



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

Appeal Number: IA/18087/2013

THE IMMIGRATION ACTS

Heard at Bradford

On 8th April 2014

Determination

Promulgated

On 30th April 2014

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Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

SECRETARY OF STATE

Appellant

and

KANYA SAVAGE

Respondent

Representation:

For the Appellant: Mr M Diwnycz, Home Office Presenting Officer

For the Respondent: Ms S Harrison, instructed by Halliday Reeves Law Firm

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Cox made following a hearing at Bradford on 7th November 2013.

Background

2. The claimant is a national of Thailand born on 9th December 1969. She came to the UK on 22nd October 2010 with leave as a spouse valid until 6th January 2013. She made an in time application for indefinite leave but was refused on 8th May 2013 because she had not provided an English language test certificate.
3. It was conceded at the hearing that the test certificate had not been produced and accordingly the judge dismissed the appeal under the Rules.
4. With respect to the human rights appeal, the judge cited the relevant case law before turning his attention to the fact of the case. The sponsor has a history of poor health and is in receipt of incapacity benefit. The judge considered Mr Savage's medical records, which were produced, and said that, whilst he would have liked a medical report explicitly addressing the issue, there was sufficient information from the GP's notes to demonstrate that Mr Savage became ill in Thailand and that he suffers from endogenous depression and hypertension. The judge concluded on the basis of the evidence that Mr Savage's health had deteriorated on his penultimate visit to Thailand. The records were consistent with the claimant's evidence that her husband finds it very difficult there especially during the Thai summer.
5. The judge chronicled the history of the relationship between the claimant and her husband, which he found to be subsisting and which is not disputed by the Secretary of State. Accordingly, unsurprisingly, he found that she enjoys family life in the UK with her husband.
6. The judge cited the claimant's explanation as to why she had not provided an English language certificate and her attempts to take the Cambridge ESOL test which had been cancelled for reasons beyond her control.
7. The judge stated that he attached significant weight to the fact that the claimant does not meet the requirements of the Immigration Rules and that the government's intentions behind the changes to the Immigration Rules seek to reflect the public interest. There were very limited circumstances when an applicant could succeed under Article 8.
8. He then wrote as follows:

“On the other hand the Appellant is in a loving and genuine relationship with a British citizen. Mr Savage has a right of abode in the UK which he is free to exercise without let or hindrance. Nevertheless, and in my view significantly, I am satisfied that Mr Savage tried to live in Thailand and I accept that his health deteriorated as a result of the intense heat in Thailand. In these circumstances I am satisfied that he cannot reasonably be expected to live in Thailand. ...A further significant factor is the medical evidence which clearly demonstrates that when the couple are

separated the Sponsor's health deteriorates and he becomes a burden on his local health services. I have also attached significant weight to the fact that the Respondent was satisfied that the Appellant could be adequately maintained in the UK without recourse to additional public funds. Finally, I have also had regard to my findings that the Appellant had to return to Thailand for compassionate reasons and note that having spent a year out of the UK this has inevitably impacted on her ability to speak and listen to English."

The Grounds of Application

9. The Secretary of State sought permission to appeal on the grounds that the appeal should only have been allowed on a basis where it was exceptional in some way, i.e circumstances in which, although the requirements of the Rules had not been met, refusal would result in an unjustifiably harsh outcome.
10. The judge considered that the sponsor would be unable to travel to Thailand with his wife on account of the hot summers and his inability to deal with the heat which is not an exceptional circumstance and not supported by independent medical evidence. The couple could not have had a legitimate expectation to remain together if the Immigration Rules were not met, and it would have been clear that the claimant was required to satisfy the English language requirement in making any such application. Article 8 is a qualified right and one that must be weighed against the public interest in an appropriate proportionality assessment.
11. Permission to appeal was granted by Judge McDade on 3rd February 2014 for the reasons stated in the grounds.

The Hearing

12. Mr Diwnycz relied on his grounds. Ms Harrison submitted that the judge had considered Article 8 in a fair and proper manner and reached a decision open to him.

Findings and Conclusions

13. It is disingenuous for the author of the grounds to characterise the main reason for the appeal having been allowed on Article 8 grounds as the sponsor's dislike of hot summers. The judge accepted that Mr Savage's health deteriorated in Thailand as a result of the intense heat, which presumably led the author of the grounds to consider that this was the main reason behind his decision. However, had the author considered the decision as a whole, it is clear that the decision was based upon the medical evidence of the sponsor's illness, which is severe enough for him to require incapacity benefit, and not simply his preference for a cooler climate. This is a couple in a genuine and subsisting relationship who

have spent considerable time together in her home country which has exacerbated the sponsor's condition.

14. The judge considered all of the matters in the round as he was required to do. He found that there was a proper explanation for the claimant's failure to provide an English language certificate, a relevant factor so far as the Article 8 assessment was concerned. This is a decision which was open to him. The grounds amount to a disagreement with the decision and nothing more.

Decision

15. The Secretary of State's challenge fails. The decision of the judge stands.

Signed

Date

Upper Tribunal Judge Taylor