Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/36586/2013**

IA/36859/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 December 2014	**On 12 January 2015**

Before

Deputy Upper Tribunal Judge MANUELL

Between

M Z
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondents: Mr S Sayeed, Counsel
(instructed by UK Chinese Law Centre Limited)

DETERMINATION AND REASONS

Introduction

1. The Appellant appealed with permission granted by First-tier Tribunal Judge Lever on 20 October 2014 against the determination of First-tier Tribunal Judge R G Walters who

had dismissed the Appellant's linked appeals against (a) removal on human rights (Article 8 ECHR) grounds, a decision dated 22 August 2013 and (b) refusal to issue her with a derivative residence card under regulation 15A of the Immigration (European Economic Area) Regulations 2006, a decision dated 10 March 2014, in a determination promulgated on 2 September 2014.

2. The Appellant is a national of China, born on 19 January 1978. It is not necessary to repeat her immigration history which is set out at [11] to [12] of Judge Walters's determination. In essence the Appellant held a multi-visit visa, and applied for leave to remain outside the Immigration Rules on 29 August 2012 during the currency of that visa. On 22 March 2013 the Appellant applied for a derivative residence card following the birth of her son A, whose father Mr P XQ ("Mr XQ") is a British Citizen. Mr XQ remains married to his wife by whom he has two adult children. Judge Walters found that A did not have to leave the United Kingdom if his mother were removed and that it was proportionate for her to make an entry clearance application as a parent or as a spouse once Mr XQ had divorced his current wife as he intended.

3. Permission to appeal was granted because it was considered that it was arguable that the judge had erred in law in his approach and had not focussed on the quality or standard of life for the child if his mother left. The judge might have had regard to the principles in Chikwamba [2008] UKHL 40.

4. Standard directions were made by the tribunal, indicating that the appeal would be reheard immediately if a material error of law were found. A rule 24 notice dated 12 November 2014 opposing the appeal had been filed on the Respondent's behalf.

Submissions – error of law

5. Mr Sayeed for the Appellant relied on the grounds of onwards of appeal and the grant of permission to appeal. In summary, he accepted that EX.1 of Appendix FM could not be relied on and that the Immigration Rules were not met. In approaching the derivate residence card appeal the judge had failed to consider Harrison [2012] EWCA Civ

1736. There had been no assessment of the effect on the child's quality of life. [24] of the determination which referred to the provision of nannies was insufficient. The judge had not given sufficient attention to the components of section 117B of the Nationality, Immigration and Asylum Act 2002. The public interest did not require the Appellant's removal in view of her genuine and subsisting relationship with a child for whom it was not reasonable to expect to leave the United Kingdom. The principles of Chikwamba [2008] UKHL 40 were applicable and should have been considered.

6. Mr Tufan for the Respondent relied on the rule 24 notice. MA and SM (*Zambrano*: EU Children outside the EU) Iran [2013] UKUT 00380 (IAC) applied. The EU child had to be *compelled* to leave, which was not the case here by any means, as the judge had properly found. The test had a high threshold. Nor was section 117B(6) was satisfied as the child did not have to leave the United Kingdom with the Appellant. Alternative arrangements were possible, as the judge had found. The judge had reached a properly reasoned decision and there was no basis for interfering with it.

7. Mr Sayeed addressed the tribunal briefly in reply. The judge's determination produced a result which was unduly harsh and harmful to the child.

8. The tribunal indicated at the conclusion of submissions that it found no material error of law and reserved its determination which now follows.

No material error of law finding

9. The judge's treatment of the evidence was more than sufficient and he set out his essential findings with clarity in a careful and well structured determination. The judge set out the relevant part of section 117B of the Nationality, Immigration and Asylum Act 2002 in full and plainly paid close attention to it. The particular factual matrix found by the judge was not covered by the Immigration Rules, specifically the additional unmarried partner of a British Citizen whose leave to enter the United Kingdom was temporary and to whom a British Citizen child had been born. The judge was entitled to find that the British Citizen

child would not have to leave the United Kingdom. As Mr Tufan pointed out, the applicable threshold is high one and the judge was right not to be swayed by irrelevant factors. As the judge stated at [63] of his determination, the decision as to whether the child should travel to China with his mother pending her obtaining entry clearance to return to the United Kingdom was one for the Appellant and Mr XQ to reach. There were a number of possibilities open to them which in no way could harm the child.

10. The judge gave consideration throughout his determination to the quality of life which A would enjoy in the event of the various options being exercised. It was obvious that his quality of life would be good since he had a loving and competent father who was well able to meet to meet his needs in his mother's temporary absence. His mother was also competent and loving, and able to meet his needs in the event of temporary separation from his father. The principles of Harrison (above), which decision incidentally stresses the high threshold required for a breach of regulation 15A, were followed.

11. The judge went on, correctly, to conduct a free standing Article 8 ECHR evaluation. His conclusions were manifestly open to him, and were consistent with his regulation 15A findings.

12. The tribunal accordingly finds that there was no error of law in the determination and there is no basis for interfering with the judge's decision.

DECISION

The making of the previous decision did not involve the making of an error on a point of law and stands unchanged

Signed **Dated**

Deputy Upper Tribunal Judge Manuell