Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/09721/2015

THE IMMIGRATION ACTS

Heard at Field House
On 16 June 2016

Decision & Reasons Promulgated
On 15 July 2016

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS RUNGNAPA WONGJOM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Sellwood, instructed by Castle Park Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Both parties to the appeal before the First-tier Tribunal have sought to challenge the decision of First-tier Tribunal Judge C H O'Rourke who allowed the appeal by the appellant, a national of Thailand born 7 October 1978, against decisions of the Secretary of State dated 26 February 2015 refusing to vary her leave to enter or remain and to remove her from the United Kingdom. The judge allowed the appeal

© CROWN COPYRIGHT 2016

under the Immigration (EEA) Regulations 2006, although that was not a ground before him nor is it one which Mr Sellwood relies on today.

2. The background to this case is that the respondent is in a relationship with a British Citizen, Mr Huby, whom she has known since 2011 following their meeting in Dubai. The couple have a child who was born in Thailand in 2012. The couple have lived variously in Australia, Thailand and the United Kingdom. They plan to marry on Mr Huby divorcing his current wife.

3. The respondent last entered the United Kingdom with their child on 20 July 2014 with leave valid until 25 December 2014. She made an application on 6 January 2015 on form FLR(M). This was on the basis of her being the unmarried partner of a person present and settled in the United Kingdom and a biometric immigration document that she had submitted.

4. The Secretary of State refused the application with reference to the relevant provisions of Appendix FM, which we do not need to recite. Essentially she did not accept that the couple had been in a relationship akin to marriage for two or more years and furthermore that the respondent had entered the United Kingdom as a visitor and thus did not qualify by virtue of E-LTRP.2.1 of Appendix FM. The application was also refused with reference to the financial requirements. The respondent contended that Mr Huby earned £18,600 a year but the Secretary of State was concerned about the absence of "specified evidence" to support that assertion.

5. The Secretary of State explained in her decision letter that she had considered the application under Appendix FM EX.1 which enables respondent to bypass certain provisions of the eligibility requirements under the Rules. She considered, however, that these provisions did not apply because the appellant had entered the United Kingdom as a visitor. This led the judge into error. In paragraph 16 of his decision he concluded that because the respondent could not comply with E-LTRP.2.1 she could not rely on EX.1 and stated:

> "I do so because it is clear that the Home Office's intention in drawing up that Rule was to prevent visitors bypassing the requirement to make an out of country entry clearance application. I am not persuaded by the appellant's Counsel's arguments that this is a lacuna in the Rules and that the clear deliberate flouting of that Rule by the [Respondent] in overstaying allows her to avoid it."

6. The judge, however, decided to rescue the situation by reaching a conclusion under the Immigration (EEA) Regulations 2006 having directed himself in that regard earlier in his decision to the Secretary of State's own policy, "Appendix FM family life (as a partner or parent) and private life: ten year routes". It is not at all clear whether the Respondent's representatives were invited to make submissions on the regulations. Such a ground does not appear in the grounds of appeal before the judge. The challenge by the Secretary of State to this decision is no longer pursued by Mr Walker. It appears that the judge granting permission to appeal, in response to the Secretary of State's challenge considered but did not reach a conclusion on that

application. We express no view except to observe that it is not necessarily without merit in the light of the absence of any argument on this point.

7. This leaves us with the challenge by Mr Sellwood on which permission has been granted. The challenge is twofold. The first is that the judge had misdirected himself in law when considering the Immigration Rules, in particular EX.1. The second is that the judge did not address Article 8. It is accepted by Mr Walker that the judge erred on the basis of the first ground; Mr Walker was right to do so. We are satisfied that the judge misunderstood the Immigration Rules at EX.1 of Appendix FM.

8. Mr Sellwood and Mr Walker have agreed that as a consequence of that error, the decision should be set aside and the appeal should be allowed under the Immigration Rules in the light of the unchallenged findings by the judge which we have referred to above and taking account of the Secretary of State's policy which appears at paragraph 15(v) of the decision. We quote from that policy:

> *"11.2.3 Would it be unreasonable to expect a British citizen child to leave the United Kingdom?*
>
> *Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano."*

9. We consider Mr Walker was correct to concede the appeal. Accordingly we set aside the decision of the First-tier Tribunal and we remake the decision allowing the appeal by the appellant under the Immigration Rules.

Signed Date: 14 July 2016

Upper Tribunal Judge Dawson