



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/18620/2019
HU/18621/2019
HU/18622/2019

THE IMMIGRATION ACTS

Heard at Field House
On 12 January 2021

Decision & Reasons Promulgated
On 27 January 2021

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KANITTHA [S]
NANTHAPHONG [T]
[KT] (A MINOR)
[NO ANONYMITY ORDER]

Respondents

Representation

For the appellant: Ms Susana Cunha, a Senior Home Office Presenting Officer
For the respondents: Mr Michael Brooks, Counsel instructed by AKL Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission from the decision of the First-tier Tribunal allowing the claimants' appeals against her decision on 31 October 2019 to refuse them leave to remain in the United Kingdom on human rights grounds, with

reference to the paragraph 276ADE of the Immigration Rules and Article 8 of the ECHR. The claimants are a mother and father and their 6 year old daughter, all citizens of Thailand.

Background

2. The first and second claimants came to the United Kingdom from Thailand. The first claimant (the wife) entered on 28 September 2005 as a work permit holder and the second claimant (the husband), on 31 August 2005, also with a work permit.
3. The wife, born in 1981, was then 24 years old and the husband was 27 years old. Their families in Thailand assisted them with money to enable them to set up home together in the United Kingdom.
4. The husband's work permit expired on 31 August 2006 and the wife's expired 8 September 2006.
5. The third claimant (the daughter) was born to the first and second claimants on 3 May 2014 and has never lived in Thailand. She has attended school for approximately two years in the United Kingdom, at the very beginning of primary schooling. She is six years old and will be 7 years old on 3 May 2021.
6. The claimants assert, and produced a friend to confirm, that although the husband and wife speak Thai at home, the daughter speaks only English and is culturally integrated here. They were ambitious for their daughter, then 5 years old: they wanted her to grow up to be a doctor or a lawyer, ambitions which they considered unattainable for them in Thailand.
7. The husband and wife took no steps to regulate their position in the United Kingdom. On the contrary: the wife worked unlawfully in kitchens and restaurants, and the husband worked as a chef until he was arrested in 2019. They have been here now for over 15 years, 14 of those years without valid leave to remain. On 13 June 2019, the husband was encountered working as a chef in a restaurant and served with a RED0001.
8. On 29 July 2019, the claimants made the present application. They said they had no income or savings and nowhere to return to in Thailand. They said that without money, it would be extremely difficult to find accommodation, and that without savings, they would not be able to pay for their daughter's education.

Refusal letters

9. In her refusal letters, the Secretary of State noted that none of the claimants was entitled to leave to remain as a partner or parent, because none of them had any leave to remain after 8 September 2006 (and in the case of the third claimant, she has never had any valid leave to remain).
10. The Secretary of State did not accept that there would be very significant obstacles to the family's reintegration in Thailand. She considered that, contrary to what they

said, the claimants were likely to have family and friends in Thailand, since they had left there as adults. They were free to work and to access whatever state benefits were available in Thailand. There were no significant obstacles to reintegration and paragraph 276ADE(1)(vi) would not assist them.

11. There were also no exceptional circumstances for which leave to remain ought to be given outside the Rules. Education in Thailand was free at state schools until grade 9, and in addition, the government provided three years of free pre-school and three years of free upper secondary education, which were not compulsory. The third claimant was still very young and would be able to adapt to life in Thailand, with the help of her parents. It would not be 'unjustifiably harsh' for the family to be expected to return and live in their country of origin.
12. The Secretary of State refused all three applications. The claimants appealed to the First-tier Tribunal.

First-tier Tribunal decision

13. First-tier Judge Lloyd heard oral evidence from the first and second claimants, setting out the history as summarised above. He made a number of findings of fact:
 - (a) That the wife and the husband had been co-operative and candid in their evidence;
 - (b) That the daughter was 'not at all comfortable with their native Thai language' although he rejected the claim that she speaks no Thai at all;
 - (c) That the daughter had spent some 1½ years in school, speaking and studying in English;
 - (d) That the wife and husband had acute concern for their daughter's educational future, and that it was 'probable' and a legitimate concern that she would fall behind significantly in her educational progress and might never recover the benefit she had gained from her time in the United Kingdom;
 - (e) That there would be 9 years of free education available in Thailand for the daughter, but probably not to the GCSE examination or 'A' level standards which would prepare her for University in Thailand;
 - (f) That corporal punishment was routine in Thai schools, which would be a huge shock for the daughter;
 - (g) That the difficulties for the daughter in finding herself in a totally unknown educational, linguistic and social culture would be acutely unsettling and 'not short of chaotic for an active 5-year-old girl who has known only life in the United Kingdom since her birth here'; and that
 - (h) The family had social and familial connections with Thailand, but that the circumstances in which the daughter would have to grow up there were totally unsatisfactory and that the daughter had strong connections to the United Kingdom.

14. The judge found that it was in the best interests of the daughter to remain with her parents, and that it would not be reasonable to expect her to leave the United Kingdom if her parents were to be removed. He directed himself that having regard to section 55 of the Borders, Citizenship and Immigration Act 2009, 'the interests of the child are paramount' and that applying section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (as amended), the public interest did not require the daughter's removal to Thailand.
15. The First-tier Judge allowed the appeals. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

16. The Secretary of State's grounds of appeal asserted that the First-tier Judge had failed to make material findings under paragraph 276ADE as to whether there were very significant obstacles to the reintegration of the wife and the husband in Thailand and that the failure to attach weight to the claimants' inability to meet the requirements of Appendix FM had also infected the exceptional circumstances consideration in his decision; that the First-tier Judge erred in finding that the child's best interests were 'paramount' when Lady Hale JSC in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 directed that they were 'a primary' consideration.
17. The Secretary of State contended that the First-tier Judge erred in law in consideration of the daughter's best interests, with reference to *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874 and *KO (Nigeria) & Ors v Secretary of State for the Home Department (Respondent)* [2018] UKSC 53, in particular the latter, as the First-tier Judge's reliance on *MA (Pakistan) & Ors, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor* [2016] EWCA Civ 705 could not survive the observations of the Supreme Court at [19] in *KO (Nigeria)*.
18. Finally, the Secretary of State contends that a section 117B(6) assessment was not appropriate, as the daughter was not a qualifying child, and that the First-tier Judge erred in applying the reasonableness test.
19. Permission to appeal was granted on all grounds by First-tier Judge Feeney.

Rule 24 Reply

20. There was no Rule 24 reply on behalf of the claimants.

Further directions

21. On 6 July 2020, Upper Tribunal Judge Kopieczek gave triage directions in the light of the COVID-19 pandemic.
22. On 1 October 2020, having regard to the responses from both parties, I set aside the decision of the First-tier Tribunal without a hearing and directed that the decision in

this appeal be remade in the Upper Tribunal on the basis described in the grant of permission.

23. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

24. At the beginning of the Upper Tribunal hearing, following the decision in *The Joint Council for the Welfare of Immigrants v The President of the Upper Tribunal (Immigration And Asylum Chamber)* [2020] EWHC 3103 (Admin), I asked the parties whether they considered that the error of law decision should be reopened.
25. For the claimants, Mr Brooks said that he recognised that there were material errors of law in the decision of the First-tier Judge and that he did not seek reopening of the material error of law decision.
26. The appeal then proceeded to the substantive remaking.
27. It was agreed that the error of law decision should be varied to the extent that the First-tier Judge's findings of fact should stand for the purpose of remaking the decision.

Technical issues

28. I heard oral submissions from Mr Brooks, but there were serious technical difficulties for the Home Office Presenting Officer, Ms Cunha, who was sharing a fairly weak internet connection. Her image froze repeatedly and her speech was 'chopped up' to an extent that it was almost impossible to understand.
29. After discussion with the parties, it was agreed that they would both submit written submissions and that I would remake the decision on the basis of the papers and those decisions. I emphasise that this approach was adopted with the express consent of Ms Cunha and Mr Brooks.

Secretary of State's submissions

30. For the Secretary of State, Ms Cunha accepted that the wife and the husband had been in the United Kingdom unlawfully since 2006, and that the daughter did not speak Thai and had never travelled to Thailand, her education and cultural assimilation being in the United Kingdom.
31. Ms Cunha conceded that for the purpose of the present hearing, the daughter, who will become a qualifying child in May 2021, should be treated as already so qualifying and therefore section 117B(6) of the 2002 Act was applicable and the sole question was the reasonableness of her removal. Ms Cunha then cited at length passages from *ZH (Tanzania)*, *EV (Philippines)* and the difference in treatment of the section 55 best interest question in the Family Courts and the Immigration and Asylum Tribunals, as set out in *A (A Child)* [2020] EWCA Civ 731 at [36]-[38] in the

judgment of the then Senior President of Tribunals, Lord Justice Ryder, who gave the judgment of the court.

32. She then set out the guidance of the Court of Appeal in *NE-A (Nigeria) v Secretary of State for the Home Department* [2017] EWCA Civ 239 as to the treatment of qualifying children, and *KO (Nigeria)* on reasonableness, at [16]-[19] in the opinion of Lord Carnwath JSC, with whom Lord Kerr, Lord Wilson, Lord Reed and Lord Briggs agreed.
33. The submissions proper begin at [16] on page 8 of the Secretary of State's document and is helpfully concise. The Secretary of State accepted that the uprooting of the daughter to Thailand might present some challenges, but argued that given her young age, she would still be mostly focused on her immediate family and that she could expect to have to adapt to a change of school in due course, as she grew older. She was young enough to adapt to inevitable changes of her home, school, doctor and even family structure: if her parents were granted leave to remain, they would seek to work lawfully, altering the presence they played in their daughter's life.
34. Given the Covid-19 pandemic, the daughter would have had much less interaction with her school and teachers during 2020 and would have had to adapt to new ways of learning in the home. There was no positive obligation on the Secretary of State to provide the daughter with a better education than she would receive in Thailand.
35. Applying *KO (Nigeria)*, although the daughter was not to be blamed for her parents' poor migration history, the reasonableness of removing her fell to be considered in the context of their removability and the precarious/unlawful status they had in the United Kingdom. On the facts, the public interest outweighed the best interests of the daughter and the appeal should be dismissed.

Claimants' submissions

36. For the claimant, Mr Brooks set out the history, reminding me that, applying *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, it was important to have a clear idea of a child's circumstances and best interests before deciding whether they were outweighed by the public interest in controlling migration.
37. Mr Brooks contended that the preserved findings of fact included his acceptance that the mother and father, as the daughter's parents had high aspirations for a professional career for their daughter, which would be unavailable to her in Thailand. Women in Thailand were generally housewives.
38. Mr Brooks expanded on the rather brief findings by the First-tier Judge that the circumstances in which the claimants would live on return were unacceptable. The wife's mother (the daughter's grandmother) lived in a two room house, along with the wife's brother, who has a drug problem and had in the past been violent. The sleeping room was perhaps 4m x 2m; the other room was the kitchen.

39. Corporal punishment of children was common for parents, teachers and family in Thailand.
40. The First-tier Judge had found that both the wife and the husband would now be disadvantaged in the labour market because of their age.
41. The daughter was not comfortable in the Thai language, which she could not read or write, and she lacked a close connection to that country. It would be 'acutely unsettling' for her to be in a totally unknown educational, linguistic and social culture in Thailand. It would defeat any enhanced educational prospects, making it likely that the daughter would end as a housewife.
42. The daughter would have to live, with her parents, in a household of six people in two rooms, one of whom (her uncle) had previously been violent. For all these reasons, it was not reasonable to expect the daughter to leave the United Kingdom and the appeal should be allowed.
43. I reserved my decision, which I now give. Having regard to the consent of both representatives at the hearing, and the submissions now received, I am satisfied that it is appropriate to make a decision on whether the First-tier Tribunal decision contains a material error of law on the basis of the decisions and submissions before me.

Analysis

44. I remind myself of the findings of fact and the matters accepted by the Secretary of State. In finding that the wife and husband had been cooperative and candid, the First-tier Judge effectively found their evidence to be broadly credible. He did not accept that the daughter spoke no Thai, but did accept that she was 'not at all comfortable' in Thai and that in her early primary schooling, she was speaking and studying in English.
45. The concerns expressed about the possibility of enhanced education leading to a professional qualification do not go to reasonableness: rather, they sound in relation to Article 2 of Protocol No.1 to the ECHR, the qualified 'right to education'. In an unanimous judgment in *Holub & Anor v Secretary Of State For Home Department* [2000] EWCA Civ 343 at [25] the Court of Appeal held that:

"24. Mr Luba contended that if the right [to education] was to have any content it should at least encompass the provision of an effective education. ...

25. We think Mr Luba is right about this and would adopt as an accurate statement of the law the following passages from *Human Rights Law and Practice* by Lester and Pannick (paras. 4.20.4 and 4.20.6) :

The general right to education comprises four separate rights (none of which is absolute):

- (i) right of access to such educational establishments as exist;

- (ii) a right to effective (but not the most effective possible) education;
- (iii) a right to official recognition of academic qualifications

As regards the right to an effective education, for the right to education to be meaningful the quality of the education must reach a minimum standard.

But we do not think that the right is more extensive than this. If Mr Luba's submission that there is a right to an "appropriate" education means something more than an effective education in the sense described above we do not accept it. There is nothing in the authorities or the literature to which we have been referred which supports such a submission. *The Convention does not confer a right to education in any particular country and so does not invite comparison between educational systems.*

26. So Article 2 is limited in scope. Does the evidence show that Luiza's removal from her school in England and return to the Polish education system would breach her Article 2 right? We do not think so. *It is certainly not enough to say that Luiza will get a better education in the United Kingdom.* Poland clearly has a well developed system of education. It is not surprising that someone who has been out of it for several years will have difficulties getting back into it. But in this case Luiza appears to have the ability to overcome these difficulties. Not only is she extremely bright but she has obviously kept up her Polish to a high standard by attending the Polish Saturday School, no doubt assisted by her mother who is a highly regarded Polish teacher. We do not think that it can be said that Luiza will be denied an effective education if she returns to Poland."

[*Emphasis added*]

46. The evidence which was before the First-tier Judge showed that the daughter would have access to 'such educational establishments as exist', for 9 years, without charge, although she might need some help in adjusting to learning in Thai. More than that is not reasonable, having regard to the qualified nature of the right to education.
- (a) That the difficulties for the daughter in finding herself in a totally unknown educational, linguistic and social culture would be acutely unsettling and 'not short of chaotic for an active 5-year-old girl who has known only life in the United Kingdom since her birth here';
 - (b) That the use of corporal punishment in Thai schools and families would be a huge shock to the daughter; and that
 - (c) The family had social and familial connections with Thailand, but that the circumstances in which the daughter would have to grow up there were totally unsatisfactory and that the daughter had strong connections to the United Kingdom.
47. The real world situation is that, absent any exceptional circumstances, or a finding that it would be unreasonable for their daughter to return to Thailand, her country of nationality, with them, the parents are removable. The remaining factual matrix concerns the use of corporal punishment in Thai families and in schools. It does not appear to have been the claimants' case that they use corporal punishment in their home, or that the daughter's grandmother would do so. The risk of corporal

punishment in Thai schools sounds in Article 3 ECHR if at all, and is not pleaded thus.

48. Finally, there is the question of the accommodation which the claimants can be offered by the wife's mother, who lives in a 2-room apartment with the wife's brother, who has in the past been violent, and has a drug problem. The addition of this little family to that accommodation will make it very crowded, but the adult claimants are capable of working, and have managed to do so under difficult circumstances in the United Kingdom.
49. If the appeal is considered without the benefit of section 117B(6), as neither exceptional circumstances nor significant obstacles have been shown on the facts as found, it can not succeed.
50. The adult claimants also say that they are 'too old' to be able to get jobs. They will be 54 and 57 this year, but I was not taken to any evidence which suggests that there are no jobs for chefs, or in restaurants or kitchens, for people that age in Thailand.
51. At the Upper Tribunal hearing, Ms Cunha confirmed that it was her understanding that the Secretary of State is not currently returning anyone to Thailand during the pandemic, the worst of which is expected to last for several months yet. Neither the parents, nor the daughter, can in practice be removed today, which makes the consideration of this appeal somewhat academic.
52. In May 2021, if they are still here then, the daughter will reach the age of 7 and become a qualifying child, and section 117B(6) of the 2002 Act will apply. Let me be clear: it does not apply today, but I consider it out of an abundance of caution, in case the family is not removed until after the daughter's birthday. In those circumstances, the argument that is not reasonable to expect this child to leave the United Kingdom if her parents are removed would need to be considered.
53. Setting aside the educational argument, which cannot succeed as there is no lack of 'effective education' in Thailand, the claimants' principal contention is that they will suffer overcrowding on return in the grandmother's apartment. That by itself would not be sufficient to make the daughter's removal unreasonable.
54. As to the schooling argument, in relation to her friendships and integration, she would by then have had 18 months of pandemic conditions, for much of which she was at home, not at school, undertaking remote learning. The claimant is still very young: I consider that she would be much more closely linked to her parents than to the school, and that it would not be unreasonable to expect her to return to Thailand with her parents, where the extended family could be expected to help her parents to resettle, as they did when they moved to the United Kingdom.
55. The appeal is therefore dismissed.

DECISION

56. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by dismissing the appeal.

Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson

Date: 14 January 2021