



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/03851/2018

THE IMMIGRATION ACTS

Heard at Birmingham
On 26 April 2019

Decision & Reasons Promulgated
On 10 May 2019

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

ASHEBA EDIGBE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Islam, E1 Solicitors

For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Borsada, promulgated on 29 November 2018, dismissing her appeal against the decision of the respondent made on 4 May 2018 to refuse to issue her with a

residence card as confirmation of her right of residence in the United Kingdom as the family member of an EEA national.

2. The appellant's case is that she has, since 6 August 2013, been married to [L N], a Czech citizen. The couple had a child born on 13 June 2017 but by then the relationship had broken down.
3. The respondent refused the application for a residence card pursuant to Regulation 17 on the basis that the appellant had not fulfilled the requirements of Regulations 6 and 7 because she had not provided adequate evidence that her husband:
 - (1) was active as a worker or self-employed;
 - (2) retains a place of residence in the United Kingdom to which he returns on a regular basis;
 - (3) had been continuously resident as a worker in the UK for at least three years.
4. Accordingly, the Secretary of State was not satisfied that the appellant's husband was exercising treaty rights in the United Kingdom and also noted that she had failed to provide a valid passport for him.
5. The appellant appealed to the First-tier Tribunal but did not request an oral hearing. It is averred in the grounds that, as the primary carer of an EEA national child the appellant qualifies for a derivative right of residence pursuant to Regulation 15A(2) (sic) as her son would be unable to remain in the United Kingdom if the primary carer were required to leave the United Kingdom. It was also averred that the appellant met the definition of primary carer and also that she met the requirements of Regulation 15A(5).
6. I note in passing that although in the grounds it is averred that the child is an EEA citizen, that in the covering letter with the application to the Home Office, it is stated that "because of the hostility of his father the child neither has the Czech Republic nationality nor can he go to Nigeria with his mother as he is not Nigerian as well."
7. I also note that reference is made in the grounds of appeal to the First-tier Tribunal (and indeed to the Upper Tribunal) to the Immigration EEA Regulations 2006, not the Immigration European Economic Area (Regulations) 2016 which had been in force since February 2017, over a year before the decision made by the respondent and it was therefore the 2016 regulations which are relevant.
8. The judge concluded [6] that the appellant was married to an EEA national and that there was a child of that relationship and that:-
 - (i) the child was entitled to Czech citizenship;
 - (ii) that appellant had not established on the evidence that she is the primary carer of her child, there being nothing from the EEA national that he is nowhere in the child's life or that he does not share parental responsibility for the child;

- (iii) that there is a dearth of evidence that the appellant's partner remains a qualified person and that basis could not succeed under the 2016 Regulations.
9. The judge also observed that the appellant had not requested any assistance from the Tribunal such as asking for directions to assist in obtaining relevant information with regard to the husband and it was open to her to make a fresh application supported by the necessary evidence or to make an application on human rights grounds.
10. The appellant sought permission to appeal on the grounds that the judge had erred:-
- (i) in failing properly to consider whether the appellant is the primary carer of the child, it being averred that she had provided sufficient evidence that this is so;
 - (ii) that the judge had erred that there is no statement of evidence from the EEA national as it had already been said that he is not in contact with the appellant or the child;
 - (iii) that a primary carer of an EEA national would qualify for a derivative right of residence under Regulation 15A(24) (sic) and that these requirements were met;
 - (iv) that the judge had failed to consider the best interests of the child.
11. On 29 January 2019 Deputy Upper Tribunal Judge G A Black granted permission to appeal, observing it was arguable the First-tier Tribunal had failed to properly consider the evidence before it.
12. At the hearing, I asked Mr Islam to address me on whether, even if the claimed errors were made out, they were material. That is because of the lack of evidence on file that the appellant met all the criteria applicable under the EEA Regulations to show that she was entitled to a derivative residence card.
13. Mr Islam sought to rely on the cases of Zhu and Chen [2004] EUECJ C-200/02 and Zambrano [2011] EUECJ C-34/09.

The Law

14. Immigration European Economic Area (Regulations) 2016 provide as follows:
17. (3) The Secretary of State must issue a registration certificate to an EEA national who is the family member of a qualified person or of an EEA national with a right of permanent residence under regulation 15 immediately on application and production of –
- (a) a valid national identity card or passport issued by an EEA State; and
 - (b) proof that the applicant is such a family member."
15. "Qualified person" is defined in Regulation 6; "family member" is defined in Regulation 7.

16. Regulation 6 of the EEA Regulations provides as follows, so far as is relevant to the facts of this appeal:-

“‘Qualified person’

6.— (1) In these Regulations –

‘jobseeker’ means an EEA national who satisfies conditions A, B and, where relevant, C;

‘qualified person’ means a person who is an EEA national and in the United Kingdom as –

- (a) a jobseeker;
- (b) a worker;
- (c) a self-employed person;
- (d) a self-sufficient person; or
- (e) a student;

17. Mr Islam did not take me to any documentary evidence to show that Mr [N], the appellant’s husband, had ever worked, or had retained the status of a worker or was otherwise a qualified person. There is only the unsupported evidence of the appellant who records that a previous application for an EEA permit to be granted on the basis of her marriage to her husband had been refused partly as he had not attended the interview. That decision had been appealed and the decision had been withdrawn at appeal. A further interview was then arranged which the appellant’s husband did not attend.
18. There is no mention in the witness statement of the husband having any employment other than the brief sentence at [3] “..... we got married my husband was in employment and he was exercising EEA treaty rights through his work.”
19. In the EEA application form it is stated at 2.14 that he has left the country which is why only a photocopy of the passport has been submitted. At Section 4 the application is stated to be made on the basis of a retained right of residence (which is not applicable given that there had been no divorce by this point) and at Section 8(b) it is stated that the sponsor left the United Kingdom on 10 May 2017. While at Section (e) at 8.36 it is stated that the husband was working for an employer, the section on employment is left entirely blank.
20. In the circumstances, given this lack of evidence the judge was manifestly entitled to conclude that it had not been shown that Mr [N] was a qualified person and accordingly that the appellant was not entitled to a residence card on that basis.
21. Turning next to the issue of derived residence rights, Regulation 16 provides as follows:-

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)
- (2) The criteria in this paragraph are that –
- (a) the person is the primary carer of an EEA national; and
 - (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.
- (3) The criteria in this paragraph are that –
- (a) any of the person’s parents (‘PP’) is an EEA national who resides or has resided in the United Kingdom;
 - (b) both the person and PP reside or have resided in the United Kingdom at the same time, and during such a period of residence, PP has been a worker in the United Kingdom; and
 - (c) the person is in education in the United Kingdom.
- (4) The criteria in this paragraph are that –
- (a) the person is the primary carer of a person satisfying the criteria in paragraph (3) (‘PPP’); and
 - (b) PPP would be unable to continue to be educated in the United Kingdom if the person left the United Kingdom for an indefinite period.
- (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.
- (6) The criteria in this paragraph are that –
- (a) the person is under the age of 18;
 - (b) the person does not have leave to enter, or remain in, the United Kingdom under the 1971 Act;

(c) the person's primary carer is entitled to a derivative right to reside in the United Kingdom under paragraph (2), (4) or (5); and

(d) the primary carer would be prevented from residing in the United Kingdom if the person left the United Kingdom for an indefinite period.

(7) In this regulation –

...

(c) an 'exempt person' is a person –

(i) who has a right to reside under another provision of these Regulations;

(ii) who has the right of abode under section 2 of the 1971 Act(13);

(iii) to whom section 8 of the 1971 Act(14), or an order made under subsection (2) of that section(15), applies; or

(iv) who has indefinite leave to enter or remain in the United Kingdom.

(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.

...

22. Even assuming that the child is a Czech citizen, which is unclear, given the absence of a passport and the ambiguity in the appellant's case as put first to the Home Office and then subsequently, the appellant needed to show not only that she was a primary carer under Regulation 16(2) but also that the child resides in the United Kingdom as a self-sufficient person.

23. Self-sufficient is defined in Regulation 4(1)(c) and requires there to be in place comprehensive sickness insurance cover. As Mr Aslam accepted, there is no comprehensive sickness insurance cover available in this case. Whilst I note his submission that the guidance provided by the Home Office is such that the comprehensive sickness insurance is to avoid somebody being a burden on the state, that is a gloss it does not absolve the appellant from having to meet that criterion. She does not do so.

24. The appellant is not assisted either by **Zhu and Chen**. [2004] EUECJ C-200/02. It is important to note that on the facts of that case as set out at [13] that:

“The order for reference also makes it clear that ... the appellants in the main proceedings provide for their needs by reason of Mrs Chen’s employment, that the appellants do not rely upon public funds in the United Kingdom and there is no realistic possibility of their becoming so reliant, and, finally, that the appellants are insured against ill health.”

25. The passages relied upon by Mr Islam at [45] and [46] are not authority for the proposition that sickness insurance is not necessary. That submission is contrary to the paragraph [41] and the ruling of the court. While the case does turn on an interpretation of Article 1 of Directive 90/364, the wording of Directive 2004/38 is not materially different as it too imposes at Article 7.1.(e) a requirement to have comprehensive sickness cover which is in addition to the requirement not to become a burden on the social assistance system.
26. For these reasons, given the acceptance that there is no sickness insurance, the appellant cannot succeed under Regulation 16(2). The appellant is unable to benefit from any of the other categories as at 16(3) to (6) as the child is not in education nor is the child a British citizen. Regulation 16 (6) does not apply as the appellant is not entitled to a derivative right.
27. Accordingly, irrespective of whether the judge erred in assessing whether the appellant was the primary carer, this error was not capable of affecting the outcome as, for the reasons set out above, none of the other relevant criteria were met and the appeal was bound to fail.
28. For the sake of completeness, I have considered the position in light of Chavez-Vilchez [2017] EUECJ C-133/15. The Court of Justice concluded in this case as follows:
 1. 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. Although this case was not pleaded, I consider that it does not assist the appellant given what is said at paragraph 2 above. It is of course open to the appellant to make the appropriate application in the light of this supported by relevant evidence.

2. 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
29. Nonetheless, for these reasons, I conclude that the decision of the First-tier Tribunal did not involve the making an error of law capable of affecting the outcome and I uphold it.

Notice of Decision

- (1) The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it;
- (2) I do not make an anonymity order.

Signed

Date 8 May 2019



Upper Tribunal Judge Rintoul