Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-001118
HU/00513/2021

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Friday 21 October 2022	**On Wednesday 15 February 2023**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MS AMPHA BENNETT

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Hussain, solicitor advocate, Zyba Law
For the Respondent: Ms H Gilmour, Senior Home Office Presenting Officer

DECISION

PROCEDURAL BACKGROUND

1. By a decision promulgated on 17 March 2022, I found an error of law in the decision of First-tier Tribunal Judge N M Paul itself promulgated on 15 September 2021 allowing the Appellant's appeal against the Respondent's decision dated 14 December 2020 refusing her human rights claim (based on her Article 8 ECHR rights). A copy of my error of law decision is appended to this decision for ease of reference. The Respondent's decision was made in the context of an application by the

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Appellant to remain in the UK based on her private life and family life with her daughter, Stephanie, and grandson ([T]) who are both British citizens.

2. In consequence of my error of law decision, I set aside Judge Paul's decision. However, I preserved Judge Paul's finding that family life exists between the Appellant on the one hand and Stephanie and [T] on the other. The parties were also agreed that I should retain the appeal for re-making in this Tribunal because the factual and legal issues are not extensive.

3. It was however agreed that further evidence could be filed so that the Tribunal could consider the issues in the updated factual context. The appeal came back before me next on 10 May 2022. At that hearing, an issue arose whether an adjournment was required. This was because the Appellant indicated at the last minute that she wished to have an interpreter for her oral evidence. None had been requested previously. Following discussions, it was agreed that Stephanie would give evidence first and could then remain in court for her mother's evidence so that she could translate for her mother any complex words which her mother might not otherwise understand. Mr Hussain had taken instructions and indicated that the Appellant would prefer to go ahead rather than adjourn the hearing. It was understood that the Appellant's general command of English was sufficient for her to understand most questions and answer them and that Stephanie's assistance would only be required in relation to technical terms. Stephanie having given her evidence, however, it quickly became apparent that the Appellant's command of English was very poor. Accordingly, it was agreed that the hearing would have to be adjourned part-heard so that it could be relisted with the benefit of a Thai interpreter.

4. Unfortunately, the following relisted hearing also had to be adjourned as Ms Gilmour was unavailable for personal reasons relating to Covid-19. Enquiries were made to see if she could join the hearing remotely, but that was not possible. The Appellant accepted that the hearing would therefore have to be adjourned for a second time. It was of course necessary for Ms Gilmour to attend for the Respondent as part of the evidence had already been heard.

5. The passage of time between May 2022 and the hearing in October (and the date of preparation of this decision) has not impacted on my recall of the evidence given by Stephanie as I prepared my own typed notes of the evidence immediately following the hearing on 10 May 2022. I have therefore been able to take into account everything said by Stephanie on that occasion alongside the evidence given by the Appellant on 21 October.

FACTS, EVIDENCE AND FACTUAL FINDINGS

6. The facts in this appeal are largely uncontroversial. I have therefore recorded below the facts which were not challenged and set out the evidence where that was tested and is relevant to the issues I have to decide as well as my findings on that evidence.

7. I had before me the Appellant's bundle of evidence before the First-tier Tribunal ([AB/xx]), the Respondent's bundle and a supplementary bundle of evidence for the hearing before this Tribunal. The supplementary bundle which I have is unpaginated and I therefore refer to documents in that bundle only as ([ABS]). Although I have read and had regard to all the documentary evidence, I refer only to that which is relevant to the factual issues which arise and are contested.

8. The Appellant gave her evidence via a Thai interpreter. I was satisfied that they were able to understand one another. Although the Appellant is now in her seventies and did become a little confused on occasion during her evidence, I was satisfied that she was able to follow the questioning and give full answers. Mr Hussain confirmed that she did not need to be treated as a vulnerable witness and although she has medical issues, none of those are said to impact on her mental competence. I have though had regard to her age when considering her answers and have made allowances for her age when assessing her responses. The Appellant has given two witness statements in this appeal, the first dated 2 September 2021 ([AB/2-12]) and the second dated 13 April 2022 ([ABS])

9. Stephanie gave her evidence in English. She has given two witness statements in this appeal, dated 2 September 2021 ([AB/13-23]) and the second also dated 13 April 2022([ABS]).

10. The Appellant is a Thai national who was born and has lived for most of her life in Thailand. However, whilst outside the UK, she met and married a British national, Arnold Bennett, who was serving in the Royal Navy. They lived outside the UK until Stephanie was aged four years and therefore until about 1986. They then came to the UK. As a result of her father's citizenship, Stephanie is a British citizen as is [T]. However, both Stephanie and [T] (as I will come to) were born in Thailand.

11. Arnold Bennett thereafter worked in the UK as a Civil Servant. Unfortunately, he passed away in 1992, having by that stage retired. It is not entirely clear to me how the Appellant remained in the UK at that time as it appears from her own evidence that she has never applied for status here. It may well be the case that her husband applied for status on her behalf and that she was unaware of the application or any grant of leave. Whatever the position, it is not suggested by the Respondent that her status was in any way unlawful at that time. It also appears that she may have worked here at that time as she is in receipt of a very small UK State pension, based, it is said, on her late husband's and her own national insurance contributions.

12. At the time of her father's death, Stephanie was aged nine years. The Appellant says that she tried to remain in the UK but was unsupported, did not speak much English and did not understand how things worked in the UK. She and Stephanie therefore returned to Thailand (as I understand it) in around 1992/1993. The Appellant has lived in Thailand from then until 2019, save for visits to the UK. Stephanie herself completed her education in Thailand and attended university there.

13. Stephanie decided to return to the UK when she was aged twenty-three years. That would therefore have been in about 2005. She says that she remained very close to her mother, called her every day, visited every year and sent money to assist her financially. However, Stephanie says that because she was largely educated in Thailand, her qualifications were "not given much importance in the UK" and she was unable to find the same work that she might have been able to do if she had remained educated in the UK. The Appellant said in her oral evidence that she had visited Stephanie five to ten times whilst Stephanie was living in the UK and typically stayed for the duration of her visa and therefore about six months on each occasion. She also indicated that, when Stephanie came to Thailand, she stayed for about one month on each occasion.

14. When Stephanie returned to Thailand for a visit in 2015, she fell pregnant with [T]. It appears that she also married [T]'s father although she does not say when this occurred. Stephanie remained in Thailand for the birth of her son which was in May 2016. When he was born, he had a blood disorder for which he received emergency treatment in Thailand. Stephanie was at that time living with her husband. She remained living with him until late 2018. Stephanie moved in with her mother at that time. She says that her mother helped her at the time to raise her son and to "protect" her from her "ex-partner". I was told that [T]'s father remains living in Thailand and Stephanie said that [T] has some continuing communication with him infrequently.

15. By 2019, [T] had recovered sufficiently to require only monitoring. Stephanie was by then separated from [T]'s father. She therefore decided to return to the UK with [T] so that [T] could be educated in the UK and so that she could find work. The Appellant was to come with them only for a short while for a visit to help them settle in. They arrived in the UK on 15 August 2019. The Appellant had a visit visa valid from 16 July 2019 until 16 January 2020. I have accepted that, by the time that the Appellant, Stephanie and [T] came to the UK in 2019, they had formed a family unit in Thailand. It was for that reason and based also on Judge Paul's finding that I accepted that the Appellant, Stephanie and [T] have family life together.

16. Stephanie says that she became aware of her mother's worsening health at this time. I will need to return to this issue later. However, she also says that, due to the spread of Covid-19 in China and Asia at that time, she "was not comfortable" with the Appellant returning alone to Thailand.

The UK then went into lockdown. That of course was not until March 2020. Stephanie says that "after a month or so when [she] saw that things would not be changing any time soon" she took advice about the Appellant remaining in the UK. On 18 May 2020, the Appellant made the application which was refused by the decision under appeal.

17. I do not accept the evidence of Stephanie and the Appellant that the Appellant had always intended to return to Thailand at the end of her visit. The Appellant's visa expired in January 2020. By that time, although Covid-19 had emerged in China, I have no evidence that it was prevalent in Thailand. The lockdown in the UK did not occur until March 2020. Even if the worsening pandemic situation was reason for the Appellant to defer her return, that does not explain why she did not make an application to remain until several months later in May 2020. Further, Stephanie says that her mother's worsening health was the reason why she applied to remain. However, both the Appellant and Stephanie accept that the Appellant had health problems before she came to the UK for which she was receiving treatment in Thailand. Even if the Appellant did intend to return, as a matter of fact, she appears to have overstayed her visa on this occasion even though I accept that she has not done so when she has visited in the past.

18. Since the Appellant's health forms a large part of her case to remain in the UK, I deal first with those health conditions. The Appellant has problems with her knees and with her neck, shoulder and arm. She suffers aches and pains and some loss of power in her left hand. According to a radiologist report dated 23 March 2022, there are "moderately severe degenerative changes in the right knee with loss of medial compartment joint space". In relation to her neck, shoulder and arm pain she has been offered anterior cervical discectomy fusion (ACDF) treatment to alleviate the pain. It appears that she may be receiving NHS treatment. I have seen no evidence of payment being made for consultations etc. The Appellant said that the only medication which she receives is for her knee problems.

19. In a letter dated 24 March 2022 following a clinical appointment on 23 March ([ABS]), the following is reported:

> "… She was previously seen by Mr Shetty and offered an ACDF at C4/C5 and C5/C6. At that time, I did not feel her symptoms were significant enough to warrant surgery. Today her symptoms are much the same. She gets intermittent heaviness in her arms, radicular symptoms and weakness. This lasts for approximately 5 to 10 minutes and resolves. She is able to do most activities of daily living without significant restriction. She does find she is struggling but her symptoms are not bad enough to warrant surgery. She has no red flag symptoms of note…."

20. The Appellant also developed Covid-19 in December 2020. The documents show that, at most, she was given medication and monitored virtually over a two-week period from 20 December 2020 to 4 January 2021. Although the Appellant and Stephanie both say that the Appellant

was close to death, the documents do not confirm that. I consider that evidence to be an exaggeration. The Appellant as a result is said to be now very fearful of dying. However, there is no medical evidence suggesting that the Appellant has continuing medical issues arising from that infection.

21. In relation to the problems with the Appellant's neck, shoulder and arm, it emerged in oral evidence that an operation was now being considered. However, the Appellant appeared unsure what the operation was for or when it would take place. She said there had been a letter suggesting that she should have an operation, but she could not remember when that was and no such letter had been produced. Mr Hussain suggested I should hear from Stephanie in that regard, but I declined to do so. By way of a compromise, I agreed that the Appellant could produce the letter to the Tribunal by 25 October 2022. On that day, the Appellant filed a letter from Mr Arash Aframian, Trauma and Orthopaedic Registrar dated 23 June 2022 following a clinical appointment on 22 June 2022 which reads as follows (so far as relevant):

> "**Diagnoses**:
>
> 1. Cervical neural foraminal stenosis with left-sided symptoms
>
> 2. Also has full-thickness, near-complete anterior supraspinatus tendon tear of ipsilateral left shoulder (posterior supraspinatus tendon fibres tendinopathic). Additionally left long head of biceps tendinopathy.
>
> **Management Plan:**
>
> Await results of recent neurophysiology, repeat CT and MRI urgently and review with the results of all three in one month with a view to consider ACDF.
>
> It was a pleasure to meet this lady who attended again with her daughter who has been at the previous appointment. They first saw Mr Shetty a year ago and she was offered an ACDF but at that point, they felt that the symptoms were not sufficiently troubling her to want surgery at that point. Things, they tell me, have progressed in the last one year and she has progressive trouble with activities of daily living, weakness trying to undo jars and numbness in the fingers.
>
> On examination, today, there is clearly wasting around the thumb base and she has numbness in the radial sensory area with reduced sensation in both the median and ulnar areas. There is generalised weakness of the upper limb with slightly reduced wrist flexion and dorsiflexion and slightly weakened elbow flexion and extension. This is complicated by the fact that there is clearly a partial supraspinatus tear and clinically she also has long head of biceps tendinopathy with tenderness in the groove as well as a positive Yergason's test.
>
> I have explained that although there are both things going on in the shoulder and in the neck they are separate issues and surgery for one will not alleviate the other. At this point, I would like to reconsider surgical

> options and I have organised for an urgent repeat MRI as well as CT. I attempted to call Neurophysiology but unfortunately, those results are not yet reported and hopefully, by the time we see her in a month they tell me they will have hopefully, caught up with the backlog.
>
> She understands that surgery is aiming to stop further progression and cannot undo the weakness and numbness that already has come about. The patient herself has a relatively good understanding of English and her daughter was kindly helping to translate in Thai and they understand that for the final consent clinic we will organise a formal Thai interpreter."

22. Before dealing further with what the medical evidence shows, I deal with a point made in the email which accompanied the filing of that letter. It was there suggested that I should take note of what is said about the Appellant's English language ability which it is said "supports the approach taken at the outset of the UT proceedings in that it was approached on the basis that the Appellant would be able to give evidence in English but due to the difficulties experienced of the formal language used, it was decided that her evidence was something best served through an interpreter". It is said that there is however "evidence that she does have English ability as she has demonstrated in the past". I can only assume that the writer of that email was not present in court on 10 May 2022 when the hearing of this appeal had to be adjourned part-heard. Contrary to what is there suggested, the Appellant was unable to understand a straightforward question asked by her own representative about the making of her witness statements. I am quite unable to accept therefore that she has anything like a good command of English. Further, if and insofar as a medical professional is competent to provide an opinion on a person's language skills, the indication that an interpreter should be booked for the Appellant to give consent to an operation in my opinion undermines any suggestion that the Appellant can be said to speak English to a good level. Stephanie herself said in oral evidence that she accompanies her mother to every medical appointment because her mother sometimes does not understand vocabulary clearly and Stephanie's presence is needed if the Appellant has to make a decision (which is consistent with what is said by the consultant).

23. I accept that the Appellant has medical issues. It may well be that an operation is advocated at some point in the future. However, the Appellant did not provide any further evidence prior to the hearing in October to show that this is intended to be carried out in the very near future or that the Appellant requires it as an emergency.

24. In fact, as emerged from the Appellant's oral evidence and Stephanie's witness statement, and as noted above, the Appellant's medical problems pre-date her arrival in the UK. The Appellant said that she had developed her medical issues from about the age of sixty (and therefore from about 2010). She confirmed that she had seen a doctor. Although she could not remember the date she accepted, as Ms Gilmour put to her, that it may have been in about 2015. It was before Stephanie had

returned to Thailand as the Appellant said that her daughter was not there because she was in the UK. The Appellant had been treated in Thailand for her problems. That was paid for privately from a combination of the Appellant's pension and contributions from Stephanie. Although the Appellant said that the doctors in Thailand had just told her to keep taking medication, she did finally accept that they had said that she could have surgery if she wanted to have that done. As appears from the first of the letters to which I have referred above, it appears that the Appellant had elected as recently as March 2022 not to have surgery. I accept as the Appellant said when re-examined that her health may well have deteriorated over time as she has got older. However, I do not accept that she requires surgery immediate or otherwise for her problems and, even if she did, that she would not be able to get the necessary treatment in Thailand.

25. I also do not accept that the Appellant's medical conditions are as debilitating as has at times been suggested. As the Appellant and Stephanie say in their statements, the Appellant looks after [T] when Stephanie is working. The Appellant accepted in oral evidence that this includes walking him to school. Although she said that she sometimes has to sit down on the way, she is clearly sufficiently mobile to walk with a young child for what Stephanie said was a ten minute walk. Notwithstanding the care which the Appellant provides, she accepted in oral evidence that Stephanie is [T]'s primary carer.

26. Stephanie says in her statement that she is concerned that the Appellant could not cope on her own in Thailand. Stephanie says in her first statement that she could "theoretically" support the Appellant financially if she returned to Thailand but says that financial support alone would not be enough. The Appellant accepted in her oral evidence that she has other relatives in Thailand. She has provided no evidence about who those relatives are or where they live. She said that they "live separately" and have "nothing to do with [her]". She did not expand on this or provide evidence that they could not assist if necessary. The Appellant also said that when she lived alone in Thailand previously and before Stephanie returned there, her neighbours helped her. Although she said that she rented the property where she lived before and that this would by now no longer be available, I can see no reason why the Appellant could not seek assistance in the same way from new neighbours and/or such family members as she still has in Thailand.

27. That brings me to the position of Stephanie and [T]. Stephanie says in her first statement that she is training to be a masseuse. She works part-time a few evenings per week in a restaurant. She is also in receipt of universal credit. She receives over £1800 per month universal credit and about £320 per month in earnings. Stephanie says that this is "sufficient for [her] family" as appears to be the case from her bank statement. Her employer allows her to take food which is left over home which "significantly reduces [her] living costs". There was a suggestion made by Mr Hussain at the hearing that the family have been given a notice to

quit their rented property, but I have no evidence about that nor why that might have occurred and I do not therefore take that into account. As things stand, however, I am quite unable to accept that the family is financially independent as Mr Hussain suggested. That the Appellant's presence might not increase the family's reliance on State benefits is nothing to the point. The family is currently very clearly unable to support itself without recourse to public funds. The majority of the family's income is made up of universal credit. Accordingly, it cannot be said that the Appellant is financially independent.

28. Stephanie says that she would find it difficult to work and train as she currently does if the Appellant were not in the UK as she would then be a single parent family bringing up a young child. Whilst I recognise that this would be the position, [T] is now in school full-time (he is aged six years) and the Appellant could therefore structure her working day around his schooling or would have to consider employing childcare for periods before or after school. Stephanie's evidence was that, at the moment, she works only part-time for eight hours per week.

29. Stephanie and [T] obviously cannot be obliged to leave the UK as both are British citizens. It is suggested by Stephanie that if the Appellant were not in the UK, she and [T] might have to move back to Thailand as she and the Appellant could not cope alone. However, Stephanie says that the Appellant will not allow this as she does not want [T] to miss out on opportunities as she feels that Stephanie has done. That is understandable but ultimately, whether Stephanie and [T] would return to Thailand with the Appellant is a matter of their choice.

30. I have very little information about [T] himself. There is no independent social worker's report dealing with the impact on [T] of the Appellant's removal. [T] is now aged six years. He is said to have a very close relationship with his grandmother with whom he has grown up both here and in Thailand. I accept that he has lived with the Appellant and Stephanie in a family unit for about four years. Given his age, those are the years of which he is likely to have the most memories and I therefore accept that he would greatly miss the Appellant if she were not living with him. He is now in education in the UK. He was already aged three years when he came to the UK and will therefore have some memory of Thailand, but I accept was not in education there and therefore would not have the same links with that country. I do though note that his father remains in Thailand. Stephanie said that [T] has settled well into school in the UK. He loves school and has made friends. He was not greatly affected by the move from Thailand to the UK as he was very young. Stephanie said that [T] had managed the move with love and support from her and the Appellant. She said that the Appellant "loves [T] like every grandma". She said that [T] would not cope if the Appellant were removed because the Appellant had "looked after him since birth". I consider that to be an exaggeration since the evidence is that Stephanie and [T] lived with their husband/father until late 2018 when they moved in with the Appellant in Thailand. Whilst the Appellant says in her

statement that she helped out even before Stephanie separated from her husband because Stephanie worked and [T]'s father was "not very helpful", she did not live with the family and [T] had both parents living with him. Stephanie also said that if she were not there for [T], the Appellant would be the "second person for him" and that sometimes [T] wanted to be with the Appellant more than her.

31. Finally, in relation to the Appellant's private life, I have little information about that. Although the Appellant says that she has made a lot of friends and been able to catch up with friends who had visited her in Thailand (because of their links with Stephanie), there is scant evidence in that regard. There are four letters of support at [AB/29-37] from friends but those friends are all friends who developed links with the Appellant when she was in Thailand or from when she was in the UK living with her husband. There is scant evidence of the Appellant's integration into wider society since her arrival in 2019. None of those persons attended to give evidence. I have noted the evidence of Derek Arnold concerning the relationship between the Appellant and [T]. He says that "one would think she is the mother such is their bond" and that [T] would probably suffer more by being deprived of his grandmother than his mother. There is however nothing in his evidence about how and when he has had the opportunity to observe that interaction. Although he says that his wife and stepson are good friends with the Appellant and Stephanie respectively, he does not say how often he sees them and whether he has observed the relationship personally. Given that his statement was made in September 2021 following a lengthy period of lockdown during which he could not have observed the relationship, I am unable to give this evidence much weight.

LEGAL ISSUES

32. As is accepted by the Appellant, she is unable to meet the Immigration Rules ("the Rules") based on her family life as that is with her daughter and grandson. That is however a large part of her case outside the Rules. As family life, the impact of removal on the Appellant on Stephanie and [T] also has to be considered. [T] is a young child. His best interests are a primary consideration although not the primary or paramount consideration. Section 55 Borders, Citizenship and Immigration Act 2019 is relevant. I also have to factor in to my consideration that both Stephanie and [T] are British citizens.

33. The Appellant cannot succeed within the Rules based on her private life based on length of residence. She has been in the UK on this occasion since mid-2019, a period of only about three years. She has visited in the past and stayed for six months on each occasion but that was only as a visitor. Even accepting that she visited each year in the ten years when Stephanie lived here previously, that would amount only to about five years in total. The Appellant also lived here with her late husband and Stephanie from about 1986 to around 1992/3. Again, however, that was a period of only around six years and was many decades ago. Even if

she had status at that time and was unaware of it, she would have long since lost it.

34. It was not suggested by Mr Hussain in his skeleton argument or oral submissions that there are very significant obstacles to the Appellant's integration in Thailand (paragraph 276ADE(1)(vi) of the Rules – "Paragraph 276ADE(1)(vi)"). I have nonetheless considered that below.

35. The Appellant's case turns on consideration of her private and family life outside the Rules. In that regard, it is for the Appellant to establish the interference with her private and family life. It is then for the Respondent to demonstrate that such interference is justified and proportionate. As with most of such cases, the assessment turns on the proportionality element of the five-stage test set out in R (oao Razgar) v Secretary of State for the Home Department [2004] UKHL 27. I must carry out a balance sheet assessment of the competing interests (see R (oao Agarko and Ikuga) v Secretary of State for the Home Department [2017] UKSC 11 – "Agyarko"). As is explained by the Supreme Court in Agyarko, the ultimate question is whether removal would have "unjustifiably harsh" consequences for those affected by the Respondent's decision.

36. I found an error of law in the decision of First-tier Tribunal Judge Paul, allowing the appeal, on the basis that he had failed to take into account the public interest factors. Section 117A Nationality, Immigration and Asylum Act 2002 requires the tribunal to take into account, when determining whether the Respondent's decision breaches an appellant's right to respect for his or her family and private life, the public interest, in particular the factors set out in sections 117B and 117C. Section 117C of the 2002 Act has no relevance to this case. I am however required to have regard to the factors in section 117B of the 2002 Act ("Section 117B").

DISCUSSION AND CONCLUSIONS

37. The Appellant is unable to meet the Rules. As I have already indicated, she is unable to meet the Rules in relation to her family life. That is with her daughter and grandson and not with a partner or minor child. As I have also indicated, Mr Hussain did not suggest that there were very significant obstacles to the Appellant's integration in Thailand. He was right not to do so. The Appellant has lived for most of her life in Thailand. She is well used to the culture and way of life there. Indeed, it is her own evidence that, when her late husband died, she returned to Thailand because she did not speak very good English and was unaware of the way of life in the UK. I do not consider that her medical problems amount to a very significant obstacle to her integration in Thailand. She had medical issues before she came to the UK which were being treated. She paid privately, assisted by her UK State pension and contributions from Stephanie. Although Stephanie is largely supported in the UK by State benefits, she indicated in her evidence that if she had to provide continuing financial support to her mother in Thailand, she would do so.

For those reasons, the Appellant does not satisfy Paragraph 276ADE(1) (vi) of the Rules.

38. Much has been made by the Appellant in these proceedings of her previous life in the UK with her late husband, that he worked in the UK as a Civil Servant and served in the Royal Navy. I was very unclear why that was said to be of relevance. If the Appellant had sought to remain at the time, she may well have been entitled to do so. However, it was her choice to return to Thailand at that time because she did not feel supported in the UK and could not cope here on her own with a young child. She may well regret that decision now given the impact it has had on her and on Stephanie but that is not due to any action of the Respondent. It is no reason to lessen the public interest in consequence. It is not relevant to the level of interference with her family and private life now, several decades on.

39. This case stands or falls on an assessment outside the Rules and whether removal of the Appellant would have unjustifiably harsh consequences for the Appellant, Stephanie and [T].

40. I begin with [T] as his best interests are a primary consideration. I accept that for the past four years, he has known as his family his mother and his grandmother. I have accepted that family life exists between them. As a British citizen, [T] is entitled to remain in the UK with all the benefits to which he is entitled as a result of that status (see in that regard ZH Tanzania v Secretary of State for the Home Department [2011] UKSC 4). However, [T] spent the first few years of his life in Thailand where he was born. His father still lives there. He still retains some contact with his father. Whilst I accept that [T] will have more memory of life in the UK due to his age and education here, and whilst I find that his best interests as a British citizen are to remain in the UK, that is not strongly the position as a result of his early years living in and family ties to Thailand.

41. I accept that [T]'s best interests are to remain in the family unit in which he has been brought up for the past four years. However, it remains the position that his mother is his primary carer. She works only part-time and then only in the evenings. Whilst she is training to be a masseuse and is therefore likely to be away from him on occasion during the day, the stronger relationship I find is between [T] and his mother. Stephanie herself said that [T] sees his grandmother as the second person he would go to if his mother was not around. That is understandable given the family's living arrangements over the past four years. I find that it is in the child's best interests to remain with both his mother and his grandmother. However, I have no independent evidence about the impact for [T] of being without his grandmother. I have indicated why I can give little weight to the evidence of Mr Arnold in that regard (particularly since he did not attend to give oral evidence). I therefore find that it is more strongly in [T]'s best interests to remain with his mother wherever she is living.

42. It was not entirely clear from the evidence what would happen to Stephanie and [T] if the Appellant were to be removed from the UK. Whilst both would be entitled to remain and the Appellant may prefer that they did in order that [T] would have better opportunities, I was far from persuaded that they would decide to stay in the UK. I find it is more likely, given the past history, that Stephanie would decide to take [T] with her and the Appellant back to Thailand. Stephanie herself spent much of her childhood in Thailand and was educated there. As she herself said, she has found it more difficult to find employment appropriate to her qualifications in the UK because those qualifications are not recognised here. Whilst she may have preferred to remain living in the UK as a child, the fact is that she did not do so. Her loss of opportunities as a British citizen is as a result of the choice made by her mother at the time when her father died. As a matter of fact, she has lived in Thailand for as much time if not longer than she has lived in the UK.

43. Even if they did decide to remain in the UK, there would be no reason why Stephanie and [T] could not visit the Appellant in Thailand. I accept that as the Appellant gets older, it may well be more difficult for her to cope with long-haul flights which might mean that Stephanie is able to spend less time with her mother than she did previously when they lived apart. However, I am unpersuaded on the evidence that the Appellant would not be able to look to whatever family members she has in Thailand and her neighbours for support if she needed it. As Ms Gilmour pointed out, the Appellant was able to manage in Thailand alone for at least five months of each year when Stephanie lived in the UK. Although the Appellant is now older, her medical problems pre-date her arrival in the UK. Stephanie could also maintain the close relationship she still has with her mother in the way by daily contact as she did when she lived in the UK previously and her mother remained in Thailand. She could continue to help her mother financially as she did previously.

44. I am unpersuaded that the Appellant requires as much support as is suggested. She clearly remains mobile and is able to look after her grandson when she has to do so, including walking him to school. The medical evidence suggests that her knee problems are managed with medication (which she may have been prescribed before coming to the UK). Treatment is available for her neck/shoulder/arm condition should she need it. The medical evidence from the UK is that an operation might be required but the position remains uncertain. I am unconvinced that the Appellant requires surgery given the lack of up-to-date evidence.

45. Stephanie says that she would find it very difficult to cope in the UK absent her mother's support. The financial and emotional interdependence between her and her mother was the principal reason for Judge Paul's finding that family life exists between the Appellant, Stephanie and [T]. However, the letters in the Appellant's bundle show that Stephanie has some friends in the UK. There is no reason why she could not make other friends, either via her work, training or with other

parents at [T]'s school. Further, [T] is now in education and will require less support for the whole day at least on weekdays during term-time.

46. Turning then to the public interest, I have already explained why I do not consider that the Appellant's previous time spent in the UK with her late husband alters the position. Whilst he gave service to the UK both in the Royal Navy and Civil Service, the evidence is that the Appellant made a choice to return to Thailand after he died because she clearly felt more comfortable living there. None of that past history is capable of diminishing the public interest or increasing the interference with the right to respect for the Appellant's family and private life now.

47. The Appellant cannot now meet the Rules for the reasons I have already explained. Whilst the Appellant has complied with the Rules during her previous visits, it appears that she may have remained beyond her visa on this occasion in breach of the Rules. Even if that is not the case, the fact that she cannot meet the Rules is relevant to the public interest in the maintenance of effective immigration control (Section 117B(1)).

48. As I have already explained, I do not accept that the Appellant can speak English to anything other than a very basic level. It is not clear to me whether the Appellant did give her evidence before Judge Paul in English, but she was entirely incapable of understanding even basic questions asked of her by her own representative before me. I have explained why I cannot give weight to the letter from the consultant in this regard. It is also worthy of note that the Appellant herself accepts that she could not speak English even after living in the UK for about six years with her late husband. Her inability to do so was one of the reasons she gave for returning to Thailand. If she was unable to learn English when living in the UK for a long period as a younger woman with a British citizen who spoke that language, I can see no reason why she would have learned the language on this occasion when she has spent only a few years here, living with a daughter who speaks Thai. It is of course also the case that for many months that the Appellant has spent in the UK on this occasion, the country has experienced lockdowns which would have prevented the Appellant having any interaction with others outside the family unit. I observed during the course of the hearing that when Stephanie spoke to her mother, she did so in Thai. I find therefore that the Appellant does not speak English. That is a factor which counts against her (Section 117B(2)).

49. Nor do I accept that the Appellant is financially independent. As I have already explained, the fact that the Appellant and Stephanie would not be able to claim any additional benefits if the Appellant were to remain, is not the issue. The issue is whether the Appellant via her family unit is supported by the public purse or independently. In circumstances where Stephanie relies for the majority of her income on State benefits, it cannot sensibly be suggested that the family and therefore the Appellant are financially independent. In addition, it appears that the Appellant may have been receiving treatment via the NHS. Whether or not that is

the position, the Appellant is not financially independent and that is a factor which counts against her (Section 117B(3).

50. In relation to the Appellant's private life, that can be given little weight in circumstances where her status is and has been precarious, regardless of whether she has in fact overstayed her visa (Section 117B(5)). I recognise that the weight to be given does depend on the strength of the private life which is demonstrated but in this case there is little evidence of any private life outside the family unit.

51. The crux of the Appellant's case turns on her family life. I have already set out the evidence about that and I do not repeat it. I accept that this is a factor deserving of weight.

52. I have also considered whether it could be said that Section 117B(6) applies. Mr Hussain in his submissions did not suggest that it did. I do not accept in any event that the Appellant is in a genuine, subsisting parental relationship with [T]. Stephanie is [T]'s primary carer. The fact that [T]'s father is not living with them does not mean that the Appellant as [T]'s grandmother steps into the shoes of the missing parent. As Ms Gilmour pointed out, the evidence is that [T] is at school for most of the week and that Stephanie only works for limited hours on three evenings per week. I cannot find on the evidence, however close the relationship between the Appellant and [T] that this amounts to a parental relationship. Even if I had done so, I would not have found Section 117B(6) to be satisfied in any event given what I have said about the past history of this case, that [T] was born in Thailand and lived the first few years of his life there and has his father living there. I would not have found it unreasonable to expect [T] to leave even though, as a British citizen, it may be in his best interests to remain in the UK.

53. Balancing the interference, in particular with the family lives of the Appellant, Stephanie and [T] and such private life as the Appellant has developed in her time in the UK against the public interest and having regard to [T]'s best interests as a primary consideration, I have reached the conclusion that the public interest in this case outweighs the interference. I accept that the family may find separation occasioned by the removal of the Appellant or return of the family unit to Thailand difficult. I do not accept however that the consequences for the Appellant, Stephanie or [T] are unjustifiably harsh when the interference is balanced against the public interest. For those reasons, I conclude that the Respondent's decision is proportionate, and I dismiss the appeal.

DECISION

The Respondent's decision does not breach section 6 Human Rights Act 1998. I therefore dismiss this appeal.

Signed: L K Smith Dated: 30 November 2022

Upper Tribunal Judge Smith

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-001118
HU/00513/2021

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination promulgated**
On Friday 11 March 2022	**17 March 2022**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS AMPHA BENNETT

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr Z Hussain, solicitor advocate, Zyba Law

DECISION AND DIRECTIONS

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge N M Paul promulgated on 15 September 2021 ("the Decision"). By the Decision, Judge Paul allowed the Appellant's appeal against the Respondent's

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decision dated 14 December 2020 refusing her human rights claim (based on her Article 8 ECHR rights). The decision is made in the context of an application by the Appellant to remain in the UK based on her private life and family life with her daughter, Stephanie, and grandson who are both British citizens.

2. The Appellant is a Thai national although was married for some years to a British national who died in 1992 (hence the nationality of her daughter and grandson). The Appellant lived with her husband abroad. Stephanie was born in Thailand. The Appellant returned to the UK with her husband and Stephanie. However, following her husband's death, she and Stephanie returned to Thailand. Stephanie returned to the UK when she was aged 23 years. However, following a visit to her mother in Thailand, she met a Thai national who she married. She lived with her husband in Thailand where her son was born. She is now estranged from her husband.

3. In August 2019, Stephanie and her son decided to return to the UK as was their right as British citizens. The Appellant came to the UK with them as a visitor. She had a multi-visit visa which was valid to January 2020. On 18 May 2020, the Appellant made the application to which the decision under appeal responded. It is not entirely clear to me whether that was within the currency of her leave, but I assume for present purposes that her permission to remain may have been extended during the Covid-19 pandemic.

4. The application made by the Appellant on its face relied entirely on her private life although I accept that this may have been due to the fact that she could not meet the Immigration Rules ("the Rules") based on her family life. The covering letter to the application, written by the Appellant's solicitor, is of little assistance in discerning the basis of the application as the chronology is factually inaccurate (making no mention for example of the fact that the Appellant chose to live for many years with her husband outside the UK nor that Stephanie had lived until very recently in Thailand).

5. Although the case put in the covering letter to the application was premised on the Appellant's position as the previously bereaved partner of a British citizen, that was not the way in which it was presented to Judge Paul. Nor was any substantial reliance placed on the Appellant's circumstances following return to Thailand. The main thrust of her case was based on her close relationship with her daughter and grandson. Judge Paul accepted that this amounted to family life due to the close dependency between them and concluded that removal of the Appellant would be disproportionate. I will come on to the detail of his findings below.

6. The Respondent appeals the Decision on two grounds. Both are put forward as a material misdirection in law and/or a lack of adequate reasons. The first relates to the Judge's finding that family life exists

between the Appellant and her daughter and grandson. The second relates to the conclusion that removal would be disproportionate.

7. Permission to appeal was granted by First-tier Tribunal Judge Mills on 1 December 2021 in the following terms so far as relevant:

> "... 3. I find that the grounds, particularly the second, do disclose arguable errors of law in the Judge's decision. While it may well ultimately be found to have been open to him to conclude that family life was engaged and that any interference with that family life was disproportionate, the Judge's reasoning is very sparse and arguably inadequate.
>
> 4. Permission to appeal is granted."

8. The appeal comes before me to decide whether there is an error of law in the Decision and if I so conclude to either re-make the decision or remit the appeal to the First-tier Tribunal for it to do so. Having heard from the parties, I found there to be an error of law in the Decision based on the Respondent's second ground. I accepted however that it was appropriate to preserve Judge Paul's finding that there is family life between the Appellant and her daughter and grandson. I gave directions for the filing and service of further evidence and a resumed hearing which are confirmed at the end of this decision. I indicated that I would provide reasons for my conclusions in writing which I now turn to do.

DISCUSSION AND CONCLUSIONS

9. The reasons given for the conclusion in the Decision in this case are brief (only five paragraphs). It is therefore possible for me to cite those in full as follows:

> "**Conclusion & Reasons**
>
> 28. The burden is on the appellant to show that this case engages Article 8, and that any decision to refuse her leave to remain is disproportionate. This is an unusual case and indeed a sad one insofar as that it is plain that the appellant (having married a British husband and finding yourself with a British daughter, and grandson) has not at any earlier stage in her life, taken the opportunity to regularise her status in this country. However, there is no medical evidence to show that she is at serious risk if she returns to Thailand. There is, furthermore, no clear financial evidence which was presented very vaguely during the course of the appeal, to show that there is any risk of destitution. One has to take into account that she lived in Thailand for a number of years after her daughter left, and was able to survive on the basis either of her husband's pension and/or the daughter's contributions, and indeed possible (if not probably) support from family and friends. I suspect that both the appellant and the daughter have been somewhat coy about admitting that there are more extended family networks available.

> 29. However, the critical issue in this case seems to me to be this:
>
> 30. The appellant is now an elderly lady. She clearly has a child and a grandson who are extremely vital to her, and at her age the prospect of continued travelling backward and forwards (having regard to that factor and also her financial cost) means that very careful consideration has to be given as to whether or not this is an exceptional family bond such as to indicate that there are exceptional circumstances.
>
> 31. Having listened to the appellant, whose evidence perhaps was somewhat clipped, I found the daughter's evidence particularly compelling. She describes the circumstances in which her own life is dependent upon the support that she receives from her mother, and the very obvious close relationship between grandmother and grandson. This suggests an extended family in which there is mutual benefit and support.
>
> 32. Having regard to all these matters, I had decided that – applying the principles as set out in the case of **Kugathas** – this is a case where there are exceptionally, strong, close family ties. To require the appellant to return to Thailand – particularly having regard to the fact that she spent a number of years living in the UK previously, and the impact that would have on the family – in my view would lead to a disproportionate interference in her Article 8 rights. For all those reasons, therefore, this appeal is allowed."

10. I begin with the Respondent's second ground since that is the basis for my conclusion that the Decision contains an error of law. In essence, that is based on the Judge's failure to have any regard to the public interest and section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B"). The Respondent relies in particular on the Judge's failure to have any regard to the maintenance of effective immigration control. Mr Tufan adopted that ground as drafted.

11. In his skeleton argument, Mr Hussain says this about the Decision in this regard:

> "11. In relation to s.117B, it was clear to the parties that the Appellant had English language ability and the discussions in relation to the Appellant's daughter being able to work due to the support provided by the Appellant also clearly demonstrated that she was financially independent. There was no strong reliance on private life as the reliance was on family life and therefore the little weight provisions do not apply.
>
> 12. The decision read as a whole demonstrates that there was a full proportionality assessment carried out and this is further evidenced by para. 28 where FTJ Paul makes findings that arguably go against the Appellant but then turns to the most important considerations as to why there would be a disproportionate breach of Article 8 if the Appellant was removed.

> 13. Even though it is accepted that specific reference to s.117B was not contained within the determination, it was something that would have been considered and also even where there was an error in not specifically discussing the application of s.117B, this was not a material error as it would not have changed the outcome of the determination."

12. Mr Hussain valiantly sought to persuade me that there was no material error in the Decision. He referred to the Judge's mention of Section 117B at [25] albeit accepting that this was only a record of the Respondent's submissions. He submitted though that the Judge could not have overlooked this when he came to reach his conclusions. However, as he was constrained to accept, not only is there no mention of Section 117B in the Judge's reasoning but there is no reference either to public interest. Mr Hussain may be right about the English language requirement and financial independence (although the evidence about the latter suggests some fairly significant disparity between Stephanie's income and outgoings for this purpose). Those factors are however neutral in terms of the public interest even if in favour of the Appellant.

13. It may well be the case that the evidence shows that the Appellant's family and private life could be found to be particularly strong (although private life in the UK is not considered at all, and the Judge's reasons undermine any substantial reliance on this factor in relation to Thailand). The Judge could not however reach a conclusion about this in the context of the proportionality of removal without any consideration of the public interest. He did not need to mention Section 117B in terms, but he needed to consider the public interest factors there set out and more generally to conduct a proper balancing assessment, taking into account also the impact of interference with the Article 8 rights of Stephanie and her son who have, as I say, until quite recently themselves lived in Thailand.

14. It could not sensibly be suggested that the other factors in Section 117B have no relevance. The Appellant does not meet the Rules. She does not do so for example as an adult dependent relative which would be the closest rule to the situation she claims to face. She also came here as a visitor which requires an intention to return to her home country at the end of her visit. Whilst I recognise that her circumstances are said to have changed whilst she was here because of the pandemic, she nonetheless made an application to settle here less than one year after she had entered only as a visitor. Even if she has not strictly overstayed, she did not have leave to remain within the Rules for more than six months at a time. Those matters are all relevant to the maintenance of effective immigration control which is confirmed by Section 117B(1) to be in the public interest.

15. The Judge's failure to have any regard to the public interest is fundamental in this case. The Appellant's claim is outside the Rules. As Mr Tufan pointed out, and as I indicate above, the Judge needed to

consider whether the impact of removal for the Appellant and her daughter and grandson would be unjustifiably harsh (see Agyarko and Ikuga v Secretary of State for the Home Department [2017] UKSC 11). It is not possible to reach a finding in that regard without any consideration of the public interest. It is not possible to import a presumption that the Judge has considered the factors weighing against the Appellant and in the public interest where the Judge has made no mention of them. This is not such a clear-cut case that it is possible to discern what would be the outcome if those factors were considered without full assessment of the evidence.

16. For the foregoing reasons, I am satisfied that the Respondent has made out her second ground and that the error made is one which could impact on the outcome. It is therefore material.

17. That brings me on to the Respondent's first ground. Based on the Judge's reasoning, I would have been inclined to set aside the Decision in its entirety following my conclusion that an error was made out on the second ground. It seemed to me that the Judge's conclusion in relation to family life was based largely on the convenience to Stephanie of having her mother in the UK to assist with the bringing up of her child. The remainder appears to be no more than a finding of the usual emotional ties. Based on what is said at [28] of the Decision, the Judge does not appear to have accepted that the Appellant was financially dependent on her daughter whilst in Thailand.

18. I was however persuaded by Mr Hussain that when the Decision is read as a whole, the finding of family life was open to the Judge albeit for rather wider reasons than the Judge gave. As Mr Hussain pointed out, Stephanie had lived in Thailand when she was married, and her son was born there. As set out at [15] of the Decision, Stephanie was at that time "struggling and finding motherhood difficult, and her partner proved to be very poor in terms of providing support". The Appellant therefore "played a major role in assisting with her daughter and grandson". As Mr Hussain put it, therefore, this was a strong family unit created outside the UK in Thailand. I accept that what is said at [15] of the Decision when read with the reasons given at [30] and [32] of the Decision are sufficient to underpin the finding that family life exists. I have for that reason preserved that finding.

19. I have therefore found an error of law in the Decision based on the Respondent's second ground and have set aside the Decision in consequence save for the finding that there is family life between the Appellant and her daughter and grandson which I preserve. Both parties agreed that I could retain the appeal in the Upper Tribunal for re-making. The factual issues are not extensive, and I therefore agreed that this is appropriate. Although the Appellant has not made any application to file further evidence, I indicated that I would be assisted by any up-to-date evidence, particularly as to the family's circumstances in the UK and Thailand to re-make the decision. I would also like to hear oral evidence

from the Appellant and Stephanie and from others supporting the Appellant's case if they wish to give evidence orally. I have made directions for that to happen.

DECISION

The Decision of First-tier Tribunal Judge N M Paul promulgated on 15 September 2021 involves the making of an error on a point of law. I therefore set aside the Decision. However, I preserve the finding that there exists family life between the Appellant and her daughter and grandson. I gave the following directions at the hearing for the remaking of the decision by this Tribunal.

DIRECTIONS

1. Within 28 days from the date of hearing (i.e. **by no later than 4pm on Friday 8 April**), the Appellant shall file with the Tribunal and serve on the Respondent, any further evidence on which she seeks to rely.

2. The appeal will be relisted for a re-making hearing with a time estimate of ½ day on the first available date after six weeks from the sending of this decision on a face-to-face basis. **If either party seeks a remote hearing, application should be made to the Tribunal within 14 days from the sending of this decision with reasons.**

3. **If the Appellant requires an interpreter for the hearing, application should similarly be made to the Tribunal within 14 days from the sending of this decision.**

Signed: L K Smith Dated: 16 March 2022

Upper Tribunal Judge Smith