



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/12082/2016

THE IMMIGRATION ACTS

Heard at Field House
On 15 March 2018

Decision & Reasons Promulgated
On 18 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

RUDOLPH [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Malik of Counsel instructed by Direct Access
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Andrew promulgated on 28 July 2017 in which she dismissed the Appellant's appeal against a decision of the Respondent dated 20 September 2016 to refuse to issue a derivative residence card pursuant to the Immigration (European Economic Area) Regulations 2006, with particular reference to regulation 15A(4A), 15A(7) and 18(A). The appeal is brought to the Upper Tribunal with the permission of Designated First-tier Tribunal Judge Shaerf granted on 19 January 2018.

2. The Appellant is a citizen of St Lucia born on [] 1989. He claims to have arrived in the United Kingdom in April 2014. He made an application for a derivative residence card under the EEA Regulations by way of an application form signed on 16 July 2014 received by the Respondent on 18 July 2014.
3. The application was made on the basis of being the primary carer of his British citizen son, [SM¹] (d.o.b. [] 2012). [SM¹]'s mother is [SJ], a British citizen born on [] 1979.
4. In the Appellant's application form it was indicated that the Appellant was no longer in a relationship with [SJ], and it was also indicated that [SM¹] lived with his mother. Section 7 of the application form was completed on the basis that the Appellant and [SJ] were said to be joint primary carers for [SM¹].
5. The Appellant's application was refused by way of a Notice of Immigration Decision dated 20 December 2016 for reasons set out in a 'reasons for refusal' letter ('RFRL') of the same date. Reference was made to the regulations to which I have referred above. In particular, with reference to regulation 15A(7)(ii) the Respondent noted that the Appellant could not be considered to be a primary carer for the purposes of the Regulations because insofar as there was 'joint responsibility' it was shared with an 'exempt person', and therefore did not avail the Appellant under the Regulations.
6. It was also observed in the RFRL, with regard to regulation 15A(4A)(c), that given that [SJ] lived with the Appellant's son "*there is no reason why she could not continue to do so and to care for the child if [the Appellant] were forced to leave the United Kingdom*". To that extent the Respondent considered there was insufficient evidence to show that "*the relevant British citizen would be unable to reside in the UK or in another EEA State if [the Appellant] were required to leave*".
7. The Appellant appealed to the IAC.
8. A bundle of documents was filed by the Appellant before the First-tier Tribunal which comprised: a skeleton argument; source materials with regard to legislation; a marriage certificate in respect of a marriage on 21 February 2013 between the Appellant and [SW] (otherwise [SSSW]); a birth certificate for [SM¹]; and a birth certificate for [SM²] (d.o.b. [] 2014). The latter birth certificate showed the mother as '[SM] otherwise [SSSW-G]' (whose maiden name was given as ['W']). Both birth certificates named the Appellant as father.
9. There was nothing in the materials filed before the First-tier Tribunal by way of a witness statement from the Appellant (albeit the skeleton argument, which contained some limited factual assertions, was signed by him). There was no witness statement from either [SJ] or [SW].
10. The Decision of the First-tier Tribunal Judge indicates that the Appellant attended unrepresented, but was present in court with a woman and a child. The Judge refers to this woman as the Appellant's "*partner*", noting that both the Appellant and partner were "*present in Court with their child*" (paragraph 2). The Judge records the following:

“The Appellant went on to tell me that he is not the primary carer of his and his partner’s child. The care of the child is shared between himself and his partner: the removal of the Appellant would not force the child, who is a British citizen to leave the United Kingdom or the EEA as he could remain in the United Kingdom with the Appellant’s British citizen partner.” (paragraph 3).

11. The Judge continues at paragraph 4:

“I explained that in these circumstances I must dismiss the appeal.”

12. The Judge then discusses Article 8 of the ECHR: it is observed that because this was an EEA case and there were no removal directions Article 8 was not really ‘in play’; nonetheless the Judge comments that had it been, she would not have allowed the appeal on such basis. For the avoidance of any doubt, no point is now pursued in respect of Article 8 before the Upper Tribunal - it being acknowledged that it is outwith the jurisdiction of the Tribunal.

13. The Appellant’s Grounds of Appeal in support of his application for permission to appeal, however, for the main part did focus on Article 8 matters. Nonetheless Judge Shaerf, recognising that the Appellant had appeared unrepresented and had seemingly prepared the grounds himself, gave scrutiny to the First-tier Tribunal’s decision beyond the limited scope of the grounds. Permission to appeal appears to have been granted pursuant to the following observations of Judge Shaerf:

“The Appellant did not help himself with the little documentary evidence that he submitted. However, included in this evidence was the birth certificate of his 2nd child born on [] 2014, some 3 weeks before his application. The Respondent’s reasons for refusal do not refer to the 2nd child and nor did the Judge. It is arguable that she should have considered the position, even if the Appellant had failed to inform the Respondent. The Judge recorded that the Appellant’s wife and their child, his 2nd child, were present at the hearing.”

14. Notwithstanding Judge Shaerf’s impression that it was [SW] and the second child, [SM²], present at the hearing, it is the Appellant’s position that he attended the hearing before the First-tier Tribunal with [SJ] and [SM¹].
15. I sought clarification from the Appellant as to why [SW] had not attended the hearing before the First-tier Tribunal. The Appellant initially said that [SW] had not attended because she was severely disabled; however he then contradicted himself by acknowledging that she was not so disabled that she could not have attended court. He also then clarified upon enquiry that he was no longer in a relationship with [SW], and that his second child - [SM²] - resided with [SW] albeit that he enjoyed regular contact.
16. I also sought clarification as to the basis upon which the challenge to the decision of the First-tier Tribunal was being pursued - particularly given that a premise of Judge Shaerf’s grant of leave - that [SW] had attended the appeal hearing - was, on the Appellant’s own admission, misconceived. Mr Malik told me that the Appellant’s raised two bases of challenge:

(i) It was unclear which child Judge Andrew had considered when evaluating the Appellant's case under the Regulations. A lack of clarity was unsatisfactory in respect of reasoning. In any event it appeared that only one child had been considered when both should have been.

(ii) In respect of [SM¹] the Respondent had erred in not following the approach in Chavez-Vilchez (C-133/15) (see further below.) Such an approach would also be of application to the Appellant's case in respect of [SM²]. Whichever child the Judge had considered, the Judge had also erred in not applying Chavez-Vilchez.

17. For the reasons set out below I reject Mr Malik's submissions in respect of Chavez-Vilchez. Whilst I accept that there is ambiguity in the Judge's decision as to which mother and child had attended the hearing, I accept Mr Wilding's submission that this made no material difference to the outcome. I accept that the Respondent's decision was correct in law and fact and in accordance with the Regulations in respect of the Appellant's relationship with [SM¹]. [SJ] could have said nothing further at the hearing to alter the outcome. [SW] did not attend and there was no supporting evidence in respect of the Appellant's relationship with [SM²]: the Appellant could not therefore have discharged the burden of proof to demonstrate to the First-tier Tribunal Judge that he could succeed under the Regulations. In any event, given his indication that he is not in a continuing relationship with [SW] and that [SM²] lives with [SW], the outcome in respect of the relationship with [SM²] would likely be decided in the same way as that with [SM¹] unless there was some distinguishing feature. No such feature has been suggested.
18. Further to the above: I note that the Decision is silent as to the exact identity of the woman and child that appeared before the First-tier Tribunal. I acknowledge that there is, therefore, a lack of clarity in the decision of the First-tier Tribunal as to whom the Judge thought had accompanied the Appellant to the hearing.
19. Judge Shaerf was clearly of the view that Judge Andrew thought it was [SW] and [SM²]. That is an entirely understandable view. It is apparent that Judge Andrew had the Appellant's bundle in mind because express reference is made to a skeleton argument (paragraph 2). I also note that the Judge refers to the Respondent's representative confirming that there were no other outstanding applications (paragraph 2); in context this appears to be a response to an inquiry from the Judge - "*... could confirm to me ...*". This exchange - and the reference to the skeleton argument - powerfully suggest that the Judge was alert to the fact that the marriage certificate and one of the birth certificates referred to a different mother and a different child from those that were the subject of the appealable decision. In this context it is to be noted that the Skeleton Argument refers to being the spouse of Sarah Matthew and the father of two British children. The Judge refers to the woman present as a 'partner', rather than an ex-partner.
20. These matters would suggest that Judge Andrew did indeed think it was Ms Wood and [SM²] who had attended.

21. Let us assume that that was so – and that, as per the Appellant, that was wrong. It may mean that the Judge understood the Appellant’s evidence about not being a primary carer but sharing care to relate to [SM²] when it was intended to relate to [SM¹]. If the answer did relate to [SM¹] – then the premise of the Respondent’s decision was correct and regulation 15A(7) had been properly applied in respect of the Appellant’s relationship to [SM¹].
22. In so far as the Judge thought – wrongly – that the answer related to [SM²] it would appear from what the Appellant has indicated before the Upper Tribunal that the result would likely be the same. The Appellant could not avail himself by reason of [SW] being an exempt person - just as [SJ] is an exempt person: see regulation 15A(7)(ii).
23. In any event it hardly behoves the Appellant to pursue his case before the Upper Tribunal by reference to his relationship with [SM²] in circumstances where he presented no supporting evidence before the First-tier Tribunal beyond the fact of paternity.
24. In my judgement it follows that whatever the ambiguity or confusion before the First-tier Tribunal, the Appellant could not have shown that he was the primary carer of either child within the meaning of the Regulations, and as such could not avail himself under the Regulations.
25. Notwithstanding the almost complete absence of any meaningful evidence before the First-tier Tribunal, and a similar failure to file anything further before the Upper Tribunal (pursuant to standard directions lest the Tribunal wish to remake a decision after a finding of error of law) Mr Malik advanced in some detail and at some length an argument drawing primarily on the case of **Chavez-Vilchez and Others** (Case C133/15).
26. The case of **Chavez-Vilchez** considers the circumstances in which a minor child might be obliged to leave the territory of the European Union by reason of the expulsion of a third-country national. As such it is concerned with the principle that finds expression in regulation 15A(4A)(c) of the domestic Regulations. This is a different issue from that of ‘primary carer’.
27. In **Chavez-Vilchez** there was no dispute as to who were the primary carers. Each of the applicants (who happened to be mothers) were “*responsible for the day-to-day and primary care*” of the minor children (paragraph 39). It was the parent without responsibility for primary care who was the EEA national. The question being explored was in relation to the extent to which it was relevant that if the non-EEA national primary carer was deprived a right of residence, the EEA national parent might take over responsibility: see e.g. paragraph 72. None of this is pertinent to the issues in the Appellant’s case.
28. Both representatives directed my attention to the case of **Nilay Patel v Secretary of State for the Home Department** [2017] EWCA Civ 2028. As Mr Wilding pointed out the conclusions therein (paragraphs 72-75) make it very clear that there is nothing in

Chavez-Vilchez that represents “any kind of sea-change”. It is made clear that the issues in **Chavez-Vilchez** related to the ‘compulsion’ to leave, and not the issue of who is a primary carer.

29. It is this latter point that Mr Wilding emphasised. Under regulation 15A(4A) it is necessary to satisfy the criteria to show that
- “(a) *P is the primary carer of a British citizen (“the relevant British citizen”);*
 - (b) the relevant British citizen is residing in the United Kingdom; and*
 - (c) the relevant British citizen would be unable to reside in the UK or another EEA State if P were required to leave.”*
30. It follows if the Appellant cannot establish that he is a primary carer the ‘unable to reside’ (or ‘compulsion’) question is not reached. Accordingly, **Chavez-Vilchez**, which is concerned with ability to reside, does not assist the Appellant whose case fails at the ‘primary carer’ requirement – i.e. under 15A(4A)(a) with reference to 15A(7)(b)(ii).
31. Mr Malik nonetheless argued that the thinking and reasoning in **Chavez-Vilchez** ought also to inform an evaluation of who is a primary carer. In short he was seeking to suggest, it seemed to me, that the third question under paragraph 15A(4A) should also inform the first question. I do not accept that: indeed Mr Malik acknowledged that it constituted a strained construction.
32. The clear and obvious position is that the Appellant was not able to establish before the First-tier Tribunal that he is a primary carer of a British citizen by reference to either of his sons or otherwise. The case of **Chavez-Vilchez** is of no relevance in this regard. The Appellant could not succeed under the Regulations. Any confusion on the part of the Judge, and/or any ambiguity in the Decision, makes no difference to the essential circumstance under regulation 15A(7) and (4A).
33. The decision of the First-tier Tribunal accordingly stands.

Notice of Decision

34. The decision of the First-tier Tribunal contained no material errors and accordingly stands.
35. The Appellant’s appeal remains dismissed.
36. No anonymity direction is sought or made.

Signed:

Date: 15 May 2018

Deputy Upper Tribunal Judge I A Lewis