Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/11378/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9th February 2016	**On 15th February 2016**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

[H N]
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M Mac, of Mac & Co Solicitors
For the Respondent: Ms A Brocklesby-Weller, Home Office Presenting Officer

DECISION AND REASONS

Background

1. This is effectively a fresh hearing following the Upper Tribunal's decision to allow an appeal by the Secretary of State against a decision of Judge of the First-tier Tribunal Foulkes-Jones who, on 18th April 2015, allowed the asylum appeal of [HN] (the Appellant).

2. The Appellant is a national of Vietnam, born in 1996. She arrived in the United Kingdom on 14th April 2011, aged 14, and claimed asylum the next day. She claimed to fear individuals or a gang who were owed gambling debts accrued by her father, whom she last saw in February 2007. Shortly after her father's departure from the Appellant's life some four to five men came to her home, where she lived with her mother and grandmother, and requested money to pay off the debt. The Appellant is unclear as to who these men were and she did not know whether the authorities were ever involved or were ever alerted. The Appellant left school at a young age and instead sold vegetables, washed dishes, waitressed and tidied in small restaurants. Her mother died of natural causes in July 2009.

3. At the beginning of 2010, as a result of issues relating to the payment of the debt, the Appellant was stabbed and threatened with abduction unless the debt was settled. Her grandmother ensured that a further ten months were given to enable the debt obligation to be met. Unbeknownst to the Appellant her grandmother then sold her house and arranged for the Appellant to leave Vietnam. The Appellant arrived in this country and was placed in foster care. Soon after she was approached by a Vietnamese man in a public library, taken to London and held against her will. She was subjected to ill-treatment, including being raped, and made to cook and clean the man's flat. She believed, at one stage, that she overheard other men talking about her grandmother and her father's debt, but she could not be sure as they were talking a mixture of Vietnamese and Chinese. She managed to escape in September 2011 and was placed with a separate foster family. There have since been no further incidents of concern. At the time of the Respondent's decision refusing her asylum and human rights claim the Appellant maintained that she was in a relationship with a Vietnamese national granted ILR and that they were expecting a child.

4. There had been some significant delay by the Respondent in determining the asylum claim, the decision under appeal being 3rd December 2014. In her refusal letter the Respondent accepted the Appellant's account in full. The Respondent concluded however that there would be a sufficiency of protection available to the Appellant, alternatively that she could avail herself of the internal relocation alternative.

5. The First-tier Tribunal allowed the Appellant's appeal on the basis that there was conspicuous unfairness arising from the Respondent's failure to engage in her tracing obligations under Regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005. The First-tier Tribunal Judge found that the Appellant had been deprived of access to the best evidence with which to prove her case. The failure to engage to the full extent with her obligations to trace the Appellant's grandmother meant that there was no further evidence as to whether the incidents with the gang had been reported to the authorities, or relating to the influence and reach of the gang and whether the gang consisted of non-state actors. Applying the principles enunciated in **Rashid, R (on the application of) v Secretary of State for the Home Department [2005] EWCA Civ 744** the appeal

was allowed and the matter remitted to the Respondent in order for an appropriate period of leave to be granted.

6. The Respondent was granted permission to appeal that decision and, shortly before the error of law hearing in the Upper Tribunal, the Supreme Court handed down its decision in **TN and MA (Afghanistan) [2015] UKSC 40**. At paragraphs 52 and 53 of **TN** the Supreme Court considered the decision of the Court of Appeal in **EU (Afghanistan) [2013] EWCA Civ 32**. In that case Sir Stanley Burnton identified difficulties with the **Rashid** principle. Sir Stanley Burnton acknowledged that the Secretary of State for the Home Department's breach of her tracing duty could have evidential relevance because, in assessing the risk to a claimant on return to his or her country of nationality, the lack of evidence from the Secretary of State for the Home Department as to the availability of familial support was a relevant factor. At paragraph 53 of **TN** the Supreme Court said this:

> "On this approach, it is not for the Tribunal or the Court, in considering a claim for asylum, to try to compensate the claimant for some past breach of duty which does not affect the question whether he is presently exposed to a risk entitling him to the protection of the Refugee Convention."

7. At paragraphs 71 and 72 of **TN** the Supreme Court indicated that the principles enunciated in **Rashid** were not to be followed. At 72 Lord Toulson stated:

> "I would hold that the **Ravichandran** principle applies on the hearing of asylum appeals without exception, and Rashid should no longer be followed. The question whether the appellant qualifies for asylum status is not a question of discretion. It is one which must be decided on the evidence before the Tribunal or court."

8. In my decision promulgated on 15 July 2015 I was satisfied that the First-tier Tribunal did make a material error in law in allowing the appeal on **Rashid** principles. There had been no substantive consideration as to whether a sufficiency of protection was, as maintained by the Respondent, available to the Appellant. Nor did the First-tier Tribunal consider the viability of internal relocation or the Appellant's Article 8 claim in relation to her partner and the lengthy delay by the Secretary of State.

9. I decided however to adjourn the appeal in light of what the Supreme Court said at paragraph 73 of its judgement in **TN**.

> "There remains the question how the Tribunal should approach an asylum appeal where the respondent has failed in her tracing obligation. If the appellant believes that he may have been prejudiced, it would be open to him to ask the respondent to attempt to carry out a tracing process and to ask the Tribunal to adjourn the appeal for that to be done. There would be force in the argument that it should not make a difference whether the appellant has by then turned 18, since that would not remove an obligation which had arisen under the Reception Directive and the effects of which were intended to last beyond their minority."

10. I directed the Respondent to undertake her tracing obligations owed to the Appellant, to be completed before the adjourned hearing. This was because there was a possibility that the grandmother, if traced, could assist in determining a number of issues relevant to the issue of sufficiency of protection and internal relocation. These include, *inter alia*, 1) whether the debt owed by the Appellant's father remains outstanding and the amount of the debt; 2) whether any of the debt owed to the gang was used to pay for the Appellant's journey to the United Kingdom (although the Appellant was informed by an agent that her grandmother had sold the house she does not know this to be the case for certain); 3) the scope of influence and the degree of reach of the criminal gang, either locally or nationally; and 4) whether the criminal gang consists of non-state agents or whether there are state agents involved. All of these are factors relevant to the assessment of the Appellant's claim to be a refugee. I additionally granted the Appellant permission to file further evidence for the adjourned hearing, both in respect of her asylum claim and in respect of her Article 8 human rights claim.

Further documents submitted

11. I received a 'Family Tracing Report' dated 27 July 2015 from the Respondent. From the Appellant I was provided with a short bundle consisting of a brief skeleton argument, a brief statement from [DH], the Appellant's partner, dated 02 February 2016, a copy of his immigration status document, a certified copy of the birth certificate relating to the Appellant's child (indicating that the Appellant's partner was the father), some NHS correspondence relating to the registration of the Appellant and her child with a GP, and a 4 page USSD report on the trafficking in persons in Vietnam, dated 27 July 2015.

12. I have considered the above documents in conjunction with the bundle of documents filed by the Appellant's representatives in respect of her appeal before the First-tier Tribunal, which included, *inter alia*, a statement from the Appellant dated 20 March 2015, educational certificates, character references, documents relating to her then pregnancy, and photographs of the Appellant and her partner and her friends and her foster family, and the COIR report on Vietnam dated 09 August 2013.

13. At the adjourned hearing I provided both representatives with an extract from the Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0B, Family Life (as a Partner or Parent) and Private Life: 10-Year Routes, published on August 2015.

The adjourned hearing

14. Having satisfied myself that the Appellant understood the Vietnamese interpreter, she adopted her statement of 20 March 2015 and was asked no further questions by way of examination-in-chief.

15. In cross-examination the Appellant confirmed that she did not know how to contact her grandmother. When asked whether her partner would choose to settle

in Vietnam the Appellant said he would not. He wanted the Appellant and their son to stay in the United Kingdom.

16. In answer to questions from myself the Appellant said that she does not live with her partner as he resides in a small bedroom outside London and he works outside London. Her son lived with her, although she took him to see his father on weekends.

17. [DH] adopted his statement. In it confirmed he was the Appellant's partner. He entered the United Kingdom in October 2002 as an unaccompanied minor and was granted ILR on 18 January 2012. He met the Appellant in May 2014 and their relationship commenced in August 2014. He confirmed that the Appellant gave birth to their child on 23 July 2015. The child is therefore a British citizen, his father having settled status at the date of the birth. The Appellant's partner confirmed that he and the Appellant were not living together as he was working in Basingstoke and lodging with a friend in Woking, while the Appellant was residing in London in house-share accommodation provided by the social services. He confirmed that he saw his son every week and provided financial support. He indicated that he would like the Appellant and their son to remain with him in the United Kingdom.

18. There was no examination-in-chief. In cross-examination the partner said he would stay in the United Kingdom if his partner was required to leave. He claimed he would be unable to look after his child without his partner and said that the child needed to have his mother.

19. I asked some clarificatory questions. The partner said he was a nail technician. He was self-employed. He worked 4 days a week. There was no-one who was capable of taking care of their 6 month old son while he was working. The baby was bottle and breast fed. The partner entered the United Kingdom as a 15 year old. He had no future in Vietnam and there were no human rights in Vietnam.

20. Both representatives made submissions which I have recorded in my Record of Proceeding and in respect of which I have taken full account.

The standard and burden of proof

21. In respect of the asylum and Article 3 aspect of the appeal, I have considered the circumstances as of the date of the hearing in accordance with section 85(4) of the Nationality, Immigration and Asylum Act 2002. The lower burden of proof is upon the Appellant to establish that there is a real risk of her suffering persecution in the country of return for one of the reasons cited in the 1951 Refugee Convention or a breach of Article 3.

22. The burden of proof in respect of showing compliance with the Immigration Rules and with establishing the factual basis for an Article 8 claim rests on the Appellant and the standard of proof in this regard is the balance of probabilities.

Findings and reasons

23. The Appellant maintains that she will be persecuted or subjected to serious ill-treatment sufficient to breach Article 3 if returned to Vietnam as the gang in respect of whom her father owed gambling debts would target her. The Respondent accepted the Appellant's account of what occurred to her in Vietnam and of her journey to the United Kingdom and the events that occurred after her entry to the United Kingdom. The Appellant has been recognised as a victim of trafficking by the Competent Authority. The Respondent was not however satisfied that the Appellant would be unable to access a sufficiency of protection from the authorities, and found, in any event, that she could internally relocate (identify Ho Chi Minh City as an example of a place she could go to).

24. There remains a significant amount of uncertainty and vagueness in the Appellant's account of events in Vietnam. This is not surprising given her age and I don't hold this against her. It was hoped that further information could be obtained following the Respondent's attempt to trace the Appellant's grandmother. The Family Tracing Report however indicated that no trace had been found. The report noted the limited amount of information the Appellant was able to furnish, and all the appropriate avenues for seeking information were pursued. The Appellant herself indicated that she was unable to contact her grandmother and there was no other evidence of any attempt on her part to trace her grandmother.

25. There is nothing in the Appellant's account to indicate that the gang who sought payment for her father's debt were state agents, or that they had any influence with the authorities. The Appellant was unaware whether her mother or grandmother ever reported the gang to the authorities. There is no evidence that any protection from the authorities had ever been sought. The Appellant relies on the COI report of August 2013 (sections 8.02 and 8.03) indicating that police investigative capabilities were very limited, and that training and resources were inadequate. The same report however indicated that the police were generally effective in maintaining public order. Relying on the same report the Respondent noted that the police in Vietnam were arranged on regional lines and therefore any influence the gang may hold in the Appellant's local area would not be deemed to extend to the rest of the country.

26. The Appellant relied on a USSD report on the trafficking in persons in Vietnam, but there is no evidence that the Appellant was ever trafficked by a gang within Vietnam or that her departure from Vietnam was an instance of trafficking. Although it is not entirely clear it seems very likely, having regard to the Appellant's account, that the Competent Authority recognised her as a victim of trafficking as a result of what occurred in the United Kingdom. Although she does not know for certain, the person that the Appellant's grandmother used to send her out of Vietnam told the Appellant that the family home had been sold in order to pay for the Appellant's journey. Although the Appellant thought she heard men taking about her grandmother when she had been abducted in London, she could

not be sure as they were talking mainly in Chinese with a few words of Vietnamese. Given the circumstances in which the Appellant met QA (the person who befriended her in a library and who forced her to cook and clean for him) I am not satisfied, even on the lower standard of proof, that the individuals who kidnapped the Appellant in London are related to those whom she fears in Vietnam.

27. The USSD report on trafficking indicates that Vietnam is a source country for men, women and children subjected to sex trafficking and forced labour within the country and abroad. Although Vietnamese women are subjected to sex trafficking abroad, and men and women are subjected to forced labour within the country, there is nothing in the report to suggest that the Appellant herself, if returned to Vietnam, faces a real risk of being trafficked. The decision also referred to the COIS report (24.09 & 24.12) indicating that the Vietnamese government were taking action against those placing others in debt bondage. The Appellant has some qualifications and hairdressing skills and there was nothing to indicate that her partner would be unable to provide her with at least some funds so that she would not be destitute.

28. In any event, I am not satisfied that the Appellant would be unable to relocate to another part of the country. An earlier Tribunal decision (**LB (Internal flight alternative – Article 3) Vietnam [2004] UKIAT 00331**) found that internal relocation was a viable option notwithstanding the existence of the ho khau registration system. Furthermore, in **Nguyen (Anti-Trafficking Convention: respondent's duties) [2015] UKUT 00170 (IAC)** the Upper Tribunal found that the chances of an individual who left Vietnam in 2008 and who had been trafficked, coming across her traffickers was 'very slight' (paragraph 51). The appellant in **Nguyen** was a single woman with three very young children. The Tribunal stated (at paragraph 52), "*It has not been shown that the background evidence indicates that returning without her partner and with the children would place her at risk of breach of her Article 3 rights or that even if she is a member of a particular social group of trafficked women from Vietnam, she faces a real risk of harm on that account. It is speculative and no more to suggest that she would face a real risk of coming across her previous traffickers or that as a woman in the circumstances in which she would return she faced a real risk of being trafficked by someone else*." In light of the aforementioned factors, d taking account of the fact that the Appellant left Vietnam in 2011 and not 2008, I am nevertheless not satisfied that her return to Vietnam would expose her to a real risk of persecution or breach of Article 3 ill-treatment.

29. I will now consider whether the Appellant's removal would constitute a breach of Article 8, with respect to both the immigration rules and her free-standing Article 8 rights and those of her family.

30. In her Reasons for Refusal Letter the Respondent noted the absence of information to support her claimed relationship with [DH]. I have now seen a statement from [DH], in which he maintains that he is the partner of the Appellant and the father of her child. He attended the hearing and gave evidence. He held and played with

the child for long periods and certainly gave the strong impression through his body language and demeanour of having a genuine and subsisting relationship with the Appellant and their child. The genuineness of this relationship was not challenged by the Presenting Officer. The brief evidence given by the Appellant and her partner, both orally and in their statements, relating to their relationship was inherently plausible. In these circumstances I am satisfied the Appellant and [DH] are in a genuine and subsisting relationship.

31. Having regard to the birth certificate (naming the partner as the father of the child) and the absence of any challenge to this relationship from the Home Office Presenting Officer, I am additionally satisfied that the Appellant's child is fathered by her partner. The partner produced in evidence his immigration status document confirming his grant of ILR in October 2012. I am therefore satisfied that the partner was settled when the child was born and that the child is a British citizen. This was not disputed by Ms Brocklesby-Weller.

32. The Appellant and her partner have consistently and plausibly maintained that they do not live together. He works in Basingstoke and resides with a friend in Woking; she lives in social-services provided accommodation in London. The child lives with her, although she takes him to see his father at weekends. This arrangement was not challenged by the Presenting Officer.

33. I must first consider whether the Appellant meets the requirements of Appendix FM, that aspect of the immigration rules giving effect to the Respondent's Article 8 obligations. I identified to the parties R-LTRPT (setting out the requirements for limited leave to remain as a parent) as being relevant to my decision. Ms Brocklesby-Weller indicated that she had also identified R-LTRPT as being relevant.

34. R-LTRPT.1.1 indicates that the requirements for leave to remain as a parent are, so far as it material, that –

    (a) the applicant and the child must be in the UK;

    (b) the applicant must have made a valid application for limited or indefinite leave to remain as a parent or partner; and either

    (c) …

    (d)

        (i) the applicant must not fall for refusal under S-LTR: Suitability leave to remain; and

        (ii) the applicant meets the requirements of paragraphs E-LTRPT.2.2-2.4. and E-LTRPT.3.1-3.2.; and

        (iii) paragraph EX.1. applies.

35. The Appellant and her child are in the United Kingdom. According to GEN.1.9 of Appendix FM the requirement to make a valid application will not apply when

the Article 8 claim is raised as part of an asylum claim. The Appellant raised her Article 8 claim as part of her asylum claim. It was not suggested by the Respondent that the Appellant fell for refusal under S-LTR.

36. E-LTRPT.2.2 requires the child to be under the age of 18, living in the United Kingdom and a British citizen. These requirements are clearly met. E-LTRPT.2.3. requires either that the Appellant has sole parental responsibility for her child or that the child normally lives with her and not his other parent. As the child normally lives with the Appellant and not his father, this requirement was met. Ms Brocklesby-Weller did not challenge this contention. E-LTRPT.2.4. requires the Appellant to provide evidence that the child normally lives with her. The Appellant did provide such evidence in the form of GP registration documents and her oral and written evidence, as well as that of the partner. This evidence was not challenged. E-LTRPT.2.4. additionally requires the Appellant to provide evidence that she is taking, and intends to continue to take, an active role in her child's upbringing. Given that the 6 month old baby is living with her mother, who still partially breast-feeds him, and in light of the interplay between the Appellant and her child at the hearing, I am entirely satisfied that the Appellant has provided sufficient evidence to prove that she is taking and intends to continue to take an active role her the baby's upbringing. It was not disputed that the Appellant met the requirements of E-LTRPT.3.1. and E-LTRPT.3.2. (relating to the Appellant's immigration status).

37. In order to succeed under the immigration rules the Appellant must also show that paragraph EX.1. applies. For the purposes of this appeal the following parts of EX.1 are relevant:

> (a)
>
> > (i) the applicant has a genuine and subsisting parental relationship with a child who-
> >
> > > (aa) is under the age of 18 years, or was 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 the 7 years immediately preceding the date of application; and
> >
> > (ii) it would not be reasonable to expect the child to leave the UK;

38. It was not disputed that the requirements of EX.1(a) were met. Ms Brocklesby-Weller however submitted that it was reasonable for the child to leave the United Kingdom. This was so, in her submission, given the very young age of the child and the fact that the father could conceivably return to Vietnam (despite his unchallenged evidence that he would not return). With reference to the Family Migration guidance published in August 2015, and in particular 11.2.3, it was

submitted that this was designed to give effect to the **Zambrano** judgement and that the child could remain with his father.

39. Given the relevance of section 11.2.3 of the guidance I set it out in full.

> **11.2.3. Would it be unreasonable to expect a British Citizen child to leave the UK?**
>
> 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.
>
> The decision maker must consult the following guidance when assessing cases involving criminality:
>
> - Criminality Guidance in ECHR Cases (internal)
> - Criminality Guidance in ECHR Cases (external)
>
> 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 considerations 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.
>
> The circumstances envisaged could cover amongst others:
>
> - criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
> - a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.
>
> In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation. If the decision maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the Office of the Children's Champion on the implications for the welfare of the child, in order to inform the decision.

40. Although there is some force in Ms Brocklesby-Weller's submission relating to the underlying purpose of the guidance, the wording of the guidance is quite clear.

Where a decision to refuse an application would require a parent to return to a country outside the EU, the case must, according to the guidance, and save for certain circumstances, "… always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the EU with that parent."

41. The circumstances in which it would be appropriate to refuse to grant leave are not exhaustive but include, by way of example given in the guidance, criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules, or a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules. The Appellant has not engaged in any criminality. Nor am I satisfied that she has 'a very poor immigration history'. The Respondent accepted the Appellant's claim in full. The Appellant entered the United Kingdom as a 14 year old following arrangements made by her grandmother while in fear of a criminal gang. I find the policy expresses the Respondent's view of the best interests of the child and the relevant weight to attach to the public interest considerations. The policy indicates, in the view of the Secretary of State, where the public interest lies in circumstances where, in order to remain as a family unit, a parent, such as the Appellant, of a British citizen child is required to return to her own country. In relation to the factual matrix of the present appeal the policy tends towards a conclusion that there are no considerations of such weight as to justify separation between the Appellant and her child.

42. I am, in any event, satisfied for other reasons that it would be unreasonable to expect the child to leave the United Kingdom. It is clear the child has a genuine and subsisting relationship with his father. The father, who has ILR, has indicated he will not leave the United Kingdom. The genuineness of this assertion was not challenged. Given that the partner entered the United Kingdom as a minor and has remained here for over 13 years, his assertion is inherently reasonable. The removal of the child, even if only temporarily, would clearly have an adverse impact on the relationship between father and son. This is a matter of common sense, and is supported by the evidence that the Appellant's partner sees his child every weekend. It is undoubtedly in the child's best interests to remain with both his parents. I additionally take account of the child's status as a British citizen, entitling him by right to educational and medical services that he would be denied if he left the United Kingdom. I additionally take account of the fact that the Appellant herself is only 19 years old and has no network of support in Vietnam. In these circumstances she is likely to encounter difficulties in supporting herself and looking after her child, even if the father is able to remit funds, something that is clearly not in the child's best interests.

43. For all of the above reasons I am satisfied that it would not be reasonable for the British citizen child to leave the United Kingdom. I am consequently satisfied the Appellant succeeds in her appeal under R-LTRPT.

44. If however I am mistaken in my consideration under the immigration rules I will, as an alternative, consider whether she can succeed under Article 8 as a free-standing right.

45. Following a long line of authorities, including **R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720** (Admin), **Singh v Secretary of State for the Home Department [2015] EWCA Civ 74** and **SSHD v SS (Congo) [2015] EWCA Civ 387**, in order for the Appellant to succeed in her application for leave to remain outside the immigration rules I must be satisfied there are compelling circumstances not sufficiently recognised under those rules. As was stated in paragraph 44 of **SS (Congo)**, "*If there is a reasonably arguable case under Article 8 which has not already been sufficiently dealt with by consideration of the application under the substantive provisions of the Rules (cf Nagre, para. [30]), then in considering that case the individual interests of the applicant and others whose Article 8 rights are in issue should be balanced against the public interest, including as expressed in the Rules, in order to make an assessment whether refusal to grant LTR or LTE, as the case may be, is disproportionate and hence unlawful by virtue of section 6(1) of the HRA read with Article 8*." This is a fairly demanding test, reflecting the reasonable relationship between the rules themselves and the proper outcome of the application of Article 8 in the usual run of cases (para 44 of **SS (Congo)**).

46. I am additionally obliged to take into account Section 55 of the Borders, Citizens and Immigration Act 2009 which requires me to have regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. In **ZH (Tanzania) v SSHD [2011] UKSC 4** the Supreme Court held that, "*In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first*." What is required by consideration of the best interests of the child is an "*overall assessment*" and it follows that its nature and outcome must be reflected in the wider Article 8(2) proportionality assessment (**MK (best interests of child) India [2011] UKUT 00475)**. **E-A (Article 8 – best interests of child) Nigeria [2011] UKUT 315 (IAC)** indicated that the correct starting point in considering the welfare and best interests of a young child would be that it is in the best interests of a child to live with and be brought up by his or her parents. I take into account that GEN.1.1 of Appendix FM indicates that the Appendix takes into account the need to safeguard and promote the welfare of children in the UK in line with section 55, but I also note that in **JO and Others (section 55 duty) Nigeria [2014] UKUT 00517 (IAC)** it was stated that the duty imposed by section 55 requires the decision-maker to be properly informed of the position of a child affected by the discharge of an immigration etc function, that the decision-maker must conduct a careful examination of all relevant information and factors, and that the question whether the duties imposed by section 55 have been duly performed in any given case will invariably be an intensely fact sensitive and contextual one.

47. Having given careful consideration to the totality of the evidence before me I am satisfied that there are, on the particular facts of this case, compelling

circumstances sufficient to render the Appellant's removal disproportionate under Article 8.

48. I was not disputed at the hearing that the Appellant enjoys family life relationships with her partner and with her child. Nor was it disputed that the decision to remove her constitutes an interference with that right sufficient to attract the protection of Article 8. In finding the existence of compelling circumstances I take account of the Respondent's guidance, as outlined at paragraph 37 of this decision. The unambiguous wording of this guidance indicates that it would be unreasonable to expect the Appellant's British citizen child to leave the United Kingdom. This guidance, as with other policies of the Respondent, is not merely a material consideration to be taken into account by the decision-maker. Rather, given its clear terms, it triggers a duty to give effect to its terms, absent good reason for departure (e.g. **R (on the application of Semeda) v Secretary of State for the Home Department (statelessness; Pham [2-15] UKSC 19 applied) IJR [2015] UKUT 00658 (IAC)**. As such, the Respondent's failure to follow her own guidance has the effect of rendering the decision to remove unlawful such that it falls foul of the third question identified by Lord Bingham in **Regina v. Secretary of State for the Home Department (Appellant) ex parte Razgar (FC) (Respondent) Razgar [2004] UKHL 27** ('is such interference in accordance with the law?').

49. Even if the decision were lawful, I find the significant delay in making the asylum decision a relevant factor in my proportionality assessment. Even taking account the Appellant's kidnapping in 2011, the Respondent still took 3 years to make a decision in respect of her asylum claim. This must be considered in the context of a vulnerable minor. No reasonable explanation for this significant delay was proffered by the Presenting Officer. It was during the delay that the Appellant met her partner, an event that, in turn, led to the birth of her British citizen son. Had the delay not occurred, the Appellant would not have established the private life rights that form the backbone of this appeal. I find, applying **EB (Kosovo) [2008] UKHL 41**, that the significant and unexplained delay does reduce the public interest in the Appellant's removal.

50. I have additionally considered the public interest considerations in sections 117B of the Nationality, Immigration and Asylum Act 2002. I take account of the fact that the maintenance of effective immigration control is in the public interest. I note in respect of s117B(2) and s117B(3) that the Appellant has produced evidence of her proficiency in English, and that she does have qualifications, suggesting she would be able to seek employment as a hairdresser should she be given permission to do so. I remind myself however that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of their fluency in English, or the strength of their financial resources (**AM (S 117B) Malawi [2015] UKUT 0260 (IAC)**). For the reasons given above in paragraphs 40 to 42 I am satisfied it would be unreasonable for the child to leave to United Kingdom, a factor of relevance under section 117B(6).

51. Having holistic regard to all the aforementioned factors I am satisfied that there are compelling circumstances sufficient to support a claim for a grant of leave to remain outside the immigration rules and in accordance with Article 8.

Notice of Decision

The Appellant's appeal is allowed under the immigration rules and under Article 8 ECHR.

Direction Regarding Anonymity – Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

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

10 February 2016

Signed Date

Upper Tribunal Judge Blum