Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04149/2019 (P)

THE IMMIGRATION ACTS

Heard under Rule 34	**Decision & Reasons Promulgated**
On 1 July 2020	**On 14 July 2020**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MOHAMED [B]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Elkettas & Associates, Solicitors (written submissions)
For the Respondent: No submissions

DECISION AND REASONS

Introduction

The appellant is a citizen of Algeria who was born on 13 September 1979. He entered the United Kingdom on 9 November 2018 with an EEA family permit based upon his relationship with his British citizen daughter, [N] who lived in the UK with her mother, the appellant's ex-partner. The appellant's family permit was valid until 12 April 2019.

On 9 April 2019, the appellant applied for a derivative residence card under reg 16(1) read with reg 16(5) of the Immigration (EEA) Regulations 2016 (SI 2016/1052 as amended) ("the EEA Regulations 2016") on the basis that he was

the "primary carer" of his daughter, a British citizen and that if he were required to leave the UK then she would be unable to remain in the UK. The underlying basis of that claim under the EEA Regulations 2016 was the CJEC's decision in Ruiz Zambrano v Office national de l'emploi (Case C-34/09) [2012] QB 265.

On 19 July 2019, the Secretary of State refused the appellant's application. The Secretary of State was not satisfied that the appellant was the primary carer of his daughter or that he had attempted to regularise his stay in the UK through UK domestic immigration law.

The appellant appealed to the First-tier Tribunal. In a decision sent on 17 October 2019, Judge Lever dismissed the appellant's appeal under the EEA Regulations 2016.

The appellant sought permission to appeal to the Upper Tribunal. On 18 February 2020, the First-tier Tribunal (Judge E M Simpson) granted the appellant permission to appeal.

Deciding without a Hearing

On 20 March 2020, the Upper Tribunal (UTJ Smith), in the light of the COVID-19 crisis, issued directions indicating that her provisional view was that the error of law issue could be decided on the papers without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended). The parties were invited to make written submissions on that issue and also on the substance of the error of law issue.

Time for filing submissions in response has expired. The appellant's representatives filed submissions. Those submissions simply placed reliance upon the grounds of appeal and the amended grounds of appeal upon which permission to appeal had been granted. The appellant's representatives indicated that they had no objection to the appeal being considered on paper without an oral hearing. The Secretary of State did not file any submissions within the required period.

Having taken into account the submissions, and in the absence of any objection, I consider it just and fair to determine the error of law issue without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The Appellant's Case

The judge heard evidence from both the appellant and his ex-partner Miss [B]. The judge found, as he put it, both witnesses to have provided credible evidence in general terms.

The evidence was that the relationship between the appellant and Miss [B] broke down in June 2013. He then moved between Algeria and the UK. Seven months after his daughter's birth in March 2014, he discovered that he had a daughter. His ex-partner also has a 13-year-old son who lives with her. His

father lives in London and with whom the son had contact. The appellant obtained a court order in 2015 giving him contact with his own daughter.

Both children suffer from neurological conditions. His ex-partner's son has Attention Deficit Hyperactive Disorder ("ADHD") and his daughter has autism.

The appellant came to the UK in November 2018 to assist his ex-partner with their daughter. Although his daughter lives with his ex-partner, the appellant's evidence was that he saw her every day and takes her to the playground or on school trips. She now attends a special school. The appellant's evidence was that he spends two days of the week when he would see her at home and occasionally he would stay weekends at his ex-partner's house. His evidence was that he was not 100% sure whether they would come to Algeria but if the mother gave the daughter to him he had no problem with her staying.

The evidence from the appellant's ex-partner was that she is the main carer of her daughter. She said that she has a good relationship with the appellant and if he went back to Algeria she would have to go back with him or at least their daughter would as she could not cope with two children. Her evidence was that she had been a teacher and a swimming coach but had stopped work two years ago. She said she receives income support and carer's allowance for her daughter and also received DLA at the highest level in respect of her daughter. Her evidence was that she has family - a mother, father, sister and two brothers - in Algeria. She also has a brother who lives in Brighton and a sister in South London, both of whom have families. Her evidence was that she had urged the appellant to come and help her as she was a single mother with two children with problems. She said that if the appellant returned to Algeria she would face difficulties.

The EEA Regulations 2016

The appellant's case, before the judge, was that he met the requirements of reg 16, in particular reg 16(1) read with reg 16(5).

Regulation 16(1) is as follows:

> "(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)."

The relevant criteria to the appellant's claim are found in reg 16(5) as follows:

> "(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."

The phrase "exempt person" is defined in reg 16(7)(c) as:

> "… 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."

The requirement that an individual be the "primary carer" of the British Citizen is defined in reg 16(8) as follows:

> "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."

The Judge's Decision

The judge, having set out the evidence of the appellant and Miss [B], gave his reasons for concluding that the appellant could not meet the requirements of reg 16 in paras 15 – 17 of his determination as follows:

> "15. I find in general terms that the Appellant and Miss [B] have provided credible evidence. I have sympathy with her trying to bring up two children who both have potential learning and behavioural difficulties. She received financial support in respect of that position as she indicated in her oral evidence. However as a single mother I can understand that it may be difficult for her coping on a daily basis. Although she has family in the UK I accept that their location and their potential personal circumstances are such that she could not rely upon them. I am uncertain what assistance she could receive from the local authority other than financial which she does receive and the fact that her young daughter is at a special school. I accept her evidence that the difficulties with her daughter are unlikely to disappear and as she grows older may in fact present greater problems for the mother. It may well be that to some extent can be counterbalanced by the mother's experience in dealing with her daughter as time passes and potentially receiving support and advice from those agencies who do assist parents who have children with learning and behavioural difficulties.
>
> 16. I accept that the Appellant plays a part now, in assisting Ms [B] in looking after their daughter. It is clear that whilst they no longer live together or are in a relationship they are close having known each other since childhood and each have a cousin who are married to each other. Ms [B] also has close family in Algeria, is

> familiar with that country and in recent years has made visits across there coincidental with the Appellant being present and therefore able to assist in looking after the daughter.
>
> 17. The Appellant's application has been brought under the EEA Regulations in particular Regulation 16 the derivative right to reside or what has been known as the **Zambrano** type of case. However I do not find that the appellant falls within the terms of Regulation 16. Having looked at the various sub-paragraphs of Regulation 16 I do not find that the appellant falls within those terms. Firstly I do not find evidence to suggest that he is the primary carer of the British citizen namely [N]. I do not find that he shares equally the responsibility for her care with Ms [B]. I certainly disagree with the Appellant's solicitors' assertion in their letter of 9th April 2019 that the mother is not fit to care for her daughter. Having seen and heard from Ms [B] I find that an entirely inappropriate turn of phrase. Further when looking at other requirements within Regulation 16 Ms [B] is an exempt person as defined within Regulation 16(7)(iv) applies. I further note that which was said in the case of **Patel [2017] EWCA Civ 2028** at para 78 that a derivative right to reside is a right of last resort which only applies if a person has no other means to remain lawfully in the UK. The appellant has not made an application under the Immigration Rules. Article 8 does not apply in this case because it is clear that the respondent's letter of 19th July 2019 that they are not contemplating removal and therefore potential interference with the Appellant's Article 8 rights but indeed have suggested that application be made under the Immigration Rules."

As will be clear from this, the judge concluded that the appellant could not succeed under reg 16(5) since he was not satisfied that the appellant was the "primary carer" of his daughter. Indeed, he went on to conclude that he was not satisfied that the appellant even shared "equally" the responsibility for the care of his daughter. In fact, that latter finding was not crucial to the application of reg 16 as its only relevance would be if it was established that he shared "equally the responsibility for [his daughter's] care" with his ex-partner *if she* were "not an exempt person". However, the judge found that she was an "exempt person" within reg 16(7)(c)(iv) because she has indefinite leave to enter or remain in the United Kingdom.

In addition, the judge appears to have concluded that the appellant could not succeed, applying the Court of Appeal's decision in Patel, on the basis that a derivative right of residence was one of "last resort" and it had not been shown by the appellant that he had no other means to remain lawfully in the UK.

The Appellant's Grounds

The appellant's grounds are set out in his original grounds of appeal together with the supplementary reasons for appealing dated 29 January 2020 filed in the light of the Supreme Court's decision in Patel and Shah v SSHD [2019] UKSC 59. Permission was granted on the combined sets of grounds. There are three grounds of appeal.

First, it is submitted that the judge failed to apply the decision in Ewulo (effect of family permit – OFM) [2012] UKUT 00238 (IAC). The appellant contends, that on the basis of this decision, as he had been allowed to enter the UK on a family permit on the basis of his relationship with his daughter, the judge failed to take into account that there had been no material change of circumstances since he arrived. Reliance is placed upon the headnote in Ewulo which states as follows:

> "Where the validity of the issue of the family permit is not contested by the Secretary of State and the permit has not been revoked, the issue is whether there has been a material change of circumstances since arrival with the consequence that the claimant no longer qualifies as an extended family member."

Secondly, the grounds contend that the judge failed to consider the totality of the evidence including evidence from the school of the appellant's daughter as to the effect of the appellant's presence upon her and the evidence of his ex-partner that he shares equal responsibility for his daughter.

Thirdly, and derived from the supplementary reasons for appealing, it is contended that the judge was wrong to have applied the decision of the Court of Appeal in the Patel decision as that had been found to be wrong and overruled by the Supreme Court when the case was appealed to that court. It is contended that as a result of the Supreme Court's decision, the judge failed to determine whether the appellant's daughter would be compelled to leave the UK by reason of her dependence upon the appellant. In addition, the judge had failed to consider the best interests of his daughter in reaching his decision.

Discussion

The Patel and Shah ground

In reaching his decision, the judge applied the requirements of reg 16(1) read with reg 16(5). That provision, as I have already pointed out, requires that the appellant establish that he has the primary care of his daughter. The judge found against him on that factual issue and, if that finding stands, the appellant could not succeed under the EEA Regulations 2016. As I have already pointed out, the issue of whether the appellant shared "equally" responsibility with his ex-partner did not arise as she was an exempt person and, by reg 16(8)(b)(ii), an individual who shares equally responsibility with another would only fall within the provisions of reg 16(5) if that other person was not an exempt person.

However, in my judgment the Supreme Court in Patel and Shah, applying the jurisprudence of the CJEC, recognised the scope of a derivative right of residence, in particular in relation to a person (such as the present) who relies on a relationship with their British citizen child, in broader terms than those of reg 16(5). In her judgment Lady Arden (with whom Lady Hale and, Lords Carnwath, Briggs and Sales agreed) set out the EU law position in [30] as follows:

> "The overarching question is whether the son would be compelled to leave by reason of his relationship of dependency with his father. In answering that question, the court is required to take account, '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' (*Chavez-Vilchez*, para 71). The test of compulsion is thus a practical test to be applied to the actual facts and not to a theoretical set of facts. As explained in para 28 of this judgment, on the FTT's findings, the son would be compelled to leave with his father, who was his primary carer. That was sufficient compulsion for the purposes of the *Zambrano* test. There is an obvious difference between this situation of compulsion on the child and impermissible reliance on the right to respect for family life or on the desirability of keeping the family together as a ground for obtaining a derivative residence card. It follows that the Court of Appeal was wrong in this case to bring the question of the mother's choice into the assessment of compulsion."

The appellant is entitled to rely upon the EU law derived from the CJEU's decisions and applied by the Supreme Court in Patel and Shah. Two important points arise from the Supreme Court's judgment.

First, the EU derivative right of residence of a parent of a British Citizen child is based upon a "practical test" of compulsion, namely that the child will in fact be required to leave the UK if the third country national parent cannot remain. The test is not a hypothetical one which, in effect, the Court of Appeal wrongly applied, by determining whether the child would have to leave because in the Shah case the UK-based mother would *choose* to leave the UK.

The Supreme Court made plain that the FtT's finding as to what would actually happen if the third country national parent left the UK was determinative of the appeal. At [28], Lady Arden said this:

> "The FTT found as a fact that Mr Shah was the primary carer of his infant son and that he, rather than the mother, had by far the greater role in his son's life (para 15). Accordingly, the child had the relevant relationship of dependency with Mr Shah. The FTT was entitled to make this finding on the facts, because the mother's evidence that Mr Shah was the primary carer of her child and that she could not assume full responsibility for him because she worked full-time was not challenged. The mother's evidence that if Mr Shah was not allowed to stay in this country they would move as a family was also unchallenged. The FTT went on to reach what it called 'an inescapable conclusion' that the son would have to leave with his parents and that accordingly the requirement for compulsion was met."

Secondly, the "compulsion" to leave must arise because of a relationship of "dependency" with the third country national parent. Although Lady Arden referred to Mr Shah, in the relevant appeal, having the "primary responsibility" for his British citizen son, it was not that *per se* which was the basis for the sustainable factual finding by the FtT but rather that because of that 'primary

care' there was a "relationship of dependency". That much is made clear by Lady Arden at [25] of her judgment where, having referred to the CJEU's case law in K A v Belgium (Case C-82/16) [2018] 3 CMLR 28 and Chavez-Vilchez v Raad van bestuur van de Sociale verzekeringsbank (Case C-113/15) [2018] QB 103, stated that:

> "[b]ecause Mr Shah was the primary carer, the need for a relationship of dependency with the [third country national] was fulfilled."

Of course, being the primary carer of the British citizen child is likely to establish the relationship of dependency which, if that parent were to leave the UK, founds the claim that it will also result in the child leaving the UK. It is, however, not a necessary condition to establishing the derivative right of residence. The necessary condition is that as a result of a "relationship of dependency" the child will be compelled to leave the UK if the third country national cannot remain in the UK. In [72] of the CJEU's decision in KA, which Lady Arden set out with approval in her judgment, the CJEU said this:

> "The fact that the other parent, where that parent 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 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 the 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 ..."

In this appeal, Judge Lever dismissed the appellant's appeal on the basis that the appellant had not established that he was the "primary carer" of his daughter. Under the EEA Regulations 2016, that finding was determinative. However, the Supreme Court's decision in Patel and Shah, reflecting the case law of the CJEU, recognises that the question of "compulsion" to leave the UK arises in the context of whether the third-country national (here the appellant) has a "relationship of dependency" with the British citizen child which would, in practice, lead to the child having to leave the UK. Judge Lever did not consider this issue. There was, of course, as I have already pointed out, evidence both from the appellant and his ex-partner that if the appellant had to return to Algeria she (along with their daughter) would not be able to cope and both (or at least the daughter) would have to go to Algeria with him. It was evidence of this sort, of course, which led the FtT in the Shah appeal to reach the unchallenged finding that led to the Supreme Court to conclude that Mr Shah's appeal, based upon a claim to a derivative right of residence, should succeed. Here Judge Lever made no finding on this issue which would necessarily turn upon an assessment of the oral and other evidence. That finding has yet, therefore, to be made either in favour of the appellant or against the appellant.

In my judgment, Judge Lever materially erred in law by failing to apply the approach of the Supreme Court in Patel and Shah and, in doing so, failed to make appropriate findings as to whether or not the appellant had the required "relationship of dependency" which would, in fact, lead to his daughter being compelled to leave the UK either with, or without, his ex-partner. Of course, Judge Lever did not have the advantage of the Supreme Court's decision in Patel and Shah which post-dated his decision. He, perhaps not unnaturally, applied the terms of reg 16(5) to which his attention was directed. Nevertheless, the declaratory effect of the Supreme Court's decision is that, in retrospect, it is clear that he fell into error. For this reason, his decision cannot stand and I set it aside.

There is one further point on the ground relying on the Supreme Court's decision in Patel and Shah. The grounds are also critical of Judge Lever's adoption of the Court of Appeal's comment (at [78]) that a derivative right is a right of last resort. Although the Supreme Court did not specifically refer to the Court of Appeal's comment that a derivative right of residence is a right of last resort which would only apply if a person has no other means to remain lawfully in the UK, I see no basis for such a limitation in principle. The fact that a person may be able to establish an alternative basis for remaining in the UK does not detract from, if it is established, his EU right of residence derived from the effect of his British citizen child being unable to remain in the UK. Of course, if the individual, in fact, has a right to remain in the UK (say under the Immigration Rules) then the derivative right based upon him leaving the UK and that his British citizen child will be compelled to leave with him would fall away.

The other grounds

In relation to ground 3, had that been the only ground of challenge to Judge Lever's decision, I would have concluded that it was not made out. The reason for that is a straightforward one. In Ewulo, the individual had been granted an EEA family permit to enter the UK on a particular basis as an extended family member. Twenty days after entering the UK he applied for a residence card on precisely the same basis. His family permit was still valid for approximately another five months. In such circumstances, if the Secretary of State does not contend that the family permit should be revoked, it is likely that only if there is a material change of circumstances (given the close proximity of the individual's entry with an EEA family permit and application for a residence card on precisely the same basis) that a Tribunal is likely to conclude that the individual no longer qualifies for a residence document on the basis upon which he entered the UK.

The present case is, however, factually quite different. Here, the appellant entered the UK with an EEA family permit in November 2018 which was valid until 12 April 2019. Shortly before that family permit expired, the appellant made his current application for a residence card based on his relationship with his daughter. Unlike in Ewulo, some time had passed since the initial assessment had led to the issue of a family permit to enter the UK. Likewise, that family permit was about to expire. Both the Secretary of State, and on

appeal the First-tier Tribunal, were entitled to assess the appellant's factual situation as at the date of their respective decisions in order to determine whether or not he now (or continued to) be entitled to a derivative residence card. This is not a case, in other words, where there is an apparent incongruity between the Secretary of State making an adverse decision on the entitlement to a residence card and not, during the effective currency of the EEA family permit, seeking to revoke it on the basis that she is no longer satisfied that the appellant meets the requirements for the derivative residence document. That is equally the case for the judge on appeal. Consequently, in that regard, I would reject ground 3.

Ground 2 is a challenge to the judge's fact-finding. It is not necessary to reach a view on this ground. Given that I have reached this decision on the papers, and given that neither party has been invited to make submissions nor has made any submissions in relation to the ultimate disposal of this appeal, there must inevitably be further proceedings to remake the decision. Given that the judge, as a result of not applying the relevant law now expounded by the Supreme Court, failed to make relevant findings in determining whether the appellant had established a derivative right of residence. The proper disposal of this appeal is, in my judgment, to remit it for a fresh hearing before the First-tier Tribunal. At that hearing, the judge is likely to have to reach an assessment of the oral evidence as well as any other evidence relied upon. In those circumstances, it would be wrong to preserve any of Judge Lever's findings.

However, for the reasons I have given the supplementary grounds of appeal based upon the Supreme Court's decision in Patel and Shah are made out.

Decision and Disposal

For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. The First-tier's decision is set aside.

The proper disposal of this appeal, having regard to para 7.2 of the Senior President's Practice Statement, is to remit the appeal to the First-tier Tribunal for a *de novo* rehearing for a judge other than Judge Lever. None of the findings of Judge Lever are preserved.

Signed

Andrew Grubb

Judge of the Upper Tribunal
2, July 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email