



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/01123/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 29 April 2015**

**Decision & Reasons Promulgated
On 13 May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

**MRS MERCELINE KEROSI GWARO
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Querton of Counsel

For the Respondent: Mr Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was born on 17 February 1982. She is a citizen of Kenya.
2. She appealed against the respondent's refusal to grant her indefinite leave to remain in the UK as the spouse of a person present and settled here. That appeal was heard by Judge C J E Nicholls (the judge) who in a decision promulgated on 23 September 2014, dismissed the appellant's appeal. He found and it was not in dispute that the appellant was unable to meet the requirements of the Immigration Rules. The judge

went on to say that where the Rules as in the appellant's case, provided a complete code, the Rules met the requirements of Article 8. He went on to consider the best interests of Ruby and s.117B(6).

3. The appellant sought permission to appeal to the Upper Tribunal on the basis that Ruby being British, the judge did not apply **Sanade (British children - Zambrano - Dereci) (India) [2012] UKUT 48 (IAC)** and failed to give sufficient weight to the public interest considerations that fell in the appellant's favour when considering s.117B. The judge's failure to give weight to that part of the appellant's case resulted in him placing the public interest too high and in any event, it was apparent that he imposed too high a test at [21] of his decision by referring to "..... any risks".
4. Judge T R P Hollingworth refused permission to appeal. His view was that grounds were without merit. It was clear from reading the determination as a whole that the judge had considered all the available evidence appropriately and did not exclude anything on the basis that the grounds suggested. As regards the claim that the judge failed to give weight to the position of Ruby and the appellant's husband, the judge gave consideration to all aspects referred to him by the appellant's representatives. **Sanade** was not put before the judge at the hearing. As regards the claim that the judge failed to give sufficient weight to public interest considerations, it was apparent that he had given careful consideration to the public interest element. He had concluded in balancing the public interest that there was nothing in principle which precluded the appellant returning to Kenya where she continued to have settled ties. She could either take Ruby with her or alternatively, leave her with her father, if it was the father's decision to remain here for work purposes.
5. The grounds were renewed. Deputy Upper Tribunal Judge Bruce found that all grounds were arguable. The **Sanade** principles and the public interest considerations in s.117A-D applied, whether or not they were expressly mentioned in submissions to the judge.
6. Thus the matter came before me.

Submissions on Error of Law

7. Ms Querton relied upon her skeleton argument but told me that she was not pursuing the **Sanade** argument at [10]-[17] of the skeleton. Mr Kandola relied upon the Rule 24 response. There were no compelling circumstances. The appellant was not Ruby's sole primary carer. **Sanade** was a case that was heard before the respondent introduced new Rules to codify Article 8 and the judge had carried out the correct assessment in that regard.

Conclusion on Error of Law

8. I do not accept that the judge was compelled to apply **Sanade** given its codification within the Immigration Rules. See the respondent's reasons for refusal dated 13 November 2013 and in particular, with regard to EX.1 of Appendix FM.

9. The judge took into account all of the evidence put before him. The appellant did not have leave to remain in the United Kingdom as a partner and following the expiry of her own leave on 4 September 2012, she had what the judge described as a precarious situation here. The judge did not consider that the appellant's circumstances were such that there were demonstrated insurmountable obstacles to the appellant continuing family life in Kenya or that it would be unreasonable to expect Ruby to travel to Kenya with the appellant. The judge took into account the best interests of Ruby who at the date of the hearing was 3 years and 4 months old. There was evidence from the appellant that the child had required surgical procedures to her fingers and toes but there was no medical evidence that there would be any unusual or particular difficulties for Ruby if either the appellant returned to Kenya to apply for entry clearance or the whole of the family chose to go back to live there. The judge considered it would be a matter for the family whether the appellant was separated from Ruby and her husband for a while but that in any event and in the absence of any evidence in that regard, the judge found the best interests of Ruby would not be adversely affected by the decision of the respondent to refuse leave to remain and to remove the appellant.
10. The judge considered part 5A Nationality, Immigration and Asylum Act 2002 as implemented by the Immigration Act 2014. He went on to assess the public interest question as to whether an interference with the appellant's right to respect for private and family life was justified under Article 8(2). He considered that the maintenance of effective immigration control was in the public interest. In particular in that regard, that those resident here were financially independent. The appellant's husband did not satisfy the Immigration Rules because his annual salary was below £18,600.
11. The judge went on to consider s.117B(6) that the public interest did not require the appellant's removal where she had a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK. Ruby was a qualifying child as she is a British citizen.
12. The evidence before the judge was that the appellant had close family in Kenya. See [12] of the decision. The appellant's husband also had family there. See [10] of the decision.
13. Ms Querton submitted that the judge imposed too high a test by commenting that "*..... I have received no evidence to show that there would be **any risks** (my emphasis) to the child if she accompanied the appellant back to the appellant's country of nationality.*". I accept that the judge might have made more clear what he meant by the use of the words "*any risks*" but I do not accept they indicate that he was imposing too high a standard of proof; there is nothing to suggest the same. I speculate that the context of what the judge was saying indicates that he was referring to Ruby's welfare on accompanying her mother to Kenya.
14. The judge took into account the medical procedures to Ruby's toes and fingers which had been referred to him but commented that no medical evidence had been

produced. He found that the appellant had a genuine and subsisting parental relationship with a qualifying child, but the evidence did not disclose that it would be unreasonable to expect Ruby to leave the United Kingdom in the company of the appellant.

15. I conclude that the decision does not contain a material error of law, such that the decision of the First-tier Tribunal should be set aside.

Notice of Decision

The decision of the First-tier Tribunal contains no error of law and shall stand.

No anonymity direction is made.

Signed

Date 5 May 2015

Deputy Upper Tribunal Judge Peart