Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04457/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 April 2018	**On 18 April 2018**

Before

UPPER TRIBUNAL JUDGE WARR

Between

YOLANDA DEL PILAR PERENGUEZ BUSTOS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Tait (Tait's Immigration Services)
For the Respondent: Mr S Kotas

DECISION AND REASONS

1. The appellant, a citizen of Ecuador, born on 2 November 1975, appeals the determination of a First-tier Judge following a hearing on 25 May 2017.

2. The appellant arrived in this country in January 2000 using a Spanish passport in someone else's name. She had a son, J, on 6 March 2007. On 29 October 2013 she made an application for leave to remain using the name on the Spanish passport. This application was refused on 20 December 2013 with no right of appeal. She made further representations in her correct name on July 2015. The decision giving rise to this appeal was the refusal by the Secretary of State on 31 July 2015 to refuse these further representations.

3. The judge found there were no exceptional circumstances preventing the appellant's reintegration into Ecuador. She spoke Spanish and limited English. She had a son in Ecuador and had some easily transferrable skills developed in the UK. Since the Secretary of State's decision the appellant had had a daughter born in October 2016 who was a British citizen at birth. She had two other daughters who had left Ecuador and had joined the appellant in the UK and they in turn had children born in this country.

4. The judge found as follows in relation to the claim under the Rules:

> "22. I find that it would be reasonable to expect J and the infant daughter to relocate to Ecuador. In coming to that conclusion I note that:
>
> a. My point of departure is that the best interests of both children lie in remaining with their mother, the appellant;
>
> b. The father of J is not involved in his upbringing and his parental focus is the appellant;
>
> c. The appellant is not in a relationship with the father of the infant daughter and his role in her upbringing appears marginal: there was no evidence from or about him at all;
>
> d. The infant daughter is focussed on her mother and is too small to have formed relationships outside her family;
>
> e. J speaks Spanish and is young enough to adapt to a new education system and make new friends; there is absolutely no evidence before me in the form of social work reports that tell me about him or where his best interests may lie, other than by remaining with his mother; there is one brief school report, from May 2015, which says that J is working two years below age expectations, with an attendance rate below 90%; there is nothing in that report to suggest removing him to another school would be disruptive to his development;
>
> f. The family unit is the appellant, J and now the infant daughter; the claim that the family unit extends to include the two older daughters and their children was not put to the Home Secretary and appears to be an afterthought for this appeal; there is limited evidence, in the form of unsigned statements from the two oldest daughters, of their relationship with J, which consists of looking after him as a small child and seeing him at birthdays and Christmas; there is nothing in the statements or other evidence, such as photographs, to suggest that the bonds are anything more than the normal familial ties of affection;".

5. In relation to the appellant's Article 8 claim, having referred to relevant authority, the judge found as follows:

> "26. I find that the interference with the appellant's article 8 rights- and those of her family- is proportionate to the legitimate aim to be achieved. In coming to that finding I take into account that:
>
> a. The appellant entered the United Kingdom using a false instrument in 2000 and maintained a false identity, including in an application for leave to remain on the basis of her family and private life in 2013;

these actions represent offences and are serious breaches of immigration control;

b. The appellant has remained in the UK unlawfully and little weight can be afforded to her private life; notwithstanding, there is next to no evidence of the appellant's integration into the UK in the form of relationships outside her family; participation in the life of the country;

c. In 17 years, the appellant has not learned enough English to speak more than rudimentary English, thereby decreasing her chances of becoming economically independent and less of a burden on taxpayers;

d. There is no evidence that the appellant has contributed to the public finances through the payment of income tax or National Insurance Contributions; rather, she has been a burden to the taxpayer through the birth of two children on the NHS and the education of three children in the state system; indeed, it appears the appellant has given no thought to those costs;

e. For the reasons I have outlined above, it is not unreasonable to expect the children to relocate to Ecuador;

f. The family unit of the appellant and the two children who live with her will be removed as a whole; the relationship between that unit and the two eldest daughters and their children does not extend beyond the normal familial ties of affection;

27. In an allegation as serious of a breach of the UK's obligations under the ECHR I would expect to see cogent evidence of the effect on the appellant and the two children and its absence in this matter is fatal to the appellant's case."

6. Accordingly the judge dismissed the appeal on human rights grounds and under the Immigration Rules.

7. There was an application for permission to appeal. Permission was refused by the First-tier Tribunal but granted on 16 February 2018 by the Upper Tribunal. It was arguable that the judge had erred by failing to take into account the entitlement of the appellant's son to be registered as a British citizen when assessing the Article 8 claim.

8. On 6 April 2018 further evidence was lodged confirming that J had become a British citizen by registration on 21 March 2018. Further material was submitted in relation to the first named appellant's daughter who was born a British citizen and had a forthcoming appointment to register the birth on 11 May 2018. Evidence was lodged concerning the settled status of the father of the appellant's British daughters. Mr Kotas had a copy of the material and took no exception to the lodging thereof. An explanation was provided for the delay in providing the material.

9. Mr Tait referred to **ZH (Tanzania) [2011] UKSC 4** and **Zambrano [2011] INLR 481 CJEU**. The Tribunal had erred in failing to carry out a proper balancing exercise in the light of Section 117B(6) of the 2002 Act. The best interests of the children had not

been considered in isolation from the appellant's immigration history. The appellant's children were British citizens with the right of abode and their best interests outweighed the public interest.

10. Mr Kotas submitted that as at the date of the decision on 31 July 2015 only the elder son was in the picture but matters had changed significantly at the time of the appeal when the daughter was a British citizen and the son had attained the age of 10 years.

11. He acknowledged that the judge had failed to consider properly the best interests appellant's children. He referred to **MA (Pakistan) [2016] EWCA Civ 705**. As he put it powerful reasons were required why a child who had spent seven years in the UK should be removed – see paragraph 46 of **MA (Pakistan)**. The Court of Appeal had also referred to the guidance and Mr Kotas referred me to the decision in **SF (Guidance, post-2014 Act) [2017] UKUT 120 (IAC)**.

12. In that case the Presenting Officer had drawn the Tribunal's attention to the guidance document concerning family migration on the topic "would it be unreasonable to expect a British citizen child to leave the UK?" The policy was the applicable one in this case and a British citizen child should not be forced to leave the UK. Mr Kotas accepted that the judge had not grappled with the point and that there was a material error of law and that further he was in difficulty in resisting the appeal.

13. Understandably Mr Tait did not seek to reply in the light of the stance taken by Mr Kotas.

14. At the conclusion of the submissions I reserved my decision. It is accepted by Mr Kotas that the decision is materially flawed in law and that he was in difficulty resisting the appeal. As the Tribunal is able to consider the fresh evidence given the concession that the judge materially erred in law it is apparent that the position of the principal appellant and her family has strengthened given the changes that have taken place since the First-tier Tribunal were seized of the matter, in particular in relation to J who is now a British citizen.

15. Mr Kotas did not seek to distinguish the appellant's circumstances on the grounds of her reliance on a false instrument and in my view was right not to do so. I accordingly deal with the case as invited by application of the decision of **SF** and as in that decision I set aside the decision of the First-tier Tribunal and substitute a decision allowing the appeals. The period of leave to be granted is a matter to be determined by the Secretary of State.

16. The appeals of the appellants are allowed.

Anonymity Order

The First-tier Judge made no anonymity award and I make none.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award. As the result in this appeal has been influenced by the subsequent lodging of material I am not satisfied that a fee award would be appropriate.

Signed Date: 17 April 2018

G Warr, Judge of the Upper Tribunal