



IAC-FH-CK-V1

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

Appeal Number: IA/28813/2014

THE IMMIGRATION ACTS

Heard at Field House

**Decision &
Promulgated**

Reasons

On 12th June 2015

On 18th June 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

**D F A
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr W Rees, Counsel instructed by Stanley Richards Solicitors

For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of the Cameroon whose date of birth is recorded as 14th June 1989. On 11th March 2014 he made application for a Derivative Residence Card pursuant to Regulation 18A of the Immigration (EEA) Regulations 2006, on the basis of him having a British child in respect of whom it was said that he was the primary carer. On 8th July 2014 a decision was made to refuse the application and the Appellant appealed. On 17th November 2014 the appeal was heard by Judge of the First-tier Tribunal R R Hopkins sitting at Birmingham.

2. In a Statement of Reasons promulgated on 2nd December 2014, but dated 30th November 2014, Judge Hopkins dismissed the appeal. He was not satisfied that it was the Appellant who had primary responsibility (as opposed to shared responsibility) for child K. He went on to say at paragraph 28:

“It is more likely that this is a case of the Appellant and Miss Roche (the mother of child K) sharing that responsibility equally. In saying that, I do not imply that they undertake the tasks involved in looking after him on an absolutely equal basis. It may be that at the present time the Appellant does more than Miss Roche, but the taking of the day-to-day decisions relating to his case is something that is carried out by them equally. It is very unlikely that two parents are ever likely to be able to divide their tasks in bringing up their child at exactly 50% each.”

3. Not content with the decision of the First-tier Tribunal, by Notice dated 12th December 2014, the Appellant made application for permission to appeal to the Upper Tribunal. Although there are four grounds, in short it was the Appellant’s case that the finding of the First-tier Tribunal was against the weight of the evidence given the mental incapacity of Miss R, the mother of child K, due to illness.
4. On 26th January 2015 Judge of the First-tier Tribunal Maller granted permission. The focus of the grant was upon paragraph 28 being that observation of Judge Hopkins to which I have already referred, and in particular the fact that the judge appeared to have found that at the date of the hearing the Appellant was doing rather more than Miss R which was capable of leading to a conclusion that the Appellant was in fact the primary carer.
5. This matter first came before on 17th April 2015. I was troubled by the absence of sufficient medical evidence in relation to Miss R, particularly because the case involved a young and vulnerable child. The matter was adjourned and a report has now been obtained.
6. It was common ground before me today, at the resumed hearing, that were I to determine that the Appellant was the primary carer then that was the only issue of fact that I needed to resolve for there to be a favourable outcome for the Appellant; that is not to say that Ms Fijiwala, for the Secretary of State, conceded the appeal. She was however content to leave matters to me, accepting that it was open to me to make such a finding. However in respect of the psychiatric report now obtained she submitted that little weight should be attached to it, based as it was, in her submission, on what Dr Persaud had been told and little more.
7. I turn then to the report of Dr R Persaud FRCPsych MSc MPhil BSc DHMSA, Consultant Psychiatrist, Emeritus Visiting Gresham Professor for Public Understanding of Psychiatry. The expertise of Dr Persaud was not put in issue and rightly so.
8. His opinion was based on what the Miss R and the Appellant had told him. Dr Persaud did not have access to corroborating information from key informants and the report is to be interpreted in that light but Dr Persaud goes on to say, “...having said that I was impressed by the vividness of

descriptions of past traumas and the intensity of emotional reactions rendering me to believe it is highly unlikely that core parts of those accounts are fabricated or exaggerated.”

9. Absent any suggestions to the contrary it seems to me that an expert of Dr Persaud’s standing would be well capable of forming his own opinion as to the veracity of what he was being told and certainly he was not suggesting that there had been any attempt by the Appellant and/or Miss R to mislead.
10. Clearly it was put to Dr Persaud that the Appellant was not only the main carer of child K but also Miss R. The basis for the illness suffered by Miss R is set out in the report. I need not repeat it, it is on the face of the document but there is an explanation given and it is noted that there has been a serious suicide attempt in the past. It was Dr Persaud’s opinion that the Appellant is needed by Miss R, who continues to suffer from a serious psychiatric disorder including major depression probably secondary to the past traumas that Miss R claims. He goes on to say that because of her severe mental health problems he does not think that she would survive were she to lose the Appellant’s support and he opines that her health would deteriorate dramatically.
11. In my judgment, having regard to the evidence that was received by the judge at first instance, and the findings, made including in particular the illness of the Miss R, the Appellant is, I find, undoubtedly, and that is much higher than the standard which I need to apply, the primary carer in this case.
12. Cases are fact-sensitive. This case turns on its own peculiar facts but in my judgment, looking to the evidence that was before the First-tier Tribunal taken together with the psychiatric evidence. insofar as the Miss R is able to cope at all she does so because of the support of the Appellant. In a sense she acts vicariously for the Appellant when exercising any care at all towards the child. I perhaps put that too highly; clearly she is able to function but without that the primary carer is the Appellant. Indeed I accept that without the Appellant child K would be at risk.
13. I have been helped by the guidance in the case of **Hines -v- London Borough of Lambeth [2014] EWCA Civ 660** where at paragraph 24 the following was said by Vos LJ:

“There was much discussion in argument as to the kind of alternative care that might be required in order to avoid the conclusion that the child would be forced to leave [the United Kingdom]. It would be undesirable, I think, for the court to lay down any guidelines in this regard, but it was, as I have said, common ground that an available adoption or foster care placement would not be adequate for this purpose. That is because the quality of the life of the child would be so seriously impaired by his removal from his mother to be placed in foster care that he would be effectively compelled to leave. I do not, however, think that all things being equal the removal of a child from the care of one responsible parent to the care of another responsible parent would normally be expected so seriously to impair his quality and standard of life that he would be effectively forced to leave the

UK. Apart from anything else, he would, even if he did leave, still only have the care of one of his previously two joint carers.”

14. This is not a case in which care would be passing from one parent to another. This is a case which on its facts care would be passing to a parent who is incapable at present of giving the requisite level of care. Consideration has of course to be given to the vulnerable child K.
15. I remind the parties, however, that a derivative right lasts for so long as it is required. It follows that at the point at which the Appellant is no longer the primary carer then his right to remain in the United Kingdom ceases. A derivative right belongs, in a case such as this, to the child and not the Appellant.
16. It is a matter for the Secretary of State in those circumstances whether or not she wishes continually to review the situation. One would of course hope that the medical condition of the Miss R would improve. Whether the Appellant is able to regularise his status on some other basis is not for me to decide. It may be a matter for the future. As matters stand, as at the date of the hearing in the First-tier I find that the Appellant was (and remains) the primary carer. As it was agreed that that was the only issue that I needed to resolve and that were I to find in the Appellant’s favour the appeal should be determined in the Appellant’s favour, that is what I do.
17. For the avoidance of doubt, there was a material error in the Statement of Reasons of Judge Hopkins. That error of law was, that in finding as at the date of the hearing that the Appellant was doing more than the Miss R, he ought properly to have assessed the evidence rather more and given the need to focus on the child ought himself to have considered standing the matter down for a psychiatric report which has now been done by the Upper Tribunal, with the report being admitted into evidence with permission and without objection from the Respondent.
18. The involvement of a child means that an Anonymity Order is appropriate.
19. Both representatives were of the view that I could not allow the appeal outright but that the matter was to be remitted to the Respondent to make a decision constant with my Decision. In the circumstances that is the course I adopt.

Notice of Decision

The decision of the First-tier Tribunal is set aside. The decision of the First-tier Tribunal is remade to the limited extent that the matter is remitted to the Secretary of State to make a decision in accordance with the findings that are contained within this statement of reasons.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant

and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge Zucker