



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/00709/2015

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice in Belfast
On 27 November 2018

Decision & Reasons Promulgated
On 21 December 2018

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**BEVERLEY [H]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: no appearance

For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge S Gillespie promulgated on 8 February 2018, dismissing her appeal against the decision made on 15 December 2014 to refuse to issue her with a derivative residence card as a primary carer of a British citizen resident in the United Kingdom, pursuant to the Immigration (European Economic Area) Regulations 2006.

2. The appellant did not attend the hearing, nor did anyone attend on her behalf. No explanation for this has been given and, having satisfied myself that due notice of the time date and venue of the appeal had been properly given, I was satisfied that I could proceed to determine the appeal in the absence of the appellant and that to do so would be in the interests of justice, bearing in mind the overriding objective.
3. As the date of this decision in this case is prior to 6 April 2015, by operation of Schedule 4, paragraph 3 of the Immigration (European Economic Area) Regulations 2006, the 2006 Regulations are preserved for the operation of this appeal.
4. The appellant is a citizen of Zimbabwe who has been resident in the United Kingdom since 2003. She has a son who is a British citizen as his father, WP, is a British citizen. The couple were in a relationship which broke down after the birth of the child. It is the appellant's case that she is the primary carer of the child; that the child's father has had no contact with him since 2013; and that in consequence, as he is either unable or unwilling to look after the child, the child will be compelled to leave the United Kingdom were she removed.
5. The respondent's case as set out in the refusal letter dated 15 December 2014 is that as the child's father is a British citizen, he equally shares responsibility for the son's care and that he had not shown, absent proof that the father was no longer living in the United Kingdom, that he could not assume the care responsibility for the child were the appellant forced to leave the United Kingdom as accordingly, she did not meet the requirements of Regulation 15(4A) (c) of the EEA Regulations.
6. The appeal against that decision was heard by the First-tier Tribunal in May 2016, and was dismissed. The appellant then appealed with permission to the Upper Tribunal which, in a decision promulgated in December 2016, the appeal was allowed and remitted to the First-tier Tribunal for a fresh decision to be made. None of the findings made by the first judge were preserved
7. On appeal, the judge found that:-
 - (i) the best interests of the child was not a relevant consideration [23];
 - (ii) that the appellant's evidence was less than satisfactory and there is no independent evidence to show that she had ever tried to contact the father via social workers or any other body that might be able to trace her former partner and that her ability to secure his cooperation to have the birth registered and to obtain a passport proves that she had been able to secure his assistance whenever it suits [27];
 - (iii) that her false claim to have been a Zimbabwean national and claiming asylum casts doubt on her credibility [28];
8. The appellant sought permission on the grounds that the judge had erred in claiming to have regard to the child's best interests.

9. On 4 June 2018 First-tier Tribunal Judge L Murray granted permission stating that it was arguable that the judge had erred in stating that the children's interests were not a relevant consideration, having had regard to Chaves-Vilchez [2017] EUECJ C-133/15.
10. On 19 October 2018 I issued a memorandum and directions stating:-
- (i) It is my preliminary view that the decision of the First-tier Tribunal involved the making of an error of law as pleaded in the grounds in that the judge failed properly to engage with Chaves-Vilchez.
 - (ii) Accordingly, the parties should prepare for the hearing on the basis that the decision would be remade in the Upper Tribunal on the day of hearing and to address Chaves-Vilchez.
11. In Chaves-Vilchez the Court of Justice said this:
- “70. In this case, in order to assess the risk that a particular child, who is a Union citizen, might be compelled to leave the territory of the European Union and thereby be deprived of the genuine enjoyment of the substance of the rights conferred on him by Article 20 TFEU if the child's third-country national parent were to be refused a right of residence in the Member State concerned, it is important to determine, in each case at issue in the main proceedings, which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national parent. As part of that assessment, the competent authorities must take account of the right to respect for family life, as stated in Article 7 of the Charter of Fundamental Rights of the European Union, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Article 24(2) of that charter.
 71. For the purposes of such an assessment, the fact that the other parent, 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 be compelled to leave the territory of the European Union if a right of residence were refused to that third-country national. In reaching such a conclusion, account must be taken, in the best interests of the child concerned, of 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 that child's equilibrium.
 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."

The court also said this:

"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."

12. I am satisfied that in light of these observations that the decision of the First-tier Tribunal did involve the making of an error of law and has to be set aside in that the judge wrongly discounted the best interests of the child and failed properly to make a proper and necessary findings of fact with respect to the child's position.
13. It is therefore necessary to remake the decision and, as I indicated to the parties in my directions, it is appropriate to do so today.
14. There are in this case no challenges to the findings of fact made by the judge. It flows from that there is no challenge to the appellant's lack of credibility and I observe that there is no dispute that she claimed to be a citizen of Zimbabwe and separately used another identity. I accept also that there are real doubts as to whether the appellant is in fact in contact with the child's father. She has failed to provide any up-to-date evidence regarding the position of the child or the arrangements made for his care. In short, there has been a failure to provide the court with any basis on which it could make the proper assessment pursuant to the ruling in Chaves-Vilchez or for that matter conduct a proper "best interests of the child" determination.

15. Bearing in mind also what was said in Chaves-Vilchez at 78, I note that it is not an error of law to require the appellant to provide at least the basic information to allow a proper assessment to be undertaken by the competent authorities.
16. In the circumstances and given the lack of evidence about the child, which is in itself worrying on the part of somebody who professes to have his best interests at heart, I conclude that the appellant has failed to show that her removal would result in the child being compelled to be leave the charity of the European Union. It is for the appellant to make out her case, and has not provided any proper evidential basis for doing so. Accordingly, I remake the appeal by dismissing it on all grounds.
17. No anonymity direction is made.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I remake the decision by dismissing it on all grounds.

Signed

Date 13 December 2018



Upper Tribunal Judge Rintoul