Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03856/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 January 2020	**On 28 February 2020**

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE KEBEDE

Between

TUAN [N]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Dhanji, Counsel, instructed by Haris Ali Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

A. THE APPELLANT'S HUMAN RIGHTS CLAIM

1. The appellant is a citizen of Vietnam, born in 1988. He claims to have entered the United Kingdom illegally in May 2014, via Dover. On 16 June 2016, he made an application for leave to remain. The appellant contended that he resided in the United Kingdom with his British partner, Dung [N], and had done so since July 2014. The appellant said that he and his partner had a child, who is a British citizen, born on 30 December 2015.

2. On 15 February 2017, the respondent refused the appellant's human rights claim. The respondent did not accept that the appellant's relationship with his partner was genuine and subsisting. Although the appellant said he had resided in the United Kingdom with his partner in a relationship akin to marriage since July 2014, the respondent considered the appellant had failed to provide sufficient evidence to demonstrate that assertion. Furthermore, the appellant had not shown that he had been living together with the partner for at least two years prior to the date of application, contrary to GEN.1.2. of Appendix FM to the Immigration Rules.

3. The respondent also considered that the appellant had failed to provide sufficient evidence to demonstrate that he had a genuine and subsisting parental relationship with the child or that he played an active role in her upbringing. The respondent said that the appellant had not explained why he would not be available at any time to look after the child, who was being looked after by a childminder, under an arrangement with the mother. There was no indication that the appellant had been present during healthcare visits relating to the child. In any event, if the appellant had to leave the United Kingdom, there was nothing to indicate that the child will also have to do so.

B. THE DECISION OF THE FIRST-TIER TRIBUNAL

4. The appellant appealed to the First-tier Tribunal against the refusal of his human rights claim. The appeal was heard at Taylor House in April 2018 by First-tier Tribunal Judge Rodger. On that occasion, the appellant was represented by Counsel. No Presenting Officer was present on behalf of the respondent.

5. The judge noted a DNA report, which showed that there was no realistic doubt that the appellant was the father of the child. The appellant attended and gave oral evidence, as did his partner. The child was also present.

6. The appellant told the First-tier Tribunal Judge that they had had to get a childminder "as he did not feel able to cope with the duties of looking after a young child". The appellant's partner said that she came to the United Kingdom in 2002. Her daughter was a British citizen. The partner produced her passport, showing that she had visited Vietnam in 2012, 2015, 2016 and twice in 2017. She nevertheless felt that she could not live there anymore. The weather made her feel sick.

7. Having set out the relevant caselaw, the First-tier Tribunal Judge proceeded to a consideration of the evidence. The judge concluded that the appellant was the father of the child and that he did, in fact, have a genuine and subsisting relationship with her. This was evidenced by the DNA report of 13 March 2018, as well as being evident "from seeing the appellant and the young child" at court.

8. Although the appellant's partner had been granted asylum, there was no evidence that she had suffered any difficulties on return to Vietnam, such that it would be unreasonable or unsafe to expect her to return, if the appellant were removed.

9. Turning to the position of the child, the judge was satisfied that it was in her best interests to remain in the care of both her parents. Given her young age and that she was fully dependent on her parents, the judge concluded that it would not be adverse to her best interests for her to leave the United Kingdom in order to join her family in Vietnam. On the contrary, it was reasonable to expect her to do so. The parents had a choice of whether the family unit would join the appellant in Vietnam. The "fact of British citizenship is not a trump card", the judge found, although it was "an important and weighty factor to be taken into consideration". The judge reiterated that the best interests of the child were to remain with her parents. Both had ties to Vietnam and a knowledge of Vietnamese culture.

10. At paragraph 49 of her decision, the judge began an assessment by reference to Part 5A of the Nationality, Immigration and Asylum Act 2002. The judge held that, pursuant to section 117B, the appellant's relationship with his partner was established at a time when he was in the United Kingdom unlawfully. Little weight, therefore, fell to be attached to that relationship. The judge made no reference to section 117B(6), in which it is stated that in a case of a person who is not liable to deportation, the public interest does not require the person's removal where he/she has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. It is, however, apparent from what we have recorded at paragraph 9 above that the judge would not have found section 117B(6) assisted the appellant.

11. The judge applied Chikwamba v Secretary of State for the Home Department [2008] UKHL 40. The judge found that the appellant could not show that it would cause undue hardship or be disproportionate to expect the appellant to return to Vietnam to make an application for entry clearance, if his family chose not to accompany him to that country. Having considered all the relevant circumstances, the judge was not satisfied that the appellant had proved "that any temporary separation will interfere disproportionately with his protected rights or that of others. His partner can still work and can arrange for alternative childcare in the UK and she can choose whether to accompany the appellant whilst he makes the application to join them" (paragraph 59).

12. The judge dismissed the human rights appeal.

C. SUBSEQUENT EVENTS

13. Permission to appeal against the First-tier Tribunal Judge's decision was sought by the appellant's solicitors in May 2018. The grounds, which the solicitors compiled, submitted that the judge's findings as to ties with Vietnam were characterised by speculation and failed to give any weight to the sponsor's evidence as to why she had returned regularly to Vietnam. It was submitted that, cumulatively, the factors tipped the balance in favour of the appellant. The relevant factors included the genuine relationships between the appellant and his daughter and partner.

14. Permission to appeal was refused by the First-tier Tribunal in August 2018. The First-tier Tribunal noted that the grounds of appeal themselves described the First-tier Tribunal Judge's decision as "carefully crafted". The First-tier Tribunal agreed, concluding that the First-tier Tribunal Judge's findings were clearly open to her.

15. A renewed application was made to the Upper Tribunal for permission to appeal. The grounds were, in essence, the same as those put to and rejected by the First-tier Tribunal.

16. In refusing permission to appeal, the Upper Tribunal Judge stated that the First-tier Tribunal Judge had considered the evidence with the required degree of anxious scrutiny. The grounds of challenge failed to establish that the findings of the judge were in any way irrational or contrary to the evidence. They were within the range of those reasonably open to the judge on the evidence.

17. The appellant sought a judicial review of the Upper Tribunal's refusal to grant permission to appeal. In these grounds, for the first time, the appellant raised the issue of the respondent's policy: Family Life (as a Partner or Parent) and Private Life (22 February 2018). This was the policy in force at the date of the hearing before the First-tier Tribunal Judge. In it, we find the following:-

> "Would it be reasonable to expect the child to leave the UK?"
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> If the effect of refusal of the application would be, or is likely to be, that the child would have to leave the UK, the decision-maker must go on to consider whether it would be reasonable to expect the child to leave the UK.
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> …
>
> **Where the child is a British citizen**
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> Where the child is a British citizen, it would not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly, where this means that the child would have to leave the UK because, in practice, the child will not, or is not likely to, continue to live in the UK with another parent or primary carer, EX.1.(a) is likely to apply.
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> In particular circumstances, it may be appropriate to refuse to grant leave to a parent or primary carer where their conduct gives rise to public interest considerations of such weight as to justify their removal, where the British citizen child could remain in the UK with another parent or alternative primary carer, who is a British citizen or settled in the UK or who has or has been granted leave to remain. The circumstances envisaged include those in which to grant leave could undermine our immigration controls, for example the applicant has committed significant or persistent criminal offences falling below the thresholds of deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules…"

18. On 8 February 2019, the High Court granted permission to bring judicial review. The High Court's observations were as follows:-

> "(1) It is at least arguable that the First-tier Tribunal made an error of law in failing to take into account the Secretary of State's policy that it would not be reasonable to expect the child who is a British citizen to leave the UK together with the claimant, and that such error infected the Tribunal's consideration of the arguments under Article 8 ECHR.
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> (2) While the point was not properly taken before the Upper Tribunal, it is arguable that permission to appeal should have been granted.
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> (3) There is a compelling reason to grant permission to apply for judicial review given the extremity of the consequences of refusal upon the claimant and his family."

19. Subsequent to the grant of permission, the Upper Tribunal's refusal of permission to appeal was quashed.

20. Following the proceedings in the High Court, the Vice President of the Upper Tribunal (Immigration and Asylum Chamber) granted permission to appeal, by reference to the grounds of application placed before the Upper Tribunal. These grounds, of course, did not raise any issue concerning the respondent's policy.

D. PROCEEDINGS BEFORE THE UPPER TRIBUNAL

21. At the hearing before the Upper Tribunal on 31 October 2019, Mr Wilford of Counsel appeared on behalf of the appellant. After hearing his submissions, and those of Mr Bramble for the respondent, the Upper Tribunal concluded that it was appropriate to grant the appellant permission to amend his grounds of appeal, in order to enable the Tribunal to consider the obligation on a judge to have regard to a published policy of the respondent, which has not been drawn to the judge's attention.

22. The amendment to the grounds was in the following terms:-

> "In the particular circumstances of this case, it was an error of law by the First-tier Tribunal to fail to take into account a policy not relied by the appellant and not produced by the Secretary of State.
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> That error of law means that the decision of the First-tier Tribunal should be set aside because, if the judge had not made that error, the outcome of the appeal might have been different and the decision in the appeal ought to be re-made in the appellant's favour because, notwithstanding any change in the relevant policy and/or clarification of the law, it would be disproportionate to require the appellant to leave the United Kingdom."

23. The present relevant policy is contained in Family life (as a Partner or Parent), Private Life and Exceptional Circumstances) Version 5.0:

> "Is it reasonable for the child to leave the UK?

Where you decide that the answer to this first stage is yes –there is a genuine and subsisting relationship to a child, then they (sic) must go on to consider secondly, whether, taking into account the child's best interests as a primary consideration, it is reasonable to expect the child to leave the UK. In doing so you must carefully consider all the information provided by the applicant, together with any other relevant factor and information of which you are aware.

In accordance with the findings in the case of AB Jamaica (Secretary of State for the Home Department v AB (Jamaica) & Anor [2019] EWCA Civ 661), consideration of whether it is reasonable to expect a child to leave the UK must be undertaken regardless of whether the child is actually expected to leave the UK.

The starting point is that we would not normally expect a qualifying child to leave the UK. It is normally in a child's best interest for the whole family to remain together, which means if the child is not expected to leave, then the parent or parents or primary carer of the child will also not be expected to leave the UK.

In the caselaw of KO and Others 2018 UKSC53, with particular reference to the case of NS (Sri Lanka), the Supreme Court found that "reasonableness" is to be considered in the real-world context in which the child finds themselves. The parents' immigration status is a relevant fact to establish that context. The determination sets out that if a child's parents are both expected to leave the UK, the child is normally expected to leave with them, unless there is evidence that that it would not be reasonable.

This assessment must take into account the child's best interests as a primary consideration.

You must carefully consider all the relevant points raised in the application and carefully assess any evidence provided. Decisions must not be taken simply on the basis of the application's assertions about the child, but rather on the basis of an examination of all the evidence provided. All relevant factors need to be assessed in the round.

There may be some specific circumstances where it would be reasonable to expect the qualifying child to leave the UK with the parent(s). In deciding such cases you must consider the best interests of the child and the facts relating to the family as a whole. You should also consider any specific issues raised by the family or by, or on behalf of the child (or other children in the family).

It may be reasonable for a qualifying child to leave the UK with the parent or primary carer where for example:

- the parent or parents, or child, are a citizen of the country and so able to enjoy the full rights of being a citizen in that country

- there is nothing in any country specific information, including as contained in relevant country information which suggests that relocation would be unreasonable

- the parent or parents or child have existing family, social, or cultural ties with the country and if there are wider family or relationships with friends or community overseas that can provide support:

- you must consider the extent to which the child is dependent on or requires support from wider family members in the UK in important areas of their life and how a transition to similar support overseas would affect them
- a person who has extended family or a network of friends in the country should be able to rely on them for support to help (re)integrate there
- parent or parents or a child who have lived in or visited the country before for periods of more than a few weeks. should be better able to adapt, or the parent or parents would be able to support the child in adapting, to life in the country
- you must consider any evidence of exposure to, and the level of understanding of, the cultural norms of the country
- for example, a period of time spent living amongst a diaspora from the country may give a child an awareness of the culture of the country
- the parents or child can speak, read and write in a language of that country, or are likely to achieve this within a reasonable time period
- fluency is not required –an ability to communicate competently with sympathetic interlocutors would normally suffice

- removal would not give rise to a significant risk to the child's health
- there are no other specific factors raised by or on behalf of the child

The parents' situation is a relevant fact to consider in deciding whether they themselves and therefore, their child is expected to leave the UK. Where both parents are expected to leave the UK, the natural expectation is that the child would go with them and leave the UK, and that expectation would be reasonable unless there are factors or evidence that means it would not be reasonable."

E. DISCUSSION

24. For the appellant, Mr Dhanji relied heavily upon the Upper Tribunal decision in SF and Others (Guidance, post-2014 Act) Albania [2017] UKUT 120 (IAC). The italic words preceding the reported decision read as follows:-

> *"Even in the absence of a "not in accordance with the law" ground of appeal, the Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal."*

25. In SF, the First-tier Tribunal Judge had not been persuaded that the child of the appellant and his partner was a British citizen. Before the Upper Tribunal, it was

common ground that the First-tier Tribunal Judge's decision on that issue was wrong. The child was British.

26. At paragraph 7 of the Upper Tribunal's decision, it was recorded that Mr Wilding, the Senior Presenting Officer appearing before the Upper Tribunal, drew its attention to an important guidance document. This was the Instruction entitled "Family life (as a Partner or Parent) and Private Life: 10 Year Routes", from the edition of August 2015. It was a policy in force at the date of the First-tier Tribunal hearing and decision.

27. The policy stated that, where a decision to refuse an 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".

28. The Upper Tribunal concluded as follows:-

> "9. It appears to us inevitable that if the guidance to which Mr Wilding has drawn our attention had been applied to the present family, at any time after it was published, and on the basis that the youngest child is a British citizen, the conclusion would have been that the appellants should have been granted a period of leave in order to enable the British citizen child to remain in the United Kingdom with them. The question is then whether that guidance as guidance has any impact on the First-tier Tribunal or on us.
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> 10. It is clear that the appellants do not have available to them a ground of appeal on the basis that the decision was not in accordance with the law such as before the amendments made to the 2002 Act by the 2014 Act they might have had. Nevertheless it appears to us that the terms of the guidance are an important source of the Secretary of State's view of what is to be regarded as reasonable in the circumstances, and it is important in our judgement for the Tribunal at both levels to make decisions which are, as far as possible, consistent with decisions made in other areas of the process of immigration control.
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> 11. If the Secretary of State makes a decision in a person's favour on the basis of guidance of this sort, there can of course be no appeal, and the result will be that the decision falls below the radar of consideration by a Tribunal. It is only possible for Tribunals to make decisions on matters such as reasonableness consistently with those that are being made in favour of individuals by the Secretary of State if the Tribunal applies similar or identical processes to those employed by the Secretary of State.
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> 12. On occasion, perhaps where it has more information than the Secretary of State had or might have had, or perhaps if a case is exceptional, the Tribunal may find a reason for departing from such guidance. But where there is clear guidance which covers a case where an assessment has to be made, and where the guidance clearly demonstrates what the outcome of the assessment would have been made by the Secretary of State, it would, we think, be the normal practice for the Tribunal to take such guidance into account and to apply it in assessing the same consideration in a case that came before it.

> 13. In our judgement, therefore, the way forward in this case is to conclude that, not for the reasons argued by Mr Eaton, but for those, as it happens, argued by Mr Wilding, this is a case where it would be unreasonable to expect the youngest child to leave the United Kingdom. We will therefore set aside the decision of the First-tier Tribunal and substitute a decision allowing the appeals of all three appellants on that ground. The period of leave is a matter to be determined by the Secretary of State."

29. Before us, Mr Dhanji submitted that SF, as a reported decision of the Upper Tribunal, should have been in the mind of the First-tier Tribunal Judge in the present case. Although Mr Dhanji did not go so far as to say that *any* policy of the respondent should be known to a First-tier Tribunal Judge, the policy concerning the reasonableness or otherwise of a British citizen child being expected to leave the United Kingdom was sufficiently well-known and encountered in practice in First-tier Tribunal appeals, that it should have been taken into account by the First-tier Tribunal Judge, once the latter had concluded (contrary to the position of the respondent in the letter of decision) that the appellant did have a genuine and subsisting relationship with his daughter.

30. There is nothing in the Upper Tribunal's decision in SF that suggests First-tier Tribunal Judges are expected to know every provision of published Home Office policy (not being contained in Immigration Rules), whether or not it is drawn to their attention. Although the First-tier Tribunal is a specialist tribunal, it is plainly unreasonable to expect its judges to carry such an awesome burden, given the extensive and fast-changing nature of the respondent's policies, whether contained in Instructions to caseworkers or otherwise.

31. Mr Dhanji, is, of course, right to point to the particular issue which we are concerned; namely, the reasonableness of expecting British citizen children to leave the United Kingdom, as one which frequently arises in human rights appeals to the First-tier Tribunal. The fact of the matter is, however, that there is enormous potential for uncertainty if we were to accept Mr Dhanji's invitation to find that it was an error of law for the First-tier Tribunal Judge in the present case not to be aware of, and have regard to, the "British citizen" child policy, as it was at the date of the hearing. There would be bound to be differing views as to which policies are so well-known as to impose a legal duty on a judge to know of them, whether or not their existence is drawn to the judge's attention. To venture down that path would, therefore, threaten the important principle of legal certainty.

32. There is strong authority for the proposition that a party who wishes to rely upon the terms of a policy of the respondent in the immigration sphere must establish the terms of that policy. In SS (Jurisdiction – Rule 62(7); Refugees family; Policy) Somalia [2005] UKAIT 00167, the Asylum and Immigration Tribunal was concerned with the ways in which a policy, said to bear upon an individual's case, might assist that individual in an appeal. At that time, one of the grounds on which an appeal fell to be allowed was where the Tribunal Judge found that the respondent's decision was "not in accordance with the law". The fact that the failure to have regard to a relevant policy could constitute such a decision was recognised by the Court of

Appeal in Secretary of State for the Home Department v Abdi (DS) [1996] Imm AR 148.

33. At paragraph 28 of its determination, the AIT observed that the respondent can publish a policy, pursuant to her "general dispensing power", which is more generous than the policy set out in the Immigration Rules. In such a case, a person might be able to contend that he/she falls within the ambit of the policy and that an adverse decision was, therefore, "not in accordance with the law".

34. The AIT was in no doubt as to the primary burden on such a person:-

> "29. The first task for such a claimant would be to establish the terms of the policy at any relevant date. If he cannot do that readily, he may have some difficulty in showing that there was a published policy in the sense intended by Peter Gibson LJ in Abdi, In any event, as we have indicated, it may not be easy to show whether a policy currently available (for example, on the IND website) is relevant to the decision in question."

35. In AG and Others (Policies; executive discretion; Tribunal's powers) Kosovo [2007] UKAIT 00082, the AIT, in a penetrating decision that repays careful reading, explored the relationship between the respondent's policies and her obligations under the Human Rights Act 1998. At paragraph 50 of its decision, the AIT was in no doubt that it was for "the claimant" to prove:-

> "… the precise terms of the policy, which … creates a presumption, on the facts of his case, in favour of granting leave, and … there is either nothing at all to displace the presumption, or nothing that *under the terms of the policy*, falls for consideration."

36. Although we find that SS and AG continue to represent the legal position, it is important to make the following points. First, a judge might wish to bring to the attention of the parties, at the hearing, the existence of a potentially relevant policy, of which the judge is aware. It will then be necessary to establish the precise terms of the policy, as then in force, before the parties are given the opportunity of considering its relevance and making any relevant submissions.

37. Secondly, as happened before the Upper Tribunal in SF, the respondent's Presenting Officer has a professional responsibility to draw to the attention of the judge any policy of which the officer is aware, which he/she considers benefits the appellant.

38. Helpful judicial behaviour and a representative's professional responsibilities towards the Tribunal are not, however, to be confused with the issue of whether a judge commits an error of law in the circumstances with which we are concerned.

39. Section 117B(6) is declaratory of the public interest question in the circumstances in which it operates. Where it applies, section 117B(6) will normally be determinative of an Article 8 appeal because, whatever view a judge may take of whether Article 8 would otherwise be violated, in the circumstances of the particular case Parliament has decreed that it does not consider there to be a public interest in removal. It is, accordingly, immaterial whether, on the facts of the case, section 117B(6) mandates an outcome which is more generous than Article 8 demands.

40. The respondent's published policy regarding what she considers to be reasonable, or otherwise, is, thus, of particular significance. The respondent is charged by Parliament with enforcing immigration controls under the Immigration Acts. If a person can show that a relevant child is covered by the policy, so that it would in the respondent's view be unreasonable for the child to leave the United Kingdom, then the public interest question is resolved in that person's favour. Conversely, if the application of the respondent's policy produces a result unfavourable to the appellant, it will be necessary for the judicial decision-maker to determine whether that result is compatible with Article 8.

41. For the reasons we have given, the First-tier Tribunal Judge in the present case did not commit an error of law by failing to have regard to the respondent's policy, as then in force. The appellant's Counsel, at the hearing, did not draw the judge's attention to the policy. Given it was the appellant's case that – contrary to the respondent's position – the appellant did have a genuine and subsisting relationship with a qualifying child, one would have expected Counsel to have been prepared to put to the judge the consequences of finding in the appellant's favour on this issue. Since there was no Presenting Officer before the First-tier Tribunal Judge, the latter could expect no assistance from the respondent in that regard.

42. Even if the First-tier Tribunal Judge had been aware of, and applied, the policy, in the version published on 22 February 2018, the judge would manifestly have reached the same conclusion. Under the question "Would it be reasonable to expect the child to leave the UK?", we have seen that the policy required consideration of whether the effect of refusal would be likely to result in the child having to leave the United Kingdom. As we now are aware, that test does not accurately describe the effect of section 117B(6)(b): see AB (Jamaica) (paragraph 23 above). That fact is, however, immaterial, insofar as concerns the challenge based on the failure of the judge to have regard to and apply the terms of the policy which existed at the date of her decision. In view of the findings of the judge, it is clear that she did not regard it likely the appellant's child would have to leave the United Kingdom. The thrust of the last part of the judge's decision is plainly to the effect that the likely scenario would be that the child and her mother would remain in the United Kingdom while the appellant returned to Vietnam to make an entry clearance application.

43. But even if we are wrong, and the Upper Tribunal had to set aside the decision of the First-tier Tribunal Judge because the application of the then-extant policy may have led to a different outcome, the question for the re-making of the decision is whether, as at today's date, requiring the appellant to leave the United Kingdom, or enforcing his removal, would violate Article 8 of the ECHR.

44. In answering that question, it is the present policy of the respondent which requires to be considered. As we have seen, that policy reflects the law as described in AB (Jamaica). It identifies the starting point as one where the respondent "would not normally expect to a qualifying child to leave the UK". Nevertheless, the list of bullet points describing where it "may be reasonable for a qualifying child to leave the UK with the parent or primary carer" is clearly relevant in the present case. In the light of (i) the detailed findings of the First-tier Tribunal Judge regarding the ability of the

appellant and his partner to return to Vietnam; (ii) the absence of any indication that it would be unreasonable for them to do so; (iii) the absence of evidence that removal would pose a significant risk to the child's health; and (iv) the fact there are no other specific factors raised by or on behalf of the child, the present policy does not avail the appellant. In so finding, we have had regard to the supplementary witness statements of the appellant and his partner, dated November 2019.

45. Furthermore, applying the policy in this way does not, we find, lead to a disproportionate interference with the appellant's Article 8 rights. The present policy, as a general matter, does not adopt a position which is likely to bring it into conflict with Article 8; certainly not in the appellant's case.

46. Although it has not featured as a ground of challenge at any point, we should say the following about the "Zambrano" issue. As we have seen, a much earlier version of the "British child" policy suggested that it would be contrary to the principle in Zambrano [2012] QB 265 to expect a British child to leave the United Kingdom and the EU. The issue in Zambrano is, however, separate from the issue that falls for consideration in section 117B(6). The issue in section 117B(6) is to be determined on the hypothesis that the child would leave the United Kingdom: AB (Jamaica). By contrast, the issue of whether a child would be deprived of his or her rights stemming from EU citizenship is to be determined by reference to whether, in actual fact, the child would be compelled to leave.

Decision

The decision of the First-tier Tribunal Judge does not contain an error on a point of law. The appeal is, accordingly, dismissed.

No anonymity direction is made.

Signed Date 24 February 2020

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber