



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/03103/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at : Field House

Decision & Reasons

Promulgated

On : 29 January 2018

On 14 February 2018

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

YAN MA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Meyer, instructed by Camden Community Law Centre
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission, against the decision of the First-tier Tribunal dismissing her appeal against the respondent's decision to refuse to issue her with an EEA family permit under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") as the parent/ primary carer of an EEA national child.

2. The appellant applied for an EEA family permit in order to accompany her British child, Lisa Lai, to the UK. The appellant and her daughter had lived in China all their lives. The appellant had been separated from her spouse, Lisa's father, Leung Lai, for 9 years, when he contacted her in 2013 requesting that his daughter come to the UK to use her right as a British citizen to seek education. The appellant's ex-spouse lived with his new spouse, Li Liu, in the

UK and contacted her in 2013 after having a stroke which left him confined to a wheelchair. He lived with his wife in his own home and had a part-time carer.

3. The respondent refused the application on 29 October 2015. The respondent considered that the relevant provision of the EEA Regulations was Regulation 15A which set out the conditions to be satisfied for a person to have a derivative right of residence in the UK. The conditions included that the applicant was the primary carer of an EEA national child and that the EEA national child would be unable to remain in the UK if the primary carer was required to leave the UK. The respondent considered that the appellant was not entitled to derivative rights since it was her ex-spouse who was the decision-maker in their daughter's life and was able to provide accommodation and facilitate her accessing her rights as a UK citizen.

4. The appellant appealed against that decision, asserting that she was the sole carer of her daughter and that her daughter was not able to exercise her right to live in the UK unless she was with her, as her father was too sick to care for her.

5. The appellant's appeal was heard by First-tier Tribunal Judge Traynor on 11 April 2015. The appellant's daughter's father and his wife, Leung Lai and Li Liu, attended the hearing and adopted their witness statements. The evidence of Leung Lai was that he was wheelchair bound since suffering a series of strokes and his wife was his full-time carer. He wanted his daughter to be educated in the UK. She had come to the UK in 2015 and had been living with him and his wife and attending school but as a result of his health problems they could no longer care for her and so she had returned to China. It was for that reason that the appellant needed to come to the UK, to take care of their daughter and enable her to attend school here. Li Liu's evidence was that she had married Leung Lai in 2001 and they had lived in Cyprus. Leung Lai had had an affair with the appellant when on business in China and the appellant had become pregnant with Lisa, who was born in December 2002. In order to ensure that Lisa was able to acquire British citizenship they got divorced, he married the appellant, he then divorced the appellant after Lisa was born and re-married her. Leung Lai had seen his daughter regularly until his stroke but he was then unable to travel and Lisa visited them in 2015 and attended school in the UK. They had tried to care for Lisa but were unable to as she provided full-time care to her husband and so Lisa had had to return to China. They therefore needed the appellant to be in the UK so that Lisa could return and continue her studies. Reliance was placed before the judge, in submissions, on the principles in Zambrano, which were said to apply equally to cases of admission to the UK.

6. Judge Traynor considered that it was the child's father, Leung Lai, who was her primary carer as he made all the decisions in her life affecting her ability to exercise her treaty rights in the UK. He considered that the appellant was subservient to the wishes of Leung Lai and was not the primary carer of their daughter. Since the child was now sixteen years of age, the level of care required to look after her was not such that it could not be given by her father and stepmother and she would not, therefore, be prevented from returning to the UK to access education. The judge found that the appellant's application

did not meet the requirements of Regulation 15A and he dismissed the appeal under the EEA Regulations.

7. The appellant sought permission to appeal that decision to the Upper Tribunal on three grounds. Firstly, that the judge had failed to consider the impact of the father's medical problems on his ability to assume the day to day care of his daughter. It was asserted that the judge had applied the wrong test for EEA cases. Secondly that the judge wrongly took account of the father's moral conduct rather than applying the relevant law. Thirdly that the judge failed to consider the guidance in Chavez-Vilchez and Others v Netherlands C-133/15 in regard to the child's welfare and the impact of separation of the child from her mother.

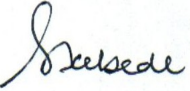
8. Permission was granted on 29 November 2017 on the grounds that the judge, in finding that the appellant was not the child's primary carer under Regulation 15A, arguably applied the test in TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049 for sole responsibility rather than considering the question of day to day care and that the judge arguably failed to consider the decision in Chavez-Vilchez.

9. At the hearing before me, Ms Meyer relied on the grounds of appeal. Mr Tarlow accepted that the judge had erred in law in his consideration of the relationship between the child and her mother and requested that the matter be remitted to the First-tier Tribunal. Ms Meyer submitted that there was no need to remit the case and that the decision could be re-made on the available evidence and the appeal allowed. Mr Tarlow submitted that remittal for a *de novo* hearing was necessary because findings of fact needed to be made. I advised the parties that in light of Mr Tarlow's concession I was setting aside Judge Traynor's decision. I indicated that I would reserve my decision and that I would re-make the decision on the evidence available if I considered that appropriate, but that if I considered a remittal necessary then I would so direct.

10. As Mr Tarlow conceded, the judge erred by applying the test of sole responsibility in TD (Yemen) rather than considering the day to day care of the appellant's daughter. The question of who was the primary carer of the child therefore remains to be re-determined, applying the correct test. It is also the case, as the grounds of appeal assert, that the judge failed to make any proper findings on Leung Lai's medical condition and the impact of his medical problems on his ability to care for his daughter, as well as the caring responsibilities of his wife and her ability to care for Lisa. I note that the medical evidence before the Tribunal was limited and it may be that the appellant would wish to produce more detailed evidence of Leung Lai's condition. Furthermore it is necessary for findings to be made on the welfare and best interests of the child and the impact of Lisa's separation from her mother, in accordance with the guidance in Chavez-Vilchez and Others v Netherlands C-133/15. It seems to me that these are findings which need to be made by way of a fresh, *de novo* hearing and that the appropriate course would therefore be a remittal to the First-tier Tribunal. Indeed that was the request made in the appellant's grounds of appeal.

DECISION

11. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal, to be dealt with afresh, with no findings preserved, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any judge aside from Judge Traynor.

Signed: 
February 2018
Upper Tribunal Judge Kebede

Dated: 12