IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20252/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 21 January 2016	**On 1 March 2016**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TAMANNA BEGUM

Respondent

Representation:
For the Appellant: Mr D Clarke, Home Office Presenting Officer
For the Respondent: Mr R Hussain, Counsel instructed by Edward Alam & Associates

DECISION AND REASONS

1. The appellant in these proceedings is the Secretary of State. However, I refer to the parties as they were before the First-tier Tribunal ("FtT").

2. The appellant is a citizen of Bangladesh, born on 17 April 1996. She arrived in the UK with entry clearance as a visitor on 18 September 2013. She made an application on 20 February 2014 for leave to remain on Article 8 grounds. That application was refused in a decision dated 17 April 2014.

3. She appealed against that decision and her appeal came before First-tier Tribunal Judge O'Keefe on 4 June 2015 whereby she dismissed the appeal under the Immigration Rules but allowed it under Article 8 of the ECHR. The Secretary of State's appealed against the decision of the FtT is in terms of Article 8. There was no cross-appeal on behalf of the appellant in relation to the appeal having been dismissed under the Immigration Rules.

4. After a hearing in the Upper Tribunal on 17 November 2015, Deputy Upper Tribunal Judge Froom ("DUTJ Froom") found that the decision of the FtT involved the making of an error on a point of law. Its decision was set aside, for the decision to be re-made in the Upper Tribunal. The error of law decision by Judge Froom is annexed to my decision.

5. To put my decision into context, it is useful to set out the basis of the decision of the FtT and the grounds of appeal on behalf of the Secretary of State in relation to it.

6. The appellant gave evidence before the First-tier judge, as did her husband Mohammed Mamnun Ahmed. The judge concluded that the appellant did not meet the requirements of the Immigration Rules for leave to remain on the grounds of private or family life. At [12] she noted that it was not disputed that the appellant is married to a British citizen and that their relationship is genuine and subsisting. They have a child born on 2 October 2014, that child also being a British citizen. Again, she noted that it was not disputed that the appellant has a genuine and subsisting relationship with her son.

7. She referred to section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act") in terms of that child's best interests. She concluded that the evidence established that the appellant takes responsibility for the majority of her son's care and at that time was still breastfeeding. She found that it was in the child's best interests to be brought up by both his parents.

8. At [15] she concluded that the appellant's spouse and son, both being British citizens, could not be required to leave the UK. She referred to ss.117A-117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). She stated that it was not suggested before her that the appellant's spouse could not maintain his wife and child.

9. Although the appellant did not have an English language certificate from an approved provider, "she did provide evidence that she has some qualifications in English".

10. She found that the appellant having entered the UK as a visitor, her relationship with her husband was entered into "whilst her immigration status was precarious".

11. At [19] there is reference to the appellant having spent the majority of her life in Bangladesh, the judge concluding that she had no doubt that the

appellant maintains family and cultural ties to that country. She reminded herself that British citizenship of the appellant's son is not to be regarded as a trump card.

12. Noting however the "substantial benefits" for the child of citizenship, including access to free healthcare and education, she concluded that it was not reasonable to expect their son to follow the appellant to Bangladesh as he would be deprived of the right to grow up in the country of which he is a citizen. She also found that it was not in his best interests to be separated from his father. She concluded therefore, that the decision to remove the appellant is not proportionate.

13. The respondent's grounds asserted that the judge's conclusions fail to balance the public interest in removal in circumstances where the appellant cannot satisfy the Immigration Rules, against the appellant's rights. The judge had failed to explain why it would be unreasonable for the child to go with her mother to Bangladesh. The judge appeared to have taken the child's British citizenship as the only factor that determined proportionality. Similarly, the judge had not considered whether the appellant's husband could accompany them to Bangladesh.

14. Although there is reference to s.117B of the 2002 Act, the judge had failed to have regard to the substance of those provisions. The grounds refer to the decision in *AM S 117B) Malawi* [2015] UKUT 0260 (IAC).

15. It can be seen that in DUTJ Froom's decision he stated at [24] that the findings of fact made by Judge O'Keefe could stand, albeit that they may be built on by further evidence. Accordingly, I identified to the parties my view as to what findings of fact had been made by Judge O'Keefe. They were as follows:

    (i) The appellant does not meet the requirements of the Immigration Rules for leave to remain in terms of family or private life.

    (ii) The appellant is married to a British citizen and their relationship is genuine and subsisting.

    (iii) The appellant and her husband have a child who is also a British citizen and with whom the appellant also has a genuine and subsisting relationship.

    (iv) The appellant takes responsibility for the majority of her son's care, and at the time of the hearing she was still breastfeeding.

    (v) It is in the child's best interest to be brought up by both parents.

    (vi) It was not suggested that the appellant's spouse could not maintain his wife and child.

    (vii) The appellant did not have an English language certificate from an approved provider but she did provide evidence that she has some qualifications in English.

(viii) The appellant has spent the majority of her life in Bangladesh and she maintains family and cultural ties to that country.

16. Neither party expressed any disagreement with my identification of the findings of fact made by the FtT.

Submissions

17. Mr Hussain pointed out that the appellant's son is still only 15 months old. Both parents are his carers, although the primary carer is his mother, the appellant. Her husband works and is the main breadwinner. This is relevant to the disruption that would be involved in requiring the appellant to make an application for entry clearance from Bangladesh.

18. Mr Hussain produced a document in relation to visa application processing times from Dhaka, Bangladesh. It was pointed out that according to that document the majority (86%) of visa applications were decided within 30 days in terms of applications for settlement. After 60 days 100% of applications were processed. However, the 'note' to those processing times indicated that there is no guarantee as to when an application would be processed. The appellant's case is likely to be less straightforward and therefore the 60 day period is the more likely.

19. The First-tier Judge had concluded that there was no issue in relation to maintenance and although the appellant had not provided an English language test from an approved provider, she had provided evidence that she has some qualifications in English.

20. I enquired of Mr Hussain as to why the appellant had not taken a test from an approved provider. He accepted that she had not taken such a test, with the only explanation being proffered that it may be that her mind was "not focused sufficiently".

21. It was submitted that as at the date of her application for leave to remain she met all the requirements except in terms of having entered as a visitor. A fresh application for entry clearance would now meet all the requirements of the Rules except for the language requirement. The appellant would be able to obtain an approved language certificate.

22. So far as s.117B of the 2002 Act is concerned, that is not as prescriptive as the Rules in terms of the English language requirements. That was relevant to the issue of proportionality. As the First-tier Judge found, she does have some English language ability.

23. It was submitted that the question arises as to whether it was reasonable to expect her to leave her very young child for as long as at least 60 days. The 60 day period is only the 'processing' time. Further time would be needed in order to prepare the application, for example.

24. As to why her son could not go to Bangladesh with her whilst she made her application for entry clearance, he said that he had no information in terms of whether the child would be able to enter Bangladesh as a visitor or whether he would be able to obtain citizenship. In any event, that would involve some time delay because of the process involved.

25. It was submitted that the "whole premise" of '*Chen*' and '*Zambrano*' is that there would be some disruption but it would not be significant. In this case, the child would soon be in need of nursery and primary education. Certainly, he is not far away from the nursery education stage.

26. There would be emotional disruption to the appellant's husband and her son if she had to return to Bangladesh. It would require the appellant's husband to adopt the main caring responsibilities which would have an impact on his ability to work. The very circumstances which would enable a successful application to be made would thereby be put at risk, at the very least in terms of the number of hours he could work.

27. Mr Clarke referred to the decision in *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40. In that respect, the appellant would need to meet the entry clearance requirements before the principle applied. It is evident that the appellant would not be able to meet the English language requirements.

28. Reference was also made by Mr Clarke to the decision in *Secretary of State for the Home Department v SS (Congo)* [2015] EWCA Civ 387, in particular at [44] in terms of the public interest.

29. The 'parent route' requires the appellant to establish that she has sole responsibility for her child, and that is not asserted here.

30. Although British citizens cannot be required to leave the UK, it would have no effect on the child's Treaty rights if he left the UK with his mother for a short period of time pending the entry clearance application. The decision in *Damion Harrison (Jamaica) v Secretary of State for the Home Department* [2012] EWCA Civ 1736 at [63] was also relied on in this respect.

31. In terms of s.117B(6) and the reasonableness of the child leaving the UK, the child is not compelled to leave. Although s.55 is relevant to the proportionality assessment, the public interest needs to be considered in terms of financial independence, precarious immigration status and the proportionality involved in expecting the appellant to make an entry clearance application. The appellant came here as a visitor. Her son is still very young and would not be greatly affected by going to Bangladesh with his mother for a short period of time.

32. In reply, Mr Hussain submitted that *SS (Congo)* dealt with circumstances of leave to enter and leave to remain. The issue arises in terms of proportionality of the appellant returning to Bangladesh without her child.

If the child left the UK with the appellant, he would be denied all the rights and benefits of citizenship and also of his father's input as a carer. In effect, he would be forced to leave the UK if the appellant had to leave.

My assessment

33. It is accepted that the appellant is not able to meet the requirements of the Article 8 Immigration Rules. That is so, at the very least, in terms of the appellant's inability to meet the English language requirements of the Rules.

34. The fact that she entered the UK as a visitor meant that she could not meet the eligibility requirements for leave to remain as a partner. In addition, at the time of the application she was not 18 or over. She accordingly is not able to rely on section EX.1.

35. I have considered whether it could be said that there are circumstances not recognised within the Rules sufficient to require consideration for leave to remain outside the Rules. I am satisfied that there are, those circumstances including that the appellant has a very young son who is a British citizen and the question of potential separation of the appellant and her son, or the appellant and her son and her husband, a British citizen.

36. I adopt the structured approach set out in *R v Secretary of State for the Home Department ex parte Razgar* [2004] UKHL 27. It is accepted that the appellant has family life with her husband and child. The respondent's decision does amount to an interference with that family life on the basis of the appellant potentially being required to leave the UK on her own. That interference will have consequences of such gravity as potentially to engage the operation of Article 8. The decision is however, in accordance with the law and pursues a legitimate aim. The issue is one of proportionality.

37. The best interests of the appellant's son are a primary consideration. It is a preserved finding that it is in that child's best interests to be brought up by both his parents. That is an uncontroversial conclusion. However, I do not consider, for reasons explained more fully below, that the respondent's decision does in fact compromise that assessment of where the child's best interests lie, when one considers the issue of the appellant returning to Bangladesh to apply for entry clearance.

38. In *SS (Congo)* the Court of Appeal referred at [33] to the public interest factors which find expression in the Secretary of State's formulation of the Article 8 Immigration Rules. It is to be remembered that in this case, as pointed out in the error of law decision by DUTJ Froom, the appellant is not able to meet the requirements of the Article 8 Rules in more than one respect.

39. She came to the UK as a visitor and entered into an arranged marriage. She then became pregnant. Those are choices made by the appellant and her husband which are not choices which are the responsibility of the Secretary of State.

40. Furthermore, the appellant is not able to meet the English language requirement of the Rules. Mr Hussain was unable to explain to me when I enquired, as to why the appellant had not taken an approved English language test. He did however, submit that if she were to make an entry clearance application from Bangladesh, she would do so with the necessary English language qualification. The fact remains however, that she is not able to meet that requirement of the Rules. This is not a requirement of the Rules that is trifling or insignificant. That, as with the other requirements of the Rules, is an expression of the Secretary of State's view as to the importance of integration, a matter also reflected in s.117B of the 2002 Act.

41. Mr Hussain submitted that the provisions of s.117B(2) are less stringent than the requirements of the Rules. The Rules require language ability to be demonstrated with reference to an approved test. S.117B(2) states that it is in the public interest and in particular in the interests of the economic wellbeing of the UK, that persons who seek to enter or remain are able to speak English, because they are less of a burden on the taxpayers and are better able to integrate into society.

42. I do not agree however, that the statutory provisions in this regard involve any dilution of the requirements of the Rules in this respect. The Rules are an expression of the executive's judgement as to the *way* in which a person's English language ability, and thus their integration and the economic wellbeing of the country, are to be assessed. I accept that the First-tier Tribunal found that the appellant does have some English language ability. The fact remains however, that she is not able to meet the requirements of the Rules in this respect.

43. No submissions were made to me on the basis of *Chikwamba*. In that case, at [42] it was said as follows:

> "In an article 8 family case the prospective length and degree of family disruption involved in going abroad for an entry clearance certificate will always be highly relevant."

44. Mr Hussain produced evidence of visa processing times in a document with that title, apparently printed from the UK Visas (or its equivalent) website. The relevant part states that in relation to settlement visas most applications are processed within 60 days. There is then a table of processing times which states that 2% of applications are processed within ten days, 23% within fifteen days, 86% within 30 days and 100% within 60 days. A note to those times states that "actual processing times may vary depending on a range of factors".

45. Mr Hussain submitted that any application for entry clearance that the appellant might make is likely to be more involved than the usual application of this type. However, he did not advance any argument, or point to any evidence, in support of that contention. There is no basis from which to conclude that an application for entry clearance by the appellant as a spouse would take any longer than what could be described as a run-of-the-mill application of this type.

46. In the event that the appellant were to make an application for entry clearance from Bangladesh, it could reasonably be expected that it would be processed, as most applications are, within 60 days. If the appellant's son remained in the UK with his father, there would in my judgement be a relatively short period of disruption to the family unit. It is also to be remembered that the evidence accepted by the FtT was that both the appellant and her husband take responsibility for the care of their son, albeit that the appellant is the main carer.

47. It was submitted to me that if the appellant's husband was required to care for their son on his own, that would have some impact on his employment, at least in terms of the number of hours having to be reduced. I was told that certain documents in terms of the appellant's husband's financial circumstances were put before the First-tier Tribunal, albeit not in any bundle, and were not disputed. The FtT's decision makes no reference to any such documentary evidence. More importantly, there is no evidence before me of what employment he actually has, or what impact any reduction of hours may have on his earning ability. In addition, no evidence was advanced in terms of whether there is anyone else who could care for the child, perhaps a family member or friend. Similarly, there is no evidence before me to suggest that care could not be provided on a paid basis.

48. The submission therefore, that the appellant's child remaining in the UK would compromise the very basis upon which an application for entry clearance could be made in terms of the appellant's husband's financial circumstances, is unsupported by any evidence.

49. It is true that if her son remained in the UK the separation between her son and the appellant is likely to have some emotional impact on the appellant. The extent to which it would affect emotionally a child of that very young age is difficult to gauge, although it is reasonable to assume that it would have some effect, albeit not a lasting effect. Nevertheless, as I have indicated, the likelihood is that the period of separation would be very short.

50. Of course, it is important to bear in mind the British citizenship of the child. However, the contention that the child's rights as a British citizen would be compromised by the refusal of leave to remain has no discernible merit. On the evidence put before me, even if the appellant's son went with her to Bangladesh, he would only be out of the country for a relatively short period of time. He is not at a stage when he would require

even nursery education. No evidence was put before me to indicate that there are any issues in relation to his health. There is no basis upon which to conclude that he would need to be in the UK to access health services, apart from routine appointments.

51. Whilst during the period of making the entry clearance application he would be separated from his father, he would still be with his mother, the primary carer. Furthermore, there is no reason to suppose that the appellant's husband could not visit them pending the entry clearance application.

52. In addition, I bear in mind what is said at [63] of *Harrison* as follows:

> "I agree with Mr Beal QC, counsel for the Secretary of State, that there is really no basis for asserting that it is arguable in the light of the authorities that the *Zambrano* principle extends to cover anything short of a situation where the EU citizen is forced to leave the territory of the EU. If the EU citizen, be it child or wife, would not in practice be compelled to leave the country if the non-EU family member were to be refused the right of residence, there is in my view nothing in these authorities to suggest that EU law is engaged. Article 8 Convention rights may then come into the picture to protect family life as the Court recognised in *Dereci*, but that is an entirely distinct area of protection."

53. I am prepared to accept, with reference to s.117B(3), that the appellant is financially independent, that being a matter that was accepted by the FtT.

54. However, the maintenance of effective immigration controls is in the public interest, a matter that is of significance in the proportionality assessment, and as reflected at s.117B(1) of the 2002 Act.

55. Furthermore, whilst the appellant did not establish her relationship with her husband whilst she was in the United Kingdom unlawfully, as previously indicated both she and he knew that she was in the UK with permission to remain on a temporary basis only.

56. So far as s.117B(6)(b) is concerned, whilst the appellant does have a genuine and subsisting parental relationship with a qualifying child, for the reasons already explained I am not satisfied that it could be said that it was not reasonable to expect the appellant's child to leave the UK with the appellant pending the entry clearance application.

57. In any event, also for reasons already given, I do not accept that there is any expectation that the appellant's son should leave the UK with the appellant.

58. In summary, I am satisfied that the respondent has established that the decision is a proportionate response to the legitimate aim of the economic wellbeing of the country expressed through the maintenance of effective immigration controls. Accordingly, this appeal is dismissed.

Decision

59. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision having been set aside, I re-make the decision, dismissing the appeal under the Immigration Rules and under Article 8 of the ECHR.

Upper Tribunal Judge Kopieczek 25/02/16

ERROR OF LAW DECISION

S-T

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20252/2014

THE IMMIGRATION ACTS

Heard at Field House
On 17 November 2015

Decision Promulgated

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Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TAMANNA BEGUM
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Ms R Akther, Counsel

DECISION AND REASONS

1. The respondent to this appeal is a citizen of Bangladesh born on 17 April 1996. The appellant is the Secretary of State for the Home Department, who has appealed with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal O'Keefe, allowing the respondent's appeal against a decision of the Secretary of State made on 17 April 2014 outside the rules on article 8 grounds. The appellant

conceded she could not meet the requirements of Appendix FM of the rules.

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal. I shall therefore refer to Ms Begum from now on as "the appellant" and the Secretary of State as "the respondent".

3. The appellant entered the UK as a visitor on 18 September 2013 but on 22 August 2013 she applied for leave as the spouse of Mr Mohammed Mamnun Ahmed, a British citizen born on 29 July 1986 ("the sponsor") by filing form FLR(M). The respondent refused the application for a number of reasons, including that the appellant was under the age of 18 at the date of application and her English language test certificate was not from an approved provider. By the date of the hearing of the appeal, the appellant had given birth to her son, born on 2 October 2014.

4. The judge directed herself that the appellant did not meet the requirements of the rules for leave on the grounds of her private or family life. "*The issue for me is whether there are circumstances not envisaged in the Immigration Rules in order to justify a grant of leave to remain outside the Rules. In order to decide that question I consider the 5 questions set out in Razgar [2004] UKHL 27. [The presenting officer] made no submissions in support of the decision to refuse the application; his submissions were limited solely to whether or not I should made a fee award in this case*" [11].

5. The judge found it was common ground that the appellant and the sponsor were in a genuine and subsisting relationship and that their child was British. The judge found it was in the child's best interests to be brought up by both his parents. His British citizenship had a value to be taken into account when assessing his best interests (*ZH (Tanzania) v SSHD* [2011] UKSC 4). Applying section 117B of the 2002 Act, the judge noted that it was not suggested the sponsor could not support the appellant and the child. The appellant did not provide a satisfactory English language test certificate but there was evidence she had some qualifications in English. The appellant's immigration status was "precarious" when she entered a relationship with the sponsor (*AM (S117B) Malawi* [2015] UKUT 00260 (IAC)). The judge then referred to section 117B(6) of the 2002 Act and *FV (Philippines) v SSHD* [2014] EWCA Civ 874. She concluded as follows [19]:

> "I take into account that the appellant has spent the majority of her life in Bangladesh and I have no doubt that she maintains family and cultural ties to that country. I remind myself that the British citizenship of the child in this case is not to be regarded as a trump card. Citizenship does however carry substantial benefits for this young child particularly access to free health care via the NHS and education. On the facts of this case I find that it is not reasonable to expect this child to follow his mother to Bangladesh as he will be deprived of the right to grow up in the country of which he is a citizen. I find that it is not in his best interests to be separated from his father. Considering the evidence as a whole, I find that the decision to remove the appellant is not proportionate."

6. The respondent applied for permission to appeal on the basis that the judge had failed to give adequate reasons on two areas. Firstly, she had not adequately explained why the child's best interests outweighed the public interest in removing the appellant, who had not met the requirements of the rules. Secondly, the judge had failed to engage with the impact of section 117B when assessing the public interest.

7. The First-tier Tribunal granted permission to appeal because it was arguable the judge erred by failing to take into consideration the possibility of the appellant returning to Bangladesh to make an application for entry clearance (*R (on the application of Chen) v SSHD (Appendix FM* – Chikwamba – *temporary separation) IJR* [2015] UKUT 00189 (IAC)). No findings were made about the appellant's ability to meet the maintenance requirements of the rules.

8. I heard submissions on whether the judge made a material error of law.

9. Mr Tufan argued the judge erred by failing to make a finding that there were compelling circumstances justifying a grant of leave outside the rules on article 8 grounds. He relied on *Singh & Khalid v SSHD* [2015] EWCA Civ 74 and *SSHD v SS (Congo)* [2015] EWCA Civ 387. This was a case of "precarious family life". The judge had allowed the appeal because the child was British and she did not consider whether family life could be continued in Bangladesh. Alternatively, the judge had not applied section 117B of the 2002 Act. In particular, in relation to subsection (6), she had not adequately assessed whether it was reasonable for he child to leave the UK. Finally, he argued the judge had not considered the possibility of the appellant returning with entry clearance in line with *Chen*. Mr Tufan acknowledged the presenting officer did not appear to have contested the appeal but he said that no concessions had been made and the judge was not absolved from making a lawful decision.

10. Ms Akther's answer to all Mr Tufan's points was that the judge had to allow the appeal because the appellant benefited from the principle established in the CJEU decision in *Ruiz Zambrano [2011] EUECJ (C-34/09).* The Grand Chamber of the CJEU in *Zambrano* held as follows:

> "45. Accordingly, the answer to the question referred is that art 20 TFEU is to be interpreted as meaning that it precludes a member state from refusing a third country national upon which his minor children, who are European Union citizens, are dependent, a right of residence in the member state of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizens."

11. Ms Akther relied on *Sanade and others (British children – Zambrano – Dereci)* [2012] UKUT 00048 (IAC) as authority for the proposition that, as the child is British, it was not possible to require the family unit to relocate outside the EU or for the respondent to submit that it was reasonable for them to do so. She said that principle had been "upheld" in *AQ (Nigeria) &*

Ors v SSHD [2015] EWCA Civ 250. She referred me to passage from the submissions made in that case.

12. Ms Akther went on to argue that the judge was entitled to go to a second stage assessment of article 8 because the fact the appellant had a British child was a very important factor. In terms of proportionality, the judge had taken into account that the child was very young and still breast-feeding. She applied *ZH (Tanzania) v SSHD* [2011] UKSC 4. She had considered section 117B with care.

13. Mr Tufan replied that the judge had not applied *SS (Congo)* and shown that she recognised the weight which had to be given to the rules. There were clear material errors in the decision.

14. I reserved my decision on whether the decision is vitiated by error of law.

15. The judge has been criticised in submissions for a failure to identify compelling circumstances so as to justify considering article 8 outside the rules. However, that was not the basis on which the respondent sought permission to appeal or the basis on which permission to appeal was granted. I do not see any reason to widen the grant of permission at this stage and the judge's self-direction in paragraph 11 is, on the face of it, adequate.

16. As noted, Ms Akther rested her case on the application of the *Zambrano* principle, which was not argued before the First-tier Tribunal at all. It is plain the judge rested her decision on a pure proportionality assessment, giving considerable weight to the best interests of the child. I see no reason to admit this issue to the appeal at this late stage either. However, were it necessary to decide the point, I would point out that *AQ (Nigeria)* did not, in fact, approve *Sanade* or the Secretary of State's concession in deportation cases, as recorded in those cases. At paragraph 64 Pitchford LJ expressly declined to decide the point. In the recent case of *Ayinde and Thinjom (Carers – Reg.15A – Zambrano)* [2015] UKUT 00560 (IAC) the Upper Tribunal considered the leading European and domestic authorities and reiterated that the *Zambrano* principle only applies in situations in which the EU citizen is forced to leave the territory of the EU. There was no test of reasonableness and the test was not whether there would be a reduction of quality of life or standard of living. The judge in this appeal made no findings on the question of whether the child would be forced to leave the EU and therefore be deprived of his rights of an EU national because she was not asked to. Given the appellant's father is also British and could remain in the UK, it was likely the *Zambrano* point would not assist this appellant.

17. In my judgment, the appeal turns on the adequacy of the judge's approach to the task of conducting a proportionality balancing exercise. In that respect, paragraph 33 of *SS (Congo)* is important because what is missing from the judge's decision is any recognition that the rules were more than a starting-point and that the judge needed to show in her decision that she

recognized that she had to give *"appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM."*

18. The context is important. The appellant gained entry to the UK as a visitor and shortly afterwards entered into marriage. According to the statements, this was an arranged marriage. She was not eligible under the five-year partner route provided in Appendix FM because she only had leave as a visitor. She also failed under that route by reference to the English language test requirement and the minimum age requirement. She failed under the ten-year route as well. Paragraph EX.1 was not available to her because she failed the minimum age requirement. In other words, the appellant sought to extend her leave, as she was entitled to do, but she could not meet the requirements of the published rules by a clear margin. This would have been apparent to her and those advising her.

19. By the date of the appeal hearing she had turned 18 but she could still not show she met the rules because paragraph E-LTRP.1.4 required her to have been over 18 at the date of application. Moreover, the appellant had not apparently taken steps to comply with the English language rule as no such evidence has been filed to date. I agree with Mr Tufan that this case can be properly characterised as "precarious family life" in the sense that the appellant and her partner formed a new relationship while the appellant was in the UK temporarily and they planned to establish family life here in the knowledge this would only be possible if Appendix FM were met.

20. In these circumstances, the judge was required to note, not only that the rules were not met, but also to assess the force of the public interest given expression in those rules. This is a vital ingredient in the balancing exercise, particularly where there is a comparatively narrow gap between the rules and what article 8 requires, as must be the case here. This factor appears to be altogether absent from the judge's consideration of reasonableness. In my view, the judge in this appeal has missed this out of her assessment and her decision is therefore fatally flawed.

21. I would also note that, whilst she directed herself that the child's best interests were not a 'trump card', it is difficult to find within this decision any factor which applied in addition to the fact the child was British.

22. I set aside the decision of the First-tier Tribunal.

23. Ms Akther argued that, if the decision were set aside, further findings of fact would be required. I was initially unpersuaded that this would be necessary. However, on further reflection, it is clear that an assessment of the application of the *Chen* (*Chikwamba*) point, which was not apparently raised at the previous hearing, will require investigation of the degree of disruption to family life which would be caused by the appellant returning to Bangladesh to seek entry clearance as a partner and whether there was a "sensible reason" to require her to do so. Whilst the Tribunal is not

required to speculate about the appellant's prospects of success in any further application, as the judge granting permission to appeal pointed out, there is no analysis of the appellant's ability to meet the financial requirements of Appendix FM.

24. As no interpreter had been provided it was not possible to hear evidence even though the appellant and her partner were in attendance. The appeal must therefore be adjourned for a continuance hearing in the Upper Tribunal. Judge O'Keefe's findings of fact (as opposed to her conclusions on the law) can stand but they may be built on by further evidence on the points identified above. The Tribunal will be assessing the circumstances as at the date of hearing. The following directions will assist:

DIRECTIONS

(a) The parties may file and serve additional evidence no later than 10 days before the hearing;

(b) Witness statements should stand as evidence in chief;

(c) The Tribunal will expect to see evidence of waiting times for entry clearance applications in Dhaka;

(d) A Bengali (Sylheti) interpreter will be provided.

NOTICE OF DECISION

The Judge of the First-tier Tribunal made a material error of law and her decision allowing the appeal is set aside. The appeal is adjourned for a further hearing in order to decide on the correct disposal of the appeal.

Signed **Date 18 November 2015**

Judge Froom,
sitting as a Deputy Judge of the Upper Tribunal