Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05225/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
on 21 March 2019	**on 29 March 2019**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

KE
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Nwaekwu, of Moorehouse Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of judge of the First-tier Tribunal J C Hamilton (the judge), promulgated on 22 June 2018, dismissing the appellant's appeal against the respondent's decision dated 20 May 2017 refusing to issue him a derivative residence card under regulation 16 of the Immigration (European Economic Area) Regulations 2016 (the 2016 Regulations) as the primary carer of an EEA national child exercising Treaty rights as a self-sufficient person.

Background

2. The appellant is a national of Nigeria, born in 1983. She entered the UK in 2011 as a visitor and overstayed. She claimed to have a relationship with a Spanish national, JO, in 2014. She fell pregnant and gave birth to their daughter, AO, on 6 August 2015. The appellant claimed to have then discovered that JO was already married and that he wanted nothing to do with her or their child.

3. On 27 January 2017 the appellant applied for a derivative residence card confirming her right to reside as the primary carer of an EEA national child. A covering letter accompanying the application claimed that the appellant had sole/primary responsibility for AO and that she had been the only one responsible for raising the child. The application was supported by AO's birth certificate and Spanish passport. It was also accompanied by a letter from JO dated 4 January 2017 asserting that, since AO's birth, he had not been involved in her upbringing and that he had an 'understanding' with the appellant that she should take care of the child alone as he was married. He stated that, although he was in the UK, he hardly got involved in what concerned the child and was not interested in having custody of the child as his circumstances did not permit it. He claimed it was "practically impossible" for the child to stay with him. The application was also supported by 3 letters from individuals claiming they had been financially supporting the appellant and her child.

4. The respondent refused the application because there was no adequate evidence that AO was a self-sufficient person and because the appellant had not demonstrated that AO would be unable to remain in the UK if she left for an indefinite period as the child's father was a national residing in the UK. The respondent noted that any unwillingness by JO to assume care for the child was not, by itself, sufficient for the appellant to assert that JO was unable to care for the child.

5. The appellant had a right of appeal against the respondent's decision pursuant to regulation 36 of the Immigration (European Economic Area) Regulations 2016 which she exercised.

The decision of the First-tier Tribunal

6. The appellant's former representatives provided a bundle of documents running to 244 pages in preparation for the hearing on 4 May 2018. This included evidence of the appellant's private medical insurance and her employment, as well as a statement from the appellant dated 26 April 2018, and a letter from the appellant's GP stating that she was the sole primary carer for AO. The Presenting Officer accepted that the appellant was now working and did not pursue the "self-sufficiency" ground for refusal.

7. The judge heard oral evidence from the appellant. There were no other witnesses in attendance. The judge recorded the appellant's evidence which was to the effect that JO agreed "*after a lot of pleading*" to put his name on AO's

birth certificate and to arrange for her Spanish passport, that he had not provided any financial support, that the appellant did not approach the Child Support Agency because she was concerned that JO may "*reverse the passport*", that he had changed his telephone number in January 2017 and that the appellant could not contact him. The appellant was pregnant at the date of the appeal hearing, the putative father being a Nigerian national. The appellant said she had not asked the friends who had supported her to attend the hearing and felt that the issue of her sole responsibility for her child had been adequately dealt with by the GP's letter. She claimed she had sent her daughter's 'Red Book' to the respondent, but the respondent had no record of receiving it.

8. In the section of his decision titled 'Discussion and Findings' the judge summarised the representatives' submissions, which included a submission from the appellant's representative that AO's best interests dictated that the appellant's application should have been granted.

9. At [27] the judge stated,

> "I accept that broadly speaking, the Appellant gave a consistent and coherent account of her relationship with [AO's] father both before and after her pregnancy. However, I also accept the submission made on behalf of the Respondent that on the face of it, her account of [AO's] father's behaviour was contradictory. It was said he wanted nothing to do with his child and would not support her financially. Allowing his name to be placed on the birth certificate is clearly inconsistent with this. Equally his wish to have nothing to do with his child because he was already married is inconsistent with the fact that he obtained a Spanish passport for her, thereby enabling her mother to apply to remain in the UK, where her and their child's presence would pose a potential threat to his marriage and increase the chances that he would be subjected to a claim for financial support."

10. In subsequent paragraphs the judge rejected the appellant's claim that she had no idea of JO's whereabouts, and rejected her claim that she had provided clear and cogent independent or third party evidence to support her account of being AO's sole carer. The GP's letter was said to be brief and did not make clear the basis for the assertions contained within it. The judge commented that the fact that the appellant may be living alone with AO did not mean that she was not in a relationship with AO's father. The judge rejected the appellant's claim that her midwife was aware of her circumstances as no evidence relating to the content of the Red Book had been provided, and the 3 people who wrote letters relating to their financial support of the appellant did not attend to give evidence. Nor was there any evidence from a person who had acted as guarantor for the appellant's tenancy, or from the person with whom the appellant claimed to have been accommodated when she was pregnant with AO. The judge additionally relied on the gaps in the appellant's bank statements, and in particular, the absence of bank accounts prior to June 2017. The judge found, in any event, and that the bank statements raised more

questions than they answered because they showed payments to other people, including one who shared her surname, and there was no explanation for the source of a regular deposit of £200.

11. At [35] the judge stated,

> "Looking at the evidence overall I am not satisfied I have been provided with an honest or accurate account of the Appellant's circumstances, including her relationship with [AO's] father. It is reasonable to infer that the Appellant has chosen not to be candid, because the truth would not assist her application. Accordingly, I find that while she may be [AO's] primary carer she has not shown that she is [AO's] sole carer and/or that [AO's] father would be unable or unwilling to care for [AO] if the Appellant had to return to Nigeria."

12. And at [36] the judge stated,

> "It follows that the Appellant has failed to show that the Respondent's decision compromises [AO's] best interests or was contrary to the Regulations."

13. The judge dismissed the appeal.

The challenge to the First-tier Tribunal's decision

14. The written grounds contend that the judge misdirected himself by requiring the appellant to prove that she had 'sole responsibility' rather than 'primary responsibility' for her daughter, and that the judge failed to apply the respondents Guidance on Derivative Rights to the effect that a parent who resides with the child on a permanent basis and does not share equal responsibility for that child's care with another person could normally be accepted as having primary responsibility. The grounds referred to evidence that the appellant and AO were living as a unit, which included the GP's letter. The grounds submitted that the judge failed to consider the totality of the evidence before him and that he dwelt on irrelevant rather than admissible evidence. I pause to observe that the grounds failed to identify what 'irrelevant' evidence had been considered by the judge. The grounds further contended that the judge drew an adverse inference relating to the appellant's second pregnancy, but this was clearly not the case when one has regard to [34]. The grounds argued that AO had always lived with the appellant and there had never been a time that JO was involved in her life, and the fact that JO's name appeared on the birth certificate and that he was able to obtain for his daughter a Spanish passport did not diminish the fact that he decided not to take care of AO.

15. In granting permission to appeal a Deputy Judge of the Upper Tribunal found it arguable that the judge erred in his finding at [35] that the appellant had not shown she was the sole carer of her child in the absence of evidence to support that tension.

16. In his oral submissions at the 'error of law' hearing Mr Nwaekwu focused on the respondent's guidance 'Free Movement Rights: derivative rights of residence', dated 27 February 2018, which had been drawn to the judge's attention, and submitted that, contrary to the guidance, the judge failed to consider AO's best interests. Mr Nwaekwu submitted that once the judge rejected the appellant's claim to be the sole carer of her daughter, it was nevertheless incumbent on the judge to then determine AO's best interests. I expressed my surprise to Mr Nwaekwu that not only had he failed to provide me with a copy of the relevant guidance, but that his submissions were not contained in the grounds of appeal. Mr Nwaekwu accepted as much but submitted that every tribunal was bound to consider the best interests of children pursuant to s.55 of the Borders, Citizenship and Immigration Act 2009 and that the judge had, in any event, failed to make an actual finding relating to JO's involvement with AO. It was submitted that the judge's reference to AO's best interests at [36] were wholly deficient and that the decision was inadequate and unsafe. Mr Avery reminded me that the burden rested on the appellant to show that AO would be forced to leave the UK and that the appellant's evidence was comprehensively disbelieved. The judge had to make a decision on the basis of the evidence provided by the parties and the decision was sustainable. Mr Avery did not suggest he was disadvantaged by or unable to engage with the arguments advanced by Mr Nwaekwu. I reserved my decision.

Discussion

17. Under regulation 16(1) of the 2016 Regulations a person has a derived right to reside in the UK during any period in which that person is not an "exempt person" and the person satisfies each of the criteria in one or more of paragraphs (2) to (6).

18. Regulation 16(2) reads,

> 'The criteria in this paragraph are that –
>
> (a) The person is the primary carer of an EEA national; and
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> (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.'

19. An 'exempt person' includes someone who has a right to reside under another provision of the 2016 Regulations (regulation 16(7)(c)). A person is the "primary carer" of a child if the person is a direct relative or legal guardian of the child and either the person has primary responsibility for the child's care, or shares equally the responsibility for the child's care with one other person who is not an exempt person.

20. In his oral submissions Mr Nwaekwu focused on the judge's failure to assess AO's best interests and not on the judge's criticisms of the appellant's evidence or the judge's reference to the appellant having 'sole responsibility' for her daughter. The issue whether the judge misdirected himself by requiring the appellant to show that she had 'sole responsibility' for AO is something of a red herring because the judge found, at [35], that the appellant was AO's primary carer, and that the appellant failed to show that JO would be unable or unwilling to care for AO if the appellant had to return to Nigeria. That the judge was not satisfied that JO was unable or unwilling to care for his daughter goes to the requirement in regulation 16(2)(b)(iii), a point with which the grounds did not adequately engage.

21. The judge was not bound to accept the assertions contained in JO's letter, but, having noted that the appellant's account of her relationship with JO was "consistent and coherent", the judge needed to identify other evidence capable of rationally undermining the assertions contained in JO's letter. In his decision the judge noted that JO had put his name on the birth certificate, arranged for his daughter's Spanish passport, and written a letter in support of the residence card application. The judge found this behaviour was contradictory to JO's claim that he didn't want anything to do with the child as it enabled the child and the appellant to remain in the UK and, as the judge stated, potentially threaten JO's marriage and increase the possibility that he may be subject to a claim for financial support. This was a rational assessment supported by rational reasons. Likewise, the judge gave rational reasons for finding it incredible that the appellant was unable to contact JO given that his address was included in his letter of January 2017. The judge was rationally entitled to hold against the appellant the absence of any oral evidence from the individuals who claimed to have provided the appellant with financial support, as well as the absence of evidence from the person who acted as guarantor in respect of her residence, and the person with whom she lived when pregnant with AO. The judge was additionally entitled to draw an adverse inference from the failure of the appellant to provide bank statements covering all but the period June to September 2017 and December 2017 to March 2018. This rendered it impossible to determine the appellant's financial circumstances over a significant period after the birth of her child.

22. The judge gave rational and sustainable reasons for finding the appellant's claim that JO was unable or unwilling to care for AO unsatisfactory. It is not however the necessary corollary of this finding that AO would not be forced to leave the UK. The issue before the judge was whether AO would be unable to remain in the United Kingdom if the appellant left the United Kingdom for an indefinite period. It is with this in mind that I consider Mr Nwaekwu's submissions relating to the judge's approach to AO's best interests and the respondent's guidance relevant.

23. In every appeal the First-tier Tribunal is bound to consider the best interests of any child present in the UK pursuant to s.55 of the Borders, Citizenship and

Immigration Act 2009. The Charter on Fundamental Rights of the European Union contains an obligation to take into consideration a child's best interests (Article 24(2)). I also note 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.

24. The Home Office Policy Guidance (Free Movement Rights: derivative rights of residence - Version 4.0. 27 February 2018) that was drawn to the judge's attention (see [26]) makes reference to the best interests of children:

> '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.'

25. 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.
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> 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:
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> - 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'

26. 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. 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.

…

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."

27. 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 and whether that dependency would entail the child having to leave the EU.

28. The judge was not ultimately satisfied that JO is unwilling or unable to care for AO if the appellant had to return to Nigeria. That conclusion was not however determinative of the issue before the First-tier Tribunal, as *Chavez Vilchez* makes clear.

29. At [36] the judge does not ask himself the question posed by reg 16(2)(b)(iii) (whether the child would be unable to remain in the UK if the appellant left for an indefinite period). This question can only be determined by having regard to the nature of the relationship between the appellant and her child and to the best interests of the child and, in particular, by considering whether the relationship between the child and the appellant contained elements of dependency such that, notwithstanding that JO can actually assume day-to-day responsibility for AO, the child will in reality be compelled to leave the EU. The judge's brief reference to the child's best interest at [36] is wholly inadequate in this regard. There has been no adequate assessment of the emotional attachment between the appellant and AO, who was under three years old at the date of the judge's decision. The judge accepts that the AO was living with the appellant, but there are no clear findings whether the child has had any contact with her biological father. I appreciate that these may be difficult findings to make, particularly in circumstances where a judge believed that the appellant had not been candid. The extent to which a judge can undertake a detailed assessment of the best interests of a child will, to a significant degree, be dependent on the evidence that an individual chooses to disclose in an appeal. If one parent asserts that the other parent has disavowed any association with an EEA national child, and this assertion is rejected for rational reasons and by reference to the available evidence, a judge will usually be left with very limited facts. There may be cases in which a judge is entitled to infer, because of the limited nature and quality of the evidence available, that there is no relationship of dependency between a child and the parent with whom the child lives such that the child will be compelled to leave the EU, but it is still incumbent on the judge to undertake this assessment.

30. I have been persuaded by Mr Nwaekwu that, in not being satisfied that JO was willing and able to care his daughter, the judge failed to consider whether there was nevertheless such a relationship of dependency between the child and the appellant such that the child would be compelled to leave the EU. I find this is an error a point of law and that the judge's decision should be set aside.

31. Given the need for further findings of fact, and given that the judge found the appellant's account of her relationship with JO, broadly speaking, to have been consistent and coherent, I consider it appropriate to remit the case to the First-tier Tribunal to be decided afresh by a judge other than Judge of the First-tier Tribunal J C Hamilton.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside.

The case is remitted back to the First-tier Tribunal for a de novo hearing before a judge other than judge of the First-tier Tribunal J C Hamilton.

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

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her 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.

27 March 2019

Signed
Upper Tribunal Judge Blum

Date