



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/42954/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 21st October 2015**

**Decision and Reasons
Promulgated
On 29th October 2015**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**MISS CHOMPUNUT BUNMEE
(Anonymity Direction not made)**

Respondent

Representation:

For the Appellant: Mr S Walker (Senior Home Office Presenting Officer)

For the Respondent: Mr D Bazini (instructed by E2W Ltd)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal, with permission, by the Secretary of State in relation to a Decision of the First-tier Tribunal (Judge Iqbal) promulgated on 26th May 2015 by which she allowed the Appellant's appeal against the Secretary of State's refusal to grant her leave to remain on human rights grounds outside the Immigration Rules.

2. For the purposes of continuity and clarity I shall continue to refer to Ms Bunmee as the Appellant and the Secretary of State as the Respondent in this judgment.
3. The Appellant is a national of Thailand who entered the UK as a visitor in 2001. In 2002 she applied for leave to remain as a spouse. There was considerable delay in the application being dealt with but she was eventually granted discretionary leave from February 2007 to February 2010. She made two further applications to remain, both unsuccessful in 2010 and 2011.
4. In 2014 she applied for leave to remain to remain on the basis of her private and family life with her same-sex partner. That was refused on 2nd October 2014 and it was her appeal against that decision which came before the First-tier Tribunal. At paragraph 8 of her Decision the Judge referred to the Letter of Refusal which noted that the Appellant had claimed that her removal would breach her human rights; that she had no ties to Thailand and as some-one in a same-sex relationship she and her partner would be stigmatised and ostracised if they were forced to go to Thailand. She claimed that the discrimination would mean she would be unable to find employment and accommodation as a result of which she would become destitute. The Judge noted that the Secretary of State had considered both Appendix FM and paragraph 276ADE of the Immigration Rules. The Appellant could not meet the requirements of either. She had not been in the UK long enough to bring herself within paragraph 276ADE and in terms of Appendix FM was outwith the definition of partner, not having been in the relationship long enough.
5. The Secretary of State did not accept that the couple could not relocate and enjoy life together in Thailand. The Secretary of State noted that despite the partner claiming she had no ties to Thailand she had two children there and there was no reason why she could not accompany the Appellant to Thailand. Furthermore, the Secretary of State did not accept that the couple would be stigmatised and ostracised by the Thai community or would be unable to find employment. The Secretary of State accepted Thailand did not have any anti-discrimination laws regarding LGBT people and also accepted that there was no law legalising same-sex partnerships. However, the Secretary of State noted that same-sex sexual activity was legal in Thailand.
6. The judge also noted that since February 2010 the Appellant had been in the UK without permission as an overstayer.
7. At paragraph 25 the Judge set out that she heard oral evidence from the Appellant, her partner and her partner's daughter. It was accepted that they could not meet the Immigration Rules. Specifically at paragraph 26 the Judge records:-"it was clarified that the issues in the appeal were to be considered outside of the rules under Article 8 of the ECHR with reference to whether the parties had a subsisting relationship, therefore family life. Furthermore consideration then the issue of proportionality if it was

accepted there was family life to include whether they could live in Thailand together."

8. That is relevant because of what is said in the Secretary of State's grounds. Additionally I would point out that the Record of Proceedings makes clear that at no time did the Home Office Presenting Officer before the First-tier Tribunal make any submissions that the matter should not be considered as a freestanding Article 8 application outside the Immigration Rules.
9. At this point I turned to the grounds upon which permission to appeal was sought. Ground 1 argues that the Judge did not identify very compelling circumstances for considering Article 8 outside the Rules which the Appellant could not meet. Ground 2 argues that the judge fell into error by failing to consider the requirements of section 117B of the Nationality, Immigration and Asylum Act 2002. Ground 3 argues that the Judge erred in finding a positive factor in favour of the Appellant that she was working. Ground 4 submits that the Judge erred in finding that had the Secretary of State decided her spouse application timeously she would have completed the necessary time to acquire Indefinite Leave to Remain. Ground 5 asserts that the Judge gave no reason why restrictions on same-sex marriages in Thailand prevented their having family life together there and Ground 6 criticises the Judge for stating that the Appellant had been seeking to regularise her stay. The Secretary of State asserts that she was both in the UK unlawfully and precariously and those are matters that ought to have been matters taken into account by the Judge. Finally Ground 7 asserts the Judge gave no adequate reasons as to why it was sufficient to allow the appeal on the basis that the partner would have "difficulties" in Thailand.
10. Mr Walker relied on the detailed grounds but said that the main thrust of the argument was that the Judge had erred in her conclusion on proportionality especially when applying the strict test of exceptionality. In effect what the Judge had done was consider Article 8 on a freestanding basis without any consideration of whether there were any exceptional circumstances to require a consideration of Article 8 outwith the Rules.
11. On the Appellant's behalf Mr Bazini indicated that on a superficial reading of the grounds they would appear to have some merit but on closer analysis of the judgment they did not. In terms of a consideration of Article 8 outside the Rules he referred to paragraph 10 where the Judge recognised that the Appellant could not bring herself within the Rules. At paragraph 26 the Judge further noted that because of the length of time the Appellant and her partner had been together they could not bring themselves within the definition of partner. However at paragraph 33 and 34 the Judge correctly directed herself as to what was required before considering Article 8 outside the Rules and in particular at paragraph 33 set out the comments in SS (Congo) [2015] EWCA Civ 387 that an individual would need to show that "after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to

remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them". At paragraph 34 the Judge noted the grounds of appeal which stressed that the Rules did not contain provision for someone in the Appellant's circumstances namely a same-sex couple in a genuine subsisting relationship with an established family and private life in the UK. For that reason the Judge found that there were arguably good grounds for granting leave outside the Rules. The judge therefore directed herself appropriately in accordance with current case law. It may be that another Judge may have decided differently but that is not the issue.

12. The Judge then went on to consider Razgar [2004] UKHL 27 and asked herself the questions set out therein concluding that this case was essentially about proportionality.
13. It is clear therefore that the Judge did ask herself the appropriate questions and concluded, giving her reasons, why it was appropriate to consider the matter outside the Rules. As I have mentioned above, it was made clear at the outset of the hearing by both representatives, which of course includes the Secretary of State's representative, that this case was about proportionality and Article 8 outside the Rules. In the absence of any submissions that this was an inappropriate step to take it ill-behoves the Secretary of State to make that argument now. I therefore find that the Judge did not err in considering Article 8 outside the Rules.
14. While Appendix FM and paragraph 276ADE are intended to cover Article 8 issues there will be occasions when they are incomplete. It is only in deportation cases where the Rules have been found to be a complete code. The Appellant's application was outside the Rules and the refusal carries a right of appeal. It must therefore be right that it is possible for an Appellant to succeed otherwise the right of appeal would be worthless.
15. So far as a failure to mention section 117B is concerned the Judge does refer to this at para 43 and makes the point that she has already taken all those matters into account. The judge at paragraph 41 clearly set out the factors contained in section 117B. She notes that the Appellant speaks English, is financially self-sufficient having worked in the past and that she and her partner have plans to set up business together in future. The Judge notes that had the Secretary of State reached a conclusion on the spouse application made in October 2002 more promptly than she did (2007) the Appellant would have been in a position in any event to have sought Indefinite Leave to Remain. To be fair, Mr Walker accepted this to be correct.
16. The Judge noted that the law of Thailand did not permit this couple to regularise their relationship as same-sex partners and that this would affect their family life. The Judge did not, as suggested by the Secretary of State, say this inability to enter into a civil partnership would "prevent" them having family life; rather the Judge said it would "affect" their family life. The inability to regularise their relationship affects property and

inheritance, and recognition as next of kin, not insignificant matters. If the right to marry is a Human Right then it would be discriminatory to suggest that the right to enter civil partnerships are not similarly protected. This was clearly a matter that weighed heavily with the Judge.

17. The Judge did take into account the fact that the Appellant had been in the UK for 14 years and also recognised that during that period her position was at all times precarious and for part of the time (since 2010) unlawful but the Judge was also entitled to take into account that she had been seeking to regularise her stay' on a regular basis. She had not gone "under the radar"
18. The judge was entitled to take into account that the Appellant's partner was 65 years of age and had worked in the UK for 25 years and there would no doubt be difficulties in expecting her to relocate at this juncture to Thailand. Had they met the requirements as partners there is no doubt it would have been unreasonable to expect the partner to live in Thailand. At paragraph 42 the Judge noted that it was clear because of the totality of the circumstances that have been referred to above cumulatively demonstrate that it would be disproportionate and a breach of the Appellant's right to family and private life under Article 8 to remove her to Thailand.
19. Whilst on the facts of this case another Judge may have decided differently, it cannot be said that this Judge made a material error of law in the way she approached the appeal. She took into account all matters she was required to take into account, including the concession by the Home Office Presenting Officer that it should be considered outside the Rules, in concluding that removal in this case was disproportionate.
20. The appeal to the Upper Tribunal is dismissed.

Signed

Date 28th October 2015

Upper Tribunal Judge Martin

Direction regarding anonymity

I make no anonymity direction.

Signed

Date 28th October 2015

Upper Tribunal Judge Martin