



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004451
UI-2023-004478

First-tier Tribunal No: EA/11750/2022
EA/11750/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

20th February 2024

Before

UPPER TRIBUNAL JUDGE KEBEDE
UPPER TRIBUNAL JUDGE L SMITH

Between

EMEKA ONYEBUCHI EZEANYAGU
(no anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Nnamani, instructed by Samuel Louis Solicitors
For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

Heard at Field House on 15 February 2024

DECISION AND REASONS

1. This is the re-making of the decision in the appellant's appeal, following the setting aside of the decision of the First-tier Tribunal which allowed his appeal against the respondent's decision to refuse his application under the EU Settlement Scheme (EUSS) as a person with a 'derivative right to reside' in the UK.
2. The appellant is a citizen of Nigeria, born on 23 May 1982. He claims to have arrived in the UK in August 2020 together with his former partner, Tanja Marjaana

Luukkonen, and their daughter Signe (born on 27 October 2014), both citizens of Finland and therefore EEA nationals, and that Ms Luukkonen left the UK for Finland together with Signe after she was refused leave under the EUSS and their relationship broke down. It is claimed that Signe resides with her mother in Finland in school term time and with the appellant in the UK during the school holidays. She has pre-settled status in the UK under the EUSS.

3. The appellant made an application under the EUSS on 31 May 2022 as a person with a derivative right to reside in the UK. The form he used was for an application as a person with a derivative right of residence (Ibrahim & Teixeira) and that was the basis upon which it was considered by the respondent in the decision of 8 November 2022. In that decision, in which the application was refused, the respondent considered that the appellant could not meet the requirements of regulation 16(4) of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") which was the relevant regulation on the basis upon which the application had been made, and that he could not meet the requirements under regulation 16(8) to show that he had primary responsibility for Signe's care or shared responsibility with her mother. The respondent concluded that the appellant did not meet the eligibility requirements for settled status or pre-settled status under EU11 or EU14 of Appendix EU.

4. The appellant appealed against that decision. The appeal came before First-tier Tribunal Judge Smyth on 11 July 2023. It was accepted on behalf of the appellant at the hearing that he could not meet the 'Ibrahim & Teixeira' criteria because Signe's mother had not been residing in the UK as a worker, but it was argued that he met the 'Chen' criteria for a derivative residence card. The appellant's evidence before the judge was that he was employed by Audi and earned approximately £2500 a month, that Signe studied English and Maths when she was in the UK and liked playing with her cousins and friends when she was here, that there was no-one else in the UK other than him who could look after Signe in the UK and that he could not move to Finland. It was argued before the judge that the appellant fell within condition 1(iv) of EU14 as being a person with a derivative right to reside. The respondent maintained the position that the appellant was not the primary carer of Signe.

5. Judge Smyth found that Signe spent the maximum time she was able to in the UK and considered that that distinguished her from simply being a visitor. He found that the appellant was a primary carer of Signe, that Signe resided in the UK as a self-sufficient person on the basis of the appellant's salary, that as a consequence of the refusal of his application the appellant would be required to leave the UK as he did not meet any other category of leave to remain under the immigration rules and that, since there was no other person who could realistically take on caring responsibilities for Signe in the UK, she would have to leave the UK. The judge found that accordingly the appellant met the requirements for limited leave to remain under Rule EU14 and he allowed the appeal.

6. The respondent sought permission to appeal Judge Smyth's decision to the Upper Tribunal on the grounds that he had failed to make any reference to the definition of "person with a derivative right to reside" contained within Annex 1 of Appendix EU when finding that the appellant satisfied the requirements of Appendix EU and that he had therefore overlooked the requirement at (iv) that "the EEA citizen would in practice be unable to remain in the UK if the person in fact left the UK for an indefinite period". The grounds asserted that Signe did not require the appellant's presence in the UK as she has already left the UK to reside with her mother in Finland and her

primary place of residence was not the UK. It was asserted further that the judge had materially erred in finding that the appellant was Signe's primary carer.

7. The matter came before the Upper Tribunal at a hearing on 12 January 2024.

8. In a decision promulgated on 17 January 2024, Judge Smyth's decision was set aside on the following basis:

"12. It seems to me that there is merit in Ms Everett's challenge to the judge's conclusions on the extent to which rights were conferred upon the appellant simply owing to his daughter spending periods of time in the UK with him in the holidays, when the evidence suggested that her principal place of residence was Finland rather than the UK. The judge was certainly not assisted by the change in the basis of the appellant's application, whereby it was not until the hearing that it became apparent that he was relying upon the 'Chen' criteria rather than those in 'Ibrahim & Teixeira' for his derivative right of residence. As a result of that there was little consideration of relevant matters such as the correct interpretation of the child's residence in the UK. I have to agree with Mr Everett that the judge made impermissible inferences in that regard from the limited evidence available and on that basis I conclude that his decision is not safe and cannot stand.

13. Having said that, I do not consider that I should simply re-make the decision by dismissing the appeal, as Ms Everett suggested. On the contrary it would be appropriate for the parties to be able to present full and detailed arguments so that the relevant issues can be considered with proper notice and care, with particular consideration being given to the interpretation of "resides in the UK" for the purposes of (a)(iii) of the definition of a "person with a derivative right to reside" in Annex 1 of Appendix EU. "

9. Directions were made at the end of the decision, as follows:

"No later than 7 days before the date of the resumed hearing:

- The appellant shall file an indexed and paginated consolidated bundle containing all evidence relied upon and in particular in relation to Signe's current circumstances in Finland and the UK.
- Both parties shall file with the Upper Tribunal, and serve on the other party, a skeleton argument setting out their respective cases with particular reference to the matters mentioned at [13] above and to case law relevant to 'Chen' cases."

10. The resumed hearing was listed for 15 February 2024, and a Notice of Hearing was sent to the parties on 23 January 2024. On 31 January 2024 the parties were reminded of the directions and for the relevant documents to be filed and served by 8 February 2024. On 8 February 2024 the parties were contacted about compliance with the directions and the appellant's solicitors were advised that a formal request for an extension of time was needed if further time was required. A request was then made on behalf of the appellant for an extension of time until close of business on 12 February 2024 on the basis that "*the Appellant is expecting additional evidence from third parties and despite efforts being made has not been able to obtain them to the current date*". The appellant was given an extension of time to 12 noon on 12 February 2024, with a warning that any documents submitted outside that time would risk not being admitted. The respondent was given an extension of time until 4pm on 12 February 2024 to serve his skeleton argument. The appellant then filed and served a bundle of documents including a skeleton argument on 12 February 2024 and Ms Nolan for the respondent filed her skeleton argument later that day.

11. The matter came before us for a resumed hearing on 15 February 2024, at which point Ms Nnamani sought to produce further documents from the appellant which he had brought with him to the hearing, namely printed whatsapp messages from his daughter's mobile phone and from her mother's phone, confirmation of funds from him to his daughter and extracts of communications from Signe's school app. Ms Nolan objected to the admission of the documents. Although we expressed our dissatisfaction at the late production of the documents, particularly given the leeway already provided to the appellant and the repeated prompting to comply with directions, we decided to admit the documents. Ms Nolan was given an opportunity to read the documents and confirmed that she was content to proceed.

12. The appellant gave oral evidence before us, confirming and adopting his two witness statements of 30 June 2023 and 9 February 2024. When asked by Ms Nnamani how often he communicated with his daughter Signe he said that it was every second day, as well as weekly mathematics training. Although he had bought his daughter a mobile telephone she would often be using her phone for other purposes and so he would have to send messages through her mother. He confirmed that he made decisions about her life through the school app. He and Signe's mother were both linked to the school app and so would both have to make decisions such as if Signe was sick they would have to sign her off. When asked how often Signe comes to the UK, the appellant said that he wanted her to be with him whenever she was on holiday from school and as much as he could afford to bring her here. He confirmed that she spent all her school holidays in the UK, both half term and the long holidays, provided he could afford her transportation. She would come for at least a month in the summer holidays.

13. When cross-examined by Ms Nolan, the appellant confirmed that he first came to the UK in August 2020 with his partner and daughter and that prior to that they had lived together in Finland. When asked why, in his form of application under the EUSS for a derivative right to residence in the UK, he had written, at question 7.1, that he started living in the UK with a derivative right to reside on 16 November 2020, the appellant said that he was uncertain of the date. He had travelled from Finland to France and by air and had then taken a taxi from France to the UK, arriving in August 2020. He did not have evidence of his arrival date in the UK as he had lost his passport and had had to obtain a new one. He knew that 16 November 2020 was not his date of arrival in the UK and suggested that it may have been when the application process started, and later accepted that the date had been plucked out of the air. His daughter and her mother left the UK some time in 2022, but he could not remember when in 2022, and his daughter started attending school in Finland that year. The appellant was asked about the whatsapp messages and the evidence of money transfers. With regard to the evidence of his daughter's visits to the UK, the appellant confirmed that she came alone from 15 to 24 January 2024 but could not remember if she came alone from 6 to 15 January 2023. As for the document confirming consent to her travelling with her mother on 5 July 2022, he could not remember where they were travelling to. He did not have evidence of Signe's visit in the summer as his brother bought the ticket. When asked if Signe would come to the UK if he was not here, the appellant said that he doubted her mother would agree to her travelling here. The appellant said that Signe started private English lessons during Covid with her childminder, and that that still continued when she was in the UK.

14. Both parties made submissions. Ms Nolan submitted that the appellant was not a credible witness. If he had entered the UK on 16 November 2020, as stated in his application form, that put into question some of the documentary evidence such as the invoice from the child-minding service, Passionate Love Home Childminder which

was dated prior to then. In any event the appellant did not meet the requirements of Appendix EU as there was insufficient evidence to show that he was a joint primary carer of Signe, but even if he was, he needed to show that Signe resided in the UK as a self-sufficient person, which he could not. Neither could the appellant show that Signe was unable to remain in the UK if he was not here. There was no evidence to show that she could not come to the UK to visit her extended family in the UK or come to the UK with her mother, and in any event she would not be intending to remain in the UK as she did not live here. Ms Nolan submitted that the appellant did not fall within the personal scope of the Withdrawal Agreement, for the purposes of Article 10, as there was no continuity of residence by the EEA national.

15. Ms Nnamani asked us to find that the appellant's account was supported by the documentary evidence and was credible and reliable. She submitted that the appellant fell within the scope of the Withdrawal Agreement under Article 10(1)(e)(i) as the family member of Signe and that there was evidence that Signe resided in the UK as she had pre-settled status here. Ms Nnamani submitted that the appellant was a joint primary carer of Signe, as confirmed by the statements of the appellant and Signe's mother and the other evidence provided, and that there was sufficient evidence to show that she resided in the UK. She relied upon the principles in the case of X (Habitual Residence), Re [2019] EWFC 84 in that regard. She submitted that Signe would not be able to come to the UK if the appellant had to leave, as her mother would not consent to her travelling here, and that the appellant therefore met the definition of a 'person with a derivative right to reside in the UK' in Appendix EU. The appeal should be allowed.

Discussion

16. The appellant relies upon condition 1(a)(iv) in paragraph EU14 of Appendix EU as a 'person with a derivative right to reside', defined in Annex 1 as:

"a person who has satisfied the Secretary of State by evidence provided that they are (and for the relevant period have been) or (as the case may be) for the relevant period they were:

- (a) resident for a continuous qualifying period in the UK which began before the specified date and throughout which the following criteria are met:
 - (i) they are not an exempt person; and
 - (ii) they are the primary carer of an EEA citizen (in accordance with sub-paragraph (a)(i) of that entry in this table and, where they are also a British citizen, the EEA citizen falls within sub-paragraphs (c) and (d) of the entry for 'relevant naturalised British citizen' in this table); and
 - (iii) the EEA citizen is under the age of 18 years and resides in the UK as a self-sufficient person; and
 - (iv) the EEA citizen would in practice be unable to remain in the UK if the person in fact left the UK for an indefinite period..."

17. The respondent does not accept that the appellant falls within this definition because he has failed to demonstrate (a) that he is the primary carer of the relevant EEA national, Signe; (b) that Signe resides in the UK; and (c) that Signe would be unable to remain in the UK if he left the country.

18. We agree with the respondent in all of these respects. The appellant's case is weak. His oral evidence was unpersuasive and unreliable and there is a distinct lack of supporting documentary evidence, despite there having been clear guidance as to the issues to be addressed and the nature of the evidence to be provided, and repeated reminders and ample opportunity to provide that evidence.

19. We list the documentary evidence relied upon by the appellant in regard to the issues before us, as follows:

Documents produced to the respondent with EUSS application form

Invoice for childminder's fees from Passionate Love Home Childminder dated 5 October 2020

Letter from Passionate Love Child Care dated 27 April 2022 confirming that the appellant and Signe attended their childcare classes between 1 August 2020 to 30 September 2021 (or 1 September 2020 to 30 October 2021)

Application for admission for a reception place at school and an offer of a place from Essex County Council dated 22 June 2022, correspondence from Essex County Council about home schooling

Signe's birth certificate

Confirmation of registration with a GP for Signe dated 1 January 2022, a GP registration letter dated 23 February 2022 and appointment letter dated 6 July 2022

Documents produced for the appeal before the First-tier Tribunal on 11 July 2023

Witness statements from the appellant and Signe's mother, Ms Luukkonen

GP appointment for Signe (undated) and hospital appointment for 6 July 2022

Letter of consent dated 21 December 2022 signed by the appellant and Ms Luukkonen giving consent to Signe travelling to the UK unaccompanied from 6 to 15 January 2023

Travel document and receipt for Signe's return flight booking to London on 6 and 15 January 2023

Letter of consent dated 2 July 2022 signed by the appellant and Ms Luukkonen giving consent to Signe travelling with her mother on 5 July 2022

Documents provided in the appellant's supplementary bundle for the appeal in the Upper Tribunal

Supplementary witness statement from the appellant

Letter dated 7 February 2024 from the parish priest of St Chad church, Vange, confirming that he had met Signe and that she attended church with the appellant when she was in the UK

Letter of consent dated 5 January 2024 signed by the appellant and Ms Luukkonen giving consent to Signe travelling to the UK unaccompanied from 5 to 14 January 2024, together with the flight booking confirmation

Photographs of Signe with other children, said to be at Sunday school

A photograph of Signe, said to be at Saturday school, and other photographs of Signe on outings with the appellant and others

Documents produced at the hearing

Whatsapp chats from Signe's mother mobile and from Signe's mobile

Money transfers from the appellant to Signe

Extracts from Signe's school app

20. We do not accept that any of that evidence, when considered together with the appellant's oral evidence, demonstrates that he is a joint primary carer of his daughter Signe.

21. The evidence of the appellant's involvement in Signe's life is minimal. He was not able to say when she left the UK and returned to Finland with her mother, other than that it was in 2022. He had no idea where she was travelling with her mother on 5 July 2022, as confirmed in the travel consent form signed on 2 July 2022, and could not say if that was when they returned to Finland. We observe that their return to Finland must have been after April 2022, given Ms Luukkonen's evidence in her statement that she returned to Finland after her EUSS application was refused and having regard to Ms Nolan's confirmation that the application was refused on 25 April 2022. The evidence of Signe's GP and hospital appointments prior to that time is therefore of no assistance to the appellant, given the absence of any evidence to show that he was the person who accompanied her there.

22. As for the evidence of contact between the appellant and his daughter and involvement in her life since she returned to Finland, that was only produced at the very last minute at the hearing, despite the previous and repeated indications of the materiality of such evidence and is, as already stated, minimal. The appellant claims to have bought Signe her own mobile telephone in 2021 yet the only evidence of communication between them, by way of whatsapp messages, is from August 2023 and is sporadic. It certainly does not support the appellant's claim that he spoke to her every second day (which then became "practically every week" when cross-examined). When asked by Ms Nolan about the gaps in the whatsapp messaging the appellant said that he sometimes could not get through to Signe on her phone and so he would call her on her mother's phone, but the evidence of Ms Luukkonen's whatsapp communications covers only a three day period and is particularly uninformative. In fact, a message on 10 February 2024 suggests that the appellant was not even aware of Signe's correct school year. The appellant claims that the evidence of communications through Signe's school app shows his involvement in decisions relating to her school life, but that only dates from 11 August 2023 and most of the messages are in Finnish, whereas the appellant told us that he knew little of that language and that his involvement was reflected in the communications in English. The English communications (seven, in February 2024), however, appear to be general messages and certainly do not provide evidence of any direct involvement in Signe's school life. There is nothing from Signe's school to confirm that there was any contact with him. The only other evidence provided by the appellant was of money transfers from himself to Signe, but we note that there are only three, on 11 November 2022 for 'child support', on 30 July 2023 for a holiday gift, and on 27 October 2023 for an airplane ticket. The appellant's evidence before us was that he also sent Signe money through Western Union and he bought her items online, but there was no evidence of that and no satisfactory explanation for the absence of such evidence.

23. As for direct contact with Signe since her return to Finland, there is no suggestion that the appellant has visited her in Finland and no evidence about his knowledge of her life in Finland, aside from the limited information from the school app. The evidence of the appellant, and from Ms Luukkonen in her statement, is that Signe spends all of her school holidays in the UK with him. However it is notable that he was unable to give the months of her school holidays, other than stating that they were at Easter, Christmas and the summer, with short holidays in between, and he failed to give a direct answer, when asked at the hearing, as to how often she came to the UK. Other than a limited number of undated photographs showing the appellant with

Signe, the evidence of how much time she spent with him in the UK and what she did whilst here is confined to a letter from a parish priest confirming that she attended church with the appellant when in the UK but with no information as to when that was and how frequent, one or two undated photographs labelled by the appellant as showing her at Sunday and Saturday school but with no further information, evidence of registration for home schooling in the UK but with no confirmation that that education actually commenced or what it involved, and two travel consent forms and flight bookings for travel to the UK from 6 to 15 January 2023 and 5 to 14 January 2024. The appellant was unable to give any satisfactory explanation as to why there was no evidence to confirm her other trips and there was certainly nothing in the evidence, other than the assertions made by the appellant and in Ms Luukkonen's statement, to support the claim that Signe was in the UK for the duration of all the school holidays.

24. In the circumstances, given the significantly limited evidence of the appellant's involvement in Signe's life, it cannot sensibly be concluded that he plays, or has ever played, a role of a primary carer jointly with her mother. We do not agree with Ms Nnamani that we can accept the statement of Ms Luukkonen and the appellant's testimony as reliable evidence of such a role, given that Ms Luukkonen's statement was brief and lacking in detail and her evidence could not be tested in cross-examination and given that the appellant did not present himself as a reliable witness. As we have already stated, the appellant's knowledge of Signe's life was limited and he was particularly evasive when pressed to provide reasons for the notable gaps in the evidence. We found him to be a particularly unimpressive witness. The appellant therefore fails to meet the definition of a 'person with a derivative right to reside' at that first hurdle.

25. That then leads us on to the question of whether Signe could be considered to be 'resident' in the UK, even if the appellant could be considered to be a joint primary carer (which we do not accept him to be). As we have already mentioned, there is no reliable evidence to support the claim that Signe divides her life between Finland and the UK. On the contrary the only evidence we have of her presence in the UK is the travel consent forms and flight bookings for two nine-day trips to the UK from 6 to 15 January 2023 and 5 to 14 January 2024. The appellant claimed that his brother brought his daughter to the UK on another trip, but there is no evidence of that trip and no satisfactory reason for the absence of such evidence. The above concerns with the evidence as a whole are such that we are not prepared simply to accept the word of the appellant and the written statement of Signe's mother of the extent of Signe's periods of stay in the UK.

26. As Ms Nolan properly observed, there is no definition to be found in Appendix EU as to what constitutes 'residence'. We note that, in order to qualify for permanent residence, Signe would have had to show continuous residence in the UK commencing prior to 31 December 2020 and continuing to date, which she obviously is unable to do. However we agree with Ms Nnamani that that is only relevant to an entitlement to permanent residence and settled status. Likewise, we agree with Ms Nnamani that the 'continuous qualifying period' relied upon by Ms Nolan in Annex 1 is relevant only to the applicant and not the EEA citizen. Having said that, we have to follow a sensible approach to the meaning of 'residence' and cannot accept that Signe could be said to be 'resident' in the UK on any sensible meaning of the word. Although the 'continuous qualifying period' is, as we have said, expressly applicable to applicants rather than to the EEA national, we do accept that it provides some guidance as to what is required to show residence and that a person who consistently resides outside the UK for more than six months a year cannot sensibly be considered, aside from the stated

exceptional circumstances, to be resident in the UK. Ms Nnamani sought to persuade us that the principles set out at [19] of X (Habitual Residence), Re [2019] EWFC 84 applied so that it could be accepted that Signe was considered to be resident in the UK, but we disagree entirely. As a starting point, that case was about habitual residence, which is not a term employed within Appendix EU. Further, and contrary to the situation in that case, Signe was not physically staying in the UK for anything other than a transitory period and the evidence did not show or suggest that she had transferred the centre of her life to the UK, that her best interests were to remain in the UK, that her ties to the UK were stronger than those in Finland or that she had become integrated in the UK. It is suggested that Signe's education in the UK by way of home schooling, together with her attendance at Saturday and Sunday school and at church, and her registration with a GP, indicates a degree of integration in the UK. However we have already observed that the evidence in that regard is limited. The only evidence of attendance at Saturday and Sunday school is a few undated photographs. The only evidence of attendance at church is the letter from the parish priest which provides no dates or details. The only evidence of education in the UK is an application for home schooling without any evidence of attendance and with no further information or details. There is no evidence of the claimed English classes she attended. The fact that Signe is registered with a GP in the UK is of no matter and the evidence in any event pre-dates, for the most part, her departure from the UK.

27. In the circumstances we do not accept that, on any sensible interpretation of the word, can Signe be considered as residing in the UK and the appellant therefore fails to meet the definition of a 'person with a derivative right to reside' on that basis too. It follows that he also cannot show that Signe would be unable to remain in the UK if he left the UK, since she is not remaining in the UK at present and resides outside the UK, in Finland.

28. Likewise, and for the same reasons, the appellant cannot show that he falls within the personal scope of the Withdrawal Agreement as the 'family member' of an EEA national, under Article 10(1)(e)(i). In order to do so he would have to show that he was the family member of a Union citizen who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continued to reside there thereafter, which he clearly could not do since Signe did not 'continue to reside' in the UK.

29. For all these reasons the appellant is unable to meet the requirements in EU14 of Appendix EU as a person with a derivative right of residence in the UK and is unable to show that the respondent's decision was not in accordance with Appendix EU or that it was in breach of the Withdrawal Agreement. His appeal therefore fails.

Notice of Decision

30. The Secretary of State's appeal having been allowed and the decision of the First-tier Tribunal having been set aside, the decision is re-made by dismissing the appellant's appeal.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

16 February 2024