellant and her husband returned to this country was that he would be able to earn sufficient money so that she could afford to apply to join him. He submitted that the Rules did not make provision enabling someone in the appellant's situation to meet the right requirements. If the child returned with appellant to Thailand, they would be in a very difficult situation. If he remained with his father in the UK, he would suffer by being separated from his mother and his father would have to give up his job. If they both returned to Thailand, the vicious circle of struggling to meet the requirements of the Rules would start again.

22. He submitted that as at the date of the hearing there was no legitimate purpose in requiring the appellant to return to Thailand as she could now meet the requirements to be granted leave. To this extent the principle in Chikwamba was engaged. The effect of the decision on their son and her husband must be properly

taken into account in the light of Beoku-Betts v Secretary of State [2008] UKHL39. The facts in EV(Philippines) could be properly distinguished as the child in the present case was a British Citizen. He argued that the circumstances of the family could properly be categorised as compelling and exceptional when the best interests of their son were considered as a primary consideration.

Consideration of the Issues

23. The chronology and the primary facts set out in [2] above are not in issue. I have no doubt that this is a genuine and subsisting marriage and there is now a child of the family born on 21 January 2011. The marriage took place in Thailand on 28 September 2010 and their son was born there by which time his father had returned to the UK. There was a visit by the appellant and their son in December 2011 and they duly returned in May 2012. A month later her husband went there for six months and obtained work as an English teacher. In December 2012 the appellant applied for and obtained entry clearance as a visitor. The application is at 1A at 28-37. At questions 11-14, the appellant said she intended to stay with her husband and family for 10 weeks. They intended to travel on 15 November 2012 and return on 27 February 2013. She acknowledged in the application that the information she had given was complete and true to the best of her knowledge.

24. However, she did not return at the end of her visit but made an in-country application for leave to remain as spouse. In his evidence her husband accepted that he had not had the funds to pay for a spouse visa at the time they left. In cross examination he said that he thought that when he got back to England, he could save so that they could apply for a visa but initially he found it difficult to get work. Both the appellant and her husband have said that there would be problems in returning to Thailand: the appellant would not have property to return to and she is not in contact with her brother and sister. Concerns have been raised about the security situation in Thailand and the extent to which their son would be able to fit in with Thai children.

25. It is conceded in this appeal that the appellant cannot meet the requirements of the Rules as amended in July 2012. She is not able to take advantage of Appendix EX.1 because she was unable to meet the immigration status requirements set out in E-LTRP.2.1(a). In accordance with the guidance in MF (Nigeria) and Nagre, the issue then becomes whether there are exceptional and compelling circumstances requiring a consideration of article 8 outside the rules. It is in this context that the provisions of s55 must be taken into account. The best interests of their son are a primary consideration: see the judgment of the Court of Appeal in ZH (Tanzania). The relevant principles were restated by the Supreme Court in Zoumbas. The Court in [10] adopted and paraphrased the legal principles as follows:

> "1. The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
> 2. In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the

child's best interests do not of themselves have the status of the paramount consideration;

3. Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

4. While different judges might approach the question of the best interests of the child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of child might be undervalued when other important interests were in play;

5. It is important to have a clear idea of a child's circumstances and what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

6. To that end there is no substitute for a careful examination for all relevant factors when the interests of a child are involved in article 8 assessments; and a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

26. The appellant's son is now aged 3 years 6 months; he has always lived with his mother and has lived with both mother and father since June 2012 initially in Thailand and then in the UK. The family still live together, his father is working and supporting them and his mother is his primary carer. It is clearly in his best interests for him to live in a family unit with his mother and father. That could be in either Thailand or the UK but I must take into account the fact that he is a British citizen which brings with it important benefits such as the right of abode and a right to future education and health care. These are important factors to be taken into account.

27. I must also take into account and give weight to the fact that the appellant has not been able to meet the requirements of the immigration rules. I have had concerns about whether the visit visa was used as a device to gain entry to the UK in circumstances where the family could not meet the requirements of the Rules. However, taking into account the First-tier Tribunal judge's findings on credibility, I accept that the intention was that the appellant's husband hoped to obtain employment and earn the money to meet the requirements of the rules and make a spouse application, but that their intentions changed when they began to settle down in the UK.

28. It is argued with some justification on behalf of the appellant that the family are in an impossible position. If they return together to Thailand, her husband would have to give up his job and she would be unable to meet the requirements of the Rules. If their son stays with him in the UK and the appellant returns, he would have to give up work to look after him. If his son returns with the appellant to Thailand, he would not be able to support them. Whilst I do not think that the position is impossible in the sense that it could not be overcome I find that there would be real difficulties which would not make it reasonable to expect the family to return together to Thailand or for their son to remain with one or other parent whilst an application is made for entry clearance. If the appellant returns to Thailand with their son, her husband's finances would be severely stretched by

having to provide support and maintenance for them there and his son would be separated from him. If their son remains with him in the UK, I accept that it would impact on his earning capacity and more significantly there would be a considerable emotional impact in their son being separated from his mother. If the family return together to Thailand, the family would no longer be in a position to meet the financial requirements of the Rules.

29. Therefore, whilst the appellant is not able to rely on the provisions of para EX1 when the matter is considered within the Rules, these factors inevitably fall for consideration when the position is such, as in the present case, that there are compelling circumstances requiring a further consideration outside the Rules under article 8. I am satisfied that there is a genuine and subsisting relationship between the appellant and her son and this has not been contested. Further, for the reasons I have outlined I am not satisfied that this is a case where it would be reasonable to expect their son to return to Thailand either with his mother or both parents. The best interests of the child of the family outweigh the public interest considerations in maintaining effective immigration control in this particular case. After the hearing the provisions of s.19 of the Immigration Act 2014 came into force introducing new provisions (s117A-117D) into part 5 of the Nationality, Immigration and Asylum Act 2002. These provide at s117B (6) that

"In the case of a person who is not liable to deportation, the public interest does not require the person's removal where-

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and
(b) it would not be reasonable to expect the child to leave the United Kingdom."

30. The appellant's son is a British citizen and is therefore a qualifying child and for the reasons I have given I am not satisfied that it would be reasonable to expect him to leave the UK. As the new statutory provisions confirm the view I had already reached, this is not a case where there is any need for the appeal to relisted for further consideration.

Decision

31. The First-Tier Tribunal erred in law and the decision has been set aside. I substitute a decision allowing the appeal on article 8 grounds against the decision refusing the appellant leave to remain as a spouse and the decision to remove her.

Signed Date: 29 August 2014

Upper Tribunal Judge Latter