Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/41382/2014
& IA/41395/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11th January 2016	**On 6th May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

AND

SP & SAT
(ANONYMITY DIRECTION MADE)

Claimants

Representation:
For the Appellant: Ms Isherwood, Senior Home Office Presenting Officer
For the Claimants: Mr Davis of Counsel instructed by Hafiz & Hague solicitors

DECISION AND REASONS

1. The claimants are citizens of Pakistan. These proceedings concern the status and interests of at least one child. In order to protect the interest of the child I make an anonymity direction.

2. By decision on an error of law after a hearing on the 19th October 2015 I ruled that there was a material error of law in the original decisions in respect of the claimants

and directed that the appeals be listed further before me to re-decide the cases. My original decision is appended to this decision.

3. This case appears in the Upper Tribunal as an appeal by the Secretary of State for the Home Department [SSHD] against the decision by a First Tier Tribunal Judge. For the purposes of the present proceedings I shall refer to the SSHD as such and the original applicants for leave to remain as the first claimant and second claimant.

4. On 4 August 2014 the claimants applied for leave to remain in the United Kingdom. By decisions made on or about 4 October 2014 both the claimants were refused to further leave to remain in the United Kingdom. In respect of the first claimant there is also a decision to remove her from the United Kingdom included in the decision letter. The claimants are appealing against those decisions.

Background facts

5. The claimants are part of a family consisting of MAH, the father of the family, SP, the mother of the family/first claimant, and two children, one of whom is SAT, the second claimant. MAH, SP and SAT are and were at all material times citizens of Bangladesh. As set out below the child, DMA the second child of the family, whilst originally a citizen of Bangladesh was registered as a British citizen at some time in December 2014.

6. The family had originally lived in Bangladesh. MAH, SP and SAT were born in Bangladesh.

7. The father of the family came to the United Kingdom as a student on 11 June 2004. He thereafter has remained in the United Kingdom and has maintained lawful leave throughout. By reason of the fact that he completed 12 years lawful leave, on the 12 June 2014 he applied for indefinite leave to remain/settlement under the immigration rules. The application by the father was granted by the respondent in September 2014.

8. The second child of the family having been born in the United Kingdom on 7 February 2014, on MAH obtaining settled status, was entitled to be registered as a British citizen in accordance with section 1(3) of the British Nationality Act 1981. Application was made on behalf of the second child and she was registered as a British citizen in or about December 2014. The second child is now therefore a British citizen.

9. The claimants came to the United Kingdom on the 21st February 2008. They had been given leave to enter the United Kingdom as the dependants of MAH. The claimants were given further leave at various times as dependants. Ultimately their leave was due to expire in August 2014. The claimants made in-time applications for further leave.

10. Clearly the fact that MAH, the father of the family, had an outstanding application for indefinite leave to remain, which had not been granted at the time of the

application was material. The claimants did however as is evident from the letters of refusal apply for further leave to remain.

11. With MAH being granted indefinite leave in September 2014 and, as is evident from the refusal letters, the SSHD being aware of that at the time of considering the applications, the applications were considered under Appendix FM and Appendix FM -- SE of the Immigration Rules and under article 8 of the ECHR.

Facts as found by the First –tier Judge

12. In paragraphs 12 to 20 of the original decision the First-tier Judge has made a number of findings of fact, which have not been affected by the decision on the error of law issue. I have to protect the anonymity of the child amended the contents of the decision to reflect that. Those findings are:-

> "12 The first claimant came to the United Kingdom on 21 February 2008 having been granted leave to enter the United Kingdom as the dependent spouse of her husband MAH, who was then a Tier 4 Student Migrant in the United Kingdom.
>
> 13 The second claimant is the dependent child of SP and MAH. On 21 February 2008 the second claimant entered the United Kingdom with added leave to enter and remain as the dependent child of MAH.
>
> 14 MAH is the father of the second claimant and the husband of first claimant. On 12 June 2014 he applied for settlement in the UK following the completion of 10 years residence in the United Kingdom and his application for indefinite leave to remain in the United Kingdom was allowed in September 2014.
>
> 15 On 7 February 2014 and their daughter, DMA, was born. She is the daughter of the first claimant and MAH and that is also the sister of the second claimant. She is a British citizen and a copy of her passport has been produced at page 10 of the claimants' bundle of documents.
>
> 16 The four lived together and continue to do so as a family at the family home in Grange Road, E13. The first claimant has been employed continuously by London Borough of Newham Council for five years. MAH works as an accounting clerk.
>
> 17 The second claimant has lived in the United Kingdom continuously since he arrived here at the age of two. He has lived here continuously for over seven years. He attends Curwen Primary school, where he has attended since 2008. His first language is English. He understands Bengali but he does not speak it.
>
> 18 He has had considerable success at school having undertaken an exhibition in art.
>
> 19 The second claimant is fully integrated into United Kingdom Society.
>
> 20 The family will stay together as they have done throughout their existence in the United Kingdom."

13. In coming to a decision I take account of those findings of fact.

The Second Claimant- Grounds of Refusal-Findings

14. The refusal letter in respect of the second claimant considers his application both under Appendix FM and on the basis of private life under paragraph 276 ADE and on the basis of family and private life under Article 8 of the ECHR.

15. In considering the application under Appendix FM the only ground given in the refusal letter for refusing his application is :-

> *In view of the fact that your parents' applications under Appendix FM have been refused the Secretary of State is not satisfied that you are able to meet E-LTRC.1.6*

16. As pointed out in the error of law decision that seems to ignore the fact that the application of the second claimant's father for indefinite leave to remain had been granted at that time. That grant of indefinite leave had been acknowledged in the refusal letter for the first claimant. It could therefore not be argued that the SSHD was unaware of the fact that the father had been granted indefinite leave.

17. In the hearing it was conceded by the representative for the SSHD that the second claimant succeeded under the rules because the father was settled at the time that the decision was made.

18. Accordingly the appeal of the second claimant is allowed under the Immigration Rules.

The First Claimant

19. The first claimant, in order to meet the requirements of the Immigration Rules Appendix FM, required an English Language Test certificate from an Approved Provider. The first claimant had produced an English Language Certificate from Learning Resource Network (LRN) Entry Level Certificate in ESOL Skills for Life (Speaking and Listening) (Entry 3).

20. It was accepted that the first claimant met all the other requirements of the rules.

21. By the letter of refusal dated 3 October 2014 it was pointed out that the first claimant had to meet the requirements of paragraph E-LTRP.4.1 which was the requirement to produce an approved English language test certificate from an approved provider. The letter then sets out the test certificate produced from LRN is not from an approved English Language Test Certificate Provider. The list of approved providers is set out in Appendix O to the rules. By reason of the first claimant not having a valid English language test certificate the claimant did not meet the requirements of E-LTRP.4.1 and as a result did not meet the requirements of R-LTRP.1.1.c) for leave.

22. Appendix FM with regard to English Language provides as follows:-

> <u>English Language Requirement</u>

E-LTRP.4.1 If the applicant has not met the requirement in the previous application to leave as a partner or parent the applicant must provide specified evidence that they

a) are a national of the majority English speaking country listed in paragraph GEN.1.6.;

b) have passed an English language testing speaking and listening at a minimal level A1 of the, and European Framework of Reference for Languages with a provider approved by the Secretary of State;

c) have an academic qualification recognised by UK NARIC to be equivalent to the standard of a Bachelor's or Master's degree or PhD in the UK, which was taught in English; or

d) are exempt from the English language requirement under paragraph E-LTRP.4.2.;

unless paragraph EX.1.applies

23. There is a saving at the end of the provisions, which means an individual who falls within EX.1. is not required to have an English Language test certificate.

24. The letter of refusal goes on to consider the provisions of paragraph EX.1 of Appendix FM. The relevant provision of the rules are:-

EX.1. This paragraph applies if

a)… i) the applicant has a genuine and subsisting relationship with a child who-

aa) is under the age of 18 years or is under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

bb) is in the UK;

cc) is a British citizen or has lived in the UK continuously for at least seven years immediately preceding the date of the application; and

ii) it would not be reasonable to expect a child to leave the UK;

b) the applicant has a genuine and subsisting relationship with the partner who is in the UK and is …. settled in the UK….. and there are insurmountable obstacles to family life with that partner continuing outside the UK.

25. Whilst neither child had been in the UK for the period of 7 years preceding the date of the application and decision, the second child was a British citizen at the time of the hearing. EX.1. (cc) imposes no requirement that the child, who is a British Citizen, must be a British citizen at the time of the application.

26. If EX.1 is engaged the issue is whether it is reasonable to expect the British Citizen child to relocate to Bangladesh. If it is not reasonable to expect the child to leave the United Kingdom and relocate to Bangladesh, then the first claimant may be excused from the English Language requirements in any event.

27. In assessing whether or not it is reasonable the SSHD's own policy as set out in the Immigration Directorate Instructions on Family Migration -- Appendix FM Section 1.0b: Family Life … and Private Life notes that Paragraph EX.1. reflects the duty under section 55 of the 2009 Act to have regard to the need to safeguard and promote the welfare and best interests of children, who are in the United Kingdom, and the requirements of Article 8 of the ECHR to treat children's best interests as a primary consideration within the proportionality exercise. The policy also notes at paragraph 11.2.3, except in the case of criminality, that :-

> Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would always be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer. In such cases it will usually be appropriate to grant leave to the parent or primary carer to enable them to remain in the UK with the child provided there is satisfactory evidence of a genuine and subsisting parental relationship.

28. In considering the reasonableness of removing a child it has also to be noted that Ruiz Zambrano [2011] ECR 1-000 as applied by the Upper Tribunal in the of Sanade & Ors (British children-Zambrano-Dereci) India] [2012] UKUT 00048 (IAC) provides further guidance in respect of EU citizens and their families. I draw attention to paragraph 6 of the headnote:-

> *"6 Where in the context of Article 8 one parent ("the remaining parent") of a British citizen child is also a British citizen (or cannot be removed as a family member or in their own right), the removal of the other parent does not mean that either the child or the remaining parent will be required to leave, thereby infringing the Zambrano principle, see C-256/11 Murat Dereci. The critical question is whether the child is dependent on the parent being removed for the exercise of his Union right of residence and whether removal of that parent will deprive the child of the effective exercise of residence in the United Kingdom or elsewhere in the Union."*

29. The principle identified may be relevant in assessing whether or not it would be reasonable to expect an EU child, including a British child to leave the United Kingdom. Given the circumstances it may be arguable that such may be for a short period of time whilst the first claimant makes an application to re-enter once she has obtained the necessary at Language certificate. At the time of the decision 4th October 2014 neither child had spent 7 years in the UK nor was there a British citizen child. By the time of the hearing the second child was a British Citizen child.

30. In the Reasons for Refusal letter in respect of EX.1.(b) it appears to have been accepted that the spouse of the claimant was settled in the United Kingdom, it was

concluded however that the first claimant had not shown that there were insurmountable obstacles to family life continuing outside the United Kingdom.

31. In the Refusal letter consideration was given to the requirements of paragraph 276 ADE(1) private life. It was found at the time of the application that the appellant had not lived in the United Kingdom for at least 20 years or half her lifetime or otherwise in accordance with subparagraph (vi) it had not been demonstrated that there were very significant obstacles to the first claimant's integration into her country of origin.

32. The first claimant having spent the majority of her life in their home country and there being no evidence of any significant obstacles to integration it was concluded that the first claimant did not meet the requirements of paragraph 276 ADE.

33. Consideration thereafter was given to private and family life rights under Article 8 of the ECHR outside the rules. In concluding that there would be no breach of any article 8 rights it was noted that the first claimant had only been in the United Kingdom six years and that her family were from Bangladesh. She had other family members there. It was noted that the partner had been granted indefinite leave on 24 September 2014 but that he was also a Bangladeshi national and that the first child was also a Bangladeshi national born in Bangladesh. In the circumstances it was considered that it was proportionately justified to expect the claimant to return with her partner and child to Bangladesh.

34. It is unclear but there appears to be no reference to the second child in the decision letter. Whether that would have made a difference at the time may be a moot point, in light of the fact that the child did not have nationality at the time and would have been only 6 months or so old. However by the time of the hearing the child had British citizenship.

Consideration of the first claimant's case

35. In considering this matter I am mindful throughout of the provisions of section 55 of the 2009 Borders, Citizenship and Immigration Act to take account of the best interests of any child.

36. I am also mindful of the provisions of section 117 of the 2002 Act as amended. With regard to Section 117B I specifically take account of the importance of ensuring that individuals speak the English language and of a person not being a burden upon the taxpayer as being aspects of public interest.

37. I specifically take account of 117B (6) which provides:-

> '(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where-
>
> a) the person has a genuine and subsisting parental relationship with the qualifying child, and
>
> b) it would not be reasonable to expect the child to leave the United Kingdom.'

38. In assessing the claimant's case consideration has to be given to Appendix FM and article 8 of the ECHR. A qualifying child includes a child that is a British citizen, section 117D (1). I have been provided with a copy of the case of AM (S117B) Malawi [2015] UKUT 260, which gives guidance as to the approach to followed in respect of S117B.

39. I have also been provided with a copy of the case of SS (Congo) 2015 EWCA Civ 387. During the course of legal argument I was referred to the case of Chen 2015 UKUT 189.

40. Within the skeleton argument provided reference has also been made to the Immigration Direction Instructions on Family Migration: Appendix FM Section 1.0b and the cases of;_

    a) Zambrano 2011 ECR 1-000 Case -34/09 [which is reflected in the IDI]

    b) Sanade 2012 UKUT 00048

    c) ZH (Tanzania) 2011 UKSC 4

41. I bear in mind the findings of fact and all the evidence submitted. With regard to the first claimant clearly the first claimant is seeking to pursue her application under the Immigration Rules and Article 8 of the ECHR.

42. In respect of Appendix FM as the partner of a person settled in the UK, the basis upon which the SSHD considered the application, the requirement under E-LTRP.4.1(b) was that the appellant has passed an English-language test certificate in speaking and listening at a minimum level A1 of the Common European Framework of Reference for Languages with a provider approved by the SSHD.

43. The principal ground for refusal under the Immigration Rules was the fact that Learning Resource Network, LRN, the provider of the English Test Certificate, was not from an approved provider. Approved providers are set out in Appendix O of the Rules.

44. The qualification submitted by the first claimant is in the bundle. As set out in the error of law decision at paragraph 20 having checked the Government website of Ofqual the citation under qualification number 600/4279/5 gave every impression that the list of approved qualifications and providers referred to the qualification of ESOL Skills for Life (Speaking and Listening) (Entry 3) B1 from LRN as being an approved qualification with a start date of 1 January 2012 and no operational end date. There is a copy of the Ofqual Website document in the papers. It is not clear whether LRN were removed from the list of approved providers in Appendix O or were never on the list of approved providers. However it is easy to understand in light of the Ofqual website how and individual may be misled into believing that LRN were an approved provider.

45. However as set out in Appendix O, see page 1260 of Phelan Immigration Law Handbook, LRN were not an approved provider. In the skeleton argument

paragraphs 7-9 it is conceded that LRN was not listed as an approved provider. Therefore the first claimant cannot meet the requirements under Appendix FM with regard to the English Language test certificate. The skeleton argument on behalf of the claimant thereafter seeks to rely upon Appendix FM- paragraph Ex.1. to excuse the need for an English Language test Certificate.

46. With regard to Ex.1(b) and the relationship of the appellant to her partner it was for the claimant to produce evidence of insurmountable obstacles. There was no evidence with regard to potential difficulties that the family would face on return to Bangladesh. In assessing the relationship between the claimant and her spouse and what constitute insurmountable obstacles there is no requirement that the assessment be conducted on the basis of the circumstances as at the date of the application.

47. There would be issues with regard to the youngest child being a British citizen; the second child having now been in the UK for seven years; the integration of the eldest child into school the fact that he is doing well in school; the fact that MAH has employment that he has maintained for a significant period of time in the United Kingdom; the fact that the first claimant also has employment which she has maintained for at least five years; the fact that the first claimant only fails to meet the requirements of the rules by reason of the English-language test certificate; and the settled lifestyle that they have established in the United Kingdom.

48. It was submitted that none of those would constitute insurmountable obstacles to family life continuing outside the United Kingdom but rather were the benefits or circumstances that the claimant and her family had in the UK.

49. As pointed out by the representative for SSHD at the hearing the claimant could return to Bangladesh and make application to enter the United Kingdom and that could be considered on its merits. Consideration could then be given as to whether or not it was proportionate for a degree of separation between the claimant and the other members of her family while she returned to Bangladesh to make the application. There may be the prospect of a temporary separation but that of itself would not in the circumstances be an insurmountable obstacle or unreasonable or exceptional. [In that respect specific reference was made to paragraph 42 of Chen, case cited above].

50. I have also to consider whether or not the claimant is excused from the requirements of the English language test certificate under EX.1. by reason of her relationship with a British citizen child. In accordance with Section 85 of the 2002 Act I consider the circumstances as at the date of the hearing.

51. It is clear that she has a genuine and real relationship with a British citizen child. The issue would thereafter be whether or not it would be reasonable to expect the child to go back to Bangladesh with the claimant, even if that be only to make an application.

52. The child and the family as a whole have settled in the UK. I note the age of the British citizen child. I note the circumstances and the fact that given its age it is appropriate for that child to be looked after by her mother/ the first claimant.

53. I note the fact that the parents have always complied with the requirements of the law. I take account of the IDIs as referred to above.

54. Taking account of the child's age, taking account of the circumstances of family I do not find that it would be reasonable to expect the child to return to Bangladesh with the first claimant.

55. In the light of that I find that EX.1 applies to the claimant's application. I find that the claimant because of the application of EX.1 does not require the English language test certificate. I find therefore consistent with the concessions made that the first claimant meets all the other requirements of the rules with regard to eligibility, suitability, relationship and financial requirements. Accordingly I allow the appeal under Appendix FM.

56. If it were necessary to do so I would also consider the matter under article 8. In respect of article 8 I follow the guidance given in the case of Razgar 2004 UKHL27. In light of the evidence I am satisfied that there is a genuine family life and that the decision would significantly interfere with that family life. Whether the decision is in accordance with the law may be arguable in light of the findings set out above but even if it is it is clearly for the purposes of maintaining immigration control as an aspect of the economic well-being of the country.

57. The final question in respect of article 8 would be whether or not the decision was proportionately justified. Looking at the circumstances of the whole of the family and all the rights engaged the fact that the family have always sought to comply with the law and the circumstances in which they are living in the United Kingdom I am satisfied that the decision would not in any event be proportionately justified. Accordingly I would have allowed this appeal under article 8 have been necessary to do so.

Decision

58. There was an error of law in the original decision and I substitute the following decisions :-

    a) The appeals are allowed under the Immigration Rules

    b) The appeal of the first claimant is allowed on article 8 grounds

Signed Date

Deputy Upper Tribunal Judge McClure

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a tribunal or court directs otherwise, the claimants are granted anonymity. No report of these proceedings shall directly or indirectly identify the claimants or any member of the claimants' family. This direction applies both to the claimants and the SSHD. Failure to comply with this direction could lead to contempt of court proceedings

Signed dated

Deputy Upper Tribunal Judge McClure

IAC-PE-SW-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/41382/2014
IA/41395/2014

THE IMMIGRATION ACTS

Heard at Field House
On 19th October 2015

Decision & Reasons Promulgated

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Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

S P (FIRST CLAIMANT)
S A T (SECOND CLAIMANT)
(ANONYMITY DIRECTION MADE)

Claimants

Representation:
For the Appellant: Mrs Sreeraman, Senior Home Office Presenting Officer
For the Claimants: Mr Dale-Harris, Counsel instructed by Hafiz Haque Solicitors

DECISION AND REASONS

1. The Claimants are citizens of Bangladesh and are mother and minor child. As these proceedings concern the status and interests of a child I consider it appropriate to make an anonymity direction.

2. The Appellant in these proceedings is the Secretary of State for the Home Department, who is appealing against the decision of the First-tier Tribunal. By a decision promulgated on 13th May 2015 First-tier Tribunal Judge R Cassel allowed the appeals of the Claimants against decisions of the Respondent to refuse them further leave to remain in the United Kingdom and thereupon to remove them from the United Kingdom under Section 47 of the 2006 Act. By a decision made on 15th July 2015 permission to appeal to the Upper Tribunal was granted.

3. Thus the matter appears before me to determine in the first instance whether or not there was a material error of law in the original decision.

4. The Claimants are mother and minor child. There is also as part of the family unit a father and another child. The second child was born in the United Kingdom in February 2014.

5. The father of the family came to the United Kingdom as a student on 11th June 2004. He has maintained lawful leave since that date. By reason of the fact that he has had at least ten years' lawful leave he applied on 12th June 2014 for indefinite leave to remain/settlement following completion of ten years' lawful residence. It appears that the father's application was allowed by the Respondent in September 2014.

6. The minor child born in February 2014 as a result of his father being granted indefinite leave/settled status made application to be registered as a British citizen and was so registered in December 2014 in accordance with Section 1(3) of the British Nationality Act 1981.

7. As stated the father of the family having come to the United Kingdom in 2004, he was joined by his wife and child, the Claimants, on 21st February 2008. They had been granted leave to enter as the dependent spouses of a Tier 4 Student Migrant.

8. The father of the family had applied for settlement in June 2014. He had by that stage the required ten years. However the leave with regard to the Claimants was due to expire in August 2014. They therefore made their application for further leave to remain. That application was refused by letter on 3rd October 2014. The letter of refusal in assessing the Claimants' situation acknowledges that they are applying as the partner and child of a person present and settled here.

9. With regard to the First Claimant the letter of refusal identifies that the First Claimant had not obtained the required English language test certificate. That was a requirement that was set out in paragraph E-LTRP.4.1 of Appendix FM.

10. In order to substantiate that she had the required level of English the First Claimant had submitted a Learning Resource Network LRN Entry Level Certificate in ESOL Skills for Life (Speaking and Listening) (Entry 3). The refusal alleges that LRN (Learning Resource Network) are not on the list of providers approved by the Secretary of State and that therefore the certificate was not acceptable. That was the only ground for refusing the application in respect of the First Claimant under the Immigration Rules.

11. In respect of the Second Claimant, the minor child, the Grounds for Refusal set out the following:-

> "In view of the fact that your parents' applications under Appendix FM have been refused the Secretary of State is not satisfied that you are able to meet E-LTRC1.6."

12. With respect at the time of the decision that seems to ignore the fact that the application by the father of the Second Claimant had been granted indefinite leave to remain/settlement in the United Kingdom and was therefore a qualifying parent.

13. In that regard I draw attention specifically to the provisions of Appendix FM paragraph ELTRC.1.6 which provides:-

> "One of the applicant's parents (referred to in this Section as the 'applicant's parent') must be in the UK and have leave to enter or remain or indefinite leave to remain, or is at the same time being granted leave to remain or indefinite leave to remain, under this Appendix (except as an adult dependent relative), and
>
> (a) the applicant's parent's partner under Appendix FM is also a parent of the applicant; or
>
> (b) the applicant's parent has had and continues to have sole responsibility for the child's upbringing or the applicant normally lives with this parent and not their other parent; or
>
> (c) there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care."

14. Given that the father of the family had been granted settled status in September 2014 by the time of the decision by the Respondent the Second Claimant met the requirements of E-LTRC.1.6 because his father was in the United Kingdom with indefinite leave to remain. Whilst the refusal letter seems to deal with the First Claimant and her relationship to the Second Claimant it seems wholly to ignore the position of the father of the family who had been given settled status.

15. For that if for no other reason the Second Claimant should succeed on the basis of the Rules. It may be that that grant of indefinite leave was not brought to the attention of the Respondent at the time that the decision was taken. However it cannot be said that it was not brought to the attention of the Respondent later. There are letters from the Claimants' solicitors which point out as of 8th January 2015 that not only has the father of the family been granted settled status in the United Kingdom but the daughter of the family had been granted citizenship.

16. Accordingly at first blush there is an argument for saying that the Second Claimant meets the requirements of the Rules in any event.

17. The Respondent had therefore been notified of the change of circumstances of the father of the family and of the second child. It was suggested that a reconsideration be given of the issues in the case by a letter dated 30th January 2015. However it was noted by the First-tier Tribunal Judge that there was no response to this request for the matter to be reconsidered.

18. On 21st February 2015 the Second Claimant completed seven years' residence in the United Kingdom.

19. The first issue that was argued before Judge Cassel was that Learning Resource Network was an approved provider. The Ofqual Register clearly establishes that Learning Resource Network was listed as an awarding organisation for the qualification of the English language test ESOL (Entry 3) qualification. Judge Cassel seems to take it that that is an academic issue. With respect I am not certain that it is. If the qualification produced by the First Claimant was a satisfactory English language test certificate then the First Claimant also met the requirements of the Rules.

20. No-one seems to have checked the details with regard to Ofqual. According to the government website in respect of Ofqual the citation under qualification number 600/4279/5 appears in the list of approved qualifications as English for speakers of other languages Learning Resource Network is an approved provider of entry level certificate in ESOL Skills for Life (Speaking and Listening) (Entry 3) and the operational start date is 1st January 2012 and there is no operation end date or certification end date which seems to indicate that the certificates are still valid. The qualification submitted by the Claimants appears at Annex 3(i) in the bundle of documents submitted by the Claimants' representative for the purposes of the hearing. It appears that the First Claimant has a valid qualification.

21. There is no other ground given for refusing the First Claimant's application under the Rules.

22. In considering these appeals the judge commenced by considering the position of the Second Claimant under Rule 276ADE(iv). The provision provides:-

> "Requirements to be met by an applicant for leave to remain on the grounds of private life
>
> 276ADE (1) The requirements to be met by an applicant for leave to remain on the grounds of private life in the United Kingdom are that at the date of application, the applicant:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR.1.2 to S-LTR.2.3 and S-LTR.3.1 in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

…

(iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK;

…"

23. There is therefore an issue as to whether or not it was reasonable to expect the Second Claimant to leave the United Kingdom. The first problem with regard to that appears to be that sub-paragraph 1 of 276ADE makes the point that consideration has to be given as to the circumstances at the date of the application. It is clear and evident from paragraph 22 that the judge is considering the matter on the basis that the Second Claimant has since the refusal letter completed seven years' continuous residence in the United Kingdom. The problem with that is that it seems to ignore paragraph 276ADE(1). Therefore the statement under paragraph 23 of the decision that the Second Claimant meets the requirement for private life under Rule 276ADE(iv) is clearly wrong.

24. The judge thereafter commences to consider the position of the First Claimant. Seeking to deal with the First Claimant on the basis of the principles set out in the case of Ruiz Zambrano [2011] ECR 1-000 Case-34/09. The judge also makes reference to the case of Sanade [2012] UKUT 00048. The judge correctly identifies that where there is an EU citizen child, that would include a British citizen child, it is not possible to require the family unit to relocate outside the European Union and so depriving the union citizen of the child of the benefits of their citizenship. However as identified in the case law where the other parent would be remaining within the United Kingdom the issue would be whether or not the removal of one parent requires either the child or the remaining parent to follow thereby infringing the principle within Zambrano. As identified in sub-paragraph 2 cited within the decision of Judge Cassel the crucial question is whether removal of a parent will deprive the child of the effective exercise of residence in the United Kingdom or whether the other parent would be able to cope or manage in the absence of the parent until such time as that parent makes an application to enter.

25. The judge then makes reference to the Respondent's Immigration Directorate Instructions family migration guidance, paragraph 11.2.3. That guidance is supposed to mirror the provisions set out within the case law. The guidance provides amongst other things:-

> "Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it will always be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer. In such cases it will usually be appropriate to grant leave to the parent or primary carer to enable them to

remain in the UK with the child provided that there is satisfactory evidence of a genuine and subsisting parental relationship."

26. On the basis of that guidance the judge has found that there is both a genuine and subsisting parental relationship and indeed that there is an appropriate family relating to all the members referred to. However what the judge seems to have ignored is that the issue was whether or not it would require the child to leave the United Kingdom. It was necessary for the judge to make a finding with regard to that. The judge has made a finding that it would not be reasonable to expect the child to leave the United Kingdom. What she has not done is determine whether or not the child would have to leave the United Kingdom or whether or not the other parent could look after the child.

27. I have to say with regard to the final paragraph of the decision by the judge, the judge seems to be using EX.1 in a manner which is inconsistent with the case of Sarkar [2014] EWCA Civ 195. It appears that the judge is using EX.1.(a) as if it were a right to leave to remain which was freestanding. That clearly is not the purpose of paragraph EX.1.(a).

28. For the reasons set out I find that there are material errors of law in the decision by the First-tier Tribunal. I have considered how best this matter should proceed further. In light of the comments made above with regard to meeting the requirements of the Rules otherwise I think it appropriate that whilst the decision by the First-tier Tribunal be set aside this matter should be reconsidered in the Upper-tier Tribunal. I consider that the appropriate course is for this matter to be listed before me for a continuation hearing on a future date.

Notice of Decision

I set aside the original decision by the First-tier Tribunal and direct that the matter be listed for a further hearing in the Upper Tribunal before me.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Claimants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Claimants and to the Appellant. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge McClure