**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: IA/34337/2015**

**THE IMMIGRATION ACTS**

| **Heard at Bradford** | **Decision & Reasons Promulgated** |
|---|---|
| **On 26 October 2017** | **On 24 November 2017** |

**Before**

**UPPER TRIBUNAL JUDGE LANE**

**Between**

**MOHAMMAD SAQIB**
(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms Chaudhry, instructed by Whitefield Solicitors
For the Respondent: Mrs Pettersen, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant, Mohammad Saqib, was born on 29 March 1988 and is a male citizen of Pakistan. He entered the United Kingdom in 2011 with entry clearance as a student. In 2014, he married a Ms Zelma but their marriage was annulled on 2 July 2015. Subsequently, having commenced a relationship with a Ms Shahzadi, he made an application for leave to remain outside the Immigration Rules. A decision was made on 29 October 2015 refusing that application. The appellant appealed to the First-tier Tribunal (Judge Rosemary Bradshaw) which, in a decision promulgated on 6 January 2017, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. The couple had married on 13 September 2016. They have a child (S) who was born in June 2016. Both S and Ms Shahzadi are British citizens. The judge accepted that the appellant and Ms Shahzadi are in a genuine and subsisting relationship. She concluded that it would not be unreasonable to expect "such a young child to leave the UK with his mother and father." [38].

3. At Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (as amended) provides:

> In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

4. A qualifying child is a child who has been living in the United Kingdom for at least seven years or who is a British child. Prior to the enactment of Section 117B6, the Upper Tribunal in *Sanade and others* (British children - Zambrano - Dereci) [2012] UKUT 00048(IAC) had found as follows:

> 6. *Where in the context of Article 8 one parent ("the remaining parent") of a British citizen child is also a British citizen (or cannot be removed as a family member or in their own right), the removal of the other parent does not mean that either the child or the remaining parent will be required to leave, thereby infringing the Zambrano principle, see C-256/11 Murat Dereci. The critical question is whether the child is dependent on the parent being removed for the exercise of his Union right of residence and whether removal of that parent will deprive the child of the effective exercise of residence in the United Kingdom or elsewhere in the Union.*

5. The judgment in *Sanade* has been that qualified by statute law in the form of Section 117B(6). Section 117B(6) makes no distinction between a qualifying child who is not a British citizen and a British child; accordingly, it must follow that it may be reasonable to require a British child to leave the EU in circumstances where an adult with whom he or she has a genuine and subsisting relationship is to be removed outside the EU.

6. The Secretary of State has issued guidance for its own officers (Immigration Directorate Instruction) which concern the application of Section 117 and to which the Tribunal referred in the case of *SF and Others (guidance, post-2014 Act) Albania* [2017] UKUT 00120 (IAC) at [7]:

> Mr Wilding, however, has with the fairness which Presenting Officers always attempt to apply, drawn our attention to an important guidance document. It is the Immigration Directorate Instruction - Family Migration - Appendix FM, Section 1.0(B) "Family Life as a Partner or Parent and Private Life, 10 year Routes". It is the edition of August 2015 and therefore not in force at the date of the decision under appeal, but it

was in force at the date of the First-tier Tribunal hearing and decision, and is still in force. It contains important guidance about the following topic at 11.2.3: Would it be unreasonable to expect a British Citizen Child to leave the UK? We will set out the relevant parts, they are as follows:

"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.

...

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."

We were not specifically referred to any other part of this document and we do not need to set any more out.

7. The second paragraph of the guidance quoted by the Tribunal in *SF* appears to be unequivocal. In particular, it makes no distinction between families where the non-EU national is to be removed is in a genuine and subsisting relationship with the child and other parent or circumstances (as in *ZH (Tanzania) [2011] 2 AC 166*) where the family has already split up whilst in the United Kingdom. The guidance makes no distinction between a scenario whereby, for example, a father who has only contact with a child but does not live with him or her is to be removed and where the family members (including a British child) are living as a unit in the United Kingdom. It does not indicate that the British child will be "leaving the EU" solely with the non-British parent or primary carer and leaving any other parent or carer behind. The ordinary meaning of the words must encompass both a scenario in which a British child leaves with the non-British parent and one in which he or she leaves with a non-British parent and also the other parent, whether or British or non-British; the focus in the guidance is entirely upon the British citizen child.

8. Given that this is the unequivocal statement of the Secretary of State's position then, for the reasons given by the Tribunal in *SF*, it is very important that the Tribunal should have regard to it. The Tribunal in *SF* at [12] does recognise that the Tribunal may find a reason for departing for such guidance, for example where it has received more information about the circumstances of the appellant than the Secretary of State or where a case is "exceptional". The present appeal is not such a case. It follows, therefore, that Judge Bradshaw should have been made aware of the guidance by the Presenting Officer, Mrs Brewer and that she should have followed "normal practice" by taking "such guidance into account and [applying] it in assessing the same consideration" in the present appeal. It is unclear whether or not the guidance was brought to the judge's attention but it would appear that this was not so given the submissions of Mrs Brewer as recorded in the judge's decision. I do not consider that it was open to Mrs Brewer to depart from an unequivocal statement of policy on the part of the Secretary of State. Not surprisingly, the guidance has been raised by the appellant on appeal to the Upper Tribunal. Whilst the grounds in respect of *Sanade* do not have merit for the reasons which I have given above, it is difficult to see how this appeal, given the accepted facts, should have been dismissed by the First-tier Tribunal. In the circumstances, I set aside the First-tier Tribunal's decision and remake the decision allowing the appeal on human rights grounds (Article 8 ECHR).

**Notice of Decision**

The decision of the First-tier Tribunal promulgated on 6 January 2017 is set aside. The Upper Tribunal has remade the decision. The appeal of the appellant against the decision of the Secretary of State dated 29 October 2015 is allowed on human rights grounds (Article 8 ECHR).

No anonymity direction is made.

Signed date 22 November 2017

Upper Tribunal Judge Lane

**TO THE RESPONDENT**
**FEE AWARD**

No fee is paid or payable and therefore there can be no fee award.

Signed Date 22 November 2017

Upper Tribunal Judge Lane