Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/11140/2013
IA/12851/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 20th January 2014	**On 23rd January 2014**
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Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

AMPA SEAL
JIRAYU PANKAEN

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Seal
For the Respondent: Mr Diwnycz, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Clarke made following a hearing at Hatton Cross on 6th November 2013.

2. The first Appellant is a citizen of Thailand born on 16th November 1987. Her son, the second Appellant, was born on 21st June 2005.

3. She came to the UK on 25th October 2010 as the spouse of Martin Seal. In October 2012 she made an application for variation of her limited leave to remain. She was refused on 26th March 2013 on the grounds that she had not provided an English language test certificate in speaking and listening from an English language test provider.

4. The judge said that the Appellant had not submitted the necessary documents to satisfy paragraph 286. He had been provided with very limited evidence as to the impact on the family for them to return but he noted that the parties married in Thailand and her sons were born there. There were no insurmountable obstacles to her living outside the UK and he had not been provided with evidence as to why the family could not move to Thailand to make the application from there. There was no substantiated basis for the Appellant asserting that her family life would be jeopardised and whilst it may be inconvenient to return and take the test and reapply that is all that it was.

5. The Appellant sought permission to appeal. Permission was granted by Judge Landes on 6th December 2013. Judge Landes stated that the judge had arguably erred in not considering whether it would be reasonable for the child to leave the UK under paragraph EX1 of Appendix FM, and it was also arguable that the judge had failed to take the child's best interests into account.

6. On 30th December 2013 the Respondent served a reply acknowledging that whilst there may be a possible error in the determination it was not material because the judge made findings open to him that it would not be disproportionate for family life to continue in Thailand and for the main Appellant to obtain the required qualification from there.

The Hearing

7. Mr Seal explained that he lived with his wife and stepson, and their British child who was born on 4th September 2009. He said that his wife had passed the reading and writing test and the speaking test was booked for a couple of week's time. She was 100% deaf in one ear and partially deaf in the other ear which had led to delays in her being able to sit the test.

8. Mr Diwnycz accepted that the judge had erred in law in failing to make any reference at all to the best interests of the children and, in relation to the substantive decision, made no submissions save to say that he stood by the original refusal.

Findings and Conclusions

9. The Appellant cannot meet the requirements of paragraph EX1 because the second Appellant has not been in the UK for seven years and is not

British. The judge was correct to state that the requirements of the Rules could not be met.

10. This is a case where the family is living together with as a unit in the UK. The father and the younger child are British and the two Appellants are Thai. In these circumstances there are arguably good grounds for granting them leave to remain outside the Rules. It is therefore necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the Rules (Gulshan (Article 8 new Rules correct approach) [2013] UKUT 00640).

11. The best interests of the children have to be considered first when deciding whether it is proportionate for the Appellant and her son to be removed.

12. The Appellants both enjoy family life in the UK with Mr Seal and the younger child. Removal would be an interference with their right to enjoy family life but would be lawful and in pursuit of a legitimate aim in that as at the date of the decision the Appellant did not meet all of the requirements of the Immigration Rules.

13. The second Appellant is now 8 years old and attending school. Returning to Thailand with his mother would be an interference with his education and, even more importantly, would separate him from his younger brother. The younger brother is British and about to start full-time education. As a 4 year old child he clearly needs to be with his mother. Returning to Thailand for an indeterminate period would interrupt the children's schooling. Their British father is employed in the UK, and needs to continue to work here in order to satisfy the financial requirements of the Rules. It cannot be in the best interests of these children to be either apart from her or from him or to be apart from each other

14. There are now no countervailing circumstances. The Appellant has a blameless immigration history. There is no suggestion that she is not in a genuine relationship with her husband. As at the date of the hearing she has passed the English language test in writing and reading and is about to sit the speaking test. The difficulty in hearing will have delayed her ability to reach the required standard.

Decision

15. The original judge erred in law. The decision is set aside. It is remade as follows. The Appellants' appeal is allowed on Article 8 grounds.

Signed Date

Upper Tribunal Judge Taylor