IAC-PE-SW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07221/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 14 July 2015	**On 18 August 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

VERONICA MWANGALA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Pratt, Waddell Taylor Bryan, Solicitors
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Veronica Mwangala, was born on 7 February 1985 and is a female citizen of Malawi appealed to the First-tier Tribunal (Judge Manuel) against the decision of the of the Secretary of State dated 23 January 2014 to refuse to issue her a derivative residence card as the primary carer of D K (who was born in September 2012) who is a British child resident in the United Kingdom. The First-tier Tribunal dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. There are three grounds of appeal. The first asserts that the judge made an error of law in her determination of the appeal on Article 8 ECHR grounds. The third ground of appeal complains of the alleged inconsistency on the part of the judge where she found (in relation to Regulation 15A) that it was reasonable to expect the appellant to return to Malawi alone whereas (in her Article 8 analysis) she reached the opposite conclusion. The second ground of appeal asserts that the judge failed to have proper regard to *Zambrano* [2011] AER 491 but also *MA and SM (Zambrano: EU children outside EU) Iran* [2013] UKUT 00380 (IAC). In that latter case, the Upper Tribunal had, following its consideration of Regulation 15A(4A) of the 2006 Regulations, found the correct legal test in application of the Regulation involved an assessment of whether the parent or carer with whom the British child would live (on the departure of the non-EU parent) was able and would "in practice" care for the child. The appellant asserts that the Secretary of State and the judge did not consider whether, in the instant case, the father of D K would care for him in practice.

3. Taking the last ground first, I find that the judge has not erred in law. At [17] the judge noted that the Secretary of State had "refused the application because the appellant had not provided evidence to show that the child's father [M K] was in a position to care for the child if the appellant was forced to leave the United Kingdom." Quite rightly, the judge has reminded herself that the burden of proof in the appeal lay on the appellant. The judge at [21], went on to consider whether it might be:

> "… reasonable to expect [M K] [to provide a statement] that confirmed that he cannot look after the child and the reasons why he cannot do so. The appellant's evidence is that his wife was aware of her and of the child. I do not therefore accept the claim that the child's father cannot care for him."

The principle adopted in *MA and SM* (which, in turn, is taken from the judgment of Hickenbottom J in *Sanneh* [2013] EWHC 793) namely that the UK-resident parent "in practice" care for the child if the non-EU parent leaves the country does not depend entirely on the willingness of the UK parent to assume responsibility for the child. The principle allows for the possibility of the UK parent assuming responsibility for the child unwillingly but because there is no alternative to his doing so if the child is to remain living in the United Kingdom. Had Hickenbottom J and the Upper Tribunal considered that the test to be applied depended exclusively upon the *willingness* of the UK parent then they would have no doubt said so. The question of whether the UK parent will "in practice" assume responsibility was a matter to be determined by the judge on the evidence before the Tribunal. The assessment required must go beyond simply ascertaining the willingness of the United Kingdom parent.

4. In the present case, the judge accepted that D K lives with the appellant but he noted that M K was financially responsible for the child. The judge found:

> "… the fact that the father regularly sends money claims child benefit for D K and visits him and takes him out is not consistent with the claim that he will not care for him particularly given the fact that his wife is aware of D K and also the fact that he told the appellant that he wants his other children to meet D K."

That finding was made against a background of a lack of evidence (noted by the judge at [21]) from the father which might indicate whether he was willing or unwilling to assume responsibility for D K. In the absence of such evidence, the judge was left with no alternative to make a finding, on the basis of the evidence which was before her, as to whether the father would "in practice" assume responsibility for the child. Where the judge writes [29] that "the appellant has failed to discharge the burden of proof upon her to show that his father cannot care for [D K]" I find that it is implicit in her finding that she has concluded that the appellant has failed to establish that the father will not "in practice" assume responsibility for a child with whom he has regular contact and whom he supports financially.

5. As regards Article 8 ECHR, it is not at all clear to me that Article 8 arises as a legitimate ground in this appeal against a decision of the Secretary of State to refused to issue a derivative residence card. Assuming that it does do so, I find that the judge had not erred in law. At [29] the judge found (in determining the appeal under the 2006 Regulations) that this was not a case "where D K will be required to leave the UK." She made that finding because she had concluded that D K's father would "in practice" assume care for him. That finding is not inconsistent with her subsequent finding at [35 and 38] that D K as a young child could, if he were not to remain living in the United Kingdom with his father, reasonably be have expected to return with his mother to Malawi and enjoy family life with her there. The judge's finding in relation to Article 8 (as with her finding on the appeal under the Regulations) was predicated on her finding that the child would not be *compelled* to leave the United Kingdom because he might remain in the care of his father (see *ZH (Tanzania)* 2011 UKSC 4 with which the judge's finding is consistent). The grounds of appeal are based on the false notion that, because the father had not positively indicated willingness to look after the child, the appeal had to succeed under the 2006 Regulations and Article 8 EHCR.

6. In the circumstances, this appeal is dismissed.

Notice of Decision

7. This appeal is dismissed.

Signed Date 10 August 2015

Upper Tribunal Judge Clive Lane