



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/10658/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 11<sup>th</sup> May 2018

Determination Promulgated  
On 17<sup>th</sup> May 2018

Before

UPPER TRIBUNAL JUDGE COKER

Between

THELMA OMOWUNMI ATOBATELE

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr A. Adewole of A & A solicitors  
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. First-tier Tribunal judge Traynor dismissed Ms Atobatele's appeal against the refusal of the respondent to issue her with a derivative residence card as confirmation of a right to reside in the UK because she is the parent of an EEA national child (Maltese citizenship). He found that the child was not self-sufficient in line with Directive 2004 /38/EC.
2. Permission was sought on the following grounds:
  - (a) The First-tier Tribunal Judge erred in rejecting the appellant's claim that her daughter was self-sufficient, including failing to take account of the child's means; he failed to apply the correct test.
  - (b) Having found that the child was an EEA national, that the appellant was the primary carer and the child would have to leave the UK if the appellant left the UK, he failed to correctly apply the regulations

(c) Failed to consider whether the appellant was entitled to a permanent residence card.

3. Permission was granted only in respect of ground (a) by First-tier Tribunal judge Andrew. The appellant had not sought to renew the application for permission regarding grounds (b) and (c).
4. The respondent had accepted that there was a BUPA comprehensive Insurance Policy for both the appellant and the EEA national child. The application for the derivative residence card included evidence that the appellant was employed and in receipt of Child Tax Credit and working Tax Credit, had savings of £4000 and referred to the child being in receipt of an inheritance, shared with her cousins, following the death of her grandmother. The grounds seeking permission and upon which permission was granted stated, *inter alia*,

.....the test applied by the FTTJ was a claim to public funds in the form of tax credit. There was no assessment of the adequacy or otherwise of the income from employment, savings and inheritance due to the EEA child nor what was her personal circumstances with regards to what she required in funds to be deemed to be self sufficient both for herself and her mother.

5. There was no evidence before the First-tier Tribunal or produced to the respondent what that inheritance was, how many cousins it was shared with, whether probate had been granted or its value. Mr Adewole said that no evidence about the inheritance had been submitted with the application but eventually, after being pressed to identify to me what exactly he was relying upon as evidence of the child's finances, informed me that the £4000 savings was the inheritance share; there was no other income or capital sum expected. He confirmed there was nothing else available to the appellant or the child other than these sums i.e. the appellant's earnings, the savings and the tax credits.
6. The First-tier Tribunal judge's findings so far as are relevant to this appeal are as follows:

28. ....although it was accepted that the Appellant is employed and has savings of approximately £4000, it was nevertheless noted that she is in receipt of Child Tax Credit and Working Tax credit, which are both deemed to be public funds. The Appellant failed to provide any evidence to demonstrate that the EEA child has income from another source which would sustain her during her period of residence in the United Kingdom.....I find that when I have considered whether the EEA child is residing in the UK as a self-sufficient person within the terms of Regulation 4, I must conclude that the fact her mother claims public funds, and where there is no other source of income which would demonstrate that the child is self-sufficient in this country, that the terms of Regulation 4 (i) are not met and that, in turn Regulation 15(a)(2)(b)(ii) cannot be satisfied.

.....  
33. ....I find that the child has no funds of her own and is dependent upon a parent who in turn is reliant upon public funds. Therefore for those reasons, I find that the appeal against the refusal of the decision to issue an EEA derivative residence Card must be dismissed.

7. The First-tier Tribunal judge considered regulation 4 under the 2006 Regulations. This is replicated, in so far as relevant to this appeal, in the 2016

Regulations. *Mirga* [2016] UKSC 1 and *Brey* C-140/12 19 September 2013 are of no assistance to the appellant. *Brey* considered the issue of an individual residing in the UK for a period longer than three months and that they should not become a burden on the social assistance system of the host state; the issue of automatic expulsion as a consequence of recourse to the social assistance system. In *Brey*, the CJEU held:

57.....it follows that...Directive 2004/38 allows the host Member State to impose legitimate restrictions in connection with the grant of such benefits to Union citizens who do not or no longer have worker status, so that those citizens do not become an unreasonable burden on the social assistance system of that Member State.

8. *Mirga* considered entitlement to certain benefits pursuant to UK domestic law. The Court of Appeal commented that *Brey* was an unusual case, the Austrian government in that case having granted Mr Brey a residence permit. The Court of Appeal rejected the submission that individual assessment of each particular case was required. *Mirga* had no significant means of support, neither had worked for sustained periods and [70] "...the main point of the self-sufficiency test is to assist applicants who would be very unlikely to need social assistance".
9. In this case, the child is not self-sufficient. Although the appellant is working and claiming tax credit, her entitlement to work stems from having made the application for a derivative residence card, not because she had a right to work in any event. Although Mr Adewole seemed to be relying upon a submission that without the Tax Credits, the appellant would have been able to financially support her and the child, that is not relevant (even if it were correct) because the child is not self-sufficient. Although the First-tier Tribunal judge expressed the dismissal of the appeal in terms of the appellant claiming tax credit, the fact is the child is not self-sufficient. There is no material error of law by the First-tier Tribunal judge dismissing the appeal on self-sufficiency grounds.
10. The grounds seeking permission to appeal submitted that the appellant should have succeeded in her appeal on the basis that she met regulation 16(4) to 16(5) of the 2016 Regulations<sup>1</sup>. Permission to appeal was not specifically refused on that ground. It does not appear that such a submission was made to the First-tier Tribunal judge. In any event to sustain such a challenge, the child has to be a British Citizen for the appellant to meet the criteria in regulation 16(5) (she is not, she is Maltese) and to meet regulation 16(4) she would have to show that the child resided in the UK at the same time as either parent who was exercising Treaty Rights and she was in education at the time. It does not appear that this evidence was before the First-tier Tribunal judge. So, in any event there could be no error of law by the First-tier Tribunal judge in failing to consider matters which were not before him.
11. Mr Adewole asserted he "required" a declaration that the appellant was entitled to permanent residence. As Mr Adewole should know, the Tribunal cannot make such a declaration, apart from the fact that the question of

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<sup>1</sup> The comparable regulation in the 2006 Regulations is 15A(4) and (4A)

whether the appellant is entitled to permanent residence forms no part of the appeal before me. First-tier Tribunal judge Traynor made full and detailed findings on the relationship between the appellant and her child; he found her to be an honest witness. If the appellant chooses to make an application for permanent residence I have no doubt but that the respondent will take full cognisance of the decision of First-tier Tribunal judge Traynor.

12. Mr Adewole also sought a declaration that 'Zambrano' applied. Again, the Upper Tribunal cannot make such a declaration even ignoring the fact that this does not form any part of the appeal before me. In any event the 'Zambrano' line of cases do not apply to non-British EU nationals who are neither self-sufficient or cannot show a right of permanent residence.

#### Conclusion

13. There is no material error of law by the First-tier Tribunal judge. I do not set aside the decision of the First-tier Tribunal.
14. The appeal to the Upper Tribunal is dismissed.
15. The decision of the First-tier Tribunal stands.

Date 14<sup>th</sup> May 2018



Upper Tribunal Judge Coker