



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/04833/2017

THE IMMIGRATION ACTS

Heard at Field House
On 11th June 2018

Decision & Reasons Promulgated
On 19th June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

OAA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms H Short of Counsel
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge James (the judge) of the First-tier Tribunal (the FtT) promulgated on 29th November 2017.

2. The Appellant is a Nigerian national born 3rd July 1981. He applied for a derivative residence card pursuant to regulation 16 of the Immigration (European Economic Area) Regulations 2016 as the primary carer of his daughter, who is a British citizen.
3. The application was refused on 4th May 2017 and the Appellant appealed to the FtT, and the appeal was heard on 7th November 2017.
4. The issue before the FtT was whether the Appellant is the primary carer of his daughter. His case was that he shared equally the responsibility for his daughter's care with her mother who is not an exempt person. The judge heard evidence from the Appellant and his daughter's mother and found that the Appellant and his daughter have a strong bond, share a number of activities together, he provides her dinner money and has provided shoes for her and other financial support. However the Appellant's daughter did not live with him and he did not cook, clean or do laundry for her. The judge did not accept that the Appellant is the primary carer of his daughter, and it was not accepted that he shared equal responsibility for her care. The judge found that the majority of the daughter's care was undertaken by her mother, although it was accepted that the Appellant has contact with his daughter and is involved in her life. The judge found that the requirements of regulation 16(8) were not satisfied. The appeal was therefore dismissed.
5. The Appellant applied for permission to appeal to the Upper Tribunal. It was submitted that the judge had materially erred in law by failing to apply the Home Office policy guidance on free movement rights with reference to derivate rights of residence, published for Home Office staff on 11th April 2017. The Appellant quoted from page 48 which relates to sharing equal responsibility with a person who is not exempt. The guidance states that equal responsibility does not mean there has to be evidence of equal sharing of responsibilities as this is not always practical. By way of example the guidance states that while a father might not provide the majority of care for the child, if he is actively involved in the child's life and continues to have parental responsibility, it should be accepted that both parents share equal responsibility.
6. Permission to appeal was granted by Judge S P J Buchanan of the FtT who found;

"It is arguably a material error of law to carry out an evaluative assessment of proportion of effort undertaken by parents in determining whether the father shares equally the responsibility for the child's care, as responsibility for care might be measured and determined in law by other means."
7. Following the grant of permission, the Respondent did not lodge a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008.
8. Directions were issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

9. On behalf of the Respondent Mr Bramble conceded that the judge had materially erred in law as contended in the grounds seeking permission to appeal. Mr Bramble acknowledged that the FtT decision should be set aside, and re-made by the Upper Tribunal, allowing the Appellant's appeal, based upon the findings made by the judge.
10. In view of the concession made on behalf of the Respondent, Ms Short had nothing to add.

My Findings and Conclusions

11. I set aside the decision of the FtT. I find that the judge materially erred in law in failing to apply the Home Office guidance referred to in the grounds seeking permission to appeal, although I can find no indication that this guidance was in fact drawn to the judge's attention by either party to this appeal.
12. I re-make the decision by allowing the Appellant's appeal based upon the findings made by the judge at paragraphs 20-22, in relation to the Appellant's involvement with his daughter. When those findings are applied to the Home Office guidance on derivate rights of residence published 11th April 2017, I find that both the Appellant and his daughter's mother share equal responsibility for the Appellant's care.
13. Regulation 16(8) of the 2016 regulations is set out below;
 - (8) A person is the "primary carer" of another person (AP) if -
 - (a) the person is a direct relative, or a legal guardian of AP; and
 - (b) either -
 - (i) the person has primary responsibility for AP's care; or
 - (ii) shares equally the responsibility for AP's care with one other person who is not an exempt person.
14. I conclude that regulation 16(8) is therefore satisfied on the basis of shared responsibility.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision. The appeal is allowed.

Anonymity

The FtT made an anonymity direction as the appeal involved considering the Appellant's daughter who is a child. I continue that direction pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Unless or until a Tribunal or court directs

otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family.

Signed

Date 12th June 2018

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

As the appeal is allowed I have considered whether to make a fee award. I make no fee award as the appeal has been allowed because of evidence considered by the Tribunal that was not before the original decision maker.

Signed

Date 12th June 2018

Deputy Upper Tribunal Judge M A Hall