IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER)

Appeal Number:
EA/12194/2021 UI-2022-001619
EA/11037/2021 UI-2022-001620

THE IMMIGRATION ACTS

Heard at Field House
On the 1 November 2022

Decision & Reasons Issued
On the 28 November 2022

Before

UPPER TRIBUNAL JUDGE BLUNDELL
and
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

LUC BEMGA MBON
(ANONYMITY NOT ORDERED)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

Representation:

For the Appellant: Mr S Cox, counsel instructed on a direct access basis
For the Respondent: Ms Ahmed, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Cameroon, born on 11 August 1982. On 9 September 2020 he made an application for a derivative residence card as the primary carer of three British children, his son born on 23.9.11 and daughter born on 26.10.13 and his partner's British daughter by a previous relationship, born on 28.12.06. This application was refused in a decision dated 28 June 2021 and he appealed against that decision to the First tier Tribunal. Following a hearing before First tier Tribunal Judge Ripley, a decision and reasons dated 3 December 2021 was promulgated, dismissing the appeal.

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2. A renewed application for permission to appeal to the Upper Tribunal was made against this decision on 27 May 2022, on the basis that Judge Ripley erred materially in law in failing to decide the appeal reference EA/12194/2021 from a decision of the SSHD dated 14 July 2021 refusing the Appellant leave under Appendix EU made on 9 September 2020 and not, as the Judge mistakenly thought, from the SSHDs refusal of his application for a residence card as a person with a derivative right to reside under reg 16(5) of the Immigration (EEA) Regulations 2016. The grounds of appeal further asserted that the Judge erred in failing to direct herself that reg 16(5)(c) of the Regulations requires the question of whether a British citizen child would be unable to reside in the UK or in another EEA State and sought to rely on the fact that the Court of Appeal had granted permission to appeal in the case of Velaj (EEA Regulations – interpretation, Reg 16(5), Zambrano) [2021] UKUT 235.

3. The grounds of appeal also pointed out that on 7 February 2022, Judge Athwal purported to determine and dismiss the same appeal as that before Judge Ripley, but without being aware of her decision and with a different reference number: EA/11037/2021. The appeals were not linked by the First tier Tribunal and the Appellant, who was at that time unrepresented, did not appreciate the importance of having the appeals linked.

4. Permission to appeal was granted by UTJ Keith in a decision dated 21 July 2022 in the following terms:

> **"The appellant seeks permission to appeal, in time, two decisions of the First-tier Tribunal. For the sake of brevity, these are summarised by the appellant in his grounds. There are two different FTT appeal files (EA/11037/2021 and EA/12194/2021) each of which are said to have decided a single appeal from the respondent's decision of 28th June 2021, in which she refused his application for a residence card under reg. 16 of the Immigration (European Economic Area) Regulations 2016, but without deciding his appeal from the respondent's decision refusing his separate application for leave to remain under Appendix EU. FtT Judge Athwal decided appeal number EA/11037/2021 on 7th February 2022, in ignorance of FtT Ripley's decision in respect of EA/12194/2021 on 3rd December 2021. There are two linked Upper Tribunal appeals – the first, this appeal, against Judge Ripley's decision, (UI-2022-001619); the second (UI-2022-001620) against Judge Athwal's decision. The grounds in this appeal challenge (1) Judge Ripley's failure to decide the appeal under Appendix EU; and (2), the arguable error to consider that the appellant, with joint parental responsibility for a child, ought to have succeeded under regulation 16(5)(c) of the 2016 Regulations, on the basis that the Court of Appeal had granted permission to appeal the Upper Tribunal's decision in Velaj (EEA Regulations – interpretation, Reg 16(5), Zambrano) [2021] UKUT 235.**

2. Since submission of the grounds, the Court of Appeal has reached its decision in Velaj v SSHD [2022] EWCA Civ 767. In that case, notwithstanding the initial grant of permission by the Court of Appeal in Velaj, the ground challenging the decisions under the 2016 Regulations has no arguable merit, in light of the Court of Appeal's subsequent decision. However, it is at least arguable that Judge Ripley failed to consider the appeal under Appendix EU.

3. Permission to appeal is granted on ground (1) only.

DIRECTIONS

Pursuant to EH (PTA: limited grounds; Cart JR) Bangladesh [2021] UKUT 00117 (IAC), and having regard to the limited grant of permission above:

1. The scope of the 'error of law' hearing is limited to Ground (1) of the Grounds of Appeal only."

Hearing

5. At the hearing before us, Ms Ahmed indicated at the outset that she did not oppose the Appellant's grounds of appeal contending there to be an error in Judge Ripley's decision. Her reason was that there were two decisions: the Appellant had been refused pre-settled and settled status under Appendix EU and in the instant appeal it appears that the refusal dated 14.7.21 against which the Appellant had appealed had given rise to the reference number EA/12194/2021; that Judge Ripley was misled because it was a paper hearing and the Appellant was unrepresented and that the Judge may have been misled by the Respondent's bundle because that bundle contained the refusal refusing him a derivative residence card under the 2016 regs and the relevant refusal letter dated 14.7.21 was not before Judge Ripley and was not considered by her. In all this leads to the Respondent accepting a material error.

6. Ms Ahmed further clarified that the Respondent's bundle before Judge Ripley had the wrong application form and wrong refusal decision and the appeal lodged by the Appellant against the 14 July 2021 decision did not appear in this bundle.

7. In his submissions, Mr Cox submitted that the decision of Judge Ripley should be set aside and remitted to a different FtT Judge for determination. Mr Cox acknowledged that the Court of Appeal had dismissed the appeal in *Velaj* but submitted that it was a very finely balanced case and that live evidence from the Appellant and his wife could result in a different outcome; that the Appellant would seek an oral hearing and be represented. Mr Cox further stated that the Supreme Court was seized of an application for permission to appeal in *Velaj* which remained outstanding, but even without that he would say there is a proper case to be heard on remittal. Citing Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others (C-133/15); [2018] QB 103, he reminded us that it would be necessary for the FtT to consider the best interests of the children and that it was possible, even in

a 'two parent' case such as this that a derived right of residence might be found to exist.

Findings and reasons

8. We find that First tier Tribunal Judge Ripley erred materially in law in determining the wrong appeal, albeit through no fault of her own, due to the fact that the Respondent's bundle contained neither the correct application form nor the correct decision under appeal and did not contain the Appellant's notice of appeal against the decision of 14 July 2021. Ms Ahmed confirmed that this was the position and did not seek to persuade us other than that there was a consequent material error of law.

9. It follows that the appeal lodged by the Appellant with appeal reference EA/12194/2021 from a decision of the SSHD dated 14 July 2021 refusing the Appellant leave under Appendix EU made on 9 September 2020 remains outstanding and undetermined.

10. We set aside the decision of First tier Tribunal Judge Ripley and remit the appeal for a hearing before a judge of the First tier Tribunal other than Judge Ripley or Judge Athwal. We are satisfied that the appellant has a prospect of success in that appeal for the reasons given by Mr Cox before us.

11. We understand that the appellant intends to pay the sum necessary in order for there to be an oral hearing. If that is done, we observe that it might be advisable for there to be a Case Management Review hearing well in advance of the substantive hearing. There is significant potential for confusion in this case, as is clear from what has gone before, and the FtT would be assisted by having complete and accurate bundles from the respondent, showing the applications, refusals and grounds of appeal in each case. Whether to hold such a hearing is a matter for the Resident Judge, however, and these are merely observations.

Rebecca Chapman
Deputy Upper Tribunal Judge Chapman

15 November 2022