Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: EA/06594/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 29th October 2018	**On 28th November 2018**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

Miss N P E

(Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ikegwuroka, instructed by Almond Legals

For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Nigeria born on [~] 1985 and was granted permission to appeal against a decision of First-tier Tribunal Judge Dineen, promulgated on 1st

August 2018, which dismissed the appellant's appeal against the decision of the Secretary of State dated 15th July 2018. That decision identified that the appellant had applied for a Derivative Residence Card as the primary carer of a European Union national child (Portuguese) who is exercising Treaty Rights as a self-sufficient person. The application was refused under Regulation 16(2), 16(4)(a) with reference to 16(3)(c) and 20(1)(b) of the Immigration (European Economic Area) Regulations 2016 because the applicant had not shown that her child (Ad) was a self-sufficient person (or indeed in education). The appellant had not provided evidence that she and her child had sufficient funding in the UK such that she would not become a burden on the social assistance system of the United Kingdom.

2. The appellant had entered the United Kingdom as a visitor in February 2012. She undertook a proxy marriage in November 2012 with a Portuguese national but her subsequent application for a spousal residence permit was refused. She parted from her said partner prior to the birth of her first child (born on 23rd January 2016) but a second child was born on 7th September 2017. Both have Portuguese citizenship. The appellant not longer has contact with her former partner and there was no evidence in relation to him in the bundle (or on whether he was still the United Kingdom).

3. The appeal before the First-tier Tribunal clearly had an unusual procedural history. The judge recorded that the bundles of evidence relied upon had not been served on the Tribunal and respondent until lunchtime on the day of the hearing and a skeleton was then served. The judge identified that the sole issue under challenge was whether the child was self-sufficient for the purposes of the Regulation. When the Tribunal reconvened at 2.30 pm counsel had been substituted by a new counsel. That counsel then himself withdrew and the appellant was without representation. The appellant produced four payslips being from 15th April 2018 to 23rd June 2018. She had net earnings of £1,901 during that period. Health insurance documents at page 177 of the bundle were also identified. The EU national child also had a record with the NHS and as the judge recorded '*making it clear that the child in question has been registered with a doctor and will be in receipt when necessary of NHS care*'. The judge concluded that

> '*it is clear that the mother and child are not in fact self-sufficient in terms of medical care*'.

4. The judge also found at paragraph 21

> '*Nowhere in the large appeal bundle is there any indication of the outgoings of the family save for the medical insurance premiums which come to something over £700 per annum. In particular, no details are given of the accommodation available to the mother or child in question. No details are given as to the cost of their upkeep or their accommodation. No details are given as to the expenses which are incurred in the upkeep of the family and it is impossible in all the circumstances to make a finding on the facts existing at the time of this decision and on the balance of probabilities that the younger child is self-sufficient. It follows from that, no other grounds being advanced on behalf of the appellant, that*

the appeal must fail under Regulation 16(2) and cannot succeed on any other basis'.

Application for Permission to Appeal

5. The application for permission asserted the judge had

(i) misdirected himself as to the proper interpretation of self sufficiency under the Community Laws. Article 7(1)(b) of the Citizens' Directive creates a right of residence for those who have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover. Article 8(4) sets out a definition of 'sufficient resources' such that

> *'Member States may not lay down a fixed amount which they regard as 'sufficient resources', but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance or, where this criterion is not applicable higher than the minimum social security pension paid by the host Member State*'.

The grounds contended that although not possible to state what the minimum level of self-sufficiency might be, it could not be higher that the level of income support for United Kingdom nationals. The appellant earned £1,264 per month and she did not receive public benefit. She was not a burden on the social assistance of the host state.

Kuldip Singh (Case C-218/14) considered potential sources of income and held that the necessary income could derive in part from a spouse who was a third country national. The judge did not consider the range of income possibilities.

ii) The appellant and her daughter were not an unreasonable burden on the state resources. Both had comprehensive sickness insurance ('CSI') which the judge acknowledged. The existence of the CSI fulfilled this aspect of the requirements of the regulations and use of the NHS did not invalidate the availability of the insurance. The judge misdirected himself when concluding that the possession of additional NHS care for the child undermined the availability of the CSI.

The judge made material factual errors which amounted to an error of law.

6. Permission to appeal was granted by Judge Ford on the first ground only on the basis that it was arguable that as the judge found the appellant earned £316 per week. There was no evidence of reliance on public funds and it was arguable that the Tribunal erred as it should not have been found necessary to show anything more than income at the level of income support which was shown.

7. However, permission on the second ground was specifically not granted. The grounds for permission had argued that as the judge found that comprehensive

health insurance (CSI) was available for the appellant and her daughter and the fact that the child had access to additional NHS care when necessary should not have led the Tribunal to conclude that the child did not have comprehensive health insurance.

8. Judge Ford found this second ground was *not* arguable. There had been shown reliance on public funds.

9. At the hearing, Mr Ikegwuroka argued with reference to the CSI but as can be seen from above, permission to appeal was not granted on that basis. Permission was only granted in respect of the self sufficiency of income. As Mr Deller contended there were in fact two components in relation to whether the child was self-sufficient which included whether there was comprehensive health insurance. Further, the child was to be self sufficient but she could only rely on the earnings of the appellant. These could only be relied only if the appellant was in the United Kingdom lawfully. I raised the question of **Alokpa** CJEU C 2013/645 and Mr Deller stated that the issue of income may not have been fully explored. Mr Ikegwuroka argued that the appellant had been granted a certificate of Application which enabled her to work and thus she was not working unlawfully. Mr Deller fundamentally opposed this approach. The Certificate of Application did not confirm that the appellant had a right to work.

Conclusions

10. As established in the Secretary of State's decision letter and at the outset of the hearing before me, the appellant had applied for a derivative right of residence as the primary carer of her child who was 'self-sufficient'. The appeal was not put on any other basis. The child was not in education.

11. Article 7 of Directive 2004/38/EU ('the Citizens' Directive), 'Right of residence for more than three months', is worded as follows:

> *'(1) All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:*
>
> *(a) are workers or self-employed persons in the host Member State; or*
>
> *(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence **and** have comprehensive sickness insurance cover in the host Member State; or*
>
> *(c)*
> - *are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and*
> - *have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social*

assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

12. In **Zhu and Chen [2004] ECR I-9925**, the CJEU held, at §45, that:

> '*A refusal to allow the parent, whether a national of a member state or a national of a non-member country, who is the carer of a child to whom art 18EC and Directive 90/364 grant a right of residence, to reside with that child in the host member state would deprive the child's right of residence of any useful effect. It is clear that enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer*'.

13. The child, however, must first be afforded an EEA right within the host member state (the child was a Portuguese national), and Regulation 4 and 16 of The Immigration (European Economic Area) Regulations 2016 set out as follows:

Worker", "self-employed person", "self-sufficient person" and "student"

4. *– (1) In these Regulations –*

(a) "worker" means a worker within the meaning of Article 45 of the Treaty on the Functioning of the European Union(1);

(b) "self-employed person" means a person who is established in the United Kingdom in order to pursue activity as a self-employed person in accordance with Article 49 of the Treaty on the Functioning of the European Union(2);

(c) "self-sufficient person" means a person who has –

*(i) sufficient resources not to become a burden on the social assistance system of the United Kingdom during the person's period of residence; **and***

(ii) comprehensive sickness insurance cover in the United Kingdom;

'***Derivative Right to Reside***

16 *(1) A person has a derivative right to reside during any period in which the person –*

(a) is not an exempt person; and

(b) satisfies each of the criteria in one or more of paragraphs (2) to (6).

(2) The criteria in this paragraph are that –

(a) the person is the primary carer of an EEA national; and

(b) the EEA national –

(i) is under the age of 18;

> *(ii) resides in the United Kingdom as a self-sufficient person; and*
>
> *(iii) would be unable to remain in the United Kingdom if the person left the United Kingdom for an indefinite period…'*

16 Permission to appeal was not granted on the basis that the child had shown self-sufficiency on the grounds of the availability of comprehensive health insurance (under the second limb of Regulation 16(2)(b) with reference to Regulation 4 (1)(c)). The judge did not accept that the health insurance was *comprehensive* because as he stated at paragraph 18

> '*Notwithstanding the existence of the medical insurance documents, at page 177 of the appeal bundle is a letter from the NHS making it clear that the child in question has been registered with a doctor and will be in receipt when necessary of NHS care'*.

17 There was no renewal of the application to appeal on that basis before me. As that ground was not permitted the application must fail. The child on whom the parent depended (was born in January 2016 and as acknowledged in the appeal documentation by the appellant not in education), was registered with and had used the National Health Service. There was no indication of any reimbursement of that system or registration as a private patient in order to access private health care. (Indeed, there was no actual evidence of premium payments made).

18 Even if that were not the case, the requirements are that there is comprehensive health insurance *and* that the EU citizen is not a burden on the social assistance system. To be self-sufficient there must be no burden on the social assistance system. I emphasise this point because as the grounds for permission stated '*the point of the child having comprehensive health insurance is to avoid reliance on public funds. Registering with a GP for NHS care rather than registering as a private patient does show reliance on public funds'*. It is not just income which is the focus of the provisions regarding reliance on the public funds.

19 The social assistance system includes the National Health Service. As set out in **W (China) and X (China)** [2006] EWCA 1494,

> *'[the] fundamental reason for the insurance requirement that was identified as the basis of the scheme of the Directive in Chen: to prevent the presence of the EU citizen placing a burden on the host state. Use of free state medical services exactly creates such a burden [on the host state]*

20 As the child needed to have both health insurance and sufficient resources, provided by her mother, not to become a burden on the host state and failed at both hurdles, she could not be classified as 'self-sufficient'.

21 Mr Deller also argued that the appellant's income was derived unlawfully as she had no leave to remain in the United Kingdom.

22 The guidance from the Home Office entitled 'Free Movement Rights: derivative rights of residence' Version 4.0 published in February 2018 (although not produced at the hearing) states at page 15

> *'Income from the primary carer*
>
> *A child may show that they are self-sufficient by relying upon the income of their primary carer. However, any work undertaken in the UK will only be considered acceptable where this is lawful employment. For example, if the primary carer currently has leave to remain under another part of the Immigration Rules which entitles them to work, they can use any income from those earnings to show they are self-sufficient'.*

23 In relation to the income of the parent there has been a reference for a preliminary ruling from the Court of Appeal in Northern Ireland (United Kingdom) made on 9 February 2018 in **Ermira Bajratari v Secretary of State for the Home Departmen**t (Case C-93/18) (2018/C 152/16) on the following basis. '*Can income from employment that is unlawful under national law establish, in whole or in part, the availability of sufficient resources under Article 7(1)(b) of the Citizens Directive (1)?*'.

24 This question, however, was previously considered in the Court of Appeal in **W (China) and X (China) [2006] EWCA Civ 1494**) which addressed the arguments as to the lawfulness of the third-party national's work. In that case it was asserted by the Secretary of State that the third party was working illegally whilst the appellant's representative advanced that the work was not illegal because as custodian of the child the parent did not require leave to enter. That was given short shrift by the court at paragraph 16

> '*for a general proposition that where the presence of a third party national was required to make EU rights fully effective then domestic law cannot be enforced against that third party. The case [Chen] is authority for no such thing. First, it depends on the establishment of the EU right before the third party enters the equation*'

and further that

> *'the state is not obliged to adjust its domestic law in order to make available to the EU citizen resources that would not otherwise be available to him, so that he can fulfil the pre-condition to the existence in his case of the article 18 right: the right which has to exist before he can require the state to adjust its domestic law in deference to it.'*

25 It has been argued that this should be read in the light of **Alokpa,** which held at paragraph 27 that there was no requirement as to the origin of the resources of the child upon whom the appellant would derive rights, as follows

> *'it suffices that such resources are available to the Union citizens, and that that provision lays down no requirement whatsoever as to their origin, since they could be provided, inter alia, by a national of a non-Member State, the parent of the citizens who are minor children at issue (see, to that effect, concerning European Union law instruments pre-dating that directive, Case C-200/02 Zhu and Chen [2004] ECR I-9925, paragraphs 28 and 30).*

26 That refers to 'origin' of funds not 'the lawfulness of funds'. Neither case states in terms that the income might include income which is unlawful. The CJEU in **Alokpa** indeed relied on and substantially mirrored the case of **Zhu and Chen**. That in turn was analysed by the Court of Appeal in **W (China)** which rejected the notion of unlawful work establishing an avenue to resources for self-sufficiency by a child and further, pointed out that, first, the EU right must be established before the third party (in this case the appellant) 'enters the equation'. Indeed, the First-tier Tribunal found that the payslips emanated from April 2018. There was no indication that any right had been established prior to April 2018 or evidence that the appellant was lawfully in the United Kingdom prior to that date. Nor does a Certificate of Application render the work of the appellant lawful. There was no evidence as to the whereabouts of the father.

27 The Home Office guidance would therefore appear to follow the Court of Appeal decision. As such the appellant cannot rely on her income as it is 'unlawful' and further she has not established the prior existence of an EEA right by her child. (The appellant in fact has two children but the rights as discussed herein are considered in relation to the older child).

28 Even if, however, my reasoning is flawed in relation to the assessment of the lawfulness of income such self-sufficiency was not effectively challenged in relation to the comprehensive health insurance or the finding that the appellant and child were not a burden on the social assistance system of the host member state (the United Kingdom) during their period of residence.

29 For the reasons given I find there is no material error of law in the judge's decision which incorporated adequately reasoned findings for dismissing the appellant's claim. The First-Tier Tribunal decision will stand.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and 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. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Helen Rimington* 14th November 2018

Upper Tribunal Judge Rimington