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Ref: Jeanine Bateka (aka Kamba) – K1226380/2

In light of the Judicial Review application, RDs set for today have been deferred pending an outcome on the said JR. Attached is a response to your submissions of 10/03/11 and 16/03/11.

If you require any further information please contact this office on either the above telephone or fax number

Kind Regards
Adam Mitchell
Teesside LIT



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**Operational Support &
Certification Unit
Removals Logistics
Appeals and Removals
Directorate
Immigration Group**

**HO Ref: K1226380/2
Port Ref: ASC/925354
Your Ref: KF/HZ/NEW**

18 March 2011

Dear Sirs

**Re: Miss Jeanine Kamba 22-August-1992 Democratic Republic of the
Congo
(also known as) Miss Jeanine Mamonekene Bateka 22-August-1988
Democratic Republic of the Congo**

1. Thank you for your letters dated 22 October 2010 and 16 February 2011 with enclosures on behalf of your client in which you submit that to remove her from the United Kingdom would breach her rights under Article 8 of the European Convention on Human Rights.
2. Your representations have not been considered by the Secretary of State personally but by an official acting on her behalf.
3. You submit that your client has established family life in the United Kingdom and that the enclosures you have produced demonstrate a subsisting family relationship. This evidence consists of witness statements and letters of support from Ms Jacqui Lovell (your client's foster mother), her foster siblings, lecturers, friends, along with letters from health professionals such as Greg Mead, Primary Mental Health Worker for Tees, Esk and Wear Valleys NHS Trust.

Immigration History

4. Your client claims to have arrived in the United Kingdom on 19 December 2005. On 21 December 2005 your client along with her brother and sister claimed asylum under the identity of Jeanine Manonekene Kamba. The date of birth your client gave when she claimed asylum was 22 August 1992. On 11 January 2006 your client was served with an IS 151A notice as an illegal entrant who was liable to removal from the United

Kingdom. Your client's true identity came to light on 5 January 2007 and it was discovered that her name was Jeanine Mamonekene Bateka, born on 22 August 1988 and that she and her siblings were issued with visit visas in Kinshasa on 30 September 2005 which were valid until 30 March 2006. Following an unsuccessful appeal which was dismissed, your client's brother became appeal rights exhausted on 5 May 2006. A subsequent Judicial Review was lodged by your client's brother on 1 April 2009. This was refused on 18 May 2009 in an Order made by Sir Michael Harrison who stated that his claim was "totally without merit".

5. Your client's brother was subsequently removed on 26 May 2009. Your client then made an asylum claim in her own right on 10 May 2009 and following careful consideration this claim was refused on 6 November 2009 and certified in accordance with Section 96 (2) of the Nationality, Immigration and Asylum Act 2002 on the basis that your client has been served with a 'One-Stop' notice and the facts relied upon related to an application or claim which relied on a matter that should have been, but has had not been, raised in a statement made in response to that notice, and in the opinion of the Secretary of State or the Immigration Officer there was no satisfactory reason for that matter not having been raised in a statement made in response to that notice. This decision did not confer an in country right of appeal on your client.

6. We note that an age assessment was also carried out by Stockton-on-Tees who considered that your client was born in 1992. Your client was therefore accepted as having been born on 22 August 1992. However, she had been issued with a valid passport with her date of birth recorded as being 22 August 1988. A copy of her passport was used to obtain a travel document for her and, as such, the date of birth on the travel document must match that given on the passport to satisfy officials at passport control and the check-in desks that her identity is correct.

Article 8

7. Consideration has been given to whether Article 8 of the European Convention on Human Rights (ECHR) would be breached by your client's removal. Article 8 (Right to Family and Private Life) of the European Convention on Human Rights (ECHR) is a qualified right and Article 8(1) provides that:
 8. *"Everyone has the right to respect for his private and family life, his home and his correspondence."*

9. However, a person's rights under this Article are qualified by Article 8(2):

"There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

10. As a starting point to this consideration, it is noted that every state has the right to control the entry of non-nationals into its territory and that Article 8 does not give a person the automatic right to choose to pursue their family or private life in the United Kingdom (**Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471**). Your client's Article 8 claim has been considered in line with the five stage test set out by Lord Bingham in **Razgar v SSHD [2004] UKHL 27**.
11. The first question is whether your client enjoys a family and private life in the United Kingdom. It is accepted that your client enjoys family and private life in the United Kingdom with Mrs Lovell and her family and that the decision to remove her will interfere with the family and private life she enjoys here. However, we would point out that Mrs Lovell only acted as a foster parent in a temporary capacity until your client attained 18 years of age and, we consider her removal to be in accordance with the law. Your client's asylum and human rights claim was refused on 6 November 2009 and that decision had no right of appeal. Since that time your client has remained here unlawfully. She has no lawful basis to remain here under the Immigration Rules or on a discretionary basis outside of those Rules.
12. Even If Article 8(1) were engaged removal will not breach Article 8(2) so long as it serves a legitimate aim and is proportionate. We consider that any interference with your client's Article 8 rights is in pursuit of one of the permissible aims outlined in Article 8(2). Case law has established that the maintenance of an effective immigration control falls within the permissible aims (**Mahmood v SSHD [2001] 1WLR 840**).
13. You have provided no evidence as to why it is not reasonable for Mrs Lovell and her children to visit your client in the Democratic Republic of Congo or, in the alternative for your client to return and seek entry clearance to visit Mrs Lovell and her family. It is open for Mrs Lovell to sponsor the application should she choose to do so.
14. In determining whether the interference in your client's private and any family life is proportionate to the permissible aim being achieved, consideration has been given to the decision in **1. Huang (FC) (Respondent) 2. Kashmiri (Appellant) (Conjoined Appeals) –v-SSHD [2007] UKHL 11, Beoku-Betts v SSHD [2008] UKHL 39, Chikwaraba v SSHD [2008] UKHL 40 and TG (Central African Republic) v SSHD [2008] EWCA Civ 997**.
15. In the case of **Huang**, the House of Lords established that the ultimate question to be asked in assessing proportionality is **“whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8”**.
16. Consideration has also been given to the Court of Appeal case of **VW (Uganda) and AB (Somalia) v SSHD [2009] EWCA Civ 5**. The Court of Appeal confirmed in this case that when gauging the proportionality of a removal which may break up a family the question is whether it is reasonable to expect the family to leave with the

claimant; the test envisaged was one of seriousness which would require the obstacles or difficulties to go beyond matters of choice or inconvenience. We accept that Mrs Lovell and her children may not be able to leave with your client, however we consider that there is no reason why they cannot visit her in the Democratic Republic of Congo or sponsor any application for entry clearance she may make.

17. In all the circumstances it is not considered that the decision to remove your client prejudices her private or any family life in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. There is no presumption of family or private life in the United Kingdom, it depends on the circumstances on each particular case. Although your client's right to a private life would be restricted, it would not be "complete denial" or "complete nullification" of her rights which is the test in Article 8 qualified rights cases, laid down in the case of Ullah [2004] UKHL 26.
18. Her case has also been considered in the light of the recent House of Lords' decisions in the case of Chikwamba [2008] UKHL40, which addressed the issue of the lawfulness of the Secretary of State 's policy that people relying on Article 8 of the ECHR should leave the United Kingdom in order to make an entry clearance application. As has been already indicated above, your client has not demonstrated that any application she may make would bring her within the requirements of the Immigration Rules.
19. The case of TG (Central African Republic) v SSHD [2008] EWCA Civ 997 made it clear that the decision in Chikwamba does not make it automatically disproportionate and unlawful for the SSHD to require an appellant to apply for leave to enter from abroad. Lord Justice Keene indicated that: "These are fact-sensitive issues" (paragraph 3). He observed that Mrs Chikwamba had married at a time when removals to Zimbabwe had been suspended. Such matters as the immigration history of an appellant are clearly relevant, as Lord Brown indicated himself at paragraph 42. Then Mrs Chikwamba, it was accepted, could not realistically leave her child behind in order to seek entry clearance from Zimbabwe, so in that case there would have been an impact on the child who had a right to remain in the United Kingdom. It has not been said that the appellant's son could not be left in this country with his mother during any such time. So there is a difference there."
20. Lord Brown also stated in Chikwamba at paragraph 42 that:
"42....Other obviously relevant considerations will be whether, for example, the applicant has arrived in this country illegally (say, concealed in the back of a lorry) for good reason or ill. To advance a genuine asylum claim would, of course, be a good reason. To enrol as a student would not. Also relevant would be for how long the Secretary of State has delayed in dealing with the case—see in this regard EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41. In an article 8 family case the prospective length and degree of family disruption involved in going abroad for an entry clearance certificate will always be highly relevant. And there may be good reason to apply the policy if the ECO abroad is better placed than the Immigration authorities here to investigate the claim".
21. As your client is not able to make an application to remain here under the Immigration Rules or to seek entry clearance in any capacity other than as a visitor (due to her being over the age of 18), we consider the onus would be on her to make out her claim under Article 8 to the Entry Clearance Officer. It would be for the Entry

Clearance Officer to take all the evidence in the round and to determine whether declining her entry clearance would breach your client's rights under Article 8 of the European Convention on Human Rights.

22. The case of Beoku-Betts [2008] UKHL 39, dealt with the issue of whether and to what extent the human rights of third party family members should be considered by the Asylum and Immigration Tribunal. We have already indicated above why we consider it is reasonable for your client to return to the Democratic Republic of Congo and seek entry clearance lawfully and why it is open to Mrs Lovell and her family to sponsor that application should they choose to do so. Even if your client is not able to meet the requirements of the Immigration Rules, the onus is on her to demonstrate that refusing her entry clearance would breach her rights under Article 8 of the European Convention on Human Rights. It is open to both your client and Mrs Lovell to submit any evidence in support of their family life to the Entry Clearance Officer. We have considered the rights of Mrs Lovell and her family. However, there is no evidence that their bonds with your client are any more than normal emotional ties that could be maintained by the usual methods of modern communication. We have also explained why in the alternative, it is reasonable to expect Mrs Lovell and her children (should they opt to do so) to visit your client in the Democratic Republic of Congo or join her there should the conviction of the family relationship be so strong that they feel they have no choice but to do so.
23. Following the Supreme Court's judgment in ZH (Tanzania) [2011] UKSC4 and taking into account the UK Border Agency's obligations under Section 55 of the Borders, Citizenship and Immigration Act 2009, the position in relation to your client's foster siblings has now been further considered. We should point out that the UK Border Agency is not seeking to remove them from the United Kingdom.
24. However, while considering whether it is proportionate to remove your client from the United Kingdom the best interests of these children have been fully considered.
25. It remains a decision for Mrs Lovell and her children as to whether she wants to establish family and private life in the Democratic Republic of Congo with your client following her removal. If they decide to continue their family life in the Democratic Republic of Congo, it is considered that at their young age, Mrs Lovell's children would not be disadvantaged. It is understood that, although your client has family members in the United Kingdom, there is no evidence that their bonds with her are any more than normal emotional ties that could be maintained by the usual methods of modern communication. Furthermore your client's sister has no lawful basis to remain in the United Kingdom.
26. As to the necessity of the interference, any family and private life that your client has established during her stay in the United Kingdom when balanced against the legitimate public interest in effective immigration control would not render her removal a disproportionate interference. She is not a settled migrant and has never been granted a right to remain in the United Kingdom. Her stay here pending the determination of her asylum and human rights claims, has at all times been

precarious and her removal, on rejection of those claims, is not rendered disproportionate.

27. We therefore consider the interference in her private life and any family life to be proportionate to the achievement of the permissible aim.
28. It is considered that the judgments of the House of Lords in Chikwamba v SSHD [2008] UKHL 40 and Beoku-Betts v SSHD [2008] UKHL 39 do not benefit your client as family life can be enjoyed in the Democratic Republic of Congo.
29. You have submitted no sufficiently compelling evidence in support of your claim that the removal of your client from the United Kingdom would give rise to a disproportionate interference with her Article 8 rights. In these circumstances it is not considered that the prejudice to your client's right to a private and family life in the United Kingdom is sufficiently serious as to amount to a breach of her Article 8 rights. It is not therefore accepted that the decision to proceed with your client's removal from the United Kingdom would breach her rights under Article 8 of the European Convention on Human Rights.
30. We have also considered whether it would be appropriate in your client's case for her to be granted leave to remain in the United Kingdom, on an exceptional basis, outside the Immigration Rules. Having taken into account all the circumstances of her particular case, we are not satisfied that there are sufficient exceptional or compelling compassionate factors which would make it appropriate for discretion to be exercised in your client's favour.
31. The effect of this decision is that the refusal letter and certification in accordance with Section 93 (2) of the Nationality, Immigration and Asylum Act 2002 made on 6 November 2009 is hereby maintained.
32. In the absence of strong countervailing circumstances, there is no barrier to your client's removal. The United Kingdom Border Agency will therefore proceed with removing her. If you wish to respond to this letter please reply to the United Kingdom Border Agency, Teeside Local Immigration Team, in the first instance as they have conduct of this case.

Yours Faithfully



C. Castillejo
Senior Caseworker
Operational Support & Certification Unit
Removals Logistics
Appeals and Removals Directorate
Immigration Group
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