



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: EA/03951/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 30 April 2019**

**Decision & Reasons  
Promulgated  
On 07 May 2019**

**Before**

**UPPER TRIBUNAL JUDGE KAMARA**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MERCY [A]**

(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer

For the Respondent: Mr F Habtemariam, Anglian Immigration Law Ltd

**DECISION AND REASONS**

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Sweet, promulgated on 6 December 2018. Permission to appeal was granted by First-tier Tribunal Judge Saffer on 7 January 2019.

Anonymity

2. No direction has been made previously, and there is no reason for one now

### Background

3. The respondent applied for a derivative residence card on 10 January 2018, confirming that she was the primary carer of a British citizen.
4. On 17 May 2018 the Secretary of State decided to refuse that application under Regulation 20 and 16(5) of the Immigration (European Economic Area) Regulations 2016 on the basis that she had not demonstrated that her child "K" would be unable to reside in the United Kingdom or another EEA state if she were required to leave the country indefinitely. The Secretary of State explained that K's father had been granted leave to remain outside the Rules on the basis that he was K's primary carer, that the respondent lived with K, K's father and K2, who is said to be the respondent's child from another relationship. It was, therefore, considered that K could be cared for by his father if the respondent was required to leave the United Kingdom.

### The hearing before the First-tier Tribunal

5. The judge concluded that the respondent met the requirements of regulation 16 because he accepted that she shared care equally with S (her husband and K's father). Furthermore, the judge took account of evidence before him including the emotional, medical and psychological needs of K and concluded that he would not be able to reside in the UK or another EEA state if the respondent left for an indefinite period.

### The grounds of appeal

6. The grounds of appeal contended that the judge accepted the respondent's credibility without reference to the starting point which was the decision of Judge Graham in 2017, who found her to be an unreliable witness who had manipulated the immigration system via she and her partner (S) entering into marriages of convenience and seeking to pass off their child as that of another man. Secondly, it was argued that the judge failed to properly assess the case with correct test in mind as set out in Patel v SSHD [2017] EWCA Civ 2028. Lastly, it was said that the judge used an artificial test in concluding that the respondent would be leaving the country for an indefinite period when it was open to her to seek entry clearance to return by making an application under Appendix FM.
7. Permission to appeal was granted on the basis sought.

### The hearing

8. Mr Tarlow relied upon the grounds, with reference to the findings of Judge Graham that the respondent and her partner were unreliable witnesses. He argued that there was nothing to stop K from staying in the United Kingdom with the father looking after him and that the reality was that the

respondent could apply to re-enter the United Kingdom under Appendix FM. Thus, the issue was whether the children could remain without her for the finite period in which it took her to apply for entry clearance.

9. Mr Habtemariam contended that the judge had directed himself appropriately and recorded the previous determination at [20] of the decision. He argued that the respondent was sharing K's care equally and that she was not an exempt person as in Patel. In addition, he emphasised the precarious position of K's father who was not able to sponsor the respondent and as a result any separation would be of an infinite duration. Lastly, it would not be appropriate for K to accompany the respondent to Ghana given the specialist care he needed for his mental health issues. It was argued that if the respondent was removed, it was likely that K would go with her.
10. Mr Tarlow added only that the judge's reasoning at [25] did not amount to the compulsion required by Patel.
11. At the end of the hearing, I announced that I would be upholding the decision of the First-tier Tribunal.

#### Decision on error of law

12. The first ground of challenge related to the judge's treatment of the previous decision of Judge Graham. The judge made a direct reference to the decision at [20] but made no further mention of it. The previous appeal resulted from the Secretary of State's refusal to issue the respondent with a residence card as evidence of retained rights of residence following divorce. It is the case that the respondent, who gave evidence before Judge Graham, was found to be an untruthful witness. The previous judge found that the respondent's marriage to a Portuguese national was one of convenience and noted that her relationship with S (K's father) had continued throughout.
13. It is clear, that Judge Graham's findings did not relate to the same issues which were part of the respondent's appeal before Judge Sweet. In the instant appeal, the respondent was relying on K's nationality, her relationship to K and medical evidence of K's condition. Thus, it was not a material error of law for Judge Sweet to fail to set out the findings of the previous judge and to state that those findings were the starting point, as per Devaseelan.
14. The second ground concerned whether the judge used the correct test, as set out in Patel. It is said in the grounds that the judge failed to explain why the child would not be able to reside in the United Kingdom with his father if the respondent was removed. The judge expressed his findings succinctly, however the case advanced was not complicated. The respondent, S, K and K2 live together as a family unit and have done so even during their respective marriages to EEA nationals. They recently married on another. The oral evidence of the respondent's husband, S,

was that he would return to Ghana with the respondent if she was removed because it would *“be difficult for him emotionally and practically as K needs help,”* S said that he worked nights and relied upon the respondent to look after the children and he did not know if the respondent’s family in the United Kingdom could provide support in her absence. S gave a longer explanation in his witness statement, in which he explained that he is not permitted to have recourse to public funds under the terms of his Discretionary Leave and relies upon his wife’s earnings to pay their mortgage. At (19) of his statement, he states as follows *“If Mercy was to leave the UK, it will mean the whole family will need to leave.”* The judge accepted all this evidence, which went unchallenged by Secretary of State’s representative at the hearing and the judge further accepted at [24] that the respondent and K were joint carers of K and K2. Thus, there was evidence before the judge that K would be compelled to leave the United Kingdom if the respondent left because his father would accompany his mother and bring the children as he would be unable to cope with the children alone, given K’s special needs, or support the family financially for an indefinite period.

15. Thirdly and lastly, the grounds contend that the judge erred in finding that the respondent would be separated from K for an indefinite period when it was open to her to seek entry clearance under Appendix FM. This last point can be disposed of swiftly. The respondent’s husband has only discretionary leave to remain in the United Kingdom which expires within a few months. His immigration status is precarious and he is not permitted to sponsor a partner to join him in the United Kingdom. Accordingly, the judge did not err in finding that the respondent’s removal to Ghana was likely to be of an indefinite duration.

16. There was no material error in the approach of the First-tier Tribunal.

### **Decision**

**The making of the decision of the First-tier Tribunal did not involve the making of an error of on a point of law.**

**The decision of the First-tier Tribunal is upheld.**

**The Secretary of State’s appeal is dismissed.**

Signed

Date: 01 May 2019

Upper Tribunal Judge Kamara