



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/00057/2019

THE IMMIGRATION ACTS

Heard at Field House
On 7th November 2019

Decision & Reasons Promulgated
On 27 November 2019

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

ROTIMI [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: None
For the Respondent: Mr D Clarke, Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant challenged the decision of First-tier Tribunal Judge Herlihy promulgated on 17th July 2019 refusing his appeal against the decision of the Secretary of State on 12th December 2019 to issue him with a derivative

residence card pursuant to the provisions of Regulation 16(5) and 20 of the Immigration (European Economic Area) Regulations 2016 (the EEA Regulations).

2. The First-tier Tribunal Judge at section 6 of her decision set out the following findings

“6.1 The Respondent has refused the Appellant’s application for a derivative residence card because she finds that insufficient evidence has been produced to show that the Appellant shares that care of his son and that his son would be unable to remain in the United Kingdom if the Appellant were forced to leave the UK. The Respondent is of the view that there is another parent who would be able to assume caring responsibilities for the Appellant’s son; namely his mother with whom he has lived since his birth and who has leave to remain in the United Kingdom until May 2020.

6.2 It is the Appellant’s evidence that he shares the care of his son with his wife and that he is responsible for his day to day care when his wife is working although his son lives with his mother. The Appellant says that he is not permitted to live with his wife and children as they have been provided with emergency housing accommodation and at the time, he did not have an outstanding application to the Home Office and could not be included in the tenancy agreement. He says however that he spends most of his days with his family and stays over some nights.

6.3 It is not disputed that the Appellant is the biological father of a minor British child. I see no reason to doubt the Appellant’s claim that he shares the care of his children, including his son O with his wife and that the children live with her and have done so since they were born. It is quite clear that the Appellant is unable to work and I see no reason to doubt his claim that he is involved in his children’s life and is the first point of contact for his children’s school.

6.4 In considering the evidence in the round I am not satisfied the Appellant does satisfy the requirements of Regulation 16(5) for the issue of a derivative residence card as I am not satisfied that he has established that O’s mother would be unable to care for him as she has been granted discretionary leave to remain until May 2020 so that there is no evidence that son O would be forced to leave the United Kingdom with the Appellant”.

3. The grounds of appeal set out the following:

- (1) it was not disputed that the appellant was the biological father of the British minor child;

- (2) it was not disputed that his son was born in the United Kingdom and still lives in the United Kingdom;
- (3) the judge saw no reason to doubt the appellant shared caring responsibilities with the sponsor mother, inclusive of involvement in the children's life and siblings, as well as being the first point of contact for the children regarding their school affairs, as well as general welfare;
- (4) she acknowledged he had no right to work and thus spent more time with the children and enabled the mother to be in employment;
- (5) in considering her final verdict the judge merely stated that he did not satisfy the requirements of Regulation 16(5) of the EEA Regulations because the child's mother could look after the child.
- (6) The background to the claim was as set out in the grounds of appeal. The mother was granted 30 months' discretionary leave to remain and thus neither parent was exempt persons from being issued a residence permit and thus were not excluded from Regulation 16.
- (7) The appellant had stated he has established an integral family life with his children and mother since 2006 and continued to do so.
- (8) Should he be granted a residence permit they would as still married continue to live life lawfully and responsibly under one roof with the children.
- (9) The approach of the judge disclosed an error of law

4. Analysis

The Immigration (European Economic Area) Regulations 2016 set out as follows:

Derivative right to reside

16. –

(1) A person has a derivative right to reside during any period in which the person –

(a) is not an exempt person; and

(b) satisfies each of the criteria in one or more of paragraphs (2) to (6).

(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.

(3) *The criteria in this paragraph are that –*

- (a) any of the person's parents ("PP") is an EEA national who resides or has resided in the United Kingdom;*
- (b) both the person and PP reside or have resided in the United Kingdom at the same time, and during such a period of residence, PP has been a worker in the United Kingdom; and*
- (c) the person is in education in the United Kingdom.*

(4) *The criteria in this paragraph are that –*

- (a) the person is the primary carer of a person satisfying the criteria in paragraph (3) ("PPP"); and*
- (b) PPP would be unable to continue to be educated in the United Kingdom if the person left the United Kingdom for an indefinite period.*

(5) *The criteria in this paragraph are that –*

- (a) the person is the primary carer of a British citizen ("BC");*
- (b) BC is residing in the United Kingdom; and*
- (c) BC would be unable to reside in the United Kingdom or in another EEA State if the person left the United Kingdom for an indefinite period.*

(6) *The criteria in this paragraph are that –*

- (a) the person is under the age of 18;*
- (b) the person does not have leave to enter, or remain in, the United Kingdom under the 1971 Act (but see Paragraph 7A);*
- (c) the person's primary carer is entitled to a derivative right to reside in the United Kingdom under paragraph (2), (4) or (5); and*
- (d) the primary carer would be prevented from residing in the United Kingdom if the person left the United Kingdom for an indefinite period.*

(7) *In this regulation –*

- (a) "education" excludes nursery education but does not exclude education received before the compulsory school age where that education is equivalent to the education received at or after the compulsory school age;*
- (b) "worker" does not include a jobseeker or a person treated as a worker under regulation 6(2);*
- (c) an "exempt person" is a person –*
 - (i) who has a right to reside under another provision of these Regulations;*
 - (ii) who has the right of abode under section 2 of the 1971 Act;*
 - (iii) to whom section 8 of the 1971 Act, or an order made under subsection (2) of that section, applies; or*
 - (iv) who has indefinite leave to enter or remain in the United Kingdom (but see paragraph 7A).*

(7A) Leave to enter, or remain in, the United Kingdom under the 1971 Act which has been granted by virtue of Appendix EU to the immigration rules is not to be treated as leave for the purposes of paragraph 6(b) or (7)(c)(iv).

(8) A person is the “primary carer” of another person (“AP”) if –

(a) the person is a direct relative or a legal guardian of AP; and

(b) either –

(i) the person has primary responsibility for AP’s care; or

(ii) shares equally the responsibility for AP’s care with one other person who is not an exempt person.

(9) In paragraph (2)(b)(iii), (4)(b) or (5)(c), if the role of primary carer is shared with another person in accordance with paragraph (8)(b)(ii), the words “the person” are to be read as “both primary carers”.

(10) Paragraph (9) does not apply if the person with whom care responsibility is shared acquired a derivative right to reside in the United Kingdom as a result of this regulation prior to the other person’s assumption of equal care responsibility.

(11) A person is not to be regarded as having responsibility for another person’s care for the purpose of paragraph (8) on the sole basis of a financial contribution towards that person’s care.

(12) A person does not have a derivative right to reside where the Secretary of State or an immigration officer has made a decision under regulation 23(6)(b), 24(1), 25(1), 26(3) or 31(1), unless that decision is set aside or otherwise no longer has effect.

5. At the hearing before me Mr Clarke conceded that the judge had not appreciated the import of the Regulation 16(5) and gave no reasoning, bearing in mind his findings as to the part that the appellant played in the primary care of the child, for refusing the appeal.
6. I note Regulation 16(8) and the definition of a “primary carer” of another person (“AP”). The Secretary of State’s Guidance on derivative rights of residence issued in May 2019 included a section on “shared responsibility” in relation to Regulation 16(8)(b)(ii). The guidance states that following the Court of Justice on the European Union judgment in **Chavez-Vilchez C-133/15** on 10th May 2017, it is not necessary to consider whether the other person is an exempt person as defined in Regulation 16(7)(c) of the 2016 Regulations but as Mr Clarke accepts it the appellant and his wife were not exempt.
7. The 2019 Guidance in relation to ‘Sharing equal responsibility’ (page 48) states “Two people should be considered to share equally the responsibility for a child when they both have responsibility for the care and welfare of the child, both long-term and on a day-to-day basis” and further in the section “Where a child’s parents live apart the parents will usually be considered to share equal responsibility for the child if the other parent has legal parental responsibility and has regular contact with the child”.
8. Specifically, under

'Evidence of shared responsibility

A person will, generally, be considered to share equal responsibility in the following circumstances, where both parents are:

- *living together in the same household with the child*
- *separated but share responsibility for the child – evidence of this may include (but is not limited to) a:*
 - *custody agreement or court order*
 - *statement(s) from the parent(s) to this effect*

Equal responsibility does not mean there has to be evidence of equal sharing of responsibilities, as this is not always practical. For example, a child may reside with their mother during the week and their father at weekends or they may reside with the mother full-time, but the father has regular contact with the child. Whilst the father may not provide the majority of care for the child, in both of these examples, the father is actively involved in the child's life and continues to have parental responsibility for the child. In such cases, unless there is evidence to indicate the father is unable to care for the child, it can be accepted that both parents share equal responsibility'.

9. I have preserved the judge's findings at 6.1 to 6.3. It was accepted by the judge and, that the appellant was the biological father of a minor British child and that the appellant shared the care of his children with his wife. It was accepted that because he was out of work, he spent a considerable time looking after his children and indeed was the first point of call for their school. He took his youngest child, O, who was a British citizen to school, had the children during the summer holidays. On that basis, I find without the support and care afforded to the children they would be forced to leave the European Union. Indeed, Mr Clarke sensibly agreed that the Regulations were fulfilled.
10. The Judge erred materially for the reasons identified. I set aside the decision (specifically the conclusion at 6.4) pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007

Order

The appeal of Mr [A] is allowed under the Immigration (European Economic Area) Regulations 2016

Signed *Helen Rimington*

Date 25th November 2019

Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award bearing in mind the complexity of the case.

Signed *Helen Rimmington*

Date 25th November 2019

Upper Tribunal Judge Rimmington