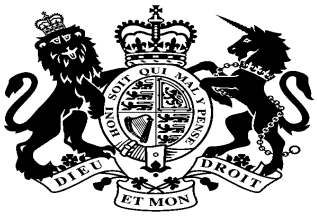

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01032/2018

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On Wednesday 19 December 2018	**On Monday 28 January 2019**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR FRANCIS [A]
(anonymity direction not made)

Appellant

and

AN ENTRY CLEARANCE OFFICER - GHANA

Respondent

Representation:
For the Appellant: Mr K Siaw, Solicitor of KPP Oplex
For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against a decision of First-Tier Tribunal Judge C Greasley promulgated on 26 September 2018 ("the Decision") dismissing his appeal against the Respondent's decision dated 4 January 2018 refusing the Appellant a family permit under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") to join his daughter, [A], who is a

British citizen (based on ten years' residence in the UK from birth) and who continues to live with her mother, the Appellant's wife, in the UK. The Appellant's wife, Florence, has been given a derivative residence card in the UK and lives here with [A] and her twin sons, although recently one of the twins ([L]) has returned to Ghana to live with his father. I will need to deal with the evidence about that in due course. The Respondent's decision was upheld by the Entry Clearance Manager on 8 March 2018 following a review of the original decision.

2. In short summary, the Respondent does not accept that the Appellant has provided sufficient evidence to show that he meets the EEA Regulations to entitle him to a derivative residence permit. The Judge declined to admit the Appellant's bundle of documentary evidence on the basis that it was filed late without adequate explanation for the delay and went on to consider the appeal based on oral submissions. He concluded that the Appellant could not satisfy the requirements of regulation 16(5) of the EEA Regulations. He therefore dismissed the appeal.

3. The Appellant raises essentially three grounds of appeal. First it is said that the Judge failed to provide reasons for his finding that the Appellant could not meet regulation 16(5) of the EEA Regulations. Second, the Appellant says that the Judge failed to consider the best interests of the children. Third, it is said that the appeal hearing was procedurally unfair because the Judge refused to hear evidence from the Appellant's wife and daughter who were in attendance.

4. Permission to appeal was granted by First-tier Tribunal Judge L Murray on 31 October 2018 in the following terms so far as relevant:

> "… [2] The grounds assert that the Judge erred in failing to give reasons why the Appellant was not a primary carer within the definition of Regulation 16(8) of the EEA Regulations 2016; that the Judge gave no reasons for finding that the refusal of entry clearance had the effect of depriving an EU citizen of the genuine enjoyment of the substance of EU rights and that the Judge materially erred in refusing to allow the Appellant's sponsor to give evidence.
>
> [3] Whilst it is unclear from the decision whether the First-tier Tribunal Judge refused to allow the Appellant's witnesses to give evidence, it is arguable that the Appellant was denied a fair hearing in view of the fact that the Judge both refused to admit the Appellant's bundle and refused an adjournment in order for the bundle filed and served. Whilst it is hard to see how the Appellant could have succeeded in his appeal on the factual matrix presented, I do not refuse permission in respect of the other grounds in view of the fact that material evidence was arguably excluded."

5. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

ERROR OF LAW DECISION

6. In light of the terms of the permission grant and although the grant was not limited, it is convenient to begin with the third ground concerning procedural fairness.

7. As I pointed out to Mr Siaw, the matter pleaded at [7] of the grounds is unsupported by evidence. Mr Siaw submitted that what is there said is factually accurate; he represented the Appellant before the First-tier Tribunal and could attest to that fact. However, as I pointed out to Mr Siaw it is entirely inappropriate for a representative to give evidence. As is made clear in BW (witness statements by advocates) Afghanistan [2014] UKUT 00568 (IAC), a representative cannot act as both advocate and witness. If a representative is required to give witness evidence, the appropriate course is for another person to take over the role of representative. Although Mr Siaw said that the Appellant's wife would also be able to give evidence of what occurred at the previous hearing, I pointed out that she has not prepared a witness statement to deal with her evidence.

8. Ms Willocks-Briscoe was unable to assist as to what occurred before Judge Greasley as there was no note of the hearing on her file. The record of proceedings from that hearing did not assist either as there is no express record of Mr Siaw asking for the Appellant's wife and daughter to be allowed to give evidence.

9. However, I have regard to the way in which the Judge dealt with the Appellant's bundle as recorded at [5] to [7] of the Decision. In circumstances where the Judge ruled out consideration of the documentary evidence which included witness statements from the Appellant, his wife and his daughter, I consider it likely that the Judge would also have refused to allow oral evidence to be given because to do so would have circumvented his ruling that the evidence ought not to be admitted due to its lateness. I therefore proceed on the assumption that what is said at [7] of the grounds is factually accurate and that the Judge refused to admit the Appellant's bundle and to hear oral evidence.

10. Having regard to what is recorded at [5] of the Decision, the Judge was entitled to regard the conduct of the representatives as "completely cavalier" ([6] of the Decision). However, that is the fault of the representatives and not of the Appellant or his family. The bundle of documents was limited (said to run to fifty-seven pages of which about thirty-one were social media message chats; although the bundle I have is missing some of those pages: see below). The Respondent did not object to the late admission of the evidence. His representative merely asserted that the appeal could not succeed with or without the evidence. The Judge did not consider the potential prejudice to the Appellant of being unable to produce evidence to support his case. This led to the Judge deciding the issues in an evidential vacuum.

11. Having regard to the overriding objective of disposing of appeals fairly and justly, I am satisfied that it was procedurally unfair to determine the appeal without considering the documentary evidence and hearing oral evidence. The failures of the Appellant's representative to comply with the Rules and to offer a good reason for those failures could have been dealt with by other means such as a costs order against them in relation to that conduct. It was disproportionate, particularly having regard to the very limited nature of the evidence, to rule out the evidence altogether.

12. It follows that there is an error of law. I am unpersuaded by the other grounds when those are considered individually. However, since the Judge's reasoning did not include consideration of the evidence, the error of law which I have found to be established impacts on those other grounds.

13. I therefore find that the Decision contains a material error of law due to the procedurally unfair manner by which it was reached. I therefore set the Decision aside.

14. Although I reserved my decision at the hearing in relation to error of law, neither representative suggested that the appeal ought to be remitted if I found an error of law to be established. The Appellant's wife and daughter were both present at the hearing and ready and willing to give oral evidence. I also had before me an application pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce a further statement from the Appellant and two documents relating to his child [L] who is currently living with him in Ghana.

15. I therefore agreed with the representatives that I would go on to hear evidence and would consider all the evidence in the event that I found an error of law as I have done. I therefore proceed to re-make the decision.

RE-MAKING OF DECISION

Factual Background

16. The Appellant is a national of Ghana as is his wife, Florence. I was not provided with much evidence about their immigration history. However, from the Appellant's application for entry clearance, it is evident that the Appellant came to the UK as a visitor in February 2008 and, having indicated that he had not made an application to remain in the last ten years, must have overstayed after expiry of his visit visa. It also appears from that application that the Appellant was refused entry on arrival in February 2008 due to a change of circumstance. Whatever the exact position, therefore, the Appellant was in the UK without leave for a period. He gives an address in Ghana as his permanent address where he has lived for six years which is consistent with what I was told, that he returned to Ghana about six years ago.

17. The Appellant's wife has a derivative residence permit as the primary carer of [A]. I will deal with her evidence as to how that came about below. Suffice it to say that [A] acquired British citizenship having been born here on 22 November 2004 and having lived here for ten years thereafter. The Appellant's wife said that she had previously been given leave to remain also based on [A]'s status.

18. At the time of the Appellant's application, his twin sons, [L] and [Le] had not been in the UK for ten years and were therefore both listed as Ghanaian nationals. The position has since changed because both are now aged over ten years and have recently been granted British citizenship. The Appellant now seeks to rely on his relationship with those children particularly with [L] who has moved to Ghana which the Appellant says shows that the refusal to admit the Appellant to the UK is having the effect of depriving [L] of his rights as a European citizen.

Legal Framework

19. The relevant provisions of the EEA Regulations are as follows:

"**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).

…

(5) The criteria in this paragraph are that—

(a) the person is the primary carer of a British citizen ("BC");

(b) BC is residing in the United Kingdom; and

(c) BC would be unable to reside in the United Kingdom or in another EEA State if the person left the United Kingdom for an indefinite period.

…

(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.

(9) In paragraph (2)(b)(iii), (4)(b) or (5)(c), if the role of primary carer is shared with another person in accordance with paragraph (8)(b)(ii), the words "the person" are to be read as "both primary carers".

(10) Paragraph (9) does not apply if the person with whom care responsibility is shared acquired a derivative right to reside in the United Kingdom as a result of this regulation prior to the other person's assumption of equal care responsibility.

(11) A person is not [to] be regarded as having responsibility for another person's care for the purpose of paragraph (8) on the sole basis of a financial contribution towards that person's care.

…"

The Evidence

Documentary Evidence and the Appellant's Witness Statements

20. I have before me a bundle said to run to fifty-seven pages. The Tribunal's copy of the bundle however runs only to thirty-nine pages. By a letter dated 8 January 2019, the Tribunal wrote to KPP Oplex asking for a full copy of the bundle to be submitted within seven days. There has been no response to that letter and, since the correspondence from KPP Oplex provides only a postal address and no telephone or e-mail contact details, it has not been possible to make any further enquiries. I am therefore obliged to decide the appeal on the basis of an incomplete bundle although it appears from the index that the missing documents are likely to be of a similar nature to the other documents in the copy which I do have.

21. The bundle contains the witness statements of the Appellant, his wife and [A]. That bundle also contains letters from [L] and [Le], the passport of [A] showing that she is a British citizen and certificates and letters recording [A]'s educational achievements. Twenty pages of the bundle ([20] to [39]) are taken by social media messages between [A] and a telephone number abroad which can be assumed from the content to belong to the Appellant.

22. In addition, I have a further witness statement from the Appellant dated 3 December 2018 which records that [L] has been excluded from school, that [L]'s mother was unable to take care of his educational needs and that [L] therefore had to leave the UK to be with his father, the Appellant. There is an admission form signed 22 November 2018 stated to have been returned on 6 November 2018 recording [L]'s admission to a school in Ghana and a letter from that school stating that [L] was registered as a pupil there from 7 November 2018 to the date of the letter on 21 November 2018.

23. There was no application to call oral evidence by video-link from the Appellant. In addition to his most recent statement, he provided a short statement dated 30

August 2018. He relies on the other evidence submitted and says this about what that evidence shows:

> "…
>
> 2. That my daughter [A] was born in the United Kingdom and that she is a British citizen. That since the Respondent's decision, our twin sons who were also born in the United Kingdom have been registered as British citizens.
>
> 3. That I am their primary carer and that I submitted evidence with the application, most of the evidence related to [A].
>
> 4. That they do not have an exempt person caring for them in the UK. I submitted evidence of our regular chats, contact and the care I provide for my children, [A] and her twin brothers. I call them to assist with their school work and advise them on every day attitude when they are at school and in public. At the time of my application my sons were not registered as British therefore I did not submit any evidence relating to them however I can confirm that I assist them too with their school work and general help and assistance.
>
> 5. I regret to say that unfortunately [L] seems to be having problems at school and I attribute his behaviour to the lack of father figure at home. I attach copies of letters from his school and I believe that he would not have behaved in such a manner if I were around him all the time. I believe that my children will benefit greatly from my presence at home rather than by communicating via social media."

24. The school letters referred to in that statement are not in the bundle (those are among the documents which are missing; from the index they should have been included at [52] to [57]) but I am prepared to accept that [L] has been excluded and has moved to Ghana for the time being to go to school there. However, when the Appellant's wife was asked about if and when [L] might return, although she first said that he would stay in Ghana until the Appellant returned, she finally admitted that if the Appellant did not return, [L] would return to the UK in September 2019 since she has secured places for [L] and his twin brother at a secondary school in the UK.

25. The letter from [L] confirms that the Appellant helps him with his homework and that he would like his father to be with him all the time. [L] speaks of his visit to Ghana and to the efforts made by the Appellant to teach him about Ghanaian customs and language. He says he "had the best time of my life". [L] speaks of the advice his father gives him to "retaliate" if someone has been rude to him and the comfort he derives from his father if he is having a difficult time. [Le] has also provided a very short letter which refers to daily contact with the Appellant. He says that the Appellant gives him guidance about discipline and helps with homework.

26. The social media messages reflect what the Appellant says about helping [A] with her homework from time to time and providing her with some moral advice as well as sending birthday wishes and the such like. However, the messages cover a period of some four months (from 7 November 2017 to 25 March 2018) and the messages are intermittent (covering a total of under fifty days in the four months' period). I do not place weight on the gaps though since my copy of the bundle is incomplete and further messages are probably amongst the missing pages.

A's Evidence

27. [A] has provided a witness statement dated 1 September 2018 which contains the following passage:

> "… 4. I can confirm that my brothers and I regularly have contact with our father who is not in the UK for his help and assistance to do our homework. He also chats with us on general discipline particularly when we are in school and public places. Although we chat regularly we miss his physical presence at home which I believe would make a lot of difference in our home if he were to be here with us in the UK.
>
> 5. That we have visited our father in Ghana on two occasions, during our stay with him I notice a vast difference in the way we did normal everyday activity compared to when we are in the UK. My brothers responded to him better than they do with our mother on her own in the UK which makes me believe that if our father is allowed to come and stay with us we will benefit enormously from his presence at home. I don't think our regular chats and phone calls alone is enough to replace his physical presence at home."

28. [A] also gave oral evidence very briefly. She confirmed that she contacts the Appellant via "Whats App", calls him directly and had visited Ghana with her mother and two brothers in 2017 and the year before that. The family stayed for six weeks on each occasion.

Evidence of Florence [A]

29. The Appellant's wife has provided a statement which is undated. She says that "[m]y husband calls the children regularly to assist them with their school work as I am not able to help them all the time. Sometimes the children will ignore me and as soon as their father calls to speak with them they respond to him". She also says that she believes that the children would "benefit greatly" if the Appellant were in the UK and he could act as a role model particularly for her twin boys.

30. In terms of her past immigration history, Mrs [A] says she has been in the UK for fourteen years. She was granted leave to remain for thirty months in 2014 based on [A]'s residence in the UK. Thereafter, she switched to an application for a derivative residence card because she was advised it was cheaper and she

would be able to have recourse to public funds which would not be available to her if she was in the UK with leave to remain on a limited basis. However, the position has now changed (following a Supreme Court judgment) and, as a result, she has been refused further assistance from the local authority.

31. Mrs [A] gave evidence about her financial difficulties. She works but is unable to work more hours because of the need to care for her children. If she does not work, she does not get paid. She confirmed that the local authority pays for the family's accommodation at present but would not continue to do so indefinitely. She has some additional help from the church community and a few individuals but struggles to make ends meet. As a result, the family are now living in temporary accommodation as they were evicted from their previous home due to rent arrears. She confirmed that the Appellant is self-employed in Ghana but does not make enough money to make any financial contribution to their upkeep. It was clear from her evidence that she is finding the situation very stressful.

32. In relation to [L], Mrs [A] said that his behaviour had suffered due to his father's absence. He wanted his father and the Appellant's absence had affected his pride and self-esteem. [L] was excluded from school because he reacted badly to other children teasing him about being homeless and not having new clothes. She had therefore taken the decision to send him to Ghana because she thought it would help him. As I have already indicated, although she said that [L] would remain in Ghana until his father was allowed to come to the UK, she admitted that, if the appeal failed, [L] would return to the UK prior to September 2019 when a school place has been arranged for him and his brother.

33. Mrs [A] was asked whether she had considered returning to Ghana with the children given her financial struggles. She said she had considered it, but the children wanted to be in the UK. They did not wish to leave their friends. She had to try to stay in the UK to give the children the opportunities of a life in this country. She would stay for the children.

Submissions

Respondent's Submissions

34. Ms Willocks-Briscoe submitted that the Appellant cannot meet regulation 16(5) of the EEA Regulations for two reasons. First, the evidence does not point to him having primary care or shared responsibility for the children. There is evidence of contact but only in relation to such things in their daily lives as homework and discipline. There is no evidence of joint decision making concerning the children. The evidence is only of direct messages passing between father and children and not of correspondence passing between the Appellant and his wife as to the children's futures.

35. Mrs [A] is the sole primary carer. She is making the decisions about the children's futures and supporting them. That is evident in relation to [L]. She discussed his wishes with him before sending him to stay with his father. She made that decision based on her assessment of what was in his best interests at the time. She says that she will remain in the UK because that is what the children wish to do. There is no evidence to suggest that the Appellant has been involved in those decisions.

36. The family in the UK is supported by the local authority, church community and three individuals who provide some respite and support. There is an absence of evidence that the Appellant is playing a parental role. There is no issue about his biological relationship with the children but that is not the same thing as evidence of primary care or assuming an equal share of responsibility for their care.

37. Even if the Appellant can show that he is a joint primary carer, the evidence does not show that his British citizen children will be obliged to leave the UK despite the challenging circumstances which the family faces here. Mrs [A]'s evidence is that she intends to stay whatever it takes because that is what the children want. She is not required to leave. The refusal of entry clearance has not obliged any of the children to leave the UK. [L]'s (temporary) relocation to Ghana to live with his father is a matter of choice made by Mrs [A] not obligation. She has also made plans for his future which include his return to the UK.

Appellant's Submissions

38. Mr Siaw submitted that since the Appellant is the children's father, he is by definition their primary carer and therefore meets regulation 16(8) of the EEA Regulations.

39. In relation to whether the children are obliged to leave the UK, he pointed to [L]'s departure from the UK brought about by [L]'s exclusion from school which was triggered in part by his reaction to being taunted by his classmates about his situation, in turn caused in part by the absence of the Appellant and his inability to help with the family's finances. The only reason the family remains in the UK is the children's wishes which Mrs [A] is doing her best to meet. The Appellant's presence in the UK would be in the children's best interests. Mr Siaw submitted that there is a fine line between being obliged to leave to the UK and choosing to do so. He said that the evidence points to the family being unable to remain due to their financial situation which is getting worse.

DISCUSSION AND CONCLUSIONS

40. A "primary carer" is defined by regulation 16(8) of the EEA Regulations. I do not accept Mr Siaw's submission that simply because the Appellant is the father of his British citizen children (which is not disputed) this is sufficient to qualify

him as their primary carer. So much is clear from the definition in the EEA Regulations. He must also either have primary responsibility for the children's care or share that equally with his wife.

41. The definition in regulation 16(8) does not define what is meant as "responsibility" but where the relationship is one of parent and child, I accept that this must be of a kind which would amount to parental responsibility. That denotes more than simply having a biological and emotional parent/child relationship and regular contact. It suggests some form of control and direction over the child's welfare. That is consistent with regulation 16(11) which provides that financial contribution alone would not amount to the assuming of responsibility for that person's care. In this case, the Appellant does not even provide financial contribution towards his children's care.

42. Whether that form of responsibility exists is a matter of fact based on the evidence. In this case, I accept that the evidence shows that the Appellant maintains contact with his children and carries out some of the duties which might be expected of a parent towards his children, such as providing them with moral guidance and helping them with homework. Notwithstanding that the messages in the bundle show intermittent contact, I am prepared to accept the evidence given by [A] and the other children that the Appellant is in very frequent contact with them all and provides those parental functions.

43. However, other of the evidence, particularly that of the Appellant's wife, does not suggest that the Appellant otherwise assumes responsibility in setting direction for the children or providing for their welfare. I appreciate that this is likely to be more difficult to show given the Appellant's physical absence from the UK. However, the evidence shows that, for example, the children's schools correspond only with the Appellant's wife. As Ms Willocks-Briscoe points out, the evidence shows that the Appellant maintains contact with the children directly. There is no evidence that the Appellant's wife and the Appellant speak regularly to discuss the children's welfare and make joint decisions in relation to the children. The Appellant's wife gave evidence that the Appellant does not make any financial contribution to the family in the UK and the tenor of her evidence was that she is left to deal with the authorities and make decisions about issues of housing and education for the children alone.

44. I am therefore not satisfied that the Appellant can show that he shares responsibility for the care of the children at least not whilst they are in the UK. The position is slightly different in relation to [L] who is now living with his father in Ghana. However, again, the Appellant's wife gave evidence that she is still making decisions in relation to [L] as regards his move from the UK to Ghana and his return and education once he returns. Furthermore, the Appellant is unable to succeed based on [L]'s situation because [L] is not currently in the UK (see regulation 16(5)(b) of the EEA Regulations).

45. The requirement for the Appellant to have responsibility for his children is moreover not the sole criterion under the EEA Regulations. He must also show that his children would be unable to reside in the UK if he left for an indefinite period. Again, this is a matter of fact to be assessed on the evidence.

46. As indicated in the headnote in the case of Sanade and others (British children – Zambrano – Dereci) [2012] UKUT 00048 (IAC), where one parent cannot be removed from the UK (as here), the removal of the other parent does not mean that either the parent who remains or the child will be required to leave. As is there said "the critical question is whether the child is dependent on the parent being removed for the exercise of his Union right of residence and whether removal of that parent will deprive the child of the effective exercise of residence in the United Kingdom ..".

47. Even if I am wrong in my conclusion concerning the Appellant's assumption of responsibility for his children, it is difficult to see how it can be argued that any of the children (including [L]) are dependent on him given that he returned to Ghana some six years ago and the children have been able to remain with their mother in the UK since then. I recognise that the Appellant's wife has found it difficult to cope on her own in the period since the Appellant's return to Ghana. However, her evidence was that she would remain in the UK with the children rather than returning to Ghana because that was their wish and she wants to give them the opportunity of a life here. Even in relation to [L], the Appellant's wife took the decision to send him to Ghana to be with his father following his exclusion from school. Her evidence did not suggest that he was obliged to leave. In any event, she said that he would be returning in September as she has arranged a secondary school placement for him.

48. For those reasons, the evidence does not show that the Appellant's absence from the UK affects the children's ability to remain in the UK. It does not show that they are unable to remain. They have lived here with their mother and without the Appellant for some six years.

49. Mr Siaw also referred to the children's best interests. He said that if the Appellant were allowed to come to the UK, then the children's rights were guaranteed. He accepted that the Appellant's wife's evidence is to the effect that she will continue to cope as best she can in the UK because the children do not want to return to Ghana, but he said that the fact that [L] had returned to Ghana was an indication that they may be obliged to leave in the future.

50. In relation to the best interests of the children, I begin with two observations. First, I have no independent evidence as to what those require. The best evidence I have is that of the Appellant's wife who says that the children want to stay in the UK. As British citizens, they are entitled to do so. I accept it is in their best interests to remain. I also accept her evidence that [L], in particular, has missed his father and that the deterioration in his behaviour at school may

be caused at least in part by his father's absence. I also accept that she and the children would prefer the Appellant to be physically in the UK with them.

51. However, second, the best interests of the children have to be considered in the context in which I am assessing that issue. I was not addressed by either party on relevant statutory provisions, case-law or policies which apply in the slightly unusual situation which pertains in this case. I have though had regard to the relevant legal principles.

52. Here, there is no human rights claim under consideration. I have already set out the evidence of the Appellant's wife as to why she has taken the decision to proceed down the route of applying under the EEA Regulations rather than making a further human rights application. Whether that was a well-advised decision is not a matter for me. As a result of that decision, though, the appeal is squarely against a decision under the EEA Regulations and the question under those Regulations is whether the Appellant has primary care responsibilities or equally shared responsibility for his children (which I have held he does not) and whether they will be required to leave the EU due to his absence. For the reasons I have already given they will not.

53. I accept that the best interests of the children remain relevant. The Charter on Fundamental Rights of the European Union contains an obligation to take into consideration the children's best interests (Article 24(2)). I also accept that, although there is no human rights claim under consideration in this appeal, Article 7 of the Charter protects the right to respect for private and family life.

54. The current Home Office Policy Guidance (Free Movement Rights: derivative rights of residence - Version 4.0. 27 February 2018) makes reference to best interests of the children in this context in the following:

> "The best interests of the child
>
> The duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK means that consideration of the child's best interests is a primary consideration in immigration cases. You must carefully consider all of the information and evidence provided concerning the best interests of a child in the UK when assessing whether a relevant child would be unable to remain, or to continue to be educated, in the UK, if the applicant left the UK for an indefinite period."

55. The guidance goes on to say that

> "Where the child is entirely dependent on the applicant, and not dependent on the other person at all, you can accept that the applicant has a derivative right of residence. Where the child is entirely dependent on the other person, and not dependent on the applicant at all, you can refuse to issue a derivative residence card. In other cases, where the child is more dependent on the applicant than the other person, you should not

automatically assume that the child would be forced to leave the UK or EEA. Instead, you must go on to consider the child's best interests. You must also go on to consider the child's best interests where the child is more dependent on the other person than on the applicant.

In a case where a child has some degree of dependence on at least two people, the child's best interests are not on their own determinative of whether requiring the applicant to leave the UK for an indefinite period would force the child to leave the territory of the UK and/or the EEA. They are a primary consideration and must be considered together with all the other evidence and information held. You must take into account any evidence provided in support of the application, which may include the child's own views. When considering the child's best interests, you must take into account the consequences on the child's everyday life if they are separated from the applicant, for example:

- would they be safe, well cared-for, and have access to any support they need to cope with change?
- would they be able to keep in contact with the primary carer, for example through letters, telephone calls, instant messaging, and video messaging services such as Skype and FaceTime, email and/or visits?
- would they need to move home, and if so, how does the nature, quality and location of their current home compare with where they would live in future?
- would there be disruption to their education, for example could they keep attending the same school?
- would they be able to keep in contact with their friends and any other family members?

You should write out for further information if you do not have enough information to know what is in the child's best interests. However, you can generally assume that it is in the child's best interests to:

- remain in the UK, unless they have equal or stronger ties to another country
- live with both parents or, if the parents live apart, to have contact with both parents, unless there are any child welfare concerns Page 54 of 65 Published for Home Office staff on 27 February 2018
- minimise disruption to their everyday life, unless it is in their best interests to change the status quo"

56. Although reference is there made to the best interests of a child being to live with both parents, the situation with which I am concerned is one where the children have lived apart from their father for the past six years and, although I

accept that they may prefer to live with both parents, I am not provided with any evidence that their welfare has been adversely affected in those six years by their family situation (other than the limited evidence that the family's situation may have contributed to [L]'s exclusion from school – see above). They have managed to retain contact with their father by other means and have visited him in Ghana.

57. The Home Office guidance is stated to have been amended to take account of the CJEU's judgment in Chavez Vilchez v Raadvanbestuur van der Sociale Verzekeringsbank & others [2018] QB 103 ("Chavez Vilchez"). Those cases were concerned with the proposed removal of third country national parents who were the primary carers of European citizen children, where the other European citizen parent was either absent or played a minimal role in the child's life and are therefore far removed from the factual situation here. However, the CJEU's judgment as to the best interests of the children in this context and how those are to be considered are instructive. The Court considered the issue of the interaction of the establishing of derivative rights and the best interests of the child and reasoned as follows:

> "68. In that regard, it must be recalled that, in the judgment of 6 December 2012, *O and Others* …. the Court held that factors of relevance, for the purposes of determining whether a refusal to grant a right of residence to a third-country national parent of a child who is a Union citizen means that that child is deprived of the genuine enjoyment of the substance of the rights conferred on him by that status, include the question of who has custody of the child and whether that child is legally, financially or emotionally dependent on the third-country national parent.
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> 69. As regards the second factor, the Court has stated that it is the relationship of dependency between the Union citizen who is a minor and the third country national who is refused a right of residence that is liable to jeopardise the effectiveness of Union citizenship, since it is that dependency that would lead to the Union citizen being obliged, in practice, to leave not only the territory of the Member State of which he is a national but also that of the European Union as a whole, as a consequence of such a refusal (see, to that effect, judgments of 8 March 2011, *Ruiz Zambrano* … of 15 November 2011, *Dereci and Others*,…; and of 6 December 2012, *O and Others*, …).
>
> 70. In this case, in order to assess the risk that a particular child, who is a Union citizen, might be compelled to leave the territory of the European Union and thereby be deprived of the genuine enjoyment of the substance of the rights conferred on him by Article 20 TFEU if the child's third-country national parent were to be refused a right of residence in the Member State concerned, it is important to determine, in each case at issue in the main proceedings, which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national parent. As part of that assessment, the competent authorities must take account of the right to respect for family life, as stated in Article 7 of the Charter of Fundamental Rights of the European Union, that article requiring to be read in conjunction with the

> obligation to take into consideration the best interests of the child, recognised in Article 24(2) of that charter.
>
> 71. For the purposes of such an assessment, the fact that the other parent, a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would be compelled to leave the territory of the European Union if a right of residence were refused to that third-country national. In reaching such a conclusion, account must be taken, in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium.
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> …
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> 78. … Article 20 TFEU must be interpreted as not precluding a Member State from providing that the right of residence in its territory of a third-country national, who is a parent of a minor child that is a national of that Member State and who is responsible for the primary day-to-day care of that child, is subject to the requirement that the third-country national must provide evidence to prove that a refusal of a right of residence to the third-country national parent would deprive the child of the genuine enjoyment of the substance of the rights pertaining to the child's status as a Union citizen, by obliging the child to leave the territory of the European Union, as a whole. It is however for the competent authorities of the Member State concerned to undertake, on the basis of the evidence provided by the third-country national, the necessary enquiries in order to be able to assess, in the light of all the specific circumstances, whether a refusal would have such consequences."

58. Both the Respondent's policy and the case-law underlying that policy, therefore, consider what is in the child's best interests in this context by reference to the level of dependency of the child on the parent to be removed (or in this case seeking admission) and whether that dependency would entail the child having to leave the Union. I am in the slightly unusual position in this case of knowing what will occur if the Appellant is removed because he is already physically absent from the UK and has been for six years. The children have not been obliged to leave the UK. I have already concluded that [L]'s move to Ghana is temporary and was a matter of choice made by his mother.

59. In terms of the children's dependency on the Appellant for their welfare which is what consideration of the child's best interests is designed to safeguard and promote, I have already concluded that they are not dependent on the Appellant. Their mother is the one who makes decisions about their education, housing and welfare generally. It is therefore in the children's best interests to remain in the UK with their mother as they have done for the past six years.

60. I have accepted, as is stated in the judgment in Chavez-Vilchez, that Article 7 of the Charter protects the right to respect for private and family life. Although I accept that the absence of the Appellant may have had some limited impact on the behaviour of [L] who may have behaved badly at school in reaction to taunts from other children about his family circumstances (although the evidence which I have in that regard comes only from [L]'s mother and not any independent source), there is otherwise a paucity of evidence to show that the children's welfare has been adversely impacted by the absence of the Appellant from their lives.

61. I accept that the Appellant's wife is struggling financially but the family has been supported by the authorities in the UK and remains housed by them. I accept her evidence that the authorities are reaching the stage where they may be unable, legally, to support her in the future but at the time of the hearing, they were continuing to do so and seeking to support the family's future by providing her with assistance whilst she seeks further employment to provide for herself and her family. There is no evidence that the children's welfare is not being adequately safeguarded or promoted by a combination of their mother's care and assistance from the local authority.

62. Based on the evidence before me, therefore I conclude that the children's best interests are to remain in the UK with their mother as they have done for the past six years. Whilst the children in particular have indicated a preference to have their father living with them, the Appellant has failed to provide evidence to show that their well-being is suffering as a result of the situation which the family has lived in for the past six years. The children continue to have regular, direct contact with their father in Ghana. The right to respect for their family life does not, on the evidence before me, require that the Appellant be permitted to come to the UK.

63. For all of those reasons, I dismiss the appeal. The Appellant has not established that he is entitled to a derivative right of residence.

DECISION

I am satisfied that the Decision contains a material error of law. The decision of First-tier Tribunal Judge C Greasley promulgated on 26 September 2018 is set aside.

I re-make the decision. I dismiss the Appellant's appeal.

Signed Dated: 23 January 2019
Upper Tribunal Judge Smith