



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/02975/2017

THE IMMIGRATION ACTS

Heard at Field House
On 11 October 2018

Decision & Reasons Promulgated
On 02 November 2018

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HE

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms A Everett, Home Office Presenting Officer

For the Respondent: Ms A Jaja, Counsel instructed by Howe & Co Solicitors

DECISION AND 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 their 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.

1. I shall refer to the Respondent as the Appellant as he was before the First-tier Tribunal. I have anonymised the Appellant because of sensitive issues raised relating to his son, P.
2. The Appellant is a citizen of Ecuador. His date of birth is [~] 1966. His case is that he came to the UK in 2000. On 5 September 2016 he applied for a derivative residence card under the Immigration (European Economic Area) Regulations 2016 (the "2016 Regulations"). This was on the basis that he is the primary carer of an EEA national, P. P is a citizen of Spain. His date of birth is [~] 2000. He was aged 18 at the hearing before me. The Secretary of State refused the application ON 3 March 2017. The Appellant appealed against the decision and his appeal was allowed by Judge of the First-tier Tribunal (the "FTT") M B Hussain, in a decision dated 30 May 2018, following a hearing at Hatton Cross on 17 April 2018. The decision was promulgated on 8 June 2018.
3. The Secretary of State was granted permission to appeal by First-tier Tribunal Judge Parkes on 8 August 2018. The matter came before me to determine whether the judge made an error of law.
4. It was the Secretary of State's case that there was no evidence that the Appellant and his son had comprehensive sickness insurance in the UK. However, this was an issue that was conceded in favour of the Appellant at the hearing before the FTT. The application was refused because the Appellant had not shown that he was P's primary carer and he had not demonstrated that P would be unable to remain in the UK should the Appellant leave. It was the Appellant's position that P's mother lived in Spain, but there was, according to the Respondent, no evidence of this. If she is Spanish and residing in the UK, the Respondent's case was that she could care for P in the Appellant's absence.
5. The judge heard evidence from the Appellant, P and the Appellant's brother (P's uncle), ME. They had made witness statements which they adopted as their evidence-in-chief.
6. The Appellant's evidence was that before coming to the UK, whilst in Spain, he met P's mother. He left Spain and came to the UK unaware at the time that she was pregnant with P. He supported them. They developed a relationship via Skype and telephone calls. The relationship between P and his mother broke down following regular attacks on P by her partner. The Appellant sent ME to Spain to collect P and bring him to the UK. He met P for the first time when he was aged 12.
7. When P arrived in the UK at the age of 12 he was skinny and nervous. He had no confidence. He attended school immediately and it became clear that he had learning difficulties. As a result, he has struggled at school. His problems may be as a result of the abuse from his mother's partner. The only place that P truly finds

comfort is the church that they attend every day. P is completely reliant upon his father. They do the usual activities together such as cycling, walking and playing football. His son does not have friends outside of family and church.

8. ME has provided for the family. He works and has savings. He does not question this. They live together and have done so for 6 years. They are a close family. They do not receive public funds.
9. P's mother remains in Spain with her violent partner. She came to the UK to visit two years ago. She stayed for four days. Her involvement in his life is minimal. The Appellant is his primary carer.
10. In cross-examination he stated that if he left the UK his brother would not be able to take care of his son. ME could not look after the child because he is in a relationship of his own. Although his brother pays the rent for their current accommodation he works for a few hours only. He gives P pocket money and buys clothes for him.
11. ME, a Spanish citizen, here with permanent residence in the UK, gave evidence. He has been living here for six years. During which time he has provided for his brother and nephew. He brought P to the UK because of the violence perpetrated by his mother's partner. P has seen his mother once since he came here. The Appellant is P's primary carer. ME provides his brother with financial support including accommodation. They live here as a family unit. In cross-examination he said that if his brother left the UK he would look after P but that he (P) was more used to being with his father.
12. P gave evidence. Life for him was difficult in Spain because of his violent step-father who was a heavy drinker and smoker. He forced the Appellant to drink and smoke when he was a young child. Life has improved now he is here with his father who cares for him and loves him. He has been bullied whilst at school here because of his poor English. His father has always supported him and attended the school to speak with his teachers. He is there for him. He does not know what he would do if his father was asked to leave the UK because he is the only parent upon whom he could rely. His uncle is there for him, but he cannot replace his father. He hopes that their lives can continue here in the UK.
13. The judge purported to make findings between paragraphs 14 and 30 under the heading "my findings." However, his findings do not commence until paragraph 25. Paragraphs 14 to 23 summarise the evidence contained in the witness statements. At paragraphs 25 and 26 the judge engaged with the evidence relating to sickness insurance despite the concession by the Secretary of State. Although not an issue that was specifically raised in the Reasons for Refusal Letter, the judge found, at paragraph 27, that the Appellant's son is self-sufficient insofar as he was dependent on his uncle's earnings. The judge was satisfied that the Appellant's brother was able to support the Appellant and his son from his earnings as a cleaner without recourse to public funds.

14. At paragraphs 28 and 29 the judge considered whether the Appellant is the “sole carer” of his son. This is not the test. Regulation 16 (2) requires the Appellant to be the primary carer of an EEA national. In any event, it can be reasonably inferred from what the judge stated in these paragraphs that he was satisfied that the Appellant was P’s primary carer. This is not an issue in any event raised in the grounds by the Secretary of State.
15. The judge went on to conclude the following at paragraph 30:

“30. At the end of the hearing, the presenting officer made only a single submission which was that if the appellant is not allowed to stay in this country, his child could be looked after by his brother. I reject that submission. This is because, although the appellant’s brother will no doubt continue to look after the child, the child’s welfare needs will not be adequately provided for by him. It has to be borne in mind that the child had left the company of his mother because he was being abused. Since 2012 he has lived with his father with whom he has built up a good relationship. He suffers from learning disability and I think there is a growth issue as well. Given all these factors and the duty of the state to safeguard the welfare of this child, it seems to me that the support that the appellant’s brother can give will be no substitute for this child’s welfare needs. Accordingly, I find that if the appellant were to leave the United Kingdom then the EEA national child would not be able to exercise his rights to live in this country.”

The Grounds of Appeal

16. The grounds of appeal assert that the judge erred because he misdirected himself in law, failed to give adequate reasons and made inconsistent findings. The reasons for the conclusion that the Appellant’s son would have to leave the UK if the Appellant were to be removed is wholly unsupported by the evidence. All the reasons given by the judge point to the ideal circumstances for P. Given that his uncle was willing and able to look after him in the Appellant’s absence, there is a lacuna of findings to support the decision ultimately reached by the judge. There was no independent evidence to suggest that the Appellant’s brother would not be able to support P given his involvement in his life to date. Ms Everett relied on the grounds. The Respondent’s case was that there were alternative care arrangements, namely that ME could care for him. Ms Everett confirmed to me at the hearing that it was not proposed by the Secretary of State that the Appellant’s son could return to Spain to be cared for by his mother.
17. I heard oral submissions from both parties. I brought to their attention the case of Nilay Patel [2017] EWCA Civ 2028. Neither party was familiar with it, however Ms Jaja addressed me on Chavez-Vilchez and Others and Raad Van Bestuur Van De Sociale Verbekeringsbank and Others (10 May 2017) (Case C-133/15) (Grand Chamber), [2017] 3 WLR 1326, [2017] 3 CMLR 35. She also helpfully drew my attention to Home Office guidance published for Home Office staff on 27 February 2018 entitled Free Movement Rights: derivative rights of residence version 4.0 (

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684300/derivative-rights-v4.0ext.pdf). She argued that there was no error of law. She stated that considering the decision of the judge as a whole he properly considered whether P would be unable to remain in the UK in accordance with the guidance and the case law. She submitted that the judge properly took into account the evidence relating to P including his learning difficulties and medical matters. He took into account the child's vulnerabilities which were material matters to consider when assessing the appropriateness of alternative care arrangements. She submitted that paragraph 30 of the decision was entirely consistent with the approach set out in the Home Office guidance.

The Legal Framework

18. Regulation 16(2) of the Immigration (EEA) Regulations 2016 states::

“Derivative Right to Reside

16. 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.”

Relevant Case Law

19. The Court of Appeal in Patel, promulgated on 13 December 2017, considered whether the approach to derivative claims for residence by those without rights of residence based upon their care for in that case British citizens who are their “direct relatives” had been altered by the decision of the CJEU in Chavez- Vilchez and Others.

20. The court made findings as follows:

“72 In the light of the foregoing, the answer to the first and second questions is that Article 20 TFEU must be interpreted as meaning that for the purposes of assessing whether a child who is a Union citizen 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.

Consideration of the third question referred

73 By the third question submitted for a preliminary ruling, the referring court seeks in essence to ascertain whether Article 20 TFEU must be interpreted as 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 for whose primary day-to-day care that parent is responsible, is subject to the condition that the third country national must establish that the other parent, who is a national of that same Member State, is not in a position to provide the primary day-to-day care of the child.

74 According to the Netherlands Government, pursuant to the general rule that a party who seeks to rely on certain rights must establish that those rights are applicable to his situation, a rule that is accepted in EU law (see, to that effect, judgments of 8 May 2013, *Alarape and Tijani*, C-529/11, [EU:C:2013:290](#), paragraph 38, and of 16 January 2014, *Reyes*, C-423/12, [EU:C:2014:16](#), paragraphs 25 to 27), the burden of proof of the existence of a right of residence under Article 20 TFEU lies on the applicants in the main proceedings. It is for them to demonstrate that, because of objective impediments that prevent the Union citizen parent from actually caring for the child, the child is dependent on the third-country national parent to such an extent that the consequence of refusing to grant that third-country national a right of residence would be that the child would be obliged, in practice, to leave the territory of the European Union.

...

78 In the light of the foregoing, the answer to the third question is that 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."

Error of Law

21. The judge made inadequate findings. He rejected the submission by the Secretary of State that the child could be looked after by his uncle. The reason given was that his welfare needs would not be adequately provided for. The judge considered that the child had been abused and that he had built a good relationship with his father. The judge also considered that he has a learning disability (and he thought he had a growth issue). The judge stated that the appellant's brother would be no substitute for his father. However, the judge did not make a full enquiry into the facts. He did not properly engage with the evidence of the uncle that he would be willing and able to care for P. The judge did not adequately reason why ME could not offer an appropriate alternative care arrangement. He did not consider whether there was such dependency between P and his father that he would be compelled to leave with him rather than stay with his uncle. There was on the evidence before the judge dependency financial and emotional, between P and his uncle. There was an inadequate assessment of the evidence and a failure by the judge to apply the correct test. I set aside the decision of the FTT to allow the appeal.

Conclusions

22. I raised with the parties how the matter should proceed in the event that the decision is set aside. Ms Jaja submitted that it was important for there to be a rehearing so that a judge can have the opportunity to hear oral evidence from P. Ms Everett submitted that there was no reason why the UT could not go on to remake the decision in the light of the absence of further evidence. I agreed with Ms Everett. The Appellant has not served any further evidence. There was no issue as regards the credibility of the witnesses and nothing to be gained by a further hearing. Neither party appreciated that P is now an adult and the Appellant cannot meet the requirements of Regulation 16 in any event. His appeal must be dismissed in these circumstances.
23. However, were P still a child, I would have dismissed the appeal. It is without doubt in his best interests for his father to remain with him here. P has experienced abuse and his own mother failed to protect him. In addition, I take into account evidence of developmental issues. ME's evidence before the judge was that he was willing and able to look after P. He is not a parent, but he has assumed a parental role. He collected P from Spain. They live together as a family unit and he provides for the family. Whilst it was clear that the level of dependency between the Appellant and P was greater than the level of dependency between P and his uncle, the evidence before the judge established considerable dependency on both his father and uncle.
24. There is correspondence from Dr Ajzensztejn, a consultant in paediatric diabetes and endocrinology relating to P. In respect of stature, all the blood tests results were within the normal limits for his age. There was some evidence of developmental

issue and special needs from the witnesses' evidence, but there was no evidence that it was as significant as thought by the judge. I note that P in his witness statement expressed his desire to become a doctor.

25. The Appellant in oral evidence stated that ME could not look after P because he has a relationship of his own. However, this was not sufficiently developed. In any event, this was not ME's evidence. P's evidence was that his uncle is no replacement for his father. None of the witnesses stated that P would leave the UK should his father have to leave.
26. The evidence before the judge all pointed towards the uncle being able to provide suitable alternative care. There was simply no evidence that P would be compelled to leave the UK or indeed that he would do so out of choice. Whilst I accept that he was and probably still is more dependent on his father than his uncle, there is significant dependence on his uncle and the evidence did not establish that the level of dependency on his father was such that he would be compelled to leave. Applying Patel, which is consistent with home office guidance relied on by Ms Jaja, the appeal cannot succeed.
27. This appeal cannot succeed because the child is now an adult (Reg 16 (2) (b) (ii)) In any event, for the reasons I have given if this were not the case the appeal would fall to be dismissed because the Appellant has not established that P would be unable to remain in the UK if he left the UK (Reg 16 (2) (b) (iii)).
28. The Appellant's appeal is dismissed under 2016 EEA Regulations.

Signed *Joanna McWilliam*

Date 24 October 2018

Upper Tribunal Judge McWilliam