



**Upper Tribunal  
(Immigration and  
Asylum Chamber)  
Appeal Number:**

**HU/04918/2016**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 15<sup>th</sup> February 2018**

**Decision & Reasons  
Promulgated**

**On 22<sup>nd</sup> February 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MCCLURE**

**Between**

**DC**

**(ANONYMITY DIRECTION MADE)**

Appellant

**And**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms Adams Counsel instructed by Irvine Thanvi Nata Solicitors

For the Respondent: Mr Walker, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Bolivia. The appellant is the mother of a British citizen child. As these proceedings concern the interests of a child, I consider it appropriate to make an anonymity direction.
2. This is an appeal by the appellant against the decision of First-tier Tribunal Judge NMK Lawrence. By decision promulgated on 12<sup>th</sup> July 2017 Judge Lawrence dismissed the appellant's appeal against the decision of the respondent to refuse her further leave to remain in the United Kingdom on the basis of her and her family's human rights under Article 8 of the ECHR.

3. By decision dated 29 December 2017 First-tier Tribunal Judge Parkes granted permission to appeal to the Upper Tribunal. In granting permission reference was made to the case of SF & others (Guidance – post 2014 Act) Albania [2017] UKUT 120 (IAC). The case gives guidance as to the approach to be taken where one is considering the removal or refusal of leave to remain in respect of a person that is a parent and primary carer of a British citizen child. [The case makes reference to the Zambrano ECJ [2011] EUECJ- C 34/09]

### **Factual background**

4. The appellant had entered Ireland as a visitor. Thereafter it appears that the appellant entered the United Kingdom arriving on or about 21 March 2007. The appellant had no leave to enter the United Kingdom and appears never to have had any lawful leave to be in the United Kingdom.
5. In August 2008 she met FS a Venezuelan national. FS has and had at the time of meeting settled status in the United Kingdom. On the 15 August 2013 the parties married. In 2016 the appellant gave birth to their child, who as a result of his father, FS, having settled status, was entitled under the British Nationality Act 1981 to British citizenship. It is accepted that the child is a British Citizen. The evidence established that the appellant was the main or primary carer for the child.
6. At the First-tier Tribunal hearing it was pointed out that the status of the child had not been brought to the attention of the respondent prior to the respondent making the decision under appeal. Consistent with the requirements of section 85 (5) of the 2002 Act as the status of the child would have been a new issue not considered by the respondent, the consent of the respondent to raising such was necessary. As is evident from paragraph 7 of the decision, the consent of the respondent was sought to raising the issue in the appeal. Consent was given by the respondent.
7. As identified in paragraph 9 of the decision the appellant's case was based upon the fact that it would not be reasonable to expect a British citizen child to leave the United Kingdom.
8. It is in that respect that the guidance in the case of SF is material. In paragraph 7 of SF attention is drawn to the respondent's guidance in Immigration Directorates Instructions-Family Migration-Appendix FM, Section 1.0(B). The relevant edition is the August 2015 edition. At paragraph 11.2.3 of that guidance the question is posed whether or not it would be reasonable to expect a British citizen child to leave the United Kingdom. Having set out at length the guidance and referred to the basis for that guidance as being the ECJ judgment in the case of Zambrano, the policy concludes that any decision which forces a British citizen child to leave the UK would not be reasonable unless there were other factors justifying separation of the family. In

the SF case an assessment was made thereafter as to what other factors could justify removing a parent, who was the primary carer.

9. In paragraph 8 of SF factors which may justify removal even where there was a British Citizen child included whether or not there was any issue with regard to criminality; whether there was any conduct of the mother or of the other children or other family members such as to give weight to justifying separation; or whether proper consideration had been given to the child remaining in the United Kingdom with the other parent or an alternative primary carer.
10. The case involved a mother and several children of whom only one was a British citizen. The result of the immigration decision would have been the separation of the youngest child from not only his mother but his siblings. The family save the father had entered illegally in 2012 and had remained in the UK. The father appears to have had settled status. The mother had given birth to a British citizen child and was the primary carer for that child. As set out in paragraph 8 there was no criminality or other factor justifying separation and whilst there were possible other carers, it was accepted that the mother was the primary carer and the refusal of leave would result in the separation of the child from his primary carer. The respondent had not in the case given any consideration to any other potential carer given the circumstances.
11. In the present case there is clearly a father in the United Kingdom and arguably the child could stay with the father. The problem would be that the father working would have limited time either to work or look after the child. There would also be separation from the mother, the current primary carer.
12. As identified in the case the policy guidance represents an important source of what the Secretary of State's view of what is reasonable in the circumstances. Where the Secretary of State has given guidance in that form setting out clearly what is and what is not reasonable, clearly that is a significant factor in assessing whether or not the decision itself is proportionately justified
13. The conclusion in SF was that expecting the mother and some of the children to leave the youngest child in the United Kingdom and effectively separating them was not in the circumstances reasonable and was not consistent with the policy identified. The result of failing to grant the mother leave would be to force the child to leave the UK. There were no other factors in the case which justified separation.
14. Central to the policies is the fact that it is not reasonable to force a British child to leave the United Kingdom. Judge Lawrence in reliance upon section 117 (B) (6) of the 2002 Act sets out that it is for the respondent to demonstrate that it would be reasonable for the child to go with the mother to Bolivia or Venezuela. That approach runs counter to the approach in the policy and in the cases of Zambrano

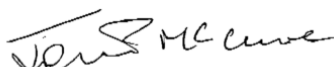
and SF. It is forcing the child to go with the mother. Whilst the judge refers to the clear wording of the Section 117(B) (6) the judge clearly has not taken account of the policy and case law. The judge has failed to consider the policy and failed to include that consideration in the assessment of proportionality. That failure to consider the policy is in the circumstances a clear error of law.

15. For the reasons set out I find that there is a material error of law in the original decision and I set the decision aside. I determined in the circumstances to remake the decision.
16. In remaking the decision I take account of the provisions of section 117 (B) (6). I also take account of Section 55 of the 2009 Act and the need to protect and promote the welfare of the child.
17. Clearly the appellant and her child have a family relationship and the decision would significantly interfere with that family relationship. I am satisfied however that the decision is in accordance with the law and for the purposes of maintaining immigration control as an aspect of the economic well-being of the country.
18. As a final matter I have to determine whether or not the decision is proportionately justified taking into account the matters set out above and the policy guidance referred to within the case law.
19. I find that the appellant is the main carer for a British citizen child and that the effect of removing the appellant from or refusing leave to remain in the United Kingdom would be to force the British citizen child to leave the UK to be with his mother. I find that there is no element of criminality or other factor of such weight as would justify separation. Whilst I take account of the circumstances in which the appellant entered the UK, given that she is the main carer for the child, I find that the decision is not proportionately justified applying the guidance and the case law. I therefore allow the appeal on Article 8 grounds.

### **Notice of Decision**

20. I set the original decision of the First-tier Tribunal aside.
21. I substitute the following decision "The appeal is allowed on Article 8 family life grounds.
22. I make no order for costs

Signed

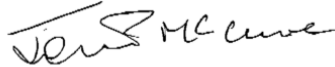


Deputy Upper Tribunal Judge McClure

Dated 15<sup>th</sup> February 2018

**Direction regarding anonymity- rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

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



Signed  
2018

Date 15<sup>th</sup> February

Deputy Upper Tribunal Judge McClure