Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/08420/2018**

THE IMMIGRATION ACTS

Heard at Bradford Phoenix House	**Decision & Reasons Promulgated**
On 6th March 2019	**On 16th April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

N M
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Medley-Daley (Solicitor)
For the Respondent: Ms R Pettersen (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Cope, promulgated on 17th October 2018, following the hearing at North Shields on 26th September 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Algeria, born in 1985, and is a female. She appealed against the decision of the Respondent Secretary of State, dated 27th March 2018.

The Appellant's Claim

3. The Appellant's claim was that she applied for leave to remain on the basis of her private and family life. In March 2016, while she was on holiday in Spain, she met Mr G, an Algerian national, who came to the UK in 2002, when he applied for asylum. He was granted leave to remain in November 2007. He subsequently became a British citizen in March 2012. He was divorced from his first wife. He has two adult children who are also living in the United Kingdom. He is in receipt of state benefits, which include personal and independent payments. The Appellant developed a relationship with Mr G. They stayed in touch through telephone and social media. She eventually obtained entry clearance on 19th July 2016 to come to the UK as a visitor. She came here on 30th July 2016. She stayed for a month with Mr G.

4. On 8th October 2016 she returned to the United Kingdom and she has lived here ever since. She and Mr G were married in Manchester on 25th November 2016. However, before her leave to enter expired on 19th January 2017, the Appellant applied on 6th January 2017 for leave to remain on the basis of her marriage. The couple's first child, L, was born on 12th August 2017 in Leeds General Infirmary. He is a British citizen. Mr G cannot return to Algeria because of the difficulties that he has faced there, on the basis of which he acquired refugee asylum status in this country, and subsequently British citizen status. He also has very little contact with his family there in any event.

The Judge's Findings

5. The judge held that the Appellant was not financially independent (paragraph 78). There was an absence of evidence in relation to any private life in this country, by way of community and other links to a wider society (paragraph 85). Section 117B of the 2002 Act meant that there was a public interest in the maintenance of immigration control (paragraph 86) the Appellant had entered as a visitor, and this excluded her from being granted leave to remain as a partner under Appendix FM, and given that her status was precarious, it was not disproportionate to require her to return to make a proper application (paragraph 92). As for the child, L, there was no suggestion that he would have to leave the UK if the Appellant had to go back to Algeria because it had not been established that Mr G, as his father, could not take care of him in this country or that he would be unwilling to do so (paragraph 99).

6. The appeal was dismissed.

Grounds of Application

7. The grounds of application state that the Appellant was in a relationship with a British citizen. They had a child together. The child is a British

citizen. The judge had failed to give adequate consideration for this fundamental fact. Instead, he has focused mainly on the relationship with the partner and the risk on return to Algeria. The judge has also failed to carry out an adequate proportionality assessment. He has simply concluded that the refusal is in accordance with the law. Second, the judge has stated that the Appellant can return to Algeria to make an entry clearance application. This ignores the fact that there is a provision within the Rules to make an application in-country. The Appellant applied while she was still on her visit visa. She did not wait to become an overstayer. There was no legitimate aim in excluding consideration of her Article 8 rights to remain here with her husband and family. Finally, the test was one of "reasonableness" in the context of paragraph EX.1, and the IDI's, stated that "Save in the cases involving criminality it will not be possible to take a decision in relation to a parent of a British citizen child where the effect of that decision would be to force the child to leave the EU ..." (see paragraph 7).

8. On 6th November 2018, permission to appeal was granted.

Submissions

9. At the hearing before me, Mr Medley-Daley submitted that the Appellant was the only carer of her son, L

10. If she were to be removed this would split the family up. The IDI's had to be applied here and he has made it quite clear that, in a case that did not involve criminality, a British citizen child could be impacted by the judgment in **Zambrano**. The Secretary of State was duty bound to follow his own IDI's. Moreover, the recent decision in **KO (Nigeria) [2018] UKSC 53** where it was stated,

> "The consideration of the child's best interests must not be affected by the conduct or immigration history of the parents or family carer, but these would be relevant to the assessment of the public interest, including in maintaining effective immigration control ..." (paragraph 11).

In the same way, Mr Medley-Daley submitted that the well-known decision in **MA (Pakistan) [2016] EWCA Civ 705**, also does not address the position of a British citizen child when it states that, in assessing, whether it is "reasonable to expect" a qualifying child to leave the UK the focus must be exclusively upon the position of the child. Be that as it may, this is a "qualifying child", who is a British citizen, and to that extent what was said in **MA (Pakistan)** remains intact.

11. For her part, Ms Pettersen submitted that she had nothing further to add. She would recognise that this was a case where there was no criminality involved.

Error of Law

12. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.

13. First, the Appellant is in a relationship with a British citizen, and now has a British citizen child, whereby a decision taken to remove her, would engage the **Zambrano** principle, and this is clear in the IDI itself (at paragraph 7). She is the sole carer of her child.

14. Second, there is no criminality involved. There is no attempt to undermine the Immigration Rules. The Appellant made her application when she already had valid leave. She was entitled to make that application because the Rules allow for an in-country application to be made.

15. Third, there is no legitimate aim to the Appellant leaving the UK and applying from Algeria, given that there is a provision that expressly allows her to make an in-country application. The suggestion that any separation between herself and her remaining family in the UK would be short is speculation. One has to look at the situation as it under the applicable provisions.

16. Fourth, in any event, given that the Appellant's partner, Mr G is on benefits and not able to meet the financial requirements, it is more probable than not that she would face difficulty in returning back to the UK, which would further bring into effect the **Zambrano** principles.

17. Finally, the position of the Secretary of State is expressly set out in the Immigration Directorate Instructions (Appendix FM 1.0, family life as a partner or parent – ten your routes, August 2015), which states that,

> "If the family could all go to the country of return together but they choose to separate this would not in itself constitute exceptional circumstances. However, the decision-maker should not usually make a decision that forces a family to be split if there is no criminality to add weight to the public interest in removal".

Remaking the Decision

18. I remake the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the reasons that I have set out above.

Notice of Decision

19. The decision of the First-tier Tribunal involved the making of an error on a point of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

20. No anonymity direction is made.

21. This appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 15th April 2019

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I make a fee award of any fee which has been paid or may be payable.

Signed Date

Deputy Upper Tribunal Judge Juss 15th April 2019