



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

Appeal Number: IA/42135/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 28<sup>th</sup> May 2015**

**Decision & Reasons  
Promulgated  
On 15<sup>th</sup> June 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**MS LEONORA MAXINE NYAWO  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr P Tapfumaneyi (LR)

For the Respondent: Mr S Kandola (HOPO)

**DECISION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge North, promulgated on 9<sup>th</sup> July 2014, following a hearing at Nottingham on 27<sup>th</sup> June 2014. In the determination, the judge dismissed the appeal of Leonora Maxine Nyawo. The Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

## **The Appellant**

2. The Appellant is a female citizen of Zimbabwe born on 24<sup>th</sup> April 1979. She applied on 3<sup>rd</sup> October 2012 for a residence card as a third-country national upon whom a British citizen was dependent in the UK, relying on the decision in **Zambrano**.

## **The Appellant's Claim**

3. The Appellant's claim is that she is the primary carer of Ruvarashe Stephanie Nyawo, a British citizen child, who was born to her after her marriage with a British citizen husband by the name of Farai Nyawo. She came to the UK on 24<sup>th</sup> October 2010 on a spouse's visa to join her British citizen husband, Farai Nyawo. They had married in Zimbabwe in September 2008. She gave birth to a daughter on 23<sup>rd</sup> February 2009. Her husband then went back to Zimbabwe after three months on business. There he started living with a girlfriend in Harare. The Appellant is employed as a care assistant. Her husband does not look after her daughter or pay maintenance. He lives in Zimbabwe. She attends primary school in the UK and the Appellant is her sole carer. Her husband had in fact applied in Zimbabwe for a custody order before the magistrates' court and on 11<sup>th</sup> May 2012 his application succeeded, granting him access at weekends on a fortnightly basis. However, it is she who is the child's primary carer. This is why reliance is placed upon **Zambrano**.

## **The Judge's Findings**

4. The judge held that the Zimbabwe court had ordered the child should remain in the custody of her maternal grandmother and had given detailed reasons for this. The judge went on to say that,  

"I find that it was in the child's best interests to remain in Zimbabwe with her grandmother at that time; the reason for her living there was that the Appellant had returned to the UK alone. The Appellant gives no reason in her evidence for subsequently removing her daughter from Zimbabwe to the United Kingdom. No credible reason for the child's removal at that time has been put forward and it has not been shown that removal was designed to enhance her best interests rather than to enhance the Appellant's chances of obtaining leave to remain in the UK ..." (paragraph 10).
5. The judge was also sceptical about the Appellant's relationship with her husband, Farai Nyawo. He said of the Appellant's account that,  

".....her oral evidence was that they remained married, that they are not divorced and no formal separation is in process. So much is inconsistent with the Appellant's evidence that her relationship with her child's father has broken down irretrievably, and that she fears for her daughter's wellbeing as a result of incidents that happened when she was spending time with him. I am not satisfied that a clear and credible picture of the child's circumstances has been given ..." (paragraph 10).

6. It was in these circumstances that the judge then went on to hold that, “the Appellant has not demonstrated that the child’s father is not in a position to care for her in the UK if the Appellant were required to leave ...” (paragraph 11).
7. Accordingly, the judge concluded that, given that the Appellant’s oral evidence was that “her husband had visited the UK since the Appellant’s return and had last seen their daughter in Peterborough in March 2013”, and given that “the Appellant’s reluctance to commence divorce or separation”, all of this was “more consistent with her wishing to continue in a relationship with her husband” (paragraph 12).
8. The appeal was dismissed.

### **Grounds of Application**

9. The grounds of application state that the Tribunal erred in law in having found at paragraphs 7 to 8 of the determination that the Appellant is the primary carer of her child and that the father lives in Zimbabwe. On the facts the appeal should have been allowed on the basis of Regulation 15A because the Appellant’s estranged husband lives in Zimbabwe and the Appellant is the sole primary carer of her British child.
10. On 25<sup>th</sup> March 2015, permission to appeal was granted that the judge arguably erred in law in proceeding to consider the Appellant’s case under Article 8, even if his findings in relation to the inconsistency and ambivalence in the evidence in relation to Regulation 15A of the EEA Regulations, was sustainable.

### **Submissions**

11. At the hearing before me on 28<sup>th</sup> May 2015, Mr Tapfumaneyi relied upon the Grounds of Appeal. He referred to the Rule 24 response by the Respondent. He submitted that given that the child was a British citizen there had been a failure to take the child’s best interests into account and a failure to factor in Section 55 of the BCIA 2009. Second, the judge did not take account of Article 8 at all and considered whether the decision to refuse the Appellant, as the primary carer of her child, was disproportionate. In this regard my attention was drawn to the Appellant’s representative’s skeleton argument (at page 2) at the hearing before the judge in the First-tier Tribunal.
12. For his part, Mr Kandola submitted that the Appellant was in the UK with no leave to remain, that leave having expired once the Appellant’s spouse’s visa had run out after her arrival in the UK. If there was an Article 8 application to be made, that application should be made so that it can properly be considered on the evidence. There was no removal decision in place and therefore Article 8 did not fall to be considered automatically by the Respondent Secretary of State.

13. In reply, Mr Tapfumaneyi submitted that the Appellant had come on a spouse's visa, and had made her application during the currency of that leave, and in her letter of 3<sup>rd</sup> October 2012 she had explained why she was applying for a derivative residence card, and she had now been in the UK for four and a half years.

### **No Error of Law**

14. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.
15. First, it is not the case that the judge has overlooked the "best interests of the child". If anything, the judge has been singularly most concerned with the best interests of this particular child. What the judge has done is to expressly say that, "I find it was in that child's best interests to remain in Zimbabwe with the grandmother" given that the court order was precisely that the custody should be with the maternal grandmother. Detailed reasons were given for this. It was, as the judge rightly concluded, the decision of the Appellant herself to then remove her daughter from Zimbabwe to come to the UK. She gave no credible reason for the child's removal. If anything, what she is setting out to do was "to enhance her best interests rather than to enhance the Appellant's chances of obtaining leave to remain in the UK".
16. Second, in terms of Article 8, the judge did have this provision specifically in mind because he concluded that, "the Respondent is entitled to require the Appellant, if she wishes to pursue an Article 8 application either within or outside the Rules to make such an application in the required form" (paragraph 13). As Mr Kandola has submitted before me today there is no removal decision against the Appellant and consequently no breach of Article 8 is intrinsically raised.
17. On the facts, there would appear to have been, in any event, no breach of Article 8 because the judge was concerned by the fact that the evidence in relation to this family was inconsistent and contradictory. The judge held, "I am not satisfied that a clear and credible picture of the child's circumstances has been given ..." (paragraph 10). The judge further held that no clear picture of the "Appellant's circumstances" had been put forward (paragraph 11). In relation to the Appellant's relationship with her husband, Farai Nyawo, the judge observed how the husband had visited the UK since the Appellant's return and had last seen their daughter in Peterborough in March 2013. The Appellant had been reluctant to commence divorce proceedings. It was true that the Appellant's husband had business interests in Zimbabwe, but the judge was not satisfied that he had severed his links with the UK (paragraph 12).

18. Accordingly, it is not clear how the decision of the Respondent impacts in Article 8 terms upon the Appellant. This consideration is all the more important when it is remembered that it is for the Appellant to stake her claim to Article 8 and to demonstrate how it is infringed. Mr Tapfumaneyi, in his submissions before me today, was also quite unable to explain what the Article 8 implications of the decision were, save to say that the Appellant was the primary carer of the child, Ruvarashe Stephanie Nyawo.
19. However, the judge had expressly dealt with this issue by explaining that the Appellant had deliberately put herself in this position by taking the child away from the grandmother's custody in Zimbabwe and bringing her to the UK, without providing any cogent reason for why this course of action had been taken, leaving the clear impression that it was designed to enhance the Appellant's own rights to remain in the UK, rather than those of the Appellant's child. In these circumstances, the decision of the judge cannot be said to be one that falls into a material error of law.

**Notice of Decision**

20. There is no material error of law in the judge's decision. The determination shall stand.
21. No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

12<sup>th</sup> June 2015