Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05050/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral decision given following hearing	**On 22 January 2020**
On 5 December 2019	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

SMERALD [K]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Blackwood, Counsel instructed by Morgan Pearse Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant in this case is a national of Albania, who has appealed against the decision of the respondent, who on 10 July 2018 refused to grant him a residence card which he had applied for on the basis that he was entitled to a derivative residence card as a primary carer of his son, who was at the time 3 years old and an EU citizen. The child's mother is a

Polish citizen and contained within the file is the son's Polish passport. The relationship between the appellant and the mother of the child had broken down and the appellant has day-to-day care of the son.

2. It is common ground between the parties that pursuant to Regulation 16 of the Immigration (EEA) Regulations 2016 the appellant would be entitled to a derivative right of residence if first he can establish that his son is "in education" and secondly (by Regulation 16(4)(b)) his son would "be unable to continue to be educated in the United Kingdom if the person left the United Kingdom for an indefinite period".

3. The appellant's appeal was dismissed by the First-tier Tribunal but in a decision given by myself immediately following a hearing on 30 April 2019 before a panel of the Upper Tribunal consisting of myself and (then) Deputy Upper Tribunal Judge Pickup, the Tribunal found that the decision of the First-tier Tribunal had contained a material error of law. The issue at that time was whether or not the appellant's son, who was then 3 years old and was attending nursery education could be said to be "in education" for the purposes of European law. The Tribunal considered that the judge's reasons for rejecting the submission that it was were not adequately reasoned and that that issue was sufficiently arguable on the facts to have required the judge to engage more fully with it.

4. We accordingly decided that the decision must be remade and the appeal was retained in the Upper Tribunal where it was again listed before me on 30 September 2019 at which time the case was not ready for hearing and I gave further directions, which directions are within the file. To summarise the state of play as at that time there was no issue between the parties as to whether or not the appellant was a "primary carer" of his son because plainly he was at least one of the primary carers and therefore everything else being equal, would be entitled to a derivative right of residence. The two issues which had to be established were first, whether the appellant's son could properly be said to be "in education" and secondly whether, if so, the appellant's removal from the UK would require his son to leave with him.

5. So far as the first issue is concerned, matters have moved on since the hearing before the First-tier Tribunal because it is now agreed by the respondent that (as normally happens when a child gets older) he is now unarguably in education, because he is now at a state primary school. So, the arguments which might have been in issue (which is whether and if so to what extent nursery education can qualify him for these purposes) is entirely academic. It is agreed that as the appellant's son is "in education", for the purposes of the EEA Regulations the only issue now that remains to be determined is whether or not, in the words of Regulation 16(4)(b) the appellant's child "would be unable to continue to be educated in the United Kingdom" if the appellant were to be removed from the UK. If it is the case that he would have to leave with his father for practical purposes, then the appellant is entitled under the Regulations to a derivative right of residence. Mr Avery, on behalf of the respondent,

does not seek to persuade the Tribunal that this construction of the applicable law is in any way wrong. It is also common ground, this being an EEA appeal, that I have to decide this issue on the basis of the position as it is today, and that the standard of proof is the balance of probabilities.

6. The evidence on this issue appears to be all one way. There is no evidence other than that the appellant has sole responsibility, certainly day-to-day, for the upbringing of his son and that the mother has effectively no involvement in his upbringing at all. There is a statutory declaration which is on file whereby the mother has stated in terms that the appellant "has been the sole carer for [their son's] day-to-day living and care including supporting him fully financially since [July 2017]". The child's mother continues by stating that "I am unable at this stage to look after my son both emotionally and financially and [am] fully reliant on [the appellant] to continue to look after my son and his welfare".

7. The mother then continues as follows:

> "I am emotionally unstable and financially unable to look after my son. I have many personal problems and if [the appellant] was to leave the country I will be forced to send my son … with him."

8. Given that the standard of proof is the balance of probabilities I am quite satisfied that it is more likely than not in the circumstances of this case that if this appellant were to be removed from the UK, his son would be obliged to leave with him, because as the sole primary carer who has any interest in caring for his son, it would practically not be possible for his son to remain in the UK without him. It would not be appropriate to take a young child into care in circumstances where both parents believe that it is in that child's best interests to remain with his father.

9. It follows that because the appellant's son is in education and that unless the appellant were to be allowed to remain in this country his son, a Polish citizen and therefore an EU citizen, would not be able to continue to be educated in the United Kingdom if he left, the appellant is entitled to a derivative right to reside in the UK pursuant to the 2016 EEA Regulations.

10. It follows that his appeal must be allowed and I so find.

Notice of Decision

The appellant's appeal against the decision of the respondent refusing to grant him a derivative right to reside in the UK as the primary carer of a child in education in the UK is allowed.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Date: 14 January 2019