



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00903/2014

THE IMMIGRATION ACTS

Heard at Field House
On 14 June 2019 and 14 November 2019

Decision & Reasons Promulgated
On 24 February 2020

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

ITTHISAK [C]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Malik, Counsel, instructed by Ash Norton Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This case has an unfortunate history. The appellant is a citizen of Thailand. He was born in December 1990 and was given indefinite leave to remain in the United Kingdom when he arrived to join his mother in March 2000. He committed criminal offences and on 15 May 2014 the respondent made him the subject of a Decision to Make a Deportation Order which he appealed. He had been advised in a letter dated 1 October 2013 that the respondent deemed his deportation to be in the public good following his being convicted of offences in August 2013 that led to his

imprisonment and invited him to give reasons why he should not be deported. He made submissions but the respondent made the decision indicated. The appeal was dismissed by the First-tier Tribunal in a decision promulgated on 27 January 2015. That decision was upheld by the Upper Tribunal but the Upper Tribunal erred. The Court of Appeal remitted this appeal to the Upper Tribunal with the consent of the parties for the Upper Tribunal to determine. The important part of the Court of Appeal's order for present purposes is at paragraph 4 of the Statement of Reasons which provides that "the parties agree that this matter should be remitted to the Upper Tribunal for a substantive determination of the matters set out in the grounds of appeal". That must mean the grounds of appeal to the Upper Tribunal.

2. The appeal then came before a division of this Tribunal (The Honourable Lord Uist, sitting as a Judge of the Upper Tribunal and Upper Tribunal Judge Perkins) on 24 May 2018. On that occasion the appeal was listed with the appeal of this appellant's brother but his circumstances had changed by reason of further and apparently serious offending. The appellants were represented by Mr Malik and the Respondent by Mr I Jarvis, Senior Home Office Presenting Officer. By agreed directions made in October 2018 (they happen to be made by me) the two appeals were no longer linked. This was done at the initiative of the parties.
3. It was also agreed that the decisions be set aside because the First-tier Tribunal has applied the rules wrongly and had not considered part 5A of the 2002 Act properly. A particular difficulty is at paragraph 20 of the judge's decision where the judge was considering the significance of the appellant's relationship with his claimed partner, Ms [H]. The judge referred to the appellant not having achieved 15 years residence in the United Kingdom and so the relationship was irrelevant for the purposes of paragraph 399 of the Rules. I agree with Mr Malik that the judge was applying paragraph 399 in a version no longer in force where 15 years residence was a requirement. The judge clearly applied the wrong rules. It followed that her findings were not safe.
4. Regrettably the hearing of the appeal was delayed because of administrative error. I did not hear the appeal until 14 June 2019. However I could not finally determine the appeal because I was concerned that I was at cross-purposes with the parties about the reasons for deciding to deport the appellant and I gave directions and ordered a further hearing that took place on 14 November 2019. I return to his point below.
5. On 16 August 2013 the appellant appeared before the Crown Court sitting at Guildford and was sentenced to a total of 80 weeks imprisonment by H.H. Judge Critchlow DL, the Honorary Recorder of Guildford. I have considered the sentencing remarks. It is clear that the appellant was sentenced to 40 weeks imprisonment for an offence of assault occasioning actual bodily harm on 3 September 2012 and 12 weeks concurrent for a public order offence committed on the same occasion, and to 20 weeks imprisonment for an offence of possessing cannabis with intent to supply on 21 September 2012 and to 20 weeks imprisonment for a further offence of possessing cannabis with intent to supply committed on 13 November 2012. The sentences for the offences of possession with intent to supply were to be served "consecutive to one another, consecutive to the assault" making 80 weeks in all. If I may say so respectfully, this is entirely unsurprising. Save for the public order matter, the

offences were committed on different occasions and although the “drugs” offences are similar the second offence was committed whilst the appellant was on bail.

6. By letter dated 1 October 2013 the respondent notified the appellant that he would be the subject of a deportation order unless he showed that he should not be deported.

Given the offending set out above the letter is puzzling. It states:

“The Secretary of State has noted your conviction on 16 August 2013 at Guildford Crown Court for Drugs- with intent to supply, Violent Crime (inc ABH/GBH), Behaviour (Including bomb hoaxes/threats to kill etc) and for which you were sentenced to 1 years, 6 months, 11 days and takes a very serious view of your offence. In light of your conviction, the Secretary of State deems that your deportation would be conducive to the public good, pursuant to section 32(4) of the UK Borders Act 2007 and you are therefore liable to deportation in accordance with section 3(5) of the Immigration Act 1971. Pursuant to section 32(5) of the UK Borders Act 2007, the Secretary of State will make a deportation order against you unless you fall within one of the following exceptions set out in Section 33 of the UK Border Act 2007:”

7. The difficulty with this is that section 32(5) obliges the Secretary of State to make a deportation order in the case of a “foreign criminal” but the appellant is clearly not a “foreign criminal” for the purposes of section 32 of the UK Borders Act 2007. The term “foreign criminal” for the purposes of that section is defined with reference to the length of sentence (s32(2)) and, for the purposes of the Refugee Convention only (section 32(3)) by reference to the categorisation of the crime. Section 32(3) is not relevant here; the appellant does not claim to be a refugee. Section 38(1)(b) shows that the critical term of 12 months imprisonment necessary to be a “foreign criminal” for the purposes of section 32 does not apply where the 12 months term is achieved or exceeded by reason of sentences being served consecutively. It follows that the reference to “Pursuant to section 32(5) of the UK Borders Act 2007, the Secretary of State will make a deportation order against you unless you fall within one of the following exceptions...” makes no sense. Further the reference to “Behaviour (Including bomb hoaxes/threats to kill etc)” seem excessive. The appellant committed the offence of assault occasioning actual bodily harm in a street fight outside a night club. The threatening behaviour was (I think, the respondent is not clear) contrary to section 4 of the Public Order Act 1986 which is only triable summarily. Be that as it may, the disorder was part of the assault and attracted a concurrent term of imprisonment that was significantly shorter than the term imposed for the assault. Unattractive as it was, it was bad behaviour a very long way from “bomb hoaxes/threat to kill etc”.
8. The appellant’s then solicitors (*not* Ash Norton) made representations based on article 8 of the European Convention on Human Rights and particularly the appellant’s youth and his having lived in the United Kingdom for over half his life, because he arrived in the United Kingdom in 2000 when he was 9 years old. The letter sought to raise an exception under section 33 of the UK Borders Act 2007 and relied on paragraph 399A(b) of the HC 395. Paragraph 399A(b) identifies being socially and culturally integrated in the UK as one of three factors including being lawfully resident in the UK for most of his life and there being “very significant obstacles to his integration into the country to which it is proposed he is deported” that are necessary under the rules to avoid deportation. The letter did not contend that section 32(4) and (5) do not apply.

9. The respondent was not impressed. On 20 May 2014 the respondent issued a Notice of a Decision to Make a Deportation Order. That decision is explained in a letter dated 15 May 2014. It is plain from both the Decision dated 20 May 2014 and the supporting letter dated 15 May 2014 that the Secretary of State had decided that the appellant's deportation is conducive to the public good but, although the details of the appellant's criminal behaviour are outlined, as far as I can ascertain the Secretary of State has not explained *why* deportation is in the public interest in this case except perhaps in the most general terms.
10. The letter dated 15 May 2014 outlines the Appellant's criminal behaviour. It draws heavily on the sentencing remarks although it states, wrongly, that the sentences were "to run concurrently making a total of 80 weeks imprisonment" when the 80 weeks was achieved by reason of the sentences running consecutively. This is a fundamental and troubling error.
11. The letter then sets out the terms of paragraph 398 of HC 395 which provides that where a person claims that deportation would be contrary to United Kingdom's obligations under the European Convention on Human Rights and certain preconditions exist then "the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.
12. According to the explanatory letter dated 15 May 2014 (at page 4 of 7):
 "The Immigration Rules states that where a person has been sentenced to a period of imprisonment of at least 12 months but less than 4 years, in assessing a claim that deportation would be contrary to Article 8 ECHR, the Secretary of State will consider whether paragraph 399 or 399A apply".
13. There is no such provision in the rules. The phrase "sentenced to a period of imprisonment of at least 12 months" can be found at section 32(2) of the UK Borders Act 2007 but it applies only to a "foreign criminal" which, as indicated above, has a precise meaning defined in the Act that does not include a person sentenced to at least 12 months imprisonment made up of consecutive terms (see section 38(1)).
14. The obligation to consider if paragraph 399 or 399A apply is created by Paragraph 398. It arises under paragraph 398 in one of three circumstance. It arises under paragraph 398(a) where the person has been sentenced to a period of imprisonment of at least 4 years and it clearly does not apply here. It also arises under paragraph 398(b) where a person has been "convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months. It is equally clear that this does not apply. The appellant has not been sentenced to 12 months imprisonment for "an offence" but for a series of offences. The phrase "period of imprisonment" is defined in the rules (paragraph 6 of HC 395) and "has the same meaning as set out in section 38(2) of the UK Borders Act 2007", that is it does not include a term made up only by consecutive sentences. Finally the obligation arises under 398(c) where "in the view of the Secretary of State, their offending has "caused serious harm, or they are a persistent offender who shows a particular disregard for the law". It has never been the respondent's case that the

appellant was a “persistent offender” which is unsurprising given that the respondent relies on only four offences committed within a short space of time so years ago, or that he has shown particular disregard for the law. Belatedly the respondent argued that the appellant’s crimes had caused serious harm. I have concluded that one of them did but I am not satisfied that this was the reason the decision to deport the appellant was made.

15. The grounds of appeal to the First-tier Tribunal rely on article 8 of the European Convention on Human Rights and contend that the appellant benefits from the exceptions created by paragraph 399A. They do not rely on the then permissible ground that the decision was not in accordance with the law. It may have been interesting if they had but the lawfulness of the decision to deport was not in issue before me.
16. The First-tier Tribunal decided that the rules were relevant and the rules required the appellant’s deportation. It dismissed the appeal.
17. The grounds of appeal to the Upper Tribunal, dated 6 February 2015, contended broadly that the Judge should have allowed the appeal with reference to paragraph 399A(b) of HC 395 and should have applied part 5A of the Nationality, Immigration and Asylum Act 2002 and should have allowed the appeal.
18. Permission to appeal was refused by the First-tier Tribunal but granted by Upper Tribunal Judge Blum who said, *inter alia*:

“5 The Judge found that most of the appellants’ immediate family lived in the UK, that they left Thailand as seven and nine year olds, that the bulk of their education occurred in the UK, that the appellant’s would struggle to read and write Thai although they did speak Thai, that they were unlikely to have any contact with their father, and that the appellants and their family would regularly return to Thailand for holidays. The Judge found that through their mother, the appellants retained cultural ties to Thailand. It is not clear on what evidential basis that particular finding was made. The Judge found that the appellants were left by their mother in the overall care of friends or relatives before they entered the UK but this related to a situation almost 15 years prior to the date the appeals were heard. The evidence before the Judge, which he did not dispute, was that the appellants had not family left in Thailand and that when returning for holidays they stayed in cheap hotels.

6 Given this factual matrix, it is arguable that the Judge erred in concluding that the appellants had more than merely remote or abstract links to Thailand, ...”
19. As indicated above, the appeal was unsuccessful before the Upper Tribunal but its decision was set aside by Court of Appeal by consent. Although it was agreed that the decision of the First-tier Tribunal had to be set aside the agreement was based on the application of an old form of the rules Judge Blum was clearly concerned about the finding that the Appellant had a support network in Thailand. I share his concern and I am satisfied that that finding was unreliable too because it rejected contrary evidence without explanation.
20. It was only after the hearing that I realised that, contrary to the parties’ apparent position, it was not clear to me that the appellant was a “foreign criminal” for the purposes of the Act or the rules.
21. I gave directions. The relevant part stated:

22. Whereas:

On 14 June 2019 this appeal was argued before me and evidence was called and it appears to me from reading the papers that the appellant has been sent to prison for consecutive terms totalling 80 weeks but he has not been sentenced to more than 40 weeks for any one offence, and there is no finding by the Respondent that he has caused serious or is a persistent offender:

DIRECTIONS

Each party is directed to state in writing to the Upper Tribunal no later than 7 days after receiving these directions:

If the party agrees with the premises set out under the heading "Whereas" above, and if not, the reasons for disagreeing

If the appellant is to be treated as a "foreign criminal" for the purposes of part 5A of the Nationality, Immigration and Asylum Act 2002;

If the party requires the appeal to be listed for further oral argument.

23. Mr Bramble replied with the "SSHD'S RESPONSE TO DIRECTIONS" and I gave Further Directions stating that:

The Tribunal wishes to hear argument directed to whether the Appellant is a "foreign criminal" for the purposes of part 5A of the Nationality, Immigration and Asylum Act 2002 and, if he is not, how the appeal should be determined.

24. The respondent's Response to Directions is not persuasive. It identifies the Reasons for Deportation Letter of 15 May 2014 as the "initial justification for the act of deportation". I have criticised that letter above.
25. The Response asserts that the "new rules" and Part 5A of the 2002 Act apply but this misses the point. Clearly they apply in the sense that they are binding provisions if the appellant's circumstances come within them; my concern was that he may not.
26. The Response then relied on the appellant having caused "serious harm". As far as I can see this is the first time that the that contention was made. However, according to paragraph 8 of the Response, for the purposes of section 117D(2)(c) the appellant has been convicted of offences that have caused serious harm.
27. It is much more difficult to decide if the offending has "caused serious harm" because the respondent has not identified that harm and then relied upon it. Indeed the respondent did not assert in the decision or explanatory letter that the appellant had caused serious harm and I doubt that the harm done was the reason for making the decision complained of. I am satisfied where "serious harm" is a precondition for exercising her powers the respondent must prove that the harm was done.
28. Whilst recognising the Secretary of State's policy of regarding offences concerning the misuse of drugs as inherently serious the terms of the Act required that "the offence has caused serious harm" which is not necessarily the same as having been convicted of a serious offence. The appellant's offending may well have contributed to an illegal industry that has caused serious harm to society but, in complete agreement with the submission of Mr Malik, I find that the terms of the Act require harm that is traceable to the offender and no such harm is evident here. It will be unusual that a "drugs" offence that is punished with something less than 12 months

imprisonment can be said to have “caused serious harm”. If the respondent wishes to assert that such an offence has caused serious harm then she should say so unequivocally and explain her view. The interpretation of statute must be a matter for a judge rather than a ministerial policy but a case specific explanation is likely to be entitled to considerable weight. There is no such explanation here. The test set by Parliament does not relate to the seriousness with which the respondent regards the offence but the harm that an offender has done.

29. No actual harm can be attributed to the offence of possessing with intent to supply. Clearly there is good reason to find that misuse of drugs does great harm to society but it does not follow that this appellant’s tiny contribution to that harm by possessing with intent to supply caused serious harm to anyone and I find that it did not.
30. Little is known about the assault except that the conviction was for assault causing actual bodily harm so it follows that although some harm was done it did not have be serious harm to justify the conviction. I do not regard the *fact* of conviction as evidence of *serious* harm. In the explanatory letter of 15 May 2014 the respondent refers to the seriousness of the offence and quotes extensively from the sentencing remarks without identifying their significance.
31. According to the sentencing remarks the victim was kicked in the head so that he became unconscious and there was “damage to an eye”. H.H. Judge Critchlow also referred to “the ongoing effect on the victim, because of his eye injury”. The judge referred to the sentencing council guidelines and described the assault as a “category 1 offence”. Neither party has provided information about that but the guidelines are public domain documents which I have consulted. According to the guidelines, in order to be a category 1 offence there must be “greater harm (serious injury must normally be present) and higher culpability”. Without in any way wishing to diminish the appellant’s culpability for his criminal behaviour the judge was sympathetic to the provocative effect of remarks made by the victim and found them a reason, with others including the guilty plea, to justify the sentence. However the judge said that the starting point for the offence was 18 months imprisonment. I will of course assume that the sentencing judge in Crown Court categorised the offence correctly and I conclude that he was satisfied for the purpose of sentence that there was serious injury. Whilst recognising that the sentencing judge had no reason to consider the immigration rules I am satisfied that the sentencing remark show that the appellant’s assault had done serious harm for the purposes of the rules and for that reason paragraph 398(c) is satisfied and paragraphs 399 and 399A had to be considered by the respondent.
32. Even so it is troubling that I have to reach this conclusion in such a convoluted way. It is not hard to say “I find that the appellant is a foreign criminal because, although only sentenced to 40 weeks imprisonment, he did serious harm when he kicked someone unconscious and did lasting damage to his eye” if that is what is meant. If the respondent wanted to assert that the appellant is a foreign criminal because he has caused serious harm then she should have said as much and she could have identified that harm that that the appellant did and, if it were not obvious, she could have explained why it was serious. If she was not in a position to do that then,

without deciding the point, I incline to the view that she should not have relied on his having caused serious harm. I fact I am satisfied that she did not rely on that point until I asked for further submission and only obliquely then.

33. I anticipate that the appellant will complain that I have made no clear findings about the nature of the injury to the eye and that I should not have been satisfied in the evidence that the harm was serious. After considerable thought I disagree with that for the reasons given, particularly because of the finding that the assault was a "category 1 offence" but reaching that conclusion has involved a degree of analysis and conjecture and assumptions about what was probable that should not have been necessary. There was no evidence from the appellant that he had not caused serious harm.
34. It is therefore my finding that the appellant is a foreign criminal within the rules and part 5A but that is because he committed an offence of assault that caused serious harm and for no other reason.
35. At the hearing on 14 June 2019 Mr Malik essentially contended that the Upper Tribunal's approach was wrong and that the case needed to be reheard. The core point is that the First-tier Tribunal confined itself to a consideration of the relevant Rules without entertaining the possibility of an appeal being allowed on human rights grounds outside the Rules and this skewed its approach and compounded that error by considering the rules in a version that no longer applied. The Tribunal also erred by failing to consider in any detail Section 117B of the Nationality, Immigration and Asylum Act 2002.
36. I appreciate that this is a gloss on seven distinct grounds of appeal. I have considered them. They are explained very fully in a skeleton argument prepared for the Court of Appeal by Mr Malik but I regard my introduction as a suitable precis to explain what this appeal is about.
37. It follows that although it is clear to me that the respondent's reasons for making a deportation order are misconceived an order was made and, for the purposes of determining the human rights of the appellant and those close him I should have regard to both the requirements of the rules and to part 5A of the Act.
38. As already indicated, I found Mr Malik's criticisms of the First-tier Tribunal's decision justified.
39. At the hearing before me on 14 June 2019 I heard evidence and argument based on the rules.
40. The rules are relevant because they illuminate the public interest.
41. The term "partner" is not defined in the rules for the purposes of "Part 13 Deportation". It is defined for the purposes of Appendix FM and that definition requires, in the case of people who are not married or affianced, living together (see GEN.1.2.(iv)) and that has not occurred here. Not without hesitation I have concluded that this definition should be used for the purposes of the word "partner" in part 13 of the Immigration Rules.

42. I have reached this conclusion because the rule following D-ILRDR.1.4 headed "Deportation and Removal" provides for the Secretary of State or an Immigration Officer considering deportation or removal in the case of someone who claims that their deportation or removal from the UK would be a breach of the right to respect for private and family life under Article 8 of the Human Rights Convention to require the person to make an application under "this Appendix or paragraph 276ADR(1), but if they are not required to make an application Part 13 of these Rules will apply."
43. It would be extraordinary if the definition of "partner" in the rules depended not the nature of the relationship but on an applicant being required to make a specific application.
44. Further the paragraph 399(b)(ii) requires "compelling circumstances over and above those described in paragraph EX.2 of Appendix FM". It would be difficult, if not impossible, to give that effect if the meaning of "partner" for the purposes of a rule offering relief in the case of undue harshness was harder to satisfy if people had cohabited.
45. There is no definition of "partner" in Part 5A of the 2002 Act. The prescribed characteristics under section 117D(1) that the partner is a British citizen or lawfully settled in the United Kingdom are clearly not exhaustive.
46. The undefined words of the statute cannot be limited by a definition in the immigration rules. Whilst evidence about cohabitation can be illuminating for the purpose of an article 8 balancing exercise and I find that a claimed to have a "partner", must, in the absence of a statutory definition, be decided after an evaluation of the evidence of the relationship, its duration and the parties' aspirations. I do not accept the cohabitation is necessary for a relationship to be partnership for the purposes of Part 5A.
47. At the hearing on 14 June 2019 Mr Malik drew to my attention a bundle paginated 1 to 64 that was prepared for the hearing in the Upper Tribunal and called oral evidence.
48. The appellant gave evidence. He adopted the statement in the bundle dated 20 June 2018 and in that statement he said that he relied on his "previous statement". He identified himself and said how he came to the United Kingdom in March 2000 with his brother to live with their mother. He expressed his regret for his criminal activity and pointed out that he had kept out of trouble since he had been sent to prison.
49. I take particular note of the claim in the statement dated 7 December 2014 where he said:

"I had nothing left in Thailand as my mother decided that the entire family must settle in the United Kingdom. My mother divorced my father because of the domestic violence. I witnessed the violence my mother was subjected to at the hands my father who was constantly beating her. As a result, my mother decided to leave the country and came to the UK to start a new life. She left me with my brother at the hands of our father who was not taking care of us. He was an alcoholic and failed to take care of us. Thus, because of his bad behaviour, our mother refused to allow us to contact him since we arrived in the UK. I do not know his whereabouts. I do not know anything about any family members left in

Thailand as the entire family is settled in the UK including our grandparents, uncles, cousins, nephews, niece and my brother and sisters. I do not have any other relatives in Thailand."

50. Before me he confirmed that his whole family were in the United Kingdom. He explained that he had one brother and three sisters, six nieces and nephews and that his grandmother and uncle as well as cousins live in the United Kingdom.
51. He had a girlfriend, Carly [H]. They had known each other for some time before the "got together on 2nd October 2012". He spoke of her in tender terms and said how they hoped to marry.
52. He offered the opinion that it would be unduly harsh for him to be sent to Thailand. He said he left that country when he was 9 years old. He had no family or friends there. He said he would have "no clue where to begin" and his situation was aggravated by reason of his not being able to read or write in Thai. He also regarded it as unduly harsh to separate him from his family and his girlfriend. He was particularly concerned about the impact that his removal would have on his mother.
53. He was cross-examined. He confirmed that he did not share a home with Carly. He had tried to discuss what they might do if he was removed to Thailand but she did not want to discuss it. She had a job.
54. He said that relatives on his father's side still lived in Thailand but he had had no contact with them since he came to the United Kingdom. He visited Thailand for a holiday in 2012 and went with his family.
55. He said that he spoke a little Thai but could not read or write the language. He had not met up with relatives when he went to Thailand.
56. He was re-examined. He confirmed that he did not live with his girlfriend. She lived with her mother and father, but they saw each other often and "stayed over" at each other's houses. He wanted to start cohabitation when his circumstances were more certain.
57. The appellant's mother gave evidence. She adopted her statement dated 20 June 2018. She confirmed the appellant's immigration history which was not contentious. She said that her son had learnt from his being imprisoned.
58. She felt that he was anxious and depressed. She deduced that from conversations they had had. Much was hanging over him. She regarded him as a "good person" who would not get into trouble. She confirmed that there was a strong family support network in the United Kingdom and his relatives in the United Kingdom would "be devastated" if he had to leave. She thought she would be "heartbroken" and was concerned about how Carly would feel.
59. She was cross-examined.
60. She said that she had holidays in Thailand most recently in March 2019 when she stayed there for about eighteen days. She did not visit Thailand every year. She said she had no friends left in Thailand. There were religious reasons for going. Her son spoke a little Thai.

61. The appellant's mother's husband, Mr Roland Berkeley, gave evidence. He identified himself as a British national born in 1957. He confirmed that all of the appellant's relatives are in the United Kingdom. He first met the family in 2005 when the appellant presented as an "ordinary young boy getting used to life in the United Kingdom". His relationship developed with the boy and he supported him when he went to prison. He said that the appellant is close to his relatives and contributes to the family with practical advice on decorating and similar projects. He described the appellant as a "natural engineer". He was not cross-examined.
62. Ms Carly [H] gave evidence. She adopted her statement of 20 June 2018 where she identified herself as a British citizen. She said how she was attracted to the appellant because of his kindness and selflessness. She described the impact of his removal to Thailand as "unimaginable". It will clearly undermine their plans to marry and make a family together. She believed it unduly harsh to separate them in this way.
63. She was asked in cross-examination if they had discussed what had happened if he had to leave. She said she could not read or speak the language in Thailand. She did not want to break up and could not imagine how she could live there.
64. There was also a statement from Miss [H]'s mother. She wrote approvingly of her relationship with the appellant and the relationship between the appellant and her daughter and how it would be "extremely heart breaking" for Ms [H] and herself if he had to go. She would regard it as losing her son.
65. I confirm too that I have seen the statements prepared in the earlier bundle. They are in many ways similar to the more recent statements but, in the case of the appellant, tell me a little more about his personal circumstances. I note that he has obtained work on occasions but does not seem able to have held a job for very long. He has taken various courses.
66. Having reflected on the evidence and the submissions of the representatives I find that I have, broadly, been told the truth. It is quite clear that the appellant came to the United Kingdom as a boy aged 9 years. He has been educated in the United Kingdom. He has committed criminal offences which are entirely to his personal discredit but he was last in trouble in September 2012.
67. I was satisfied that he has integrated into life in the United Kingdom. He certainly speaks English and understands the British way of life. I accept that he has a close relationship with his immediate relatives but nothing that is out of the ordinary. Rather they are the relationships that are to be expected between young people and their relatives and are not something worthy of particular weight in an Article 8 balancing exercise. Certainly they are not anything like the important relationship that exists between parents and minor children or husband and wife.
68. Importantly I accept that the appellant has no relatives in Thailand who are inclined to support him. The claim that he has lost all contact with his father is told consistently and is consistent with the facts that his mother came to the United Kingdom bringing the children without their father. I cannot know that there are no relatives who would support the appellant in Thailand. Often family ties are preserved for the sake of the children and often more distant relatives have a genuine

degree of friendship that survives a breakup between partners but there was no evidence that that is the case here and I have been given no reason to disbelieve the claim that the relatives are not known and certainly not available for support. This is important.

69. The relationship between the claimant and Ms [H] is not marriage. It is not characterised by cohabitation, at least not in the sense of having their own home, but it is also a long lasting relationship. I accept the evidence from Ms [H] that she longs to be in a permanent relationship and longs to start a family with the appellant and I accept the evidence of the appellant's mother and Ms [H]'s mother that this relationship is one of which the family approve. This too is important. Clearly it is more than a casual relationship. It has lasted for more than 6 years. Further there was credible evidence that it is not a static relationship but one moving towards creating even stronger "family life" when circumstances permit. I am satisfied that the appellant and Ms [H] are to be treated as partners for the purposes of part 5A.
70. I consider now the refusal letter on which the Secretary of State relies. This begins with rehearsing the appellant's criminal convictions. The details of the convictions are not nearly as important for these purposes as the fact of the conviction but he was convicted of two counts of possessing a class B drug with intent to supply and a count of assault occasioning actual bodily harm and a charge of using threatening and abusive words and behaviour.
71. The decision to deport is made because it is concluded that his deportation would be conducive to the public good. As I have explained above, I am satisfied that the respondent misunderstood the length of the sentences that were passed and her decision that the appellant's deportation is in the public good is unexplained.
72. It is the appellant's case that he was left with his father for a time while his mother established herself in the United Kingdom and because of his father's alcoholism he was not given proper care during that time and it was a consequence of that that provoked his mother to saying there would be no contact after they had arrived in the United Kingdom.
73. The most telling thing about his integration in the United Kingdom is that notwithstanding reservations expressed in the OASys Report about his future there has been no evidence that he has committed further offences. The offences were now committed 6 years ago. I must conclude that he has put his offending behind him. I say immediately this does not mean that he is somehow entitled to remain. The point is that for the purposes of integration this is not a young man who is disaffected with society and fixed on a life of crime.
74. I note it was part of the Secretary of State's reasoning that the appellant had lived with his father's family before arriving in the United Kingdom in 2002 and that he could readapt and that it is "considered likely that your client or member of your client's immediate family in the United Kingdom have maintained contact with family and friends in Thailand". The first point makes no sense in the light of the appellant's claim to have been so ill treated by his father that his mother forbade further contact and the second is entirely speculative. There is no evidence to show that there are relatives able to help. It was clearly the Appellant's case, raised in the

solicitors' letter of 20 November 2013, that he had lost all contact with his father because of domestic abuse arising from alcoholism and that he had no ties with Thailand. It does not follow from its longevity that the claim is true but the respondent appears to have rejected it for no good reason whatsoever.

75. I prefer evidence to speculation. I find that there are no relatives available to support this appellant in Thailand. There might be some friends who can give some nominal support because the family have kept some contacts there but there is no basis for concluding that anyone with sufficient concern to help the appellant re-establish himself in that country.
76. I accept the evidence that the claimant does not write or read in the Thai language. He has some ability to speak the language. However he has not spoken the language naturally except within the immediate family for many years. I have no reason to assume that his mother and her husband speak Thai. I accept that the claimant can speak some Thai but it is the Thai of a child not a mature man.
77. For the purposes of paragraph 399(b) I find that the appellant does not have a "partner" within the meaning of the rules. The relationship does not meet the definition in Appendix FM which, I find, applies.
78. I accept he has a close relationship with Ms [H] and that the relationship began when he had indefinite leave to remain and so his status was not precarious. It would be hard for her to live in Thailand. She is not an educated person. She has no knowledge at all of the culture or the language. She would not be going into an environment where her partner was there to support and assist her because he too would be struggling under considerable difficulty. However the provisions of paragraph 399(b)(ii) require that it would be unduly harsh for the partner (she is not a partner) to live in Thailand for "compelling circumstances over and above those described in EX.2 of Appendix FM. This means something over and above the "insurmountable obstacles" necessary to continue their life together and they are not present. It would not "unduly harsh" for Miss [H] to remain in the United Kingdom without the appellant. It would be very hard and hurtful and would dash her hopes and plans but, if I may be permitted that cliché, that is what deportation does.
79. I find that Miss [H] and the appellant do enjoy a "partnership" for the purposes of section 117(5) but for similar reasons the adverse effects would not be "unduly harsh" for the purpose of Exception 2 at subsection 5.
80. Separate consideration of the requirements of Article 8 outside the rules does not help the appellant. If I am wrong and he does not enjoy a partnership for the purposes of the section he and Ms [H] enjoy an important close supporting relationship that is at the "family life" end of the "private and family life" spectrum and is, I find, entitled to respect but it is not enough to overcome the public interest in the appellant's deportation.
81. I am satisfied that for the purposes of paragraph 399A the appellant has been lawfully resident in the United Kingdom for most of his life and that he is socially and culturally integrated in the United Kingdom. Clearly there would be significant obstacles in the way of his integration into life in Thailand. He has no adult

experience of living the Thailand except as an occasional holiday maker. He cannot read or write Thai and his spoken Thai is limited although no doubt it would improve quite quickly. He has no obvious trade and, importantly, no one to support him or guide him as he strove to find shelter and employment in a country where he has little experience.

82. When considering Exception 2 under s117C I remind myself of the words of Sales LJ in **Kamara v Secretary of State for the Home Department** [2016] EWCA Civ 813 that:

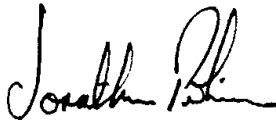
“The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.”

83. He left Thailand when he was 9 years old. He is illiterate. His capacity to speak the language is limited. He has no one to help and support him. I am satisfied that there will be difficulties in integrating into society in Thailand.
84. He has made significant progress in putting behind him his criminal past but he has done that with considerable familial support, including the support of Ms [H].
85. The appellant's mother visits Thailand from time to time but she has no strong links there and she has responsibilities to her husband in the United Kingdom. She cannot be expected to return with the appellant help him start his new life. Neither can she be expected to much use.
86. Notwithstanding the advantages of relative youth, apparent good health and some knowledge gained by occasional visits to Thailand I cannot see how he can cope.
87. I am required to balance his rights, and the rights of those who care about him, with the public interest in deportation. Given the thin reasoning by the respondent and the short prison sentence I put the public interest at a low level but it still an interest that requires deportation unless at least one of the exceptions applies. I find that there would be very significant obstacles in the way of integration into Thai society.
88. I have noted the points in section 117B that apply in all “Article 8” cases. He speaks English and, I accept, although the evidence is thin, he will earn a living. His family would encourage him to do that but these points add little if anything to his case. They are relevant because his position would be worse if they were not satisfied.
89. I remind myself that the appellant did assault someone and damaged his eye but the best evidence I have about the seriousness of that offence is the sentence of 40 weeks imprisonment.
90. I find that his deportation would be a disproportionate interference with his human rights.

Notice of Decision

91. I set aside the decision of the First-tier Tribunal and I substitute a decision allowing the appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 24 February 2020