



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/08843/2018**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at** Field House

**Decision & Reasons  
Promulgated**

**On** 14 February 2019

**On** 20 February 2019

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DOYLE**

**Between**

**ADUL SEMAPET**

(No Anonymity Direction Made)

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr D Coleman (counsel); Instructed by Paul John & Co, solicitors

For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Kainth, promulgated on 19 November 2018, which dismissed the Appellant's appeal

### Background

3. The Appellant was born on 14 January 1970 and is a national of Thailand. On 6 April 2018 the Secretary of State refused the Appellant's application for leave to remain in the UK.

### The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Kainth ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 21 December 2018 Judge Hollingworth gave permission to appeal stating

It is arguable that the Judge has attached insufficient weight to the right to family life of the Appellant's only grandchild with whom the Appellant lives. It is arguable that the Judge has set out insufficient analysis dealing with the criteria in relation to a British child leaving the United Kingdom. It is arguable that the proportionality exercise has been affected.

### The Hearing

5. (a) Mr Coleman moved the grounds of appeal. He told me that there is clear evidence of a special relationship between the appellant and his British citizen grandchild. He told me that the appellant was part of a close family unit - which includes his wife and daughter and grandchild. He took me to [27] of the decision where (he said) the Judge identifies the need to consider more than simply the appellant's interests, but, in the last sentence of [27] the Judge focuses clearly on the appellant only and fails to consider the impact of the respondent's decision on the appellant's British citizen grandchild.

(b) Mr Coleman told me that the appellant's British citizen grandchild has no contact with her biological father and looks to the appellant as a father figure. He relied on MSA (St Lucia) [2018] CSOH 92 and Beoku-Betts. He urged me to set the decision aside and remit this case to the First-tier Tribunal for further fact-finding.

6. (a) For the respondent, Mr Wilding told me that the decision does not contain errors of law. He told me that at [30] the Judge accepts that the appellant forms part of a small, close, family unit in the UK, but the Judge finds that there is an abundance of family support for the appellant in Thailand. He told me that the appellant's British citizen grandchild is a factor in this case, but that the appellant's granddaughter cannot outweigh the public interest. He told me that the Judge acknowledged the relationship between the appellant's granddaughter in the overall proportionality assessment.

(b) Mr Wilding told me that, on the evidence presented, the Judge reached conclusions well within the range of reasonable conclusions available to him. He urged me to dismiss the appeal and allow the decision to stand.

### Analysis

7. The Judge's proportionality assessment starts at [27] of the decision. In the final sentence of [28] the Judge finds that the appellant is not the primary carer for his grandchild, and at [30] finds that the appellant is part of a small, close, family unit in the UK. At [16] of the decision, the Judge finds that article 8 family life exists for the appellant in the UK because he lives with his wife, his daughter and his grandchild. At [17] the Judge finds of the appellant's grandchild is a British national.

8. Between [28] and [35] the judge dwells on article 8 private life and does not really consider article 8 family life. At [37] the Judge finds that there are no exceptional circumstances in the appellant's case.

9. The problem is that the Judge races to conclusions, citing caselaw rather than making findings of fact. The balance sheet article 8 assessment encouraged by Agyarko cannot be found in the decision. Having found that article 8 ECHR family life exists, the Judge gives that article 8 Family life scant consideration in the proportionality balancing exercise.

10. In MSA (St Lucia) [2018] CSOH 92 a grandmother from St Lucia whose application for leave to remain in the United Kingdom on the basis of her private and family life was certified by the respondent as "clearly unfounded" successfully challenged that certification because the reasons for refusal letter failed to take into account the "best interests" of that petitioner's grandchild in considering her claim article 8 ECHR grounds.

11. The appellant's relationship with his British citizen stepdaughter is a central issue in this appeal, but there is no consideration of section 117B(6) of the 2002 Act and no consideration of section 55 of the Borders, Citizenship and Immigration Act 2009. There are no meaningful findings of fact about the relationship between the appellant and his British citizen granddaughter.

12. Because the fact-finding exercise is incomplete; because the decision contains no meaningful analysis of relevant evidence lead for the appellant; because s.117B(6) of the 2002 Act has not been considered and because there is no consideration of s.55 of the Borders Citizenship and Immigration Act 2009, the decision is tainted by material error of law. I set it aside. I consider whether I can substitute my own decision. The material error of law in the decision relates to an inadequacy of fact finding. I cannot substitute my own decision. Further fact-finding exercise is necessary.

13. As Mr Wilding concluded his submission, he told me that there has been a change in circumstances for the appellant's family. Mr Coleman confirmed that the appellant's wife has now been granted leave to remain in the UK. It is clear from the Judge's decision that the appellant's daughter had an outstanding application at the date of the appellant's hearing before the First-tier Tribunal. It is more than likely that the circumstances of the appellant's family have changed, and those changes will be relevant to the article 8 proportionality assessment. As a result, an entirely new fact-finding exercise is necessary.

#### Remittal to First-Tier Tribunal

14. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25<sup>th</sup> of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.


15. In this case I have determined that the case should be remitted because a new fact-finding exercise is required. None of the findings of fact are to stand and a complete re-hearing is necessary.

16. I remit the matter to the First-tier Tribunal sitting at Hatton Cross to be heard before any First-tier Judge other than Judge Kainth.

#### **Decision**

**17. The decision of the First-tier Tribunal is tainted by material errors of law.**

**18. I se  
2018. '   
determ**



**nulgated on 19 November  
First-tier Tribunal to be**

Signed  
February 2019

Date 18

Deputy Upper Tribunal Judge Doyle