Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/06814/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 May 2019	**On 29 July 2019**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

P A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Sarwar, Legal Representative
For the Respondent: Ms S Jones, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Ghana born in 1989. On 19 July 2018 she made an application for a residence card under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). The application was refused in a decision dated 28 September 2018.

2. The appellant's appeal against that decision came before First-tier Tribunal Judge O'Hagan ("the FtJ") at a hearing on 27 February 2019 following which the appeal was dismissed.

3. Permission to appeal on all grounds was granted by a Judge of the First-tier Tribunal with particular focus in the grant of permission being the appellant's relationship with her second child who was aged 3 months at the date of the hearing before the FtJ, and the nature of the care that the appellant provides to her.

4. In order to put the arguments before me into context, it is necessary to summarise the FtJ's decision.

The FtJ's decision

5. The FtJ referred to the fact that the appellant initially asked for an oral hearing but did not attend. However, that was because by letter dated 20 February 2019 she said that she would not be attending and asked that the matter be dealt with 'on the papers'. A Tribunal caseworker refused the request for the appeal to be determined on the papers because to change the hearing from an oral hearing required the consent of the respondent under rule 25(1)(a) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. It was noted that the appellant had received that response because she wrote in reply, again asking for a decision on the papers. The FtJ refused to accede to that request.

6. He recorded at [5] that the submissions on behalf of the respondent amounted to no more than relying on the respondent's decision letter, with no other submissions made on behalf of the respondent. He recorded that nothing of substance was said and that his decision was "in reality" based on material in the documents before him.

7. He recorded the appellant's background and the fact that she and her partner have two children, born in May 2017 and November 2018, who are both British citizens.

8. The FtJ went on to state that the appellant's partner was a prison *psychologist.* He summarised the respondent's decision and at [13] summarised what the appellant had to establish pursuant to reg 16(5) of the EEA Regulations. He recorded that it was not in dispute but that the appellant's children were British citizens and are residing in the UK. The issue before him was whether the appellant is their primary carer and whether they would be unable to reside in the UK or in another EEA State if the appellant left the UK.

9. He referred to the decisions of *Hines v London Borough of Lambeth* [2014] EWCA Civ 660 and *Chavez-Vilchez & Ors v Raad van Bestuur* (Case C-133/15) 10 May 2017, summarising the effect of those decisions. He also referred to *Patel v Secretary of State for the Home Department* [2017] EWCA Civ 2028.

10. In his findings from [18] he accepted that the appellant is the primary carer for both children. He referred to the appellant's partner's work

schedule which covered a four month period from 1 February 2019 to 31 May 2019. He said that given that the appellant's partner is in full-time work it is likely that she is undertaking the role of primary carer.

11. However, analysing the work schedule, he went on to state that the appellant's partner had 40 scheduled rest days over the period of the schedule which equated to a third (33.3%) of the days and that he also had 16 days annual leave which equated to a little over 13% of the days.

12. He concluded that it was difficult to reconcile this pattern of work and non-work days with the state of affairs asserted on behalf of the appellant to the effect that her partner had no involvement with the children's lives other than as a provider of financial support. He said he recognised that the appellant's partner was working away for a significant amount of time and that it was credible that it was the appellant who had adopted the primary responsibility for the care of the children for that reason. On the other hand, her partner was also at home for a significant period of time. He concluded that it was not credible that the children have no attachment to their father who lives in the same household and who is not at work for a substantial amount of time. He said that if that were true it would be a highly unusual state of affairs and the evidence did not support a finding to that effect.

13. At [21] he went on to say this:

> "I also struggle to reconcile what I am told of [the appellant's partner's] lack of parenting skills with the fact that he works as a prison psychologist. Put simply, my assumption is that a man undertaking such work would have to have a reasonable degree of intelligence, and a capacity to engage with others. It would be worrying if that were not so. I do not accept that a man with the capacity to undertake such work would '… not know how to change a nappy, wash and bathe my daughter or how to feed her and change her clothes after she has soiled herself'".

14. He went on to conclude therefore, that the appellant had exaggerated her role from that of primary carer to that of sole carer and had entirely negated her partner's role as father, both as an attachment figure for the children and as someone able to provide practical care.

15. Turning to the question of whether the children would be unable to reside in the UK or in another EEA State if she left the UK, he referred to the appellant's claim that if she were forced to leave the UK for Ghana the children would be forced to accompany her as they are attached to her only, and her husband would not be able to care and look after them because of his shift patterns and lack of parenting skills.

16. He reiterated that he did not accept that the children have no attachment to their father or that he was so wholly lacking in parenting skills as the appellant would have him believe. He said that he had considered whether the shift pattern would preclude him from caring for the children to such an extent that they would be unable to reside in the UK. He found

that there would be difficulties but no more so than for any other single parent who has to juggle the demands of childcare responsibilities and work. He said that such circumstances were never easy but it was managed by single parents up and down the country all the time.

17. He therefore concluded that the evidence did not persuade him that there were factors particular to this case which meant that the appellant's partner could not do what so many others manage, finding that he was actually better placed than many because he was holding down a responsible job.

18. He then turned briefly to consider Article 8 but found that in the light of authority the appellant was not entitled to argue Article 8.

19. At [27] he concluded with the final observation that he found it likely that the application was made to provide precisely the type of back-door route to residence by non-EU citizen parents that was discussed by the Court of Appeal in *Patel*. The appellant, he said, could apply for leave under the Article 8 Immigration Rules or for leave outside those Rules.

The grounds and submissions

20. The grounds may be summarised as follows. It is argued that the FtJ erred in considering the application at an oral hearing after it had been confirmed by notice to the appellant that it would be by way of a paper hearing.

21. It is further argued in the grounds that the FtJ had erred in his consideration of the work schedule and the role played by the appellant's partner. Thus, it appeared that the FtJ was suggesting that due to the amount of days off and leave, the appellant's partner would be able to take care of the children if the appellant was forced to leave the UK. However, the appellant's partner was presently undertaking a two-year course at university which required attendance on rest days and annual leave days, as well as undertaking research and written course work and assignments on those days as well as during most evenings. He would be unable to assume the role of a primary carer as well as working long, variable shift patterns, especially nightshifts, when undertaking further educational studies.

22. The grounds go on to contend that although the FtJ did not accept that the appellant's partner has no attachment to the children or lacked parenting skills, that was not the test that needed to be applied. Furthermore, although it was concluded that there would be difficulties in the appellant's partner caring for the children, the FtJ failed to give sufficient or adequate reasons for his findings in that respect.

23. In addition, it is asserted that the FtJ had failed to take into account that the children would not be able to be cared for overnight because of the varied shift patterns, especially long night shifts.

24. Paragraph 9 of the grounds contends that the FtJ failed to take into account the ages of the two children, one being aged 1 year and the other 3 months and "both" being breastfed by the appellant. Thus, it is argued that the FtJ failed to assess and take into account that there was a relationship of dependency between these two very young children and the appellant.

25. Lastly, it is argued that the FtJ failed to take account of the best interests and welfare of both children and had failed to consider whether the children would be compelled to leave with the appellant if she was forced to leave the UK.

26. In submissions on behalf of the appellant the grounds were relied on. It was submitted that the FtJ had made a mistake in saying that the appellant's partner was a prison psychologist, whereas in fact he is a prison officer. He had also failed to take into account the studies that her partner was undertaking and there were documents before the FtJ in that respect.

27. I raised with Mr Sarwar the question of why the issue of the appellant's partner's studies is not mentioned in the appellant's or her partner's witness statements. Mr Sarwar suggested that it may be that the person who drafted the statements forgot to include it.

28. It was submitted that although childcare could be provided, that would be disproportionate to the salary of a prison officer. During nightshifts there would be no-one to take care of the children. Thus, he could not be a carer if the appellant was forced to leave the UK and both children would be forced to follow her.

29. On behalf of the respondent Ms Jones submitted that there was no material error of law in the FtJ's decision. Although the grounds contend that the appellant's partner was studying, that was not evidenced before the FtJ. Furthermore, the FtJ had not accepted the case put on behalf of the appellant to the effect that her partner was not involved in the children's lives.

30. At [27] the FtJ had concluded that this was an attempt by the appellant to use a backdoor route to residence in the UK.

31. On the issue of the appellant breastfeeding the youngest child, Ms Jones agreed that there was no engagement by the FtJ with that issue.

32. In reply, Mr Sarwar said that although the appellant had the option of making another application under Article 8, there was no guarantee that that application would succeed. The decision needed to be considered under reg 16(5) of the EEA Regulations.

33. Furthermore, even if the evidence in relation to further studies was not before the FtJ, he had failed to address the issue of nightshifts, the long

hours and the appellant's breastfeeding. Her partner would need to sleep during the day after being on a nightshift.

34. Following submissions, I indicated to the parties that I would reserve my decision, which I now give with my reasons.

Assessment and conclusions

35. Reg 16 of the EEA Regulations provides 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;

(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 (13);

(iii) to whom section 8 of the 1971 Act (14), or an order made under subsection (2) of that section (15), applies; or

(iv) who has indefinite leave to enter or remain in the United Kingdom.

(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 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."

36. The issue identified by the FtJ as being the matter in dispute was the question of whether, under reg 16(5)(c), the appellant's children would be unable to reside in the UK or in another EEA State if the appellant left the UK for an indefinite period. There was no argument on behalf of the respondent to the effect that the children would be able to reside in another EEA State.

37. In terms of whether the appellant was the primary carer for the children, the FtJ resolved that matter in favour of the appellant.

38. *Patel* considered the position with reference to the 2006 Regulations, where the equivalent of reg 16(5) of the 2016 Regulations is to be found at reg 15A(4A). The Court of Appeal said that there must be a careful inquiry into the circumstances of each particular case. The focus must be not on whether the EU citizen child or dependant can remain in legal theory but whether they can do so in practice. I note what is said at [76] to the effect that the legislative landscape is now such that those who marry British citizens and have children, without having (or acquiring) leave to remain, do so at the risk that they may be compelled to leave the country. There the Court said that:

> "The *Zambrano* principle cannot be regarded as a back-door route to residence by such non-EU citizen parents."

39. As regards the argument that the FtJ failed to take into account the appellant's partner's shift patterns, that complaint is not sustainable. At [24] the FtJ expressly referred to the question of whether his shift pattern would preclude him from caring for the children to such an extent that they would be unable to reside in the UK. The FtJ did not make express reference to the fact that the appellant's partner works at night but it is reasonable to conclude that he noted what was clear from the documents starting at page 9 of the appellant's bundle, namely that there were "Night Duties" on several occasions. It is inconceivable that the FtJ was not cognisant of that fact given that at [18] there is express reference to the work schedule and at [19] to its detail.

40. It is true that there is an error in the FtJ's decision in that he referred to the appellant's partner as a prison psychologist, whereas it is clear from the evidence, not least the witness statements, that he is a prison officer.

41. What the FtJ had to say at [21] about "the fact" that he works as a prison psychologist indicating that he would have attributes meaning that he would know how to care for an infant, including in terms of feeding, bathing and changing her, is in my view rather dubious as an assessment of the extent to which a father could undertake those tasks. It seems to me to be a matter of common sense that no particular intelligence is needed to perform those tasks and there is no reason to think that a person with professional qualifications such as a prison psychologist,

would be any better able, or more willing, to perform those tasks than a father without such a professional background.

42. However, that was not an essential feature of the FtJ's decision in terms of his conclusion that the appellant's case as to her partner's inability to care for the children was not credible. The primary finding in that respect is to be found at [20] whereby the FtJ said that he found it difficult to reconcile the pattern of work and non-work days with the contention that he had no involvement with their lives, other than as a provider of financial support.

43. He noted that he works away for a significant amount of time and found it credible that the appellant was the one who had adopted the primary responsibility for the care of the children for that reason. However, her partner was at home for a significant amount of time and the FtJ found it incredible that the children would have no attachment to him, given that he lives in the same household and is not at work for a substantial amount of time.

44. I am satisfied that the FtJ was entitled to conclude that the appellant had exaggerated her role from that of primary carer to that of sole carer, and that she was not credible in her attempt to negate her partner's role as a father, both as an attachment figure for the children and as someone able to provide practical care.

45. In terms of whether the FtJ had failed to take into account what is said to be the appellant's partner's studies, as I pointed out at the hearing the witness statements do not refer to such studies. The emphasis is on his shift patterns and overnight shifts in particular. There are no documents in the appellant's bundle in relation to any studies. There is on the Tribunal's file documentary evidence of study undertaken by her partner, but all that documentation post-dates the hearing before the FtJ. For example, there is a letter dated 16 March 2019 which refers to his studying part-time for an MSc in leadership whilst a prison officer at HMP Coldingley. The letter says that whilst he did not complete the course, he did attend lecture days and complete a number of assignments. Furthermore, the FtJ quoted the grounds in full and those grounds say nothing about studies, only stating that, amongst other things, he works in the prison service and works long shifts.

46. It cannot be an error of law for the FtJ to have failed to take into account evidence that was not before him. Indeed, the evidence itself, such as it is, hardly advances the contention that he was studying to such an extent that even the time he had at home was taken up with things other than his responsibilities as a father.

47. As regards the FTJ's decision to deal with the appeal as an oral hearing, I note that the First-tier Tribunal wrote to the appellant on 25 February 2019 stating that the appeal would be determined on the papers. However, directions issued on the same day stated that the appeal could not be heard on the papers without the consent of the respondent (as set

out in the FtJ's decision). Furthermore, it is apparent from the FtJ's decision that the appeal was dealt with, to all intents and purposes, on the documents only, the Home Office representative at the hearing before him not having made any submissions and simply relying on the respondent's decision. Accordingly, there is no error of law in the FtJ having proceeded to an oral hearing. Even if the appellant at one point thought that the appeal would be decided on the papers, there was in fact no unfairness or disadvantage to the appellant in the appeal having been dealt with at an oral hearing.

48. Although in his decision the FtJ summarised the grounds of appeal, including the contention that the appellant breastfed her (then) only daughter, he did not expressly refer to this aspect of the case in coming to his conclusions. It seems to me that he should have done. This was, and is, potentially a significant matter. However, I am not satisfied that the FtJ's omission in this respect amounts to an error of law, still less one that requires the decision to be set aside.

49. In the first place it has to be borne in mind that the appellant's claim was otherwise found to lack credibility in the assertion that her partner provided nothing other than financial support. That was emphatically rejected by the FtJ for reasons which are entirely sustainable regardless of the error that he made in terms of the appellant's partner's employment. Secondly, no evidence was put before the FtJ in terms of the importance that the appellant and her partner attached to their now youngest child being breastfed. At the date of the hearing before the FtJ that child was 3 months old. Even accepting that she did breastfeed her daughter for those three months, in practical terms there was no evidence before the FtJ to suggest that the child could not be bottle-fed.

50. In saying that I make no comment on the relative importance of breastfeeding but simply point out the obvious, namely that many infants are bottle-fed, for no doubt a variety of reasons. But as I have said, there was no evidence before the FtJ from the appellant in terms of the importance to her, or them as a couple, of breastfeeding, or any explanation in evidence as to why her child could not be bottle-fed.

51. I note that in the grounds of appeal in relation to the FtJ's decision it states at [9] that both children are being breastfed by the appellant. That assertion is contrary to what is said in the appellant's witness statement in which she states at [5] that she breastfed her eldest child until November 2018. That coincided with the date of the birth of her second daughter, on 11 November 2018.

52. In terms of any argument as to the cost of childcare in circumstances where the appellant's partner may need care for the children at night, no evidence was put before the FtJ in this respect, either in terms of the family's finances or in terms of the cost of childcare which, admittedly as a matter of common knowledge, can be expensive. But there was similarly no evidence as to whether the appellant's partner would be able to change

his shift patterns such that he no longer needed to work nightshifts because of his parental responsibilities. The cost of childcare (in the daytime) in those circumstances would be likely to be more affordable.

53. In the light of the above analysis, I am not satisfied that there is any error of law in the FtJ's decision.

54. In relation to the observation made by the FtJ at [27] as regards the prospects of the appellant making a further application under Article 8, I do agree that the FtJ was required to assess the application with reference to the EEA Regulations, but his observation in that respect did not in fact form part of his assessment of the evidence.

Decision

55. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal therefore stands.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Because this decision involves minors, unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her 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.

Upper Tribunal Judge Kopieczek 24/07/19