Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04400/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 December 2017	**On 23 January 2018**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

THI [B]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T D H Hodson, instructed by Elder Rahimi Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

Anonymity
The First-tier Tribunal did not make an anonymity direction. No application was made for a direction to this Tribunal and one is not necessary. I have however anonymised the name of the minor child involved in the appeal.

DECISION AND REASONS

Background

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1. The Appellant appeals against a decision of First-tier Tribunal Judge Plumptre promulgated on 3 July 2017 ("the Decision") dismissing her appeal against the Respondent's decision dated 29 January 2016 refusing her leave to remain as the (single) parent of a British citizen child.

2. The Appellant is a national of Vietnam. She entered the UK as a student on 1 March 2013. Her leave was extended until 27 July 2015. Thereafter she overstayed. Her child, H, was born on [ ] 2015. She is estranged from the child's father who is a British citizen. He currently has no contact with H.

3. The Respondent did not accept that H's father is the man who the Appellant named as his father because, by the time of H's birth, she had moved in with another man who it appears is not a British citizen. The Appellant has not produced any DNA evidence as to the paternity of H but the Judge accepted the Appellant's evidence that H's father is the man she named and that H is British, based in particular on the fact that the Appellant produced a British passport in H's name.

4. However, the Judge went on to consider the position under Appendix FM to the Immigration Rules applying in particular EX.1 and found that it would be reasonable to expect the Appellant and H to leave the UK and therefore that the Appellant could not succeed.

5. The Appellant raises three grounds of appeal. First, she says that the Judge has become confused as to the provisions of EX.1 and appears to have adopted the test relevant to whether a partner of a British citizen can be removed (i.e. whether there are "insurmountable obstacles" to the relationship continuing abroad). Second, it is said that the Judge has failed to take into account certain of the evidence when assessing H's best interests, in particular that H is a British citizen and that the Appellant would like H to have contact with his natural father and that he would lose that opportunity if the Appellant and H returned to Vietnam. Third, it is said that the judge failed to take into account the ECJ case of Zambrano**.**

6. Permission was granted by Upper Tribunal Judge Frances on 14 September 2017 in the following terms so far as relevant:

   > "It is arguable that the judge erred in law in finding that it was reasonable to expect the British citizen child to leave the UK. The Appellant was his primary carer and the child could not be compelled to leave the UK".

7. The matter comes before me to decide whether the Decision contains a material error of law and if so to remake the Decision or remit the appeal for rehearing to the First-tier Tribunal.

Decision and reasons

8. At the outset of the hearing Mr Wilding who appears for the Secretary of State conceded that there is indeed an error of law in the Decision at [30] which I set out below. He accepts that, in light of that error of law, the appropriate course is to set aside the Decision. He also accepts that in light of the Secretary of State's policy and what is said in the Tribunal case of SF & Others (Guidance; post-2014 Act) Albania [2017] UKUT 120 (IAC) ("SF") it is appropriate for this appeal to be allowed.

9. At [30] of the Decision, Judge Plumptre said this:

> "I accept that the child lives with his primary sole carer, his mother, but find that the requirements of paragraph EX.1(c) are not met insofar as that although the child [H] is a British citizen, I find that it would be reasonable to expect this child to leave the UK with his mother who is of Vietnamese origin and given that he is of a very young age and has not started school and could readily adapt to life in Vietnam with his maternal grandparents and given that both his natural parents are of Vietnamese origin. Further I find he would have the opportunity to form a relationship with his maternal grandparents in Vietnam."

10. Mr Wilding also appeared before the Tribunal in SF. As he pointed out to the Tribunal in that case, the Secretary of State has a policy contained within the Immigration Directorate Instruction Family Migration, Appendix FM, Edition August 2015. The section of that policy relevant to the circumstances in SF and this case reads as follows:

> "Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano.
>
> .....
>
> 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 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. It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to consideration of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU."

11. As I have already pointed out, in this case, the Appellant is the single parent of H and H is not currently in contact with his father. There is therefore no question of the child being able to stay with another parent. This is a post-Immigration Act 2014 appeal and therefore the question for me is whether the Respondent's decision breaches the Appellant's human rights and not whether that decision is in accordance with the law. As the Tribunal pointed out in **SF**, however, the fact that the Secretary of State has a policy which would be breached in the event that the Appellant were

forced to leave the EU, the appropriate course is to allow the appeal. I therefore follow that course for the reasons expressed in SF which I gratefully adopt.

12. In short summary, it would not be reasonable to expect H to leave the UK. The Appellant therefore meets paragraph EX.1 of Appendix FM as H's parent and is entitled to succeed.

Notice of Decision

I am satisfied that the Decision contains material errors of law. The Decision of First-tier Tribunal Judge Plumptre promulgated on 3 July 2017 is set aside.

I re-make the decision. I allow the appeal on human rights grounds for the reasons given above.

Signed Dated: 19 January 2018

Upper Tribunal Judge Smith