IAC-AH-CJ-V2

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/05877/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
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| **On 15th January 2016** | **On 23rd February 2016** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS**

**Between**

**MISS LISA CHISHA KAPOPOLE**
**(NO ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr L Yussefian (Legal Representative)
For the Respondent: Mr E Tufan (Home Office Presenting Officer)

**DECISION AND REASONS**

1. The Appellant is a citizen of Zambia born on 13th September 1984. The Appellant claimed to have entered the United Kingdom on 19th January 2006 on a category C visitor's visa valid from 22nd December 2005 expiring on 22nd June 2006. Thereafter the Appellant became an overstayer. On 20th February 2013 the Appellant sought a derivative residence card as confirmation of a right of residence as the primary carer of a British citizen. That application was refused by the Secretary of State by Notice of Refusal dated 13th January 2014. The Appellant appealed and the appeal came before Designated Judge of the First-tier Tribunal Digney

sitting at Hatton Cross on 6th August 2014. In a determination promulgated on 26th August 2014 the Appellant's appeal was dismissed.

2. On 2nd September 2014 Grounds of Appeal were lodged to the Upper Tribunal. On 6th October Designated Judge of the First-tier Tribunal McClure granted permission to appeal. Judge McClure noted that the grounds of the application seeking permission asserted that:–

   (a) That the judge made improper, unreasoned and generalised findings that, if the Appellant were required to leave the United Kingdom, her sisters would look after the child. There was no evidential basis for that finding and accordingly the judge was acting on assumption and speculation.

   (b) That the judge failed to put such matters to the witnesses and failed to obtain evidence that they would look after the child.

   (c) That the judge failed to give sufficient reasons for concluding that the Appellant's sisters had not been truthful when they stated that they would not be able to care for the British citizen child Jeremiah.

3. Judge McClure noted that the Appellant is the mother of a British citizen child and that that child was 5 years old. He noted that it was claimed that in accordance with Section 15A and Section 4A of the 2006 Regulations that the Appellant is entitled to a derivative right of residence and a residence card to acknowledge that. He noted that the judge found that the fact that the Appellant's two sisters lived in the United Kingdom meant that they could and would look after the child if the Appellant were forced to leave the UK. He concluded that it was arguable that in assessing the issue of whether the British citizen child would have to leave the United Kingdom, the judge had failed properly to assess the evidence before him and made assumptions without the necessary factual basis.

4. On 14th October 2014 the Secretary of State responded to the Grounds of Appeal. The Secretary of State's response contended that the judge had found that the Appellant's child would not have to leave the UK on the basis that there are people who could care for him in this country such as aunts and his mother's partner. The Secretary of State noted that it was argued that these points were not put to the Appellant. The matter thereafter was referred to Judge McClure this time sitting as a Deputy Upper Tribunal Judge on 9th December 2014 and he concluded that there were material errors of law in the decision of Designated Judge Digney, set it aside and remitted the matter back for a fresh hearing in the First-tier Tribunal.

5. The appeal thereafter then came back before Judge of the First-tier Tribunal Grant sitting at Hatton Cross on 8th July 2015. In a decision and reasons promulgated on 22nd July 2015 the Appellant's appeal under the Immigration (European Economic Area) Regulations was dismissed.

6. On 3rd August 2015 further Grounds of Appeal were lodged to the Upper Tribunal. Those grounds contended:–

(i) That whilst the judge had placed a great deal of weight upon the principles set out in the authority of *Hines v the London Borough of Lambeth [2014] EWCA Civ 660* the judge had properly failed to apply the case law and that he had made no assessment as to the welfare of the British child and whether the quality or standard of life would be impaired should the Appellant be removed from the United Kingdom.

(ii) The judge had erred in finding that the evidence of the Appellant's sisters should not be accepted without providing a cogent reason as to why this should be the case.

(iii) That the judge made findings without clear reasoning which were irreconcilable with the facts as set out at paragraphs 20 to 23 of the Grounds of Appeal.

7. On 5th November 2015 Judge of the First-tier Tribunal Grimmett granted permission to appeal. Judge Grimmett noted that the grounds asserted that the judge had failed to make an assessment of the welfare of the British child and whether his quality or standard of life would be impaired should his mother be removed. Judge Grimmett indicated that he was satisfied that that was arguable as although the judge had referred to *Hines v the London Borough of Lambeth* there was no consideration of the impact on his quality or standard of life due to the absence of his mother.

8. On 17th November 2015 a further Rule 24 response was filed and served by the Secretary of State opposing the Appellant's appeal. In summary the Respondent submitted that the Judge of the First-tier Tribunal directed himself appropriately and that the judge had given adequate reasons for the finding that the Appellant's son could remain in the UK with his extended family of which it appeared from the evidence that there was family life with the Appellant's partner and her sisters.

9. It is against that extensive background that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by her instructed legal representative Mr Yussefian. The Secretary of State appears by her Home Office Presenting Officer Mr Tufan.

**The Authority**

10. It is useful herein before referring to the submissions/discussions of the legal representatives to give some consideration to the decision of the Court of Appeal in the case of *Maureen Hines v the London Borough of Lambeth [2014] EWCA Civ 660*. That authority addressed the test that a judge should ask himself when dealing with the question of whether an EU citizen child would be forced to leave the EU as a matter of practicality and whether the quality of life of the child would be impaired by the removal of the non-EU citizen.

11. The test is set out at paragraph 22 in the judgment of Vos LJ where the learned judge states:–

> "22. In my judgment, however, the welfare of the child cannot be the paramount consideration because that would be flatly inconsistent with the statutory test which is whether the child would be unable to reside in the UK if the mother left. It will, in normal circumstances, be contrary to the interests of a child for one of its parent carers, whether the primary carer or not, to be taken away from him or her.
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> 23. I have no doubt that the test applicable under Regulation 15A(4A)(c) is clear and can be given effect without contravening EU law. The reviewer has to consider the welfare of the British citizen child and the extent to which the quality or standard of his life will be impaired if the non-EU citizen is required to leave. That is all for the purpose of answering the question whether the child would, as a matter of practicality, be unable to remain in the UK. This requires a consideration amongst other things, of the impact which the removal of the primary carer would have on the child, and the alternative care available for the child.
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> 24. There was much discussion in argument as to the kind of alternative care that might be required in order to avoid the conclusion that the child would be forced to leave. It would be undesirable, I think, for the court to lay down any guidelines in this regard, but it was, as I have said, common ground that an available adoption or foster care placement would not be adequate for this purpose. That is because the quality of the life of the child would be so seriously impaired by his removal from his mother to be placed in foster care that he would be effectively compelled to leave. I do not, however, think that all things being equal the removal of a child from the care of one responsible parent to the care of another responsible parent would normally be expected so seriously to impair his quality and standard of life that he would be effectively forced to leave the UK."

## Submissions/Discussion

12. Mr Yussefian submits that the guidance set out above in *Hines* was not applied. He takes me to paragraph 31 of Judge Grant's determination explaining that the judge has made no reference whatsoever to the quality of life of Jeremiah and that he has failed to apply the test as set out within paragraph 23 of *Hines*. He submits that there was a requirement upon the judge to assess these factors and that alternative care would affect the quality of life of the child. He submits that the judge has approached the matter in the wrong way, namely that he has focused on alternative care and has given no consideration for the discernible care and the effect of the child being separated from his mother and that it is imperative that an assessment be carried out as set out as in paragraph 24 of *Hines* and that the judge has failed to do this.

13. Whilst Mr Yussefian acknowledges that no explanation is given within *Hines* as to why the quality of life would be so impaired by a child being placed in foster care, he emphasises that the authority does concentrate on the trauma of being removed from the mother and that that would

affect the quality of life of the minor, Jeremiah. He submits that such trauma is not restricted to physical trauma but also emotional and mental wellbeing and that he submits placing the child in the care of aunts could be construed as being similar to foster care insofar as the aunts are not direct relatives or legal guardians. He takes me to the Home Office guidelines valid from 7th April 2015 on derivative rights of residence and reference therein as to what constitutes direct relatives, pointing out that:–

> "If there is no evidence that there is another direct relative in the UK who is currently caring for the child, or is able to assume caring responsibilities, for the purpose of the application you can accept there is no alternative care available."

14. He reminds me that the child was abandoned by his father and that to put him in care of aunts would not be to his benefit, submitting that the contact he has had with his aunts is very limited. He contends therefore that it was incumbent upon the judge to assess the quality of life of the child if removed from his mother and that he has failed to do so and that the judge has only looked at the practical alternatives and that the failure to carry out the necessary assessment constitutes a material error of law.

15. So far as other purported material errors of law, Mr Yussefian is content to rely on the Grounds of Appeal. He submits that the First-tier Tribunal Judge erred in finding that the evidence of the Appellant's sisters should not be accepted without providing a cogent reason as to why this is the case and that the judge has failed to do so, and that to find that the evidence of the Appellant's sisters should not be believed simply because they provided witness statements for the purpose of an appeal is perverse, otherwise all witness statements would be classed as "self-serving" and the evidence of witnesses could be dismissed as not credible on that basis alone. He submits that the First-tier Tribunal Judge has failed to take into account the oral evidence of the witnesses, all of whom answered questions directed to them by both the Respondent and the First-tier Tribunal Judge. Finally he relies on the submission set out at paragraphs 20 to 24 of the Grounds of Appeal that the judge made findings without clear reasoning and which were irreconcilable with the facts specifically as to the ability of the Appellant's partner and sister to look after the child.

16. Mr Tufan states that the judge correctly noted the test and that paragraph 23 of *Hines* must be read in conjunction with paragraph 22. He submits that that analysis is for answering the question as to whether or not a child can remain in the UK and that at paragraph 23 in *Hines* the judge stated that a child could live with extended family. He submits that the precise issue in this case is whether or not the child can leave the UK and that the judge has addressed this.

17. In brief response Mr Yussefian accepts that the judge has quoted *Hines* but he has not applied it and that quality of life must be a consideration. He

submits the judge has not followed *Hines* and that even if welfare is not of a paramount consideration it remains a consideration and that the judge has failed to address this. He submits that had the judge done so there may have been a substantial difference in the finding at the end of the day and that the error of law is material. He asked me to remit the matter to the First-tier Tribunal for rehearing.

## The Law

18. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

19. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

## Findings

20. This matter has a lengthy history which I have set out in some detail. The guiding feature relates to the application of the test as set out within *Hines v the London Borough of Lambeth* and whether or not the judge has applied it. It is clear the judge has given consideration to *Hines* but I agree that it is incumbent upon a judge to give due consideration to the extent to which the quality or standard of the child's life would be impaired if the non-EU citizen (in this case the Appellant/his mother) is required to leave. The judge has failed to address this issue in his decision.

21. I acknowledge that the judge has said that the child could live with his aunt despite testimony to the contrary given orally before him and set out at paragraph 30 of his decision. It is important to give full and proper consideration to the Home Office guidelines on derivative rights of residence. The quote recited above that if there is no evidence that there is another direct relative in the UK who is currently caring for the child, or able to assume caring responsibilities, for the purpose of the application, then the Secretary of State can accept there is no alternative care available, has not been considered and the Tribunal has not addressed the matter as to whether or not in the particular circumstances of this case a sister of the Appellant could be construed as being a direct relative. My initial thoughts are that they are not. Direct relatives must, by the very

implication of the terms, make specific reference to a parent. However circumstances may well arise in specific cases such that the relationship with an extended family member that the child's physical and emotional needs would in some circumstances be met. Each case must be fact-specific.

22. The judge in this instant case has failed to carry out that extremely detailed but necessary analysis. He has made assumptions contrary to the evidence that was placed before him, imparting his own views over and above that of the testimony that he has heard. In such circumstances the decision is unsafe. Whilst I am reluctant for this matter to have to continue further, I agree with the submissions made by Mr Yussefian that it is necessary for the Tribunal to apply the principles in *Hines* and give reasoning for them rather than to merely recite them, and that the judge in this instant case has not applied the guidance nor given any due consideration to the effect that separation would have on the emotional and/or mental ties between the child and his mother. In such circumstances the decision contains material errors of law and is unsafe and I set aside the decision of the First-tier Tribunal, remit the matter back to the First-tier Tribunal and give directions herein with regard to the rehearing of this matter.

**Notice of Decision**

(1) The decision of the First-tier Tribunal contains a material error of law and is set aside.

(2) That the matter is remitted to the First-tier Tribunal sitting at Hatton Cross on the first available date 28 days hence with an ELH of two hours to be heard before any First-tier Tribunal Judge other than Immigration Judge Grant.

(3) That there be leave to either party to file and serve an up-to-date bundle of subjective and objective evidence including witness statements upon which they intend to rely at least fourteen days prehearing.

(4) That in the event that the Appellant's solicitors require an interpreter to be present for any of their witnesses then they must, within fourteen days of receipt of these directions, notify the Tribunal of this and give details of the language required of the interpreter.

No anonymity order was made and no application is made to vary that order.

Signed Date

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT**
**FEE AWARD**

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris