



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/00805/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 14 February 2018

Decision & Reasons Promulgated  
On 28 March 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MURRAY

Between

SAMUEL [Q]  
(ANONYMITY HAS NOT BEEN DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr A Murray, Counsel for Chesham & Co Solicitors, London

For the Respondent: Mr Bramble, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Ghana born on [ ] 1974. He appealed against the decision of the respondent taken on 6 January 2016 refusing to issue him with a permanent residence card as confirmation of his right to reside in the United Kingdom. His appeal was heard by Judge of the First-Tier Tribunal Rayner on 21 April 2017. His appeal was dismissed as it was found that not granting a residence card does not breach the appellant's rights under the EU Treaty. The Judge states that although he makes positive factual findings about the appellant's situation and his relationship with his son [M], his appeal must fail as it was initially misconceived as the appellant

at no time qualified for the permanent residence card for which he applied and the “alternative” ground, based on the European Charter of Fundamental Rights is either not available or, if it is, the balance weighs heavily in favour of the respondent.

2. An application for permission to appeal was lodged and permission was granted by Judge of the First-Tier Tribunal Hollingworth on 15 December 2017. This states that it is not sought, on the basis of the permission application, to argue that Article 8 would be breached. The appeal is based (as is referred to at paragraph 19 of the decision) on Treaty Rights. At paragraph 23 of the decision the Judge states, relating to Section 55, that the duty relates only to children who are in the United Kingdom and the appellant’s child is not in the United Kingdom other than when contact takes place. The permission finds that it is arguable that Section 55 applies when a child is in the United Kingdom for the purpose of contact. The permission goes on to state that it is arguable that the Judge’s approach to the decision has been affected by the restrictive approach adopted relating to the application of Section 55 and it is arguable that the Judge fell into error in not finding that the Charter was engaged and that the assessment of proportionality has been affected in relation to the application of Section 55 which the Judge adopted. The grounds refer to the case of *Abdul* [2016] 00106 (IAC). The grounds state that the appellant’s claim is that he has access rights and parental contact in the United Kingdom, with his Italian citizen son [M], at the times when his son enters the UK exercising his right of free movement identified in Regulation 11 of the Immigration EEA Regulations 2006. The appellant previously held a residence card, issued in 2010. The grounds admit that the appellant was unable to demonstrate that he qualified under the Regulations for a permanent residence card, but the permission states that the respondent in her decision did not consider the contact issue outside the Regulations under wider EU law or under Section 55 of the 2009 Act. It is stated that the decision of the respondent breaches the appellant’s rights under the EU Treaties in respect of entry to, or residence in, the United Kingdom.
3. Ground 1 states that the duty imposed by Section 55 is not defined as or limited to children permanently resident in the United Kingdom. Ground 2 states that the Judge is wrong in law to find that the Charter is not engaged as it has a direct effect in English law and is not dependent on being imported into domestic law by the Regulations. Ground 3 states that the Judge’s assessment of proportionality is flawed as weight should be attached to any arrangement that facilitates free movement and the Judge is wrong to treat as weighing against the appellant’s case, that [M] is not a British citizen settled in the UK when a significant factor is precisely that the boy is an EEA national exercising free movement rights.
4. There is no Rule 24 response.

### **The Hearing**

5. Counsel referred me to paragraph 14 of the decision in which the Judge states that although the family court contact arrangements are that the appellant’s ex-partner Ms [F] had not to remove the child from the United Kingdom she had done so, but the appellant decided not to pursue action over the breach of the court order in case she would try to prevent him from seeing his son at all. Counsel pointed out that the

appellant pays £300 a month to Ms [F] for the child. At paragraph 16 of the decision the Judge notes that Ms [F] wants the child's father, the appellant, to have a good relationship with [M]. She states that the child wants to see his father.

6. Counsel referred to paragraph 18 of the decision which refers to [M] being an EEA citizen exercising his Treaty Rights by visiting the United Kingdom. This paragraph goes on to state that the respondent must have regard to Section 55 of the Borders, Citizenship and Immigration Act 2009. At paragraph 19 the Judge refers to the appellant's representative submitting that Article 7 of the European Charter of Fundamental Rights affirms the right to family and private life in terms analogous to Article 8 of ECHR. In this paragraph the Judge states that it is in [M]'s best interests that contact continues.
7. Counsel then referred to the Judge's findings and reasons at paragraph 21 of the decision and submitted that the facts are not significantly in dispute. At 21(ii) the Judge finds that [M] is an EEA national. At 21(iv) he finds that the appellant is of good character. At 21(ix) although the Judge finds that the appellant may have exaggerated the frequency of contact since his separation from Ms [F], the quality of the contact is good.
8. Counsel then referred to paragraph 23 of the decision and the case of *Amirtaymour v Secretary of State for the Home Department* [2017] EWCA Civ 353 which refers to a quasi human rights argument. The Judge in this paragraph refers to the duty of the respondent, Section 55 of the 2009 Act and the best interests of children but he states that this duty relates to children who are in the United Kingdom (Section 55)(i)(a). The Judge states [M] is not in the United Kingdom other than when contact takes place. At paragraph 25 the Judge refers to none of the three parties in this case being a UK citizen. The Judge goes on to state that contact between [M] and the appellant would be most beneficial to the appellant if he were allowed to remain in the United Kingdom and may be best for [M] but he refers to contact being able to continue if he were in Ghana or Italy. Because of this he finds that [M]'s right to family life, in terms of his right to exercise freedom of movement Treaty Rights, is not significantly affected by refusing the appellant's application for a permanent residence card in the UK.
9. Counsel then referred me to the said case of *Abdul* at the heading (ii) regarding Section 55 and I was referred to paragraph 26 of that case which states that the reach of the Charter is more expansive than the European Convention on Human Rights and Fundamental Freedoms. At paragraph 27 of that case Article 24(3) states "Every child shall have the right to maintain on a regular basis, a personal relationship and direct contact with both of his or her parents, unless this is contrary to his or her interests".
10. I was then referred to paragraph 28 of *Abdul* and the case of *Deticek -v- Sgueglia* [2009] EUECI C-403/09. At paragraph 56 of that case it is stated "It is clear that the wrongful removal of a child following a decision taken unilaterally by one of the parents, more often than not deprives the child of the possibility of maintaining on a regular basis a personal relationship and direct contact with the other parent". He

submitted that although this is not the same as in this appellant's case it amounts to the same thing.

11. I was then referred to paragraph 29 of the case of Abdul which refers to a case McB - v- Ele [2010] EUECI C-400/10 which states that the fundamental rights of the child cannot be disregarded. At paragraph 30 of Abdul it is stated "I consider it clear that Article 24(3) was designed to create a discreet right, an analysis which is harmonious with the general principles of EU law". The paragraph goes on to state that this construction is further fortified by the commentary of the Charter of Fundamental Rights of the European Union at page 207:- "Children are no longer considered as mere recipients of services or beneficiaries of protective measures but rather as rights holders and participants in actions affecting them".
12. Counsel then referred to the grounds and submitted that although [M] is not permanently resident in the United Kingdom he comes regularly and he submitted that the case of Abdul states that the Judge was wrong to find that the Charter was not engaged. At paragraph 25 of Abdul reference is made to the proportionality assessment and it is stated that when the Judge found that public interest must prevail the proportionality assessment and conclusion was legally flawed. He submitted that although [M] is not a British citizen he is an EEA national and is entitled to free movement. He submitted that the fact that none of the parties in this case is a UK citizen does not shut the child out of his EEA rights. He is entitled to visit the United Kingdom to see his father and he submitted that not to allow this would be against the spirit of EEA law and this is a material error of law by the First-Tier Judge.
13. The Presenting Officer made his submissions submitting that there is no merit in these grounds. He referred to Section 55 and whether it is engaged or not and he submitted that even if it is, this may not be material. He submitted that the relevant circumstances in this case have to be considered and I was referred to paragraph 25 of the decision in which the Judge refers to this and states "The EEA Regulations provide for rights to reside in specific and defined circumstances. That does not import a balancing exercise of rights under the European Charter of Fundamental Rights. Even if it does, the balance would weigh, in terms of a residence card application, heavily in favour of the respondent". He submitted that this has been properly considered by the Judge and I was asked to consider the case of Abdul again. He referred me to paragraph 7 which refers to Article 24(3) of the Charter "Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both of his or her parents, unless this is contrary to his or her interests". He submitted that in the case of Abdul the appellant was an EEA national appealing against deportation. In Abdul a deportation would break up the relationship of the appellant with his two British children, therefore in the case of Abdul, because the appellant was an EEA national and because the children were British he was allowed to stay in Britain.
14. The Presenting Officer submitted that that is not the case here. In this case [M]'s mother is Italian and so is [M]. His father is Ghanaian. He wants residence in the United Kingdom. He submitted that the First-Tier Judge at paragraph 25 of his decision has taken this into account and has noted that none of the parties in this case

is British. I was referred to paragraphs 15 and 16 of the First-Tier Judge's decision which refers to the evidence of the parties in this case. The appellant has stated that he could go to Italy but it would be better to go back to Ghana financially, as in Italy he will have problems with the language and the politics and economy are not so good there.

15. Ms [F] states that the appellant would have difficulty securing work in Italy but the Presenting Officer submitted that there is actually no reason why the appellant cannot go to live in Italy if he wants to be near his son. Also, the appellant has admitted that even if he goes to live in Ghana he will continue having contact with his son. All of this is considered by the Judge at paragraph 25 of the decision and if the appellant is not granted a residence card the child's freedom of movement will not significantly be affected. Contact can take place in another EU country or in Ghana. He submitted that the Judge has considered the matter under the Charter and has gone through the specific issues and has found against the appellant. I was asked to uphold the First-Tier Judge's decision.
16. Counsel for the appellant referred to Section 55 and submitted that it is engaged and the fact that it is engaged is material. He referred to paragraph 25 of the Judge's decision when he states that the application involves three individuals, two of whom are EEA nationals but none of whom are United Kingdom citizens. He submitted that because they are not British does not stop them having rights in the United Kingdom and he submitted that paragraph 27 of the case of Abdul is on point relating to the rights of the child.
17. He submitted that the appellant could go to stay in Italy but the Judge finds that it would be better for the child if the appellant could remain lawfully in the United Kingdom. He submitted that the problems with the appellant going to Italy have been referred to. At present the appellant supports the child by paying £300 per month but if he goes to Italy he will have problems finding work there because of a number of matters, in particular the language and he submitted that the First-Tier Judge has erred in law relating to this. He submitted that there is a fluid position and although the family court order stated that Ms [F] should not take the child out of the country she did so and the appellant has not objected to this because he has been allowed contact with the child in the United Kingdom and now sees the child regularly.
18. I asked him if, as has been suggested, Ms [F] may come back to live in the United Kingdom with the child and he said that she has mentioned this but there is nothing definite. He submitted that the important thing is the appellant and his child having regular contact. I asked him how regular the contact is as at paragraph 21(ix) of the Judge's decision he states "I find that Mr [Q] may have exaggerated the frequency of contact since their separation". Counsel was unable to answer the question but pointed out that the Judge states that he is satisfied that the quality of the contact is good and it is important to [M]. He refers to the appellant's commitment to [M] and the fact that he provides financially for him.

## **Decision and Reasons**

19. The argument put to me by Counsel for the appellant is interesting, however I have paid particular attention to paragraph 25 of the Judge's decision. The EEA Regulations do provide for rights to reside in specific and defined circumstances but that does not import a balancing exercise of rights under the European Charter of Fundamental Rights. The Judge goes on to say that even if it does the balance would weigh, in terms of a residence card application, heavily in favour of the respondent.
20. He correctly points out that none of the parties in this case is British. He states that it would be most beneficial to the appellant if he were allowed to remain in the United Kingdom and that could be best for [M], but he refers correctly to the appellant acknowledging that contact can continue if he was in Ghana or he could move to Italy. The difficulties about the appellant moving to Italy are not prohibitive and I find that the solution to this claim is a matter of choice.
21. The appellant is not entitled to a residence card in the United Kingdom. He has no right to be in the United Kingdom. [M] has a right to family life and has a right to freedom of movement but the appellant does not require to be in the United Kingdom for [M] to exercise these rights and although the appellant may not be able to provide £300 a month to Ms [F] for their child, there was nothing before the Judge to show that the appellant would be unable to get a job in Italy or another EU country or that he would be unable to get a job in Ghana.
22. It is in the best interests of the child to continue his contact with his father. I have noted the case of Abdul but the circumstances of that case are quite different to this case, as was pointed out by the Presenting Officer. The appellant was an EEA national and the children were British. In this case the appellant is from Ghana and the children are EEA nationals. None of them are UK citizens.
23. It is clear that there is contact between the appellant and his child but it is not clear how regular that contact is. The question was asked but does not appear to have been answered at the First-Tier hearing.
24. The appeal based on the European Charter of Fundamental Rights cannot succeed. When it is considered in depth the balance weighs heavily in favour of the respondent. The appellant is not entitled to a residence card in the United Kingdom in the circumstances of this claim.

## **Notice of Decision**

25. The decision of the First-Tier Tribunal promulgated on 15 May 2017 must stand as there is no material error of law in that decision.
26. Anonymity has not been directed.

Signed

Date 23 March 2018

Deputy Upper Tribunal Judge Murray