Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: EA/01936/2015

THE IMMIGRATION ACTS

At Field House
on 16.10.2017

Decision & Reasons Promulgated
on 7.12.2017

Before:

Upper Tribunal Judge John FREEMAN

Between:

MONIRA Khatun

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: *Alexis Slatter* (counsel instructed by Londonium) on 16 October; Mr Manir Chowdhury (working under the supervision of Londonium) on 5 Dec
For the Respondent: Mr Paul Duffy

RULING AND DIRECTIONS

1. This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Neil Froom), sitting at Hatton Cross on 14 February, to dismiss an appeal by a citizen of Bangladesh, against refusal of an EEA residence card as the primary carer of her son Ahamuf Jarif, a British citizen through his father Mohd. Jahirul Haque, born here on 2 January 2013. The judge was not satisfied, for reasons he gave, that the appellant would be compelled to leave the EEA if his mother were: see *Sanneh* [2013] EWHC 793 (Admin).

2. Permission was given in the Upper Tribunal, on the basis that there still needed to be a finding as to who would be the appellant's main carer. It was agreed, following *Chavez-Vilchez and others* (Union citizenship - Article 20 TFEU - Access to social assistance and child benefit conditional on right of residence in a Member State : Judgment) [2017] EUECJ C-133/15 (10 May 2017, that specific findings would need to be made on this point.

3. This decision does not in any way set aside the findings of fact made by the very experienced judge on the evidence put before him: however I shall consider for myself the evidence of the appellant, and those who might reasonably be expected to take care of the child if she were removed, or its absence. The appellant and her brother Maruf Ahmed gave evidence in accordance with their statements, and were cross-examined on it by Mr Duffy.

4. At the end of this process, the following things were clear. First, the appellant and her brother had quite cynically manipulated the effect of her son's birth here to a British father. Whether or not they are telling the truth about the father's having effectively abandoned the child, they have done everything they can to minimize the amount of help the brother appeared to be able to give the appellant with him.

5. One glaring example was the letter written by the brother, posing as no more than her flatmate, and referred to by the judge at paragraphs 19 and 28. Before me, he tried to explain this gross piece of attempted deception by saying he was not prepared, for reasons he gave, to accept the unrecognized religious ceremony of marriage through which the appellant had gone with the child's father. As the judge said, if that was the reason, then why write her a letter of support at all?

6. The only point on which I am prepared to give further consideration to any explanation given by the appellant and her brother is on what is said in the Family Plan for the child, prepared by the local authority's social services department following a meeting on 13 July 2013. The passage concerned, under Q. 1, is this

> The paternal aunt and uncle live [in] the adjacent building, which means that it is easy to provide this support.
>
> [The appellant] comes round to [her brother and his wife's] home 2 or 3 times a week, so [the child] is supported and looked after. {The wife] has looked after [the child] on several occasions. For instance, he is weaning and is bottle fed so [the wife] can manage this easily.

7. The brother explained that he and his wife had all along been living at [ ] at the time in question the appellant was at no. 25. This was indeed the address she gave in a medical context in October that year. Since the social worker had just said that he and his wife were able to look after their own children without outside support, the support referred to is clearly what they, and in particular she, were able to give the appellant. Their two dwellings might not unreasonably have been described as adjacent, and in the circumstances I am prepared to accept their evidence that the social worker's reference to 'paternal aunt and uncle' was her mistake for 'maternal', and that there are no other close family members in this country.

8. The appellant's brother went on to give evidence that his daughter had lately passed the entrance examination for the [ ] and he and his wife were about to move into the

school's catchment area as required, so away from where the appellant is presently living with her child, still in the East End, but with a friend who she says has taken her in.

9. While I do not doubt that the brother and his wife would want to do their best for their daughter's education, I have serious doubts as to whether they have parted company with the appellant, so far as their living arrangements are concerned, or have any real intention of doing so. However I do not consider it necessary to resolve these doubts, for reasons I shall go on to give.

10. As Mr Duffy pointed out, the leading authority in point before the judge had been *Ayinde and Thinjom* (Carers - Reg.15A - Zambrano) [2015] UKUT 560 (IAC): however, that had now to be read in the light of *Chavez-Vilchez* , and in particular paragraph 1 of the Grand Chamber's ruling:

> Article 20 TFEU must be interpreted as meaning that for the purposes of assessing whether a child who is a citizen of the European Union would be compelled to leave the territory of the European Union as a whole and thereby deprived of the genuine enjoyment of the substance of the rights conferred on him by that article if the child's third-country national parent were refused a right of residence in the Member State concerned, the fact that the other parent, who is 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 indeed be so compelled were there to be such a refusal of a right of residence. Such an assessment must take into account, in the best interests of the child concerned, 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 the child's equilibrium.

11. In this case, the child's EU citizen parent is not able or willing to assume sole responsibility for him: while I might be prepared to find that the appellant's brother and wife were able to do so, I do not find it possible to go behind his expressed unwillingness. Even if they were both able and willing, that could not take things further than in the case of an able and willing parent, which is no more than a 'relevant factor'.

12. In this case the child is not yet 5, has always lived with his mother, and is as dependent on her as any other child of his age in those circumstances. There is nothing to suggest he is not a perfectly normal child: when he had bronchitis in 2013 he got treated for it, and the local authority have been keeping an eye on the arrangements for his care. He clearly knows his maternal aunt and uncle very well, and no doubt has a good relationship with them too.

13. However Mr Duffy did not seek to argue with my suggestion that in those circumstances the child's best interests would be to stay with his mother, and not to be separated from her by her removal to Bangladesh. Nor did Mr Duffy suggest that, on a practical level, the child would be unable to live here without her.

14. It follows that this appeal must be allowed, whatever distaste may be felt for the various deceptions and contrivances practised by the appellant and her brother. It should be noted, however, that *Ayinde* remains fully authoritative in cases not involving children, as

were those considered in it. Even where children are involved, paragraph 2 of the Court's ruling in *Chavez-Vilchez* shows the way forward.

15. While both *Ayinde* and *Chavez-Vilchez* were decided on the basis of article 20 TPEU, paragraph 2 of the ruling empowers member states to require evidence

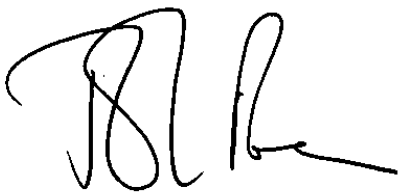
> … to prove that a refusal of a right of residence to the third-country national parent would deprive the child of the genuine enjoyment of the substance of the rights pertaining to the child's status as a Union citizen, by obliging the child to leave the territory of the European Union, as a whole.

16. As pointed out in *Ayinde*, this is exactly what reg. 15(4A) (iii) of the Immigration (European Economic Area) Regulations 2006 [the EEA Regulations], as they now stand, does require; but the ruling in *Chavez-Vilchez* goes on:

> 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.

17. Applications of this kind should be dealt with by the Home Office on the basis of such inquiries, and, in the light of paragraph 1 of the ruling in *Chavez-Vilchez*, a full assessment of the best interests of the child: the familiar adversarial judicial process cannot be used as a substitute.

Appeal allowed



(a judge of the Upper Tribunal)