UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: PA/07402/2017**

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
On: 6 February 2018	**On: 9 March 2018**

Before

Deputy Upper Tribunal Judge Mailer

Between

VANEST [Z]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: **Mr B J Bundock, counsel (instructed by Elder Rahimi Solicitors)**
For the Respondent: **Ms A Brocklesby-Weller, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The appellant is a national of Iraq, born on [ ] 1991. She appeals with permission against the decision of the First-tier Tribunal dismissing her asylum and human rights claims in a decision promulgated on 27 September 2017. Permission to appeal

was limited to the decision relating to the removal of a primary carer of a British child.

2. The Judge noted that the appellant's child is a dual citizen of Iraq and Britain. The appellant arrived in the UK in February 2017. He found that the child's best interests are to remain living in the family unit, notwithstanding his British citizenship. It would not be contrary to his best interests to return with his family to Iraq [25]. Further, it would not be unreasonable for the child to leave the UK [26].

3. She was not persuaded that the appellant meets the provisions under s.117B (6) of the 2002 Act. His removal would therefore not be disproportionate or against the public interest in maintaining effective immigration control [33].

4. In granting permission to appeal First-tier Tribunal Judge Farrelly stated that bearing in mind the Zambrano principles, the respondent's guidance on the removal of the primary carer of a British child; the case law and s.117B(6), it is arguable that the Judge erred in consideration of this issue.

5. At the commencement of the hearing, Mr Bundock who did not represent the appellant before the First-tier Tribunal Judge informed the Tribunal that on 1 January 2018, the appellant's second child was born in the UK. She too is a British citizen.

6. He submitted that the Judge was required to consider, as she did, whether it would be reasonable to expect the appellant's British child to leave the UK. She failed however to consider and take into account the respondent's IDI – Family Migration: – Appendix FM, s.1.0 b dated August 2015. He referred to paragraph 11.2 of the Guidance.

7. He submitted that there was a clear obligation on the respondent to draw the IDI to the First-tier Tribunal's attention – UB (Sri Lanka) v SSHD [2017] EWCA Civ 85 at [16-21]. He also referred to the decision of the Upper Tribunal in SF and Others (Guidance Guidance Post 2014 Act) Albania [2017] UKUT 00120 (IAC).

8. He submitted that in the circumstances the decision should therefore be set aside and re-made in accordance with the respondent's policy and the relevant authorities.

9. Ms Brocklesby-Weller submitted that there is no compulsion for the child to leave the UK.

Assessment

10. The First-tier Tribunal noted that the appellant is the wife of an unsuccessful asylum seeker who is now a British citizen. The couple met and married in Iraq in 2012 and lived together. They had a son born on [ ] 2014.

11. The family including her husband all live together in the UK and as at the date of hearing the appellant was expecting their second child. I was informed that on [ ] 2018 their second child was born in the UK. She too is a British citizen. The birth certificate relating to that child was produced.

12. It is not disputed that the appellant's children and her husband are British citizens.

13. The Judge found that the child's parents have conspired together to evade immigration control [26]. She went on to find that as it is reasonable for the child to leave the UK and accordingly the appellant did not meet the requirements under s.117B (6) of the 2002 Act. She was not satisfied that the appellant's removal is disproportionate when weighed against the public interest.

14. Neither the appellant's legal representative nor the presenting officer drew to the attention of the First-tier Tribunal Judge the decision of SF and Others, *supra*. Nor was her attention drawn to the IDI to which I have referred.

15. In accordance with the IDIs, referred to in SF, such a case must always be assessed on the basis that it would be unreasonable to expect the child to leave the EU with her parents and primary carer.

16. I have had regard to the guidance as set out and identified at [7] of SF. This is the August 2015 IDI Family Migration Appendix FM section 1.0b.

17. At paragraph 11.2.3 it states that save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British child when "the effect of that decision is to force the British child to leave the EU, regardless of the age of that child." 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 child to leave the EU with that parent or primary carer.

18. It goes on to provide that in such cases it would 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 EU. It is finally provided that in considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation.

19. There was no suggestion that the circumstances envisaged in the IDIs apply to the appellant.

20. I have also had regard to s.117B(6) of the 2002 Act. This recognises that in non criminal cases, it will not be proportionate to sever a genuine and subsisting relationship between parent and the qualifying child.

21. In this case both the child and his father were British citizens. The Judge did not consider the Zambrano guidelines. Nor did she assess the case under the applicable IDI. It was not contended that there was not a genuine and subsisting parental relationship.

22. I accordingly find that the decision of the First-tier Tribunal Judge involved the making of an error on a point of law. I accordingly set it aside. As at the date of the

appeal this appellant has given birth to a second child who is a British citizen. Both children are still very young.

23. The effect of the appellant's removal would likely be that the children would be deprived of the genuine enjoyment of their rights under Article 20 TFEU, and would be unlawful in accordance with the principles in Zambrano.

24. The appellant's children are British citizens and the appellant enjoys a genuine and subsisting relationship with them.

25. I accordingly consider whether in the circumstances it would be reasonable to expect either child to leave the EU with their mother.

26. The guidance clearly demonstrates the outcome of the assessment which would have been made by the respondent. Accordingly, I take such guidance into account and apply it in assessing the same considerations in this appeal: SF at [12].

27. Having regard to the evidence, I find that it would be unreasonable to expect the children to leave the UK.

28. I accordingly substitute a decision allowing the appellant's appeal.

Notice of Decision

Having set aside the decision of the First-tier Tribunal, I substitute for it a decision allowing the appellant's appeal. The period of leave is to be determined by the respondent.

Anonymity direction not made.

Signed Dated: 22 February 2018

Deputy Upper Tribunal Judge Mailer