



First-Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/00213/2019

THE IMMIGRATION ACTS

Heard at Belfast
On 28 May 2019

Decision & Reasons Promulgated

.....05/06/2019.....

Before

Judge of the First-tier Tribunal J.C. Grant-Hutchison

Between

**Mrs. Charinrat Waddell
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

Secretary of State for the Home Department

Respondent

Representation

For the Appellant: Ms. E. McIlveen, Barrister

For the Respondent: Mr. M. McCallum, Home Office Presenting Officer

DECISION AND REASONS

INTRODUCTION

1. The Appellant is Mrs. Charinrat Waddell who was born on 28 August, 1979 and is dual national of New Zealand and Thailand.
2. On 11 October, 2018 the Appellant applied for a Derivative Residence Card as confirmation of a right to reside in the United Kingdom under Regulation 16 of the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”) on the basis that she is the primary carer for her son, Alan James Waddell, (“Alan”) who is a dependant British child who was born on 27 June, 2011. The application

was refused on 28 December, 2018 under Regulation 16 (5) of the 2016 Regulations because the Respondent is satisfied that the Appellant (a) has not provided sufficient evidence of primary care and (b) has not demonstrated that the child would be unable to reside in the United Kingdom or in another EEA State if the Appellant required to leave for an indefinite period as the Appellant stated that the child’s father works in Ireland which is an EEA State. No evidence had been provided to show that the child’s father is unable to care for the child or that the child would not be able to reside in the United Kingdom or another EEA state if she were required to leave.

- 3. The Appellant has appealed this decision under Section 82 (1) of the Nationality, Immigration and Asylum Act 2002 and Regulation 36 of the 2016 Regulations.

THE DOCUMENTATION SUBMITTED INTO EVIDENCE

4. Evidence for the Respondent

- i. the Respondent’s bundle and documents attached
- ii. a copy of a Home Office Minute Sheet dated 29 September, 2018 (submitted and accepted into evidence on the day of the hearing)
- iii. a copy of a Notice of refusal of Leave to Enter dated 29 September, 2019 (submitted and accepted into evidence on the day of the hearing)

5. Evidence for the Appellant

- i. the Appellant’s bundle and documents attached

THE HEARING

- 6. The Appellant gave her oral evidence with the assistance of an interpreter. The language is Thai. She adopted her witness statement and answered all questions put to her.
- 7. The Appellant’s husband, Mr. Peter Waddell, (“Mr. Waddell”) gave his oral evidence without the assistance of an interpreter. He adopted his witness statement and answered all questions put to him.
- 8. Both parties made submissions.

THE LAW

- 9. Regulation 16 of the 2016 Regulations states: -

“(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)*

.....
.....

(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.*

.....
.....
(7) an "exempt person" is a person –

- (i) who has a right to reside under another provision of these Regulation;*
- (ii) who has the right of abode under section 2 of the 1971 Act (a);*
- (iii) to whom section 8 of the 1971 Act (b), or an order made under subsection (2) of that section (c), 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.*
-"

- 10. The burden of proof is on the Appellant and the standard of proof is the balance of probabilities.

THE DECISION

- 11. Both the Reasons for Refusal Letter and the Representative's skeleton argument state that the Appellant applied for a Derivative Residence Card on 11 August, 2018 when in actual fact she sent her application under cover of a letter from her Representatives on 11 October, 2018 (page 139 of the Appellant's bundle). The Appellant confirmed in oral evidence that by 28 September, 2018 the forms had been completed but had not as yet been sent off to the Respondent. This was confirmed by Mr. Waddell in his oral evidence. He said that they were simply waiting for their son's British passport which came through 10 days later and then the forms were submitted. I accept the oral evidence of both the Appellant and Mr. Waddell because it is supported by the following documentary evidence, namely (a) Alan's passport which shows the date of issue as 8 October, 2018 and (b) the date of the said letter from the Appellant's representatives dated 11 October, 2018 sending the Appellant's application to the Respondent for consideration.
- 12. The Home Office Presenting Officer lodged a Home Office Minute Sheet dated 29 September, 2018 and a Notice of Refusal of Leave to Enter form IS.82 No AR RLE refusing the Appellant leave to enter the United Kingdom as a visitor for 6 months. The Minute details that the Appellant left the United Kingdom on 28 September, 2018 on a flight to Amsterdam with a return flight on the same day. On being questioned by the Immigration Officers on return the Appellant said that the sole aim of her journey was to get her passport stamped as a visitor for 6 months. She had explained that she had been living in the United Kingdom since 4 July, 2018 and had arrived in the United Kingdom via Dublin airport where her passport had been given a 90 day stamp by immigration officials at the time. She had been living in Lisburn, Northern Ireland with her husband and their child both of whom are British citizens and hold Irish passports. She said that her husband had started the process of applying for a visa for her but that she wanted the 6-month stamp to give her time to get her immigration status sorted out. Although she was found by the

said immigration officials not to be a genuine visitor there were concerns that her immediate removal to Amsterdam could be deemed as disproportionate considering the impact it would have on her family life and therefore she was granted bail and no set removal directions were made at that point. They also contacted Mr. Waddell who confirmed that he, the Appellant and their son had come in July to visit his family with the intention of returning to New Zealand. However, he had decided that he wanted to remain in the United Kingdom and he claimed that he knew that his wife would need a visa and had been in touch with the Respondent. He was advised to complete an EEA-EU application or Settlement/Family Reunion application form.

13. Although the Representative submitted that the Appellant's application form was submitted in advance of the Amsterdam trip for the reasons given it is clear that the application form was submitted after the Amsterdam trip. I place no weight on the Appellant's journey to Amsterdam and back on the same day in coming to a decision because the Respondent does not seek to rely on it in the Reasons for Refusal Letter and the Home Office Presenting Officer, while submitting the documentary evidence and cross-examining both the Appellant and Mr. Waddell about it, did not ultimately make any submissions on this point. In any event if the Appellant had obtained a 90-day visit visa on 4 July, 2018 she still had leave on this basis until 4 October, 2018 which was after the date of the Appellant's journey to Amsterdam and back. Although her application was made on or about a week later the Respondent did not seek to remove the Appellant at the time for the reasons given as detailed in paragraph 12 above.
14. The Respondent does not call into question that the Appellant and Mr. Waddell have been validly married since October, 2010 and are in a genuine and subsisting relationship and that they are the biological parents of Alan.
15. The Appellant has set out in detail in her witness statement how due to the transient nature of her husband's employment as a self-employed aircraft engineer, his job takes him away from home to other countries regularly for different short-term periods of time and as a result he is not at home very much and therefore it is not feasible for him to be the primary carer for Alan. She confirms that since they have arrived in the United Kingdom on 4 July, 2018 Alan has been registered in a local primary school and has settled well. He takes part in a number of activities outside school. She provides Alan with full-time care and a steady home life. She sets out all the tasks that she does relating to taking care of him such as preparing his meals, washing his clothes, cleaning his room and the house they live in. She helps him to get washed and dressed and to take him to all his necessary appointments. She takes him to and from school and attends parent-teacher meetings to discuss his progress. She sets out a timetable of what extracurricular activities Alan does during the week after school. She takes him to the Scouts, the Boys Brigade, karate and a Kid's Club in their local Church. She also arranges play dates with their neighbours' children or sometimes her friend's children. At the weekend she takes him to his Rugby club on Saturday mornings and stays while he attends practice and matches. She takes him swimming or to the cinema to keep him occupied. They sometimes go to the library. On Saturdays or Sundays his grandparents might visit for a few hours and sometimes they would go out for the day as a family. He has a set routine as to when he goes to bed during the school week and then at weekends. She also assists with his homework. She said in oral evidence that Alan has stayed with his paternal grandparents but she has always

stayed with him and he has never stayed over on his own. She states that Mr Waddell comes home for the weekend once or twice a month but his time is limited because of the nature of his work and the fact that he works in different countries.

16. I have no reason to doubt the Appellant's evidence in that she is the primary carer for Alan for the following reasons: -
- (a) the Appellant has been clear, detailed and consistent in her account of her role as the primary carer for Alan.
 - (b) the fact that Mr. Waddell has a job which is transient in nature is confirmed by the supporting evidence which has been lodged in the Appellant's bundle. For example, at page 110 of the Appellant's bundle Mr. Waddell's employers as at 9 January, 2019 confirmed that he was working at Solinair Maintenance Organisation, Ljubljana Airport, Slovenia. There is also a copy of several independent contractor agreements lodged showing that he worked in Australia whilst they were all living in New Zealand at the time.
 - (c) Mr. Waddell has made a witness statement and gave oral evidence in support of the Appellant. I have no reason to doubt his evidence which again I found to be clear, detailed and consistent. He said that when he came to Northern Ireland for a holiday he had received a number of job offers outside the United Kingdom and that was the reason why he decided to accept them and for his family to stay in Northern Ireland. At paragraph 5 of his witness statement he lists 10 countries where he had worked for short periods of a few days to a few months between November, 2016 to 10 days before the hearing in such countries as Tamworth, Australia, Caines, Australia, Papua New Guinea, Tasmania, Chester in the United Kingdom, Denmark, Slovenia, Ireland, Slovenia again and in oral evidence he said that since he wrote his witness statement he has now obtained a job in Belgium 10 days ago. He is likely to be there for 6 months and his contract may be extended for up to a year. He confirmed that he had only been home three times since Christmas 2018 because although he is given time off and indeed the said letter from his Slovenian employers dated 9 January, 2019 stated that he would have one week off in four weeks he did not take the time off because of time constraints to get the job done. I fail to see how Mr. Waddell could be Alan's primary carer given the transient nature of his job.
 - (d) although Mr. Waddell has family in Northern Ireland, he states that his parents are in their 80's and could not cope looking after Alan. He has an older brother and a younger brother but both have their own families and both brothers and their respective wives work full-time and would not be able to look after Alan. These said family members have provided letters at pages 94, 98, and 102 of the Appellant's bundle to confirm the commitments that they all have. I have no reason to doubt the contents of the said letters. Although the paternal grandparents in particular see him at the weekend and the Appellant said in oral evidence that they do assist from time to time for example in an emergency or if she has to attend an appointment to look after him for a few hours, in oral evidence she said that he never stays over on his own with them. When they do stay over at their home she and her son stay over together. I do not accept that any member of Mr. Waddell's family would be prepared to assist Mr. Waddell in caring for Alan if his mother had to leave the United Kingdom

- (e) the Respondent states that the Appellant had not lodged a letter from Alan's primary school to confirm his address or her address but this has been rectified at page 90 of the Appellant's bundle which is a letter dated 14 May, 2019 from Alan's school who confirms that the school record shows that his home address is with his mother. The letter also confirms that the Appellant drops Alan off at school and picks him up every day and has consistently attended parent teacher conferences when required during the academic year since he was registered at the school. The Appellant has also provided at page 78 a copy of her tenancy agreement which gives the same address. I find that the Appellant has now satisfied the Respondent's concerns in relation to this point.
17. I note (as pointed out by the Home Office Presenting Officer at page 21 of 74 of the Appellant's application form copied at page 17 of the Appellant's bundle for ease of reference) that in answer to question 2.2 the Appellant has ticked the box to state that she is a joint primary carer who shares caring responsibilities for a British citizen, namely Alan, equally with another person, namely her husband. In oral evidence the Appellant said that the box was ticked in was an error. She had made a mistake. It should have been completed to show that she was the primary carer but that her lawyers had completed the form. Mr. Waddell said in oral evidence that at the time when the application was completed he was in Northern Ireland and was at home at that time more than he was away. Firstly, for the reasons given, I find that the Appellant is the primary carer for Alan notwithstanding that the answer given to question 2.2. Secondly, the Appellant meets the criteria of being the "primary carer" notwithstanding the answer given to question 2.2. Regulation 16(8) as detailed in paragraph 9 above states that the "primary carer" has to be a direct relative. In this case the Appellant is Alan's biological mother and either (my underlining) the person has primary responsibility for their care or (my underlining) she shares equally the responsibility with one other person who is not an exempt person. In this case I find that the Appellant is the person who has primary responsibility for Alan.
18. The Home Office Presenting Officer submitted that Mr. Waddell's employment on its own would not be sufficient to show that he could not care for Alan should the Appellant require to leave the United Kingdom. I fail to see how given the nature of Mr Waddell's employment where he moves regularly between countries and is not very often at home and the lack of other family support he would have to rely on to look after Alan in his absence. The Appellant provides stability and emotional support for Alan as his mother particularly as his father is away so often. If the Appellant were to return to New Zealand or Thailand and Mr Waddell had to put some sort of care plan or arrangement in place for Alan whilst he was away working it is clear that Alan would be left on his own with neither parent because his father would require to work away from home as he said in oral evidence that there was no work for him in Northern Ireland. I refer to the Court of Justice of the European Union judgement in Chavez-Vilchez C-133/15 where it states as quoted in the Representative's skeleton argument at paragraph 70 that it is important to determine in each case which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third country national parent. I find that in this case Alan is fully dependent on his mother and as such if he were required to separate from her as it states at paragraph 71 of said case that the risk of separation could affect Alan's physical and emotional development. He is only 8 years of age.

19. It was also submitted by the Home Office Presenting Officer that despite the transient nature of Mr Waddell's employment that as he is working in EEA States therefore Alan does not require to leave the EEA. Firstly, I have already considered the scenario should Alan remain in Northern Ireland without his mother or father, Secondly, I do not find that Alan can be expected to uproot his life and education if he were to move round Europe with his father at the age of 8 and live in different countries for short periods at a time. His father said in oral evidence that when he lives away from home accommodation is supplied by his employers which means sharing with other workers which allows the job to be financially viable for him in order that he can look after his family. Such accommodation and lifestyle in my view would not be suitable for Alan. Thirdly, simply because Mr. Waddell has had various jobs in Europe from June 2018 to the date of hearing does not in my view mean to say that his jobs will continue only in Europe in the future taking into account his previous employment since November, 2016 which took him to Australia, Tasmania, Papua New Guinea. It is clear that Mr. Waddell has a skill set which can take him anywhere in the world.
20. For the reasons above, I do not accept the reasons given by the Respondent in the refusal to issue a Derivative Residence Card to the Appellant. The Appellant has discharged the burden of proof.

NOTICE OF DECISION

21. The appeal is allowed under the 2016 Regulations.
22. No anonymity direction is made.

Signed:

Date: 30 May 2019

Judith Grant-Hutchison

Judge J. C. Grant-Hutchison
Judge of the First-Tier Tribunal

TO THE RESPONDENT **FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award because the Appellant required to give further evidence at a hearing to discharge the burden of proof.

Signed:

Date: 30 May 2019

Judith Grant-Hutchison

Judge J. C. Grant-Hutchison
Judge of the First-tier Tribunal