IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006351
First-tier Tribunal No:
EA/04107/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 21 May 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

Besmir Malaj
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr A Rehman, instructed by Lawfare Solicitors
For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

Heard at Field House on 6 April 2023

DECISION AND REASONS

1. The appellant seeks permission to appeal the decision of First-tier Tribunal Judge Moon, who on 2nd July 2022, dismissed the appellant's appeal against the refusal of the Secretary of State dated 28th March 2022 to grant his application under the EU Settlement Scheme EUSS as the joint carer of EU nationals, the appellant's biological children who are Italian nationals. The appellant sought permission to appeal on the following grounds:

   (1) The judge erred in concluding that the appellant did not meet the criteria under the EU Settlement Scheme as a person with a derivative right to reside.

2. At [39] the judge held as follows:

"The definition of a person with a derivative right to reside contained within Annex 1 of Appendix EU requires that the points set out in Regulation 16 of the 2016 Regulations are made out at the specified date. This means that it is relevant to consider whether the appellant equally shared responsibility for the children on the specified date. At this time, the appellant was living in Croydon in a shared house, the evidence is that he visited the children at their home at weekends. There is no evidence of any financial contribution made by the appellant to the children or their household at this time, the financial evidence begins later, neither is there any independent evidence that the appellant had an active role in the children's care at the specified date."

3. The judge erroneously concluded that there is no independent evidence of financial contribution made by the appellant to the children or their household on the specified date, which was 31st December 2020.

4. The grounds stated that the appellant had, as part of his application, submitted a Halifax Bank statement:

(1) he had been travelling to Hounslow, see card payments to National Express;

(2) this was supported by further evidence of using his bank card in Hounslow;

(3) payments were made on 27th July and 7th September 2020 to Al Forno confirming the appellant took his children there;

(4) on 27th July the appellant bought clothes for his daughter;

(5) on 3rd August 2020 he bought earnings for his daughter;

(6) on 11th 2020 he bought a TV for Ricardo's room; and

(7) the appellant's Monzo Bank statements confirms that on 13th December 2020 he bought a TV.

5. In addition to the above, the appellant has provided the following document which confirmed he had been making financial contributions and was involved in their daily life:

(1) The appellant had been renewing the comprehensive sickness insurance for all three children since November 2020.

(2) The appellant had provided a letter from the GP which confirmed the appellant as a parent and confirmed he had authority to discuss with the GP in relation to the children's health.

(3) The appellant had provided a letter from St Richard's School in relation to the children and confirmed he was involved in their education.

6. In **Chavez-Vilchez case 133/15** the CJEU stated:

> *"77. Accordingly, the application of such national legislation on the burden of proof does not relieve the authorities of the Member State concerned of the obligation to undertake, on the basis of the evidence provided by the third-country national, the necessary inquiries to determine where the parent who is a national of that Member State resides and to examine, first, whether that parent is, or is not, actually able and willing to assume sole responsibility for the primary day-to-day care of the child, and, second, whether there is, or is not, such a relationship of dependency between the child and the third country national parent that a decision to refuse the right of residence to the latter would deprive the child of the genuine enjoyment of the substance of the rights attached to his or her status as a Union citizen by obliging the child to leave the territory of the European Union, as a whole."* [my underlining]

7. The evidence confirmed the decision to refuse the appellant's right of residence would deprive his children of genuine enjoyment of the substance of the rights attached to their status as union citizens by obliging them to leave the territory.

8. The judge erred in finding at [45] to [50] that the appellant is not a beneficiary of the Withdrawal Agreement, despite the fact that the judge in [33] referred to [6], [9] and [13] of "Explainer for Part Two (Citizens' Rights) of the agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the Appeal Number: EA/04107/2022 9 European Union" on 16th October 2020. This confirmed that the close family members included unmarried partners, dependent children and grandchildren and dependent parents. The judge at [50] only considered that in relation to whether the Withdrawal Agreement applied on the basis that the appellant's presence is required by Ms Prifti in order not to deprive her children of residence.

9. The appellant's case was that he fell within the scope of the Withdrawal Agreement and relied on [9]. The judge was required to make an assessment of whether the Withdrawal Agreement applied on the basis the appellant's presence was required by the appellant's children. In order not to deprive them of their right of residence. No such assessment was made and given the strength of the evidence, the appellant would be deprived of their right of residence if he was required to leave.

10. Further, the judge erroneously concluded the appellant did not meet the definition of durable partner in Annex 1. He maintained that he had provided evidence to confirm that he had been in a durable relationship.

11. The judge found the appellant was not in a secure relationship and did not fall within the scope of the Withdrawal Agreement, despite having found the appellant and his partner were reliable and truthful and neither tried to exaggerate. This was not a relationship of convenience.

12. The judge wrongly considered the proportionality exercise, as set out in Article 18(r). Article 18(o) required the respondent to provide an opportunity to the applicants to provide proof of their eligibility. In this case the respondent had evidence from the applicant of being in a durable relationship. Therefore the judge's decision was disproportionate under the EU context in the terms of 18(r).

Conclusion

13. The appellant submitted an application to the EUSS on the basis of having a derivative right of residence. That application, as was established at the hearing before me, was submitted in March 2021. The previous application in November 2020 had been withdrawn.

14. EU 14 of Appendix EU sets out as follows:

EU 14 Persons eligible for limited leave to enter or remain as a relevant EEA citizen or their family member, as a person with a derivative right to reside or with a Zambrano right to reside or as a family member of a qualifying British citizen

EU14. The applicant meets the eligibility requirements for limited leave to enter or remain where the Secretary of State is satisfied, including (where applicable) by the required evidence of family relationship, that, at the date of application and in an application made by the required date, condition 1 or 2 set out in the following table is met:

[Condition 1] Is met where:

(a) The applicant is:
(i) a relevant EEA citizen; or
(ii) a family member of a relevant EEA citizen; or
(iii) a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen; or
(iv) a person with a derivative right to reside; or
(v) a person with a Zambrano right to reside; ***and***
(b) The applicant is not eligible for indefinite leave to enter or remain under paragraph EU11 of this Appendix solely because they have completed a continuous qualifying period of less than five years; ***and***
(c) Where the applicant is a family member of a relevant EEA citizen, there has been no supervening event in respect of the relevant EEA citizen

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15. At [12] to [16] of the determination, the judge set out the relevant sections of Appendix EU including paragraph EU14, which specifies that the appellant meets the eligibility requirements for limited leave to remain where the Secretary of State is satisfied by the required evidence of the family relationship at the date of application and in an application made by the required date, condition 1 or 2 is met. Condition 1 includes:

(iv) a person with a derivative right to reside; or

(v) a person with a **Zambrano** right to reside.

16. Annex 1 of Appendix EU sets out the definition of a person who had a derivative or Zambrano right to reside as follows:

> *a person who, before the specified date, was a person with a derivative right to reside or a person with a Zambrano right to reside, immediately before they became (whether before or after the specified date):*
> *(a) a relevant EEA citizen; or*
> *(b) a family member of a relevant EEA citizen; or*
> *(c) a person with a derivative right to reside; or*
> *(d) a person with a Zambrano right to reside; or*
> *(e) a family member of a qualifying British citizen,*
> *and who has remained or (as the case may be) remained in any (or any combination) of those categories (including where they subsequently became a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen or with a qualifying British citizen)*
>
> *in addition, where a person relies on meeting this definition, the continuous qualifying period in which they rely on doing so must have been continuing at 2300 GMT on 31 December 2020*

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17. As the judge set out at [14] that a person with derivative right to reside is defined in Annex 1 of Appendix EU:

> *"14. The definition of a person with a derivative right to reside contained within Annex 1 of Appendix EU requires that the points set out in Regulation 16 of the 2016 Regulations are made out at the specified date. This means that it is relevant to consider whether the appellant equally shared responsibility for the children on the specified date. At this time, the appellant was living in Croydon in a shared house, the evidence is that he visited the children at their home at weekends. There is no evidence of any financial contribution made by the appellant to the children or their household at this time, the financial evidence begins later, neither is there any independent evidence that the appellant had a active role in the children's care at the specified date."*

18. The judge then proceeded at [15] to set out as follows:

> *"15. The above Explainer confirms that the close family members include unmarried partners, dependent children and grandchildren, and dependent parents and grandparents."*

19. The guidance handed to me by Mr Rehman at the hearing was entitled Free movement rights, derivative rights of residence, Version 5 dated 2nd May 2019. This set out a section on sharing equal responsibility:

> *"Sharing equal responsibility*

Two people should be considered to share equally the responsibility for a child when they both have responsibility for the care and welfare of the child, both long-term and on a day-to-day basis. This includes things like deciding where the child lives, choosing what school, looking after the child's property, disciplining the child, and authorising medical treatment or a school trip. Two people who spend different amounts of time with a child (for example where the child lives with one parent during the week and the other at weekends, or where child lives with one parent during the week and the other at weekends, or where one parent works and the other does not) may still have equal responsibility for the child.

Where a child lives with two parents, the parents will usually be considered to share equal responsibility for the child, even where one parent works and the other does not, unless one of the parents does not have responsibility for the child at all (for example due to a mental or physical impairment). Where a child's parents live apart, the parents will usually be considered to share equal responsibility for the child if the other parent has legal parental responsibility and has regular contact with the child. For information about when a parent has legal parental responsibility, see Parental rights and responsibilities.

Circumstances must be considered on a case-by-case basis.

Evidence of shared responsibility

A person will, generally, be considered to share equal responsibility in the following circumstances, where both parents are:

- *living together in the same household with the child*
- *separated but share responsibility for the child – evidence of this may include (but is not limited to) a:*
    - *custody agreement or court order*
    - *statement(s) from the parent(s) to this effect*

Equal responsibility does not mean there has to be evidence of equal sharing of responsibilities, as this is not always practical. For example, a child may reside with their mother during the week and their father at weekends or they may reside with the mother full-time, but the father has regular contact with the child. Whilst the father may not provide the majority of care for the child, in both of these examples, the father is actively involved in the child's life and continues to have parental responsibility for the child. In such cases, unless there is evidence to indicate the father is unable to care for the child, it can be accepted that both parents share equal responsibility.

You must consider each case on its individual merits and consult your senior caseworker if you have any doubt whether responsibility for a child is equally shared."

20. It was submitted in the grounds that the appellant had made various financial contributions and was involved in the daily life of the children, for example he had been renewing the comprehensive sickness insurance and provided a letter from the GP and from the school.

21. The key question in **Chavez-Vilchez** at [77] was:

> *"Whether there is, or is not, such a relationship of dependency between the child and the third country national parent that a decision to refuse the right of residence to the latter would deprive the child of the genuine enjoyment of the substance of the rights attached to his or her status as a Union citizen by obliging the child to leave the territory of the European Union, as a whole."*

22. To that end, the judge carefully considered the evidence and focused her attention on the specified date, which is 31st December 2020. As recorded in the decision at [4], in October the appellant's mother and children decided to move to the United Kingdom for a better life. The mother obtained a private tenancy for a property. The appellant arrived in the UK later on 3rd December 2019 and lived with five other men in Thorton Heath, Surrey. It was not until October 2021 that he moved into the accommodation with the partner and children. He asserted he was a primary carer and as such he met the criteria under the EU Settlement Scheme. The judge recorded that the respondent took the view that the appellant did not meet the requirements of the regulations because he had not demonstrated that the children would be unable to continue to be educated in the United Kingdom if he left for an indefinite period. That was because he was separated from the children's mother and there was no evidence, she would be unable to care for the children without the appellant being present in the United Kingdom.

23. As the judge identified the aspect that is key is what the situation was as at 31st December 2020 and whether the appellant equally shared responsibility for the children on that specified date. The judge noted at [39] that the appellant was living in Croydon in a shared house albeit he visited the children at weekends and although she stated there was no evidence of any financial contribution made by the appellant to the children or the household, it is correct that there was no evidence of bills for the household being paid, albeit that the appellant may have made some contribution for a restaurant and clothes and presents.

24. The judge found at [51] that the mother of the children *'lived in a separate household in a different area to him for a two year period during which time, she managed to work in [and] undertook childcare responsibilities'.*

25. The guidance provided to me suggests that indicators of whether there is shared equal responsibility includes issues such as deciding where the child lives and the judge had clearly found that the mother had independently uprooted the children and brought them herself to the United Kingdom to find a private tenancy in the UK and placed them in education. The father did not live with them and there was no indication that the father had chosen the school or at that point provided for their education or even determined how the children spent time outside the school or whether he disciplined the child or authorised medical treatment or school trips. Although sickness insurance was funded by the father the Court of Justice of the European Union did in fact rule that eligibility for NHS treatment does count as Comprehensive Sickness Insurance, VI v Her Majesty's

Revenue and Customs, C-247/20. There was no indication that the children had no access to the NHS.

26. At the relevant date the children did not live with two parents because, as the judge recorded, and the husband lived separately. It is stated that where a child's parents live apart, the parents would usually be considered to share equal responsibility for the child if the other parent had legal parental responsibility and regular contact, but the judge made detailed findings at the relevant time. There was no indication at the relevant time that the father had the children at weekends or specific elements of time.

27. The guidance also identifies that the 2016 Regulations confirmed that financial support alone will not bring a person within the definition of primary care for the purposes of the Regulations. As Ms Nolan pointed out, the letter from the school and the letter from the letter from the doctor did not indicate that the father had taken authority in that respect as the judge noted at [41] "there is no evidence from the school confirming whether the appellant is involved in the children's education" and further:

> *"Whilst the letter from the GP at AB 141 states the names of the older daughter's parents. This letter does not state that the GP deals with the father or consults him in relation to medical treatment. Overall, there is no evidence that the children would not be able to continue their education in the United Kingdom if the appellant was required to leave."*

28. I was referred to the witness statement of the mother, which specifically said at [9], "In the event the appellant leaves the UK the children would not be able to continue their education in the UK as they are very much dependent on him". This however gives no reason as why the children could not continue their education in the UK bearing in mind, they were placed in education by the mother seemingly independently previously and secondly, at [10], the mother states, "My children and I cannot relocate to Albania just to be with him. I have my family, my friends and my life in UK. I am working and studying here and I cannot leave my life behind and start afresh in Albania."

29. Overall, the judge did not accept, having assessed the evidence and having heard the witnesses before her, that there was shared, equal responsibility for the children. The guidance suggests that each case should be decided 'on its individual merits'. That is precisely what the judge did. A judge does not have to refer to every single piece of evidence and there is no indication that the sporadic gifts and visits showed shared responsibility by the relevant date.

30. The weight to be given to the evidence is a matter for the judge, as I find no error of law in the assessment that the father had not shown that at the relevant date, he had a derivative right of residence.

31. At the hearing Mr Rehman submitted that the judge had not properly considered the best interests of the children, but I find that was not properly pleaded in the grounds and not borne out by a careful reading of the decision. The judge at [42], specifically referenced that she did consider the best interests of the children. Although she found it was in the best interests to enjoy a good relationship with both parents, and it would be easier if the appellant was in the United Kingdom, it was open to her to find contact would still be able to be possible through travel and through modern communication, albeit not so often.

The best interests of children are not necessarily a trump card and are a primary but not a paramount consideration. The judge specifically found that the children would be able to continue to go to school in the United Kingdom if the appellant were not present and:

> *"given that Ms Prifti managed as a single working parent for a period of two years, taking on a college course towards the end of that period in addition to her other responsibilities, there is nothing to suggest that she would be unable to cope if the appellant was required to leave the United Kingdom" [42].*

32. Nor do I find there was any error in relation to the judge's assessment of whether the appellant fell within the scope of the Withdrawal Agreement because, as at the 31st December 2020, there was no durable relationship between the appellant and the mother of the children and nor was there any derivative right of residence. The judge considered the Withdrawal Agreement together with the European Parliament Directive 2038/EC which is referred in terms of setting out the beneficiaries of the Withdrawal Agreement and at [46] set those out.

33. The judge made clear at [47] that the appellant was not a family member because he was not s spouse nor a partner and at [49] the judge made clear that the appellant did not fall within the definition of Article 9 because it was clear that his presence was not required by union citizens in order not to deprive them of a right of residence.

34. Although the judge did not include the full definition of family member under Article 2 of the EC Directive, the appellant did not fall under 2(c) as the direct descendant of an EU citizen or under 2(d) as the dependent direct relative. Thus, the appellant was not a family member under Article 9 of the Withdrawal Agreement and could not fall within the personal scope of the Withdrawal Agreement under Article 10. As the judge set out at [51] and [52]:

> *"51. In this case Ms Prifti moved to the United Kingdom without the appellant. She lived in a separate household in a different area to him for a two year period during which time, she managed to work in undertook childcare responsibilities. The evidence is that she facilitated contact between the children and the appellant at the weekends. She is able to collect the youngest child to school and the main assistance that she requires is childcare on two evenings every week during term time when she goes to college.*
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> *52. Ms Prifti has a sister in the United Kingdom, she also works and so has income from which she could pay for evening childcare until her older daughter, who is now 14 would be of an appropriate age to look after her two younger siblings. Although the appellant and Ms Prifit have a relationship, this is as parents of three children, the evidence does not indicate that they are currently partners in a secure relationship. In these circumstances, I find that the appellant's presence is not required by Ms Prifti in order not to deprive her of a right of residence and so I have concluded that the appellant does not fall within the scope of the Withdrawal Agreement."*

35. I find that the judge accurately summarised and considered the relevant evidence, correctly applied the law and there is no material error of law in the decision.

Notice of decision

The decision of the First-tier Tribunal shall stand, and the appellant's appeal remains dismissed.

Helen Rimington

Judge of the Upper Tribunal Rimington
Immigration and Asylum Chamber

Signed 25th April 2023