



IAC-FH-NL-V1

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

Appeal Numbers: DA/00903/2014
DA/01011/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 1 February 2016**

**Decision & Reasons Promulgated
On 17 February 2016**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

**ITTHISAK CHANAMKLANG
ATTHASAT CHANAMKLANG
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr R Layne, Counsel instructed by Samuel Louis Solicitors
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Thailand and they are brothers. Mr Itthisak Chanamklang's date of birth is 4 December 1990 and that of Atthasat Chanamklang is 14 June 1992. Both appellants were made subject of a deportation order under Section 32(5) of the UK Borders Act 2007 on 21 May 2014 following criminal convictions against them. On 6 June 2013 they were convicted of possession with intent to supply cannabis. On 12 July 2013 they were convicted of ABH and using threatening, abusive

insulting words or behaviour with intent to cause fear or provocation. They were sentenced to 20 weeks for the drug offence and 60 weeks for the ABH and Public Order Act offence. Both sentences were to run concurrently, making a total of 80 weeks' imprisonment. Both appellants have a history of offending. Atthasat has eight convictions relating to eleven offences. Itthisak has two convictions relating to four offences

2. The appellants appealed against the deportation order and their appeals were dismissed by Judge Braybrook (following a hearing on 20 January 2015) in two separate decisions promulgated on 27 January 2015. Permission to appeal was granted to the appellants by Judge of the First-tier Tribunal Blum in a decision of 28 May 2015. Thus the matter came before me.
3. The appellants were granted ILR when they arrived here in 2000 to join their mother who had arrived here in 1994 as a visitor and who had since then been granted ILR.

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4. The judge took into account that the appellant left Thailand at the age of 7 and the bulk of his education took place in the UK. She accepted that the appellant would struggle to read or write Thai but concluded that he speaks the language and indeed speaks to his mother in Thai. The judge took into account the appellant's assertions that he has no family in Thailand and he accepted that there was likely to be little, if any, contact between the appellant and his father in Thailand, given the harsh experiences the appellant (and his brother) experienced when they were with their father there.
5. The judge took into account that the appellants' mother had been travelling to and from the UK as a visitor from 1994 and that before she obtained indefinite leave to remain in 1998, as a result of her marriage to a British citizen, both appellants had been left in Thailand. The judge concluded that the only credible inference is that they had been left by their mother in the overall care of a "circle of relatives or friends as well as the appellants' father". The judge took into account evidence that the family had returned to Thailand on holiday every one to two years. The judge concluded that the appellant would be returning to a country in which he had been brought up when young and to where he had returned on a number of occasions.
6. The judge found that the appellant had not established that he would be without ties including cultural, linguistic and social ties in Thailand. The judge considered the appellants' relationship with Ms [P] and Ms [M] but concluded that he had not been in the UK for fifteen years could not meet the requirements of paragraph 399.
7. In relation to this appellant's son (born here on 12 November 2012 and who was aged two at the hearing) the Judge considered the OASys Report

of 20 February 2014 in which the appellant had indicated that he hoped to return to his parents and in the long-term to live with his partner, Ms [P] and their young son. He stated that he had been in a relationship with her for six years and she was a “stabilising factor”. In relation to the child the judge took into account correspondence from the appellant’s solicitors which indicated that the mother of the child was a national of the Philippines and that the appellant was, most of the time, living with his parents.

8. At the hearing before the First- tier Tribunal Ms [M] stated that she had been in a relationship with the appellant for two and a half years and that they were expecting their first child together in May 2015. The case was presented before the First-tier Tribunal on the basis that the appellant and Ms [P] had separated following the birth of their son. The judge concluded that the inconsistency (between the appellant’s case as presented at the hearing and what he had said to the author of the report) “cast some doubt on their account of the appellant’s relationships.”
9. There was further contradiction, found by the judge, in relation to the evidence about where the appellant was living prior to incarceration. In any event, the judge went on to conclude that the child’s mother Ms [P] was the carer of her son and therefore the appellant could not meet the requirements of the Rules. His case was presented on the basis that there were exceptional circumstances which justified consideration outside of the Rules, the exceptional factor identified by the appellant’s representative was the very close family unit in the UK and the appellant’s relationship with his son. The judge concluded that the appellant had never lived consistently with his son and had been detained for a considerable period of time in his son’s life. The judge concluded that the appellant’s decision to develop a relationship with Ms [M] and had a further child would limit any further financial support he was able to give to his son.
10. The judge took into account the strong family support and emotional bonds between the appellant and other family members but found there was little to indicate that outside of the family home his sisters or parents were involved in his wider social circle. The judge concluded that the relationship with Ms [P] was limited to contact with their son. The judge concluded that although Ms [M] asserted that she was pregnant, the relationship had been entered into when she was well aware of the appellant’s precarious immigration status and found that they had never cohabitated. The judge concluded that Ms [M] was living with her own family, there was no financial interdependency and she was currently in receipt of jobseekers allowance. The judge did not attach significant weight to the relationship which had been disclosed for the first time shortly before the hearing. The judge considered the seriousness of the offending concluding that the appellant was an adult when he committed the offences.

11. The judge took into account the OASys Report which noted “an emerging pattern of antisocial and criminal behaviour is building all within a relatively short space of time” and noted a tendency to drink in excess and resort to violence and entrenched pre-criminal attitudes. The judge noted that there was no mention in the OASys Report of the appellant’s evidence as to what steps he had taken to ensure that he does not relapse into excessive alcohol and the daily cannabis use in which he was involved. The Judge concluded that there was no clear evidence that the appellant, (once no longer on licence), would not meet up with the same friends as before and that he was living in the same area. The judge concluded that there was much against the appellant in the balancing exercise notwithstanding that he had been lawfully resident here since 2000. He concluded that there were no very compelling reasons which would outweigh the public interest in deportation.
12. The judge took into account that the appellant had been here since the age of 7 but concluded that he was not satisfied that there would be “very significant obstacles to his integration in Thailand”. He was not satisfied that the relationship between the appellant and Ms [M] was genuine or subsisting and the appellant’s son was not a qualifying child for the purposes of paragraph 117C of the 2002 Act.

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13. In a separate decision the judge made findings which was very similar to that of his brother. This appellant had left Thailand aged 9 but had spent the bulk of his education here in the United Kingdom. The judge concluded that he would be returning to a country which was not alien to him and that through “his mother his cultural and linguistic ties to Thailand were maintained”. The judge was not satisfied that the appellant would be without ties including cultural, linguistic and social ties.
14. The judge considered the appellant’s relationship with Ms Hanif under paragraph 399 (b), but concluded that the appellant had not been in the UK with leave for fifteen years and therefore it did not apply to him. The judge was not satisfied that there would be very significant obstacles to his integration in Thailand. The judge considered exceptional circumstances as put forward by the appellant’s representative (see paragraph 22) which included consideration of the appellant’s relationship with Ms Hanif. The judge noted that there had been hitherto no mention of this relationship for the purposes of the proceedings. The judge noted that there was a reference in the OASys Report to a current girlfriend which the judge assumed was Ms Hanif. The judge noted that in oral evidence the appellant had said that she had been his girlfriend since October 2012 whilst her oral evidence was that they had been in a relationship for three years. In any event, the judge went on to conclude that they had never cohabited and whilst accepting that the relationship was genuine, “it was of limited duration and their future was tied to factors such as becoming financially independent and the need to find employment and housing”. The judge went on to find that their plans for actual

cohabitation were taken at a time when both parties were well aware of the appellant's precarious immigration status. The judge accepted that Ms Hanif was a British citizen who would find particular difficulties in moving to Thailand given her family and work commitments in the UK but overall he did not consider that he could give the relationship significant weight.

15. The judge took into account the judge's sentencing comments, but noted that the offences were committed when the appellant was an adult. The judge noted the OASys Report for this appellant disclosed that he had a limited employment record and that he will turn to illegal sources of income when he has limited sources of income and that there was a risk that he would return to mixing with negative associates and socialising in high risk areas. The judge concluded that removal would be proportionate.

Error of Law

16. The judge applied the wrong Immigration Rules in respect of both of the appellants. Neither of whom submitted any further evidence in accordance with the directions of the UT and I gave the parties the opportunity, in the light of the clear error of law, to make submissions in relation to the application of the correct version of the Immigration Rules. There are, in my view, lawful and sustainable findings of fact made by the First-tier Tribunal (which were not the subject of challenge in any event). I considered whether the decision could be maintained in the light of the submissions I heard or whether this was not possible in the light of the error. Having heard lengthy submissions I decided to set aside the decision because it is not possible to conclude with certainty that the judge would have reached the same conclusion had she applied the correct version of the Rules. I heard submissions with a view to remaking the decision myself. In the light of the lack of further evidence and sustainable findings of fact made by the First-tier Tribunal, I could see no merit in remitting the matter to the First-tier Tribunal or adjourning the matter. Indeed there was no request made by either party for me to do so. The basis for the remaking of the decision are the findings of fact made by Judge Braybrook. However, it is clear from the documentation that was before the First-tier Tribunal that Itthisak's son is a British citizen and there is now a second child in the picture whose circumstances must be considered. There is no evidence relating to his interests, but his existence and nationality is not in dispute.
17. The appellants' deportations are conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than four years but at least twelve months (see paragraph 398 (b) of the Immigration Rules).
18. I will deal with Itthisak first of all. He has a genuine and subsisting relationship with two British citizen children. The issue is whether it is unduly harsh for the children to live in Thailand and whether it would be unduly harsh for them to remain here without the appellant (399 (ii) (a)

and (b) of the Rules). I find that it would be unduly harsh to expect the appellant's son to live in Thailand. I conclude that the appellant has not established, considering the evidence before the First-tier Tribunal and the findings made by the judge, that it would be unduly harsh for his son to remain in the UK without him.

19. There is tension between the opinion of the Upper Tribunal in regards to unduly harsh. In KMO (section 117 – unduly harsh) [2015] UKUT 543 the UT held that the words “unduly harsh” do import a balancing exercise that requires consideration of the statutory presumptions introduced by the Immigration Act 2014. In MAB (para 399; “unduly harsh”) USA [2015] UKUT 435 the UT decided that the words “unduly harsh” do not import or require any kind of balancing exercise and that the statutory human rights presumptions. In this case the appellant's son is young and lives with his mother. He does not live with the appellant and the appellant and his mother are no longer in a relationship. The appellant has spent a considerable period of the child's life in custody. There is a history of offending. The appellant has been convicted of serious offences and deportation is in the public interest. It is uncontroversial that the best interests of the child are to remain here in the UK with his father here in order to facilitate regular contact, but this does not establish unduly harsh in either the MAB or KMO sense.
20. Although not accepted by the First -tier Tribunal, Ms [M] has since that hearing given birth to the appellant's child and I find that the relationship is genuine and subsisting. The child and mother are British citizens. By any account this relationship was formed at a time when the appellant's status was precarious albeit lawful. It was formed when the appellant was subject to a deportation order and therefore the appellant cannot benefit from paragraph 399(b).
21. There has been no further evidence submitted relating to the child. There is no evidence before me that the difficulties involved in relocating to Thailand would be such as to amount to unduly harsh in the context of the Rules. In the light of the age of the child and dependency on both parents, whilst it is likely to be unduly harsh for her to remain in the UK without her father, as a result of her very young age, the evidence does not establish that it would be unduly harsh to expect the child and mother to relocate to Thailand where they could live together with the appellant. I appreciate that both are British citizens and that Ms [M] has family here, but the child is very young and there is no evidence before me that would lead me to conclude that relocation would be unduly harsh following an MAB or a KMO assessment.
22. Neither party addressed me in oral submissions in relation to paragraph 339A. The appellant has been lawfully resident in the UK most of his life and the starting point has to be in my view that he is socially and culturally integrated in the UK. Judge Braybrook did not properly consider this. However, in relation to 399A, the determinative issue is whether there would be very significant obstacles to his integration into Thailand

which the Judge ultimately properly considered and concluded that there were none. I agree with Judge Braybrook.

23. The appellant does not satisfy the requirements of the Immigration Rules and therefore he is only able to succeed in his appeal if he is able to establish that there are very compelling circumstances over and above those described in paragraph 399 and 399A. I asked Mr Layne to identify compelling circumstances. He relied on matters that have been considered within the assessment under the Immigration Rules. Article 8 must be considered through the lens of paragraphs 117(B) and (C) of the 2002 Act. Significant weight that should be attached to the public interest in cases of deportation. The deportation of the appellant is in the public interest and the exceptions in section 117 C (4) and (5) do not apply to the appellant in this case. This appellant's appeal is dismissed under the Rules.
24. In respect of Mr Itthisak Chanamklang he does not have any children here but relies on his relationship with Ms Hanif which has been found to be genuine and subsisting. In terms of whether or not deportation would be unduly harsh in the context of the Rules, the judge made lawful and sustainable findings about the nature and quality of the relationship. In light of these, any unduly harsh assessment on any basis, would in my view inevitably result in a decision in the respondent's favour. It could not by any account be considered unduly harsh (within the context of the Rules following on from the findings of the First-tier Tribunal) for the appellant to be deported leaving Ms Hanif here to remain without him. It is also the case that it is not entirely clear from the evidence whether or not this relationship was started at a time when the appellant's immigration status was precarious because it followed the making of the deportation order. There was inconsistency in the evidence on this issue. His case was not advanced before me under 399A, but I conclude that he has not established that there are significant obstacles to integration and I rely on the findings made by Judge Braybrook. In terms of compelling circumstances this appellant like his brother was unable to establish that these existed in the context of the Rules. His Article 8 claim rests primarily with his relationship with Ms Hanif and his wider family. He has committed a serious offence and has previous convictions. He does not fall within exception in 117C (4) and (5). His appeal falls to be dismissed under the Rules in the absence of Mr Layne identifying compelling circumstances over and above those described in the Rules which have been considered. In respect of both of the appellants, I have had regard to the length of time that they have been here and that they came to the UK as children, but the trigger offences were committed at a time when they were adults. I have had regard to the judgement in Akpinar, R (on the application of) v The Upper Tribunal (Immigration and Asylum Chamber) [2014] EWCA Civ 937.
25. The appellants' appeals are dismissed under the Immigration Rules and Article 8.

No anonymity direction is made.

Signed Joanna McWilliam
Upper Tribunal Judge McWilliam

Date 12 February 2016