Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35814/2013

THE IMMIGRATION ACTS

Heard at: Manchester	**Determination Promulgated**
On: 18th June 2014	**On: 24th June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Taveesak Jantong
(no anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr Allen, Global Immigration Solutions
For the Respondent: Ms Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Thailand. He has permission to appeal against the decision of First-tier Tribunal Judge Smith to dismiss his appeal against directions for his removal from the United Kingdom pursuant to section 10 of the Immigration and Asylum Act 1999. That decision to remove the Appellant followed rejection of his application for indefinite leave to remain on human rights grounds.

2. The basis of the Appellant's application was that he is in a durable relationship with a British woman, Sarah Gudegast. They had been living together in Thailand since June 2011 and in January 2013 they came to the

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United Kingdom, the Appellant having obtained a visit visa. It was their intention to return to Thailand where the Appellant had work commitments and they had their home. However after their arrival Ms Gudegast discovered that she was pregnant. They decided to stay in the UK for the birth. Ms Gudegast has the support of her family here and would like to bring her child up in the United Kingdom. The Appellant therefore applied for leave to remain in order to be with his British wife and child.

3. The Respondent refused the application with reference to Appendix FM of the Immigration Rules. The Respondent was not satisfied that the Appellant and Ms Gudegast had been living together in a relationship akin to marriage for two years or more so he failed at the first hurdle, that being ‘eligibility’. The refusal did not address the matter of the Appellant’s relationship with his British child, since at the date of the decision the Respondent was not aware that the child had been born. In fact the couple’s daughter was born the day before the refusal was served, on the 15th August 2013.

4. On appeal to the First-tier Tribunal Judge Smith accepted that the couple had in fact been living together since June 2011 but found that the Appellant still failed under ‘eligibility’ because he was in the United Kingdom as a visitor at the date of application: E-LTRPT.3.1. Although there was no need for him to do so, Judge Smith also gave consideration to whether EX.1 could have applied to the Appellant. He found that it did not, since it could not be said that it would “not be reasonable” to expect the Appellant’s daughter to leave the UK. In making the assessment of whether it would be “reasonable” the Judge had regard to ten factors listed at his paragraph 27(i)-(j).

Error of Law

5. The grounds of appeal are that the First-tier Tribunal erred in its approach to failing to give adequate consideration to the fact that the Appellant’s daughter is a British national entitled to enjoy the benefits of such nationality. The Appellant relies in particular on the speech of Baroness Hale in ZH (Tanzania) [2011] UKSC 4 and submits that in failing to give this factor adequate weight the Tribunal erred in respect of its assessment of section 55 ‘best interests’ as well as the wider proportionality balancing exercise.

6. The Respondent submits that the findings of the First-tier Tribunal were lawful and open to it on the evidence. The Tribunal conducted a rounded assessment of proportionality.

7. I find that the Tribunal was correct in dismissing this appeal under the Rules. The provisions of Appendix FM are exacting, and for this young couple who have unexpectedly become parents, too exacting to meet. The Appellant was here as a visitor when the application was made, so he immediately fell foul of E-LTRPT.3.1. Ms Johnstone further pointed out that there was no evidence as to the Appellant’s English language ability, not a matter considered by the First-tier Tribunal but another reason why the application could not have succeeded.

8. The Tribunal went on to consider the appeal under Article 8. Ms Johnstone rightly observed that the Tribunal did so without any consideration of whether there was a good arguable case[1] for so doing, and to that extent that Appellant had the benefit of that omission.

9. Having proceeded to consider proportionality under *Razgar* Article 8 the Tribunal is criticised for failing to give adequate weight to the fact that the Appellant's baby daughter, then only four months old, could potentially be deprived of the benefits of her British nationality should her father lose his appeal and she travel to Thailand with him.

10. The Tribunal set out the factors relevant to proportionality at paragraph 27-29. He takes into account the fact that the Appellant came here as a visitor and had only been in the UK a very short time. Until he came here, and at the point of return, he had friends, family, a home and work in Thailand. There was therefore a strong private life there and virtually no private life here. His only ties to the UK were his partner and daughter. The Tribunal noted that the baby was still very young and as such her Article 8 rights were limited to her relationship with her parents. As a family unit there did not appear to be any reason why they could not relocate to Thailand where the couple had previously been living; in his oral evidence the Appellant had said that if he went back they would all go together. The baby had no health concerns. His partner had also worked in Thailand and before her pregnancy had apparently considered pursuing a career there. At paragraph 29 the Tribunal states that it has given particular consideration to the interests of the baby.

11. Mr Allen submitted that these paragraphs, summarised above, do not give any or adequate consideration to the fact that the baby is British. It is true that no express consideration is given to that point. However I am not satisfied that this is an omission such that the decision should be set aside. The Tribunal rightly identified that this is a very young child whose private and family life is entirely centred on its parents. Unlike the children in <u>ZH (Tanzania)</u> this little girl has not (yet) grown up in this country. The children of ZH were aged 9 and 12 and had been born in the UK. They had known no other life, culture or language. Baroness Hale was therefore concerned that inadequate focus had been placed on that fact. The Appellant's daughter will not be removed from school or friends, and there is nothing to suggest that this decision will involve a long-term interference with her right to live in the UK. As Judge Smith notes, she is entitled to remain here with her mother until such time as her father can meet the requirements of the Immigration Rules, or she and her mother may decide to move to Thailand and stay with him until that time.

12. I understand that this is not the ideal situation for this family. Whatever they decide to do, someone in this family will be separated from

[1] <u>MS (Petitioner</u>) [2013] CSIH 52; <u>R (on the application of) Nagre v SSHD</u> [2013] EWHC 720 (Admin); <u>Gulshan v SSHD</u> (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC), <u>Shahzad</u> (Article 8: legitimate aim) [2014] UKUT 85 (IAC)

the baby – if the family unit leaves it will be her maternal grandparents in the UK, if only the Appellant leaves it will be her father. This is a difficult situation but it is not one that is "unjustifiably harsh" for any of the parties concerned. It is obviously in this child's best interests to be with both Mum and Dad. There was nothing in the evidence before the First-tier Tribunal to suggest that this had to be in the UK. I am not prepared to find that this child should automatically prefer the exercise of her UK citizenship rights over those deriving from the Thai nationality to which she is undoubtedly entitled. Mr Allen submitted that healthcare and education are of poorer quality in Thailand than they are in the UK and that these were rights intrinsically connected with the exercise of her nationality rights. This baby is not currently in education and happily has no immediate healthcare concerns. If her parents wish for her to access either of these services she is entitled to come back to the UK at any point.

Decisions

13. The decision of the First-tier Tribunal contains no error of law and it is upheld.

Deputy Upper Tribunal Judge Bruce
18th June 2014