Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00956/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7th January 2020	**On 29th January 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

AH
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Coleman, Counsel instructed by TMC Solicitors
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. An anonymity direction was made by the First-tier Tribunal ("F*t*T"). Unless and until a Tribunal or Court directs otherwise, AH is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.

2. The appellant is a national of Pakistan. On 3rd November 2017, he applied for a derivative residence card to confirm that he is the primary carer of ("SA"), a self sufficient EEA national under the age of 18. SA was born on 18th November 2013 and is the son of the appellant's brother, a national of Pakistan, and sister-in-law, a citizen of Poland. The application was refused by the respondent for reasons set out in a decision dated 11th February 2019 and the appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Aujla ("the judge") for reasons set out in a decision promulgated on 21st August 2019.

The decision of First-tier Tribunal Judge Aujla

3. The appellant's immigration history is set out at paragraphs [2] to [7] of the decision. There is reference, at paragraph [10], to an order made by Milton Keynes County Court in respect of SA, but the judge was not shown a copy of that order because the appellant had not obtained the permission of the Family Court for the order to be disclosed. The judge heard oral evidence from the appellant, his brother and his sister-in-law. At paragraph [17], the judge refers to the reasons given by the respondent for refusing the application:

> "… He had applied on the basis that he was the primary carer of SA but the respondent's records showed that the appellant and SA's mother appear to be living at the same address. As the child was living with his mother, the respondent could not be satisfied that the appellant had primary responsibility for the child. Furthermore, the appellant had not demonstrated that SA would be unable to remain in the UK if the appellant left for an indefinite period. It was claimed that the second sponsor was a person who was exercising free movement rights in the UK as a worker. As such she had a right to reside in the UK as a result of the provision of the 2016 Regulations. As the second sponsor was residing in the UK, she could continue to care for SA if the appellant were to leave. It was accepted therefore that as SA was more likely to remain in the UK and be cared for by the second sponsor if the appellant were required to leave the UK for an indefinite period *(sic)*. His application was therefore refused."

4. The evidence given by the appellant, his brother and sister-in-law is summarised at paragraphs [18] to [20] of the decision. The appellant's brother and sister-in-law had given evidence that they had returned to the UK from Poland the day before the hearing and would be leaving the

following day, leaving their son in the care of the appellant. The judge noted the appellant claims that he is the primary carer of SA pursuant to the Court Order made by Milton Keynes County Court, that the appellant submitted, amounted to legal guardianship. The appellant claimed that since the making of the order, he has had primary responsibility for SA's care because SA's parents were spending time back in Poland as the appellant's sister-in-law had inherited a farm and had responsibility for that. They therefore left SA in the UK to be cared for by the appellant and SA would have to leave the UK if the appellant is required to leave.

5. The judge accepted the appellant is the legal guardian of SA. The Judge states, at [25]; *"the only other issue before me to determine therefore is whether or not the appellant was in fact the primary carer of SA".* In addressing that issue, the judge considered, at [27], why the appellant had waited until November 2018 to make his application when in fact he claimed to be the primary carer of SA since May 2017. The judge considered the delay undermined the genuineness of the appellant's claim that he has had sole responsibility for SA's care since at least May 2017 and continues to be his primary carer. At paragraphs [28] and [29], the judge sets out his reasons for the conclusion that the appellant has not established, on the balance of probabilities, that he is the primary carer of SA. The judge stated:

> "28. The evidence before me was that the sponsors were still either exercising treaty rights or settled in the UK under the regulations. They had their home here in the UK. As the respondent noted, the appellant was living in the same household with them. Although the sponsors may be spending time in Poland from time to time, there is no evidence before me to suggest that they had lost all connections with the UK. I repeat, they still had a home here. There was no evidence before me to clearly show by reference to months weeks or days, (with a clear chronology and appropriate evidence showing exit from entry *(sic)* back to the UK) that the sponsors had been absent from the UK and SA's life for substantial periods of time at a time since May 2017. There was equally no evidence before me to show that they had 'migrated' back to Poland thereby severing all connections with the UK. In the absence of any evidence in that regard, considering that they were still maintaining a home in the UK and spend time here, the fact that the appellant was looking after SA during his parent's short absences abroad from time to time did not make him the primary carer.

> 29. Even if I accept that the sponsors were spending some time in Poland during which time SA was looked after by the appellant, the appellant had to show much more involvement, confirmed by relevant evidence, than what he had provided or claimed to qualify as the primary carer of the child. The scenario before me was that the sponsors, as the biological parents of SA, were still primary carers of their child, like other biological parents. They were fit and well and physically and financially capable of looking after the child. They have not provided a credible and sustainable reason for giving up their responsibility to care for the child, if they had truly given it up which I do not accept. I therefore find that the appellant does not establish that he was the primary carer of SA."

6. The Judge found, at [30] that at its highest, the appellant shares responsibility for SA's care with his parents and is not the primary carer. The Judge found that the appeal could therefore only succeed if the appellant shares responsibility for SA's care with one other person who is not an exempt person. An exempt person is defined in Regulation 16(7) of the Immigration (European Economic Area) Regulations 2016 as *inter alia* a person has a right to reside under another provision of the Regulations. The judge noted that as the appellant's brother and sister-in-law have a right to reside in the UK under the regulations, they are 'exempt persons' and the appellant cannot satisfy Regulation 16(8) of the 2016 Regulations.

The appeal before me

7. The appellant advances four grounds of appeal. First, the judge considered whether the appellant is the legal guardian of SA, whereas the respondent did not challenge the appellant's claim that he is a legal guardian of SA. Second, the judge refers to the late application for a derivative residence card as undermining the appellant's claim that he is the primary carer of SA, but that was not a matter relied upon by the respondent in reaching the decision to refuse the application. In the absence of a Home Office Presenting Officer at the hearing of the appeal and any opportunity for the appellant to explain the delay, the judge erred in concluding that the delay undermines the appellant's claim. In any event whether the appellant has an entitlement to a derivative right of residence is a matter of fact, and any delay in making an application when in fact no such application is required, demonstrates the judge taking into

account an irrelevant factor in reaching his decision. Third, in reaching his decision the judge failed to consider the decision of the CJEU in Chavez-Vilchez C-133/15. The CJEU held that it was important to determine which parent was the primary carer of the child and whether there was in fact a relationship of dependency between the child and that parent. That the other parent, a Union citizen, was actually able and willing to take responsibility for the child was a relevant factor, but it was not a sufficient ground for a conclusion that there was not, as between the child and the third-party national parent, such a relationship of dependency that the child would indeed be compelled to leave the EU if the third-party national were refused the right of residence. Finally, there was no consideration of any dependency between the appellant and his nephew and the judge failed to consider the best interests of the child.

8. Permission to appeal was granted by First-tier Tribunal Judge Landes on 25th November 2019. The matter comes before me to determine whether the decision of the First-tier Tribunal judge is tainted by a material error of law, and if so, to remake the decision.

9. On behalf of the appellant, Mr Coleman adopts the grounds of appeal. He submits that at the hearing of the appeal, the judge did not ask any questions of the appellant and or his witnesses and the findings made are at odds with the evidence that was before the Tribunal. He submits the central issue in the appeal was whether the appellant is the primary carer of SA. If the judge was concerned about the delay in making an application, and about the application that the appellant had previously pursued, that should have been explored at the hearing and the appellant given an opportunity to explain the delay.

10. Mr Coleman drew my attention to the evidence of the appellant set out at paragraphs [4] to [7] of his witness statement. The appellant's evidence was that his sister-in-law has been preoccupied due to her responsibilities in Poland and his brother and sister-in-law travel to Poland to maintain a farm. The appellant confirms that his nephew resides with him in the UK

and as a result, his brother and sister-in-law decided to make him a legal guardian. SA is in full-time education in the UK and the appellant takes him to and brings him back from school. The appellant also takes SA to the park and to social gatherings. The appellant's evidence was that he is fully involved with SA's educational activities and helps him with homework and attends parents evening. The appellant said in his witness statement that he is responsible for SA's daily care, including decisions surrounding his upbringing and welfare. In his witness statement the appellant's brother confirmed that his wife has inherited a farm in Poland and that means that she needs to be in Poland to help her elderly mother who can no longer maintain the farm. He confirmed that he has also been visiting Poland with his wife to help her run the farm. The appellant's brother confirmed that he has faith in his brother and that the appellant is a legal guardian to his son. He explained that the appellant takes SA to school and has a say in his upbringing. There was also a statement from the appellant's sister-in-law who confirmed that SA is very fond of the appellant and they spend a lot of time together whilst she works. She too confirms that she has inherited a farm in Poland which requires her and her husband's full-time attention. Her evidence was that her mother is not well, elderly and is therefore unable to maintain the farm and needs their assistance. She confirmed that she has been to Poland with her husband for long periods of time, leaving the appellant to care for SA.

11. The respondent was not represented at the hearing of the appeal and the judge did not question the evidence. At the end of paragraph [28], the judge refers to the appellant looking after SA during his parents' 'short absences abroad', whereas the evidence was that SA's parents' spent long periods of time in Poland. Mr Coleman submits that at paragraph [29], the judge stated that *"... The scenario before me was that the sponsors, as the biological parents of SA, were still the primary carers of their child..."*, but that is not founded upon the evidence that was before the Tribunal. He submits that in reaching the decision as to whether the appellant has primary responsibility for SA's care, the judge reached a decision that was

not open to him on the evidence. In Patel and Shah -v- SSHD [2019] UKSC 59, Lady Arden confirmed that in the case of children, it is first necessary to determine who the primary carer is, and whether there is a relationship of dependency with the third country national.

12. On behalf of the respondent, Ms Isherwood submits there is no material error of law in the decision of the First-tier Tribunal Judge. She submits at paragraph [10] of his decision, the judge records that the there was a Child Arrangement Order not a legal guardianship order. Although the respondent was not represented at the hearing of the appeal, the respondent's position was set out in the decision that was the subject of the appeal. The respondent had confirmed in that decision that the respondent does not accept the appellant has provided adequate evidence to show that he has primary responsibility for SA's care. It was for the appellant to establish his claim and it was entirely open to the Judge to conclude, at [28], the appellant has failed to provide any evidence to clearly show that his brother and sister-in-law have been absent from the UK and SA's life for substantial periods of time since May 2017. She submits the evidence set out in the witness statements is vague and just because the appellant's brother and sister-in-law claimed that there had been long absences, the judge was not bound to accept there have been long absences. Ms Isherwood submits that at paragraphs [28] and [29], the judge reaches a decision on the evidence that was open to the judge. The judge was entitled to conclude the appellant does not have primary responsibility for SA's care and that at its highest, as the judge states at [30], the appellant shares responsibility for SA's care, with SA's parents.

13. Ms Isherwood refers to the decision of the Supreme Court in Patel & Shah -v- SSHD. At paragraph [22] of the decision, Lady Arden confirmed that what lies at the heart of the *Zambrano* jurisprudence is the requirement that the Union citizen (here, SA) would be compelled to leave the union territory if the third country national with whom the union citizen has a relationship of dependency, is removed. In the case of children, it is first necessary to determine who the primary carer is, and then determine

whether there is a relationship of dependency with the third country national or the national parent. Here, SA would not be required to leave the EU. SA's parents remain in the UK albeit, they claim to spend long periods of time in Poland. The judge was not satisfied, on the evidence that they do spend long periods of time in Poland and there was no evidence of SA's dependency upon the appellant or a claim that SA would be compelled to leave the union territory if the appellant is removed.

Discussion

14. It is convenient to set out the relevant provisions of the Immigration (European Economic Area) Regulations 2016 that make provision relating to the derivative right to reside in the UK. Insofar as is relevant, Regulation 16 stated:

> **16.— Derivative right to reside**
>
> (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.
>
> …
>
> (7) In this regulation—
>
> …
>
> (c) an *"exempt person"* is a person—
>
> (i) who has a right to reside under another provision of these Regulations;
>
> …
>
> (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.
>
> (9) In paragraph (2)(b)(iii), (4)(b) or (5)(c), if the role of primary carer is shared with another person in accordance with paragraph (8)(b)(ii), the words *"the person"* are to be read as *"both primary carers".*
>
> …

> (11) A person is not be regarded as having responsibility for another person's care for the purpose of paragraph (8) on the sole basis of a financial contribution towards that person's care.
>
> ...

15. It was for the appellant to establish that he is the primary carer of SA. The appellant is the paternal uncle of SA. Here, to establish that he is the primary carer, Regulation 16(8) required the appellant to establish that he is a legal guardian of SA; and, either, (i) he has primary responsibility for SA's care; or (ii), he shares equally the responsibility for SA's care with one other person. If the appellant is a legal guardian of SA, and does not have primary responsibility for SA's care, he could still establish that he is a 'primary carer' for the purposes of Regulation 16(2)(a) if he shares equally the responsibility for SA's care with one other person. In those circumstances, Regulation 16(9) operates such that the appellant has a derivative right to reside if SA would be unable to remain in the United Kingdom if both his primary carers left the United Kingdom for an indefinite period.

16. At paragraph [25], the judge noted that there are two issues for him to determine. The first is whether the appellant is a legal guardian of SA. Although that was not an issue identified by the respondent in the decision dated 11th February 2019, on appeal, it was for the appellant to establish that he has a derivative right to reside in the UK. In any event, the judge resolved that issue in favour of the appellant. Although, the judge did not see the order made by the Family Court, the judge noted there was a child arrangement 'agreement' between the appellant, his brother and sister-in-law. The judge accepted the submission made by Mr Coleman that it was for all intents and purposes a legal guardianship arrangement.

17. The judge was not satisfied for reasons given at paragraphs [26] to [29] that the appellant has primary responsibility for SA's care. I have carefully considered the evidence of the appellant, his brother and sister-in-law that was drawn to my attention by Mr Coleman. The judge noted, at [27], that the appellant's brother and sister-in-law were spending time outside the UK in Poland to look after the farm that the appellant's sister-in-law had

inherited. Although the judge referred, at [27], to the delay in making the application as one that undermines the genuineness of his claim that he has sole responsibility for SA's care, the judge went on to consider the evidence that was before the Tribunal.

18. The judge noted, at [28], the appellant's brother and sister-in-law were still either exercising treaty rights or settled in the UK under the Regulations. The judge noted they continue to have a home in the UK, and the appellant lives in the same household with them. The judge noted that although the *"..sponsors may be spending time in Poland from time to time, there is no evidence before me to suggest that they had lost all connections with the UK.... There was no evidence before me to clearly show by reference to months, weeks or days (with a clear chronology and appropriate evidence showing exit from entry (sic) back to the UK that the sponsors had been absent from the UK and SA's life for substantial periods of time since May 2017. There was equally no evidence before me to show that they had 'migrated' back to Poland thereby severing all connections with the UK..."*. In my judgement upon a careful reading of paragraphs [26] to [29] of the decision, it was in the end the paucity of the evidence that led to the judge concluding that he could not be satisfied the appellant has primary responsibility for SA's care. Although the witness statements of the appellant and SA's parents make the broad claim that the appellant is responsible for SA's daily care, the statements are devoid of any real detail to establish that the appellant has primary responsibility for SA's care. The judge was entitled to note that SA's biological parents are also primary carers of SA. They are fit and well and physically and financially capable of looking after SA. There is no evidence of their having given up their responsibility to care for SA. There is little doubt the appellant cares for SA whilst his parents are in Poland, but the periods and length of their stay in Poland was far from clear. On the evidence, it was in my judgement open to the judge to find the appellant does not have primary responsibility for SA's care for the reasons set out in the decision.

19. That is not however the end of the matter, because Regulation 16(8)(b) provides that the appellant could also establish that he is the primary carer of SA, if he is a legal guardian *(which the judge accepted)* and shares equally the responsibility for SA's care with one other person. At paragraph [30] of the decision, the judge found the appellant cannot satisfy that requirement, because the appellant could not show he was sharing responsibility for SA's care with a person "who is not an exempt person". The judge had set out Regulation 16 of the 2016 Regulations at paragraph [23] of his decision. The provision cited by the Judge was that in force until 28th July 2018. In fact, the words "who is not an exempt person" in Regulation 16(8)(b)(ii), were revoked by Immigration (European Economic Area) (Amendment) Regulations 2018/801, Schedule 1 paragraph 10. The regulations were amended to reflect the Zambrano principle. I am satisfied the judge erroneously considered Regulation 16(8)(b)(ii) by reference to the provision as it was in force until 28th July 2018, and the judge erred in concluding that the appellant is not the primary carer of SA for the purposes of Regulation 16(2)(a) of the 2016 Regulations.

20. I must therefore consider whether the error is material to the outcome of the appeal. In such a case, the appellate Tribunal has to decide whether it would be just to let the First-tier Tribunal's decision stand. The question is whether I can be tolerably confident that the First-tier Tribunal's decision would have been the same on the basis of the evidence that was before the First-tier Tribunal and the reasons which have survived scrutiny.

21. The judge was satisfied the appellant is a legal guardian of SA and shares equally the responsibility for SA's care with SA's biological parents. The appellant is therefore a primary carer of SA for the purposes of Regulation 16(2)(a) of the 2016 Regulations. The question that then arises by operation of Regulation 16(9) of the 2016 Regulations is whether SA would be unable to remain in the UK if the appellant, his brother and sister-in-law left the United Kingdom for an indefinite period.

22. The judge noted the evidence that the appellant's brother and sister-in-law may be spending time in Poland from time to time, but there was no evidence before the First-tier Tribunal that they had lost all connections with the UK. In fact, they continue to have a home in the UK and are either exercising treaty rights or are settled in the UK. Although there was evidence of the appellant playing a role in the day-to-day care of SA during periods when SA's parents are both absent from the UK, in Poland, there was no evidence before the Tribunal as the judge noted, to establish the amount of time that SA's parents were absent from the UK, by reference to months, weeks or days *(with a clear chronology and appropriate evidence showing exit from and entry back to the UK)* to establish the biological parents had been absent from the UK and SA's life for substantial periods of time.

23. As Lady Arden said in Patel & Shah -v- SSHD, what lies at the heart of the Zambrano jurisprudence is the requirement that the Union Citizen would be compelled to leave the Union territory if the third country national, with whom the union citizen has a relationship of dependency, is removed. In answering that question, a Court or Tribunal is required to take account of the best interests of the child concerned and all the specific circumstances. They include 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, and the risks which separation from the latter might entail for that child's equilibrium; *Chavez-Vilchez*.

24. The test of compulsion is a practical test to be applied to the actual facts and the evidence before the decision maker. As Ms Isherwood submits, there was quite simply no evidence to establish that there is a relationship of dependency such that SA would be compelled to leave the territory of the European Union if the appellant does not have a derivative right to reside in the UK. There was no evidence before the First-tier Tribunal of anything regarding the age of SA, his physical and emotional development, and the extent of his emotional ties to the appellant and his

biological parents, such that separation from the appellant would be contrary to the best interests of SA. Although SA's biological parents may desire that the appellant is able to reside in the UK to keep the family together, that is insufficient to conclude that SA would be compelled to leave the territory of the European Union if the appellant does not have a derivative right to reside in the UK.

25. I accept that in the circumstances, as Ms Isherwood submits, the appeal could not succeed on the basis of the findings that were made by the judge which have survived scrutiny, and upon a proper consideration of the very limited evidence that was before the First-tier Tribunal. I am satisfied error of law identified in this decision would not have resulted in a different outcome and the error is immaterial to the outcome of the appeal.

26. It follows that I dismiss the appeal.

Notice of Decision

27. The appeal is dismissed.

Signed Date 23rd January 2020

Upper Tribunal Judge Mandalia

FEE AWARD

I have dismissed the appeal and there can be no fee award

Signed Date 23rd January 2020

Upper Tribunal Judge Mandalia