Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02617/2018

THE IMMIGRATION ACTS

Heard at Fox Court
On 13 December 2018

Decision & Reasons Promulgated
On 29 January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

DIEUDONNE [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Saifolahi, Counsel
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS ON ERROR OF LAW

1. The appellant is a citizen of Cameroon born on 9 May 1987. He overstayed his leave as a Tier 4 (General) Student Migrant and was served with enforcement papers. He then applied for a derivative residence card as the primary carer of his wife, Ms [KA], a British citizen.

2. The respondent refused the application on 3 October 2017 because: (1) whilst it was accepted Ms [A] required some care which the appellant provided, it was not accepted she was wholly dependent on this care or that he cared for her "all day", as

he had claimed, because he was seeking full-time employment; and (2) Ms [A] would not be compelled to leave the UK if the appellant were required to leave. This appeal now turns on the second of those reasons.

3. The appellant appealed and his appeal was heard by Judge of the First-tier Tribunal Griffith at Taylor House on 22 June 2018. The appellant attended and gave evidence, as did Ms [A]. The judge first considered whether the appellant was the 'primary carer' of Ms [A] and found he was. There was no evidence before her showing the appellant was working full-time and the medical evidence supported the claim that the appellant was Ms [A]'s carer. I pause to note that Ms [A] has schizoaffective disorder and has spent periods as an in-patient.

4. The judge then went on to consider whether Ms [A] would be unable to reside in the UK if the appellant left. She noted the Upper Tribunal guidance in *Ayinde and Thinjom (Carers – Reg.15A – Zambrano)* [2015] UKUT 00560 (IAC). She found Ms [A] would not be able to live anywhere but the UK and reasoned the appellant had not shown that she would be forced to leave the UK.

5. Permission to appeal was granted by the First-tier Tribunal on two grounds. Firstly, it was arguable the judge had failed to consider adequately the care which the appellant provided to Ms [A], and (2) it was arguable the judge had not adequately considered the alternative argument made by the appellant, which was that his son would be forced to leave the UK if he left.

6. The respondent has not filed a rule 24 response opposing the appeal. There is no cross-appeal on the point about the appellant being Ms [A]'s primary carer.

7. I heard submissions as to whether the judge made a material error of law. Ms Saifolahi developed the points she made in her grounds seeking permission to appeal. In effect, she made no criticism of the judge's self-direction in law. She had correctly applied the principles set out in *Ayinde & Thinjom*. However, had the judge properly considered all the evidence before her, she could not have concluded, as she did, that Ms [A] would not be forced to leave the UK. In particular, she highlighted the judge's findings that Ms [A] would not leave the UK if the appellant left and that, if she remained, support would be available from Ms [A]'s mother.

8. Ms Saifolahi took me to parts of the evidence suggesting Ms [A] and her mother had a "difficult relationship", that the emotional and practical support provided by the appellant was necessary to ensure Ms [A]'s condition remained stable and highlighting the negative impact which the appellant's removal would have on Ms [A]'s recovery. There was evidence in the form of a letter from Ms [A]'s care coordinator recommending that the appellant remain with Ms [A] and stressing the importance of Ms [A] not becoming "enveloped" by NHS services, which is what would happen if the appellant left. It would risk Ms [A] having another hospital admission. The judge had a letter from Ms [A]'s treating psychiatrist supporting the appellant's continued presence. Ms Saifolahi also argued the position of the appellant's son required separate consideration, which the judge had failed to do.

9. Mr Wilding argued that the appellant's appeal was a classic example of rearguing the case rather than showing a material error of law. The question was whether Ms [A] would be compelled to leave the UK, not whether it was reasonable to expect her to do so. It was not a proportionality test. The judge had found - and she was entitled to find - that there was no compulsion on Ms [A] to leave the UK. She had clearly taken the evidence into account.

10. I reserved my decision as to whether the decision of Judge Griffith contains a material error of law.

11. The Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") read as follows:

> "Derivative right to reside
>
> 16.- (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.
>
> …
>
> (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."

12. The meaning of "unable to reside" has been the subject of consideration in the Courts and the Upper Tribunal. In *R (Sanneh) v SSWP & HMRC* [2013] EWHC 793 (Admin) Hickinbottom J considered the case of a person who claimed that the denial of certain benefits would lead to the primary carer of a British child having to leave the UK in contravention of the *Zambrano* principle[1]. At paragraph 19 he set out the following propositions derived from case law:

> "i) All nationals of all member states are EU citizens. It is for each member state to determine how nationality of that state may be acquired, but, once it is

[1] *Ruiz Zambrano v Office National de l'Emploi* (C-34/09) 8 March 2011, [2012] QB 265.

acquired by an individual, that individual has the right to enjoy the substance of the rights that attach to the status of EU citizen, including the right to reside in the territory of the EU. That applies equally to minors, irrespective of the nationality of their parents, and irrespective of whether one or both parents have EU citizenship.

ii) An EU citizen must have the freedom to enjoy the right to reside in the EU, genuinely and in practice. For a minor, that freedom may be jeopardised if, although legally entitled to reside in the EU, he is compelled to leave EU territory because an ascendant relative upon whom he is dependent is compelled to leave. That relative may be compelled to leave by dint of direct state action (e.g. he is the subject of an order for removal) or by virtue of being driven to leave and reside in a non-EU country by force of economic necessity (e.g. by having insufficient resources to provide for his EU child(ren) because the state refuses him a work permit). The rights of an EU child will not be infringed if he is not compelled to leave. Therefore, even where a non-EU ascendant relative is compelled to leave EU territory, the article 20 rights of an EU child will not be infringed if there is another ascendant relative who has the right of residence in the EU, and who can and will in practice care for the child.

iii) It is for the national courts to determine, as a question of fact on the evidence before it, whether an EU citizen would be compelled to leave the EU to follow a non-EU national upon whom he is dependent.

iv) Nothing less than such compulsion will engage articles 20 and 21 of the TFEU. In particular, EU law will not be engaged where the EU citizen is not compelled to leave the EU, even if the quality or standard of life of the EU citizen is diminished as a result of the non-EU national upon whom he is dependent is (for example) removed or prevented from working; although (a) diminution in the quality of life might engage EU law if (and only if) it is sufficient in practice to compel the a relevant ascendant relative, and hence the EU dependent citizen, to leave, and (b) such actions as removal or prevention of work may result in an interference with some other right, such as the right to respect for family life under article 8 of the European Convention on Human Rights.

v) Although such article 8 rights are similar in scope to the EU rights conferred by article 7 of the Charter of Fundamental Rights of the European Union, the provisions of the Charter are addressed to member states only when they are implementing EU law. If EU law is not engaged, then the domestic courts have to undertake the examination of the right to family life under article 8; but that is an entirely distinct area of protection.

vi) The overriding of the general national right to refuse a non-EU national a right of residence, by reference to the effective enjoyment of the right to reside of a dependent EU citizen, is described in both Dereci (paragraph 67) and Harrison (paragraph 66) as "exceptional", meaning (as explained in the latter), as a principle, it will not be regularly engaged."

13. In *Ayinde and Thinjom (Carers – Reg.15A – Zambrano)* [2015] UKUT 00560 (IAC) the Upper Tribunal considered the leading European and domestic authorities and reiterated that the *Zambrano* principle only applies in situations in which the EU citizen is forced to leave the territory of the EU. There was no test of reasonableness and the test was not whether there would be a reduction of quality of life or standard of living. In the case of carers of adult family members, the fact they would have to receive care in a residential care home, against their wishes, did not engage the *Zambrano* principle. It was plain the appellants in those cases would not leave the UK and follow their carers. The Upper Tribunal stated as follows:

> "55. The differential in the care provided by a family member acting as carer and the standard of care provided by social services, care agencies or the NHS does not engage the *Zambrano* principle."

14. In *Patel v SSHD; SSHD v Shah & Boursuisa* [2017] EWCA Civ 2028, the Court of Appeal held that the judgment in *Chávez-Vílchez and Others v Raad van Bestuur van de Sociale Verbekeringsbank and Others* (C-133/15) did not alter the approach to the taken. The test was one of compulsion in respect of both children and adults. With regard to the latter, there was discussion as to which circumstances might entitle adults cared for by other relatives to succeed in showing entitlement to a derivative right of residence:

> "84. During the hearing, we asked the Secretary of State to consider in what circumstances compulsion might arise in respect of adult dependents of those without residence: if there were none, might the regulation so interpreted be a dead letter, forcing a different interpretation to preclude redundancy? Mr Blundell's response accepts that this category of cases might be very narrow. However, he did proffer examples. Where the family share a rare blood group, and blood transfusion or bone marrow transplants might be required, it might be arguable that the carer should remain. He also instanced a British adult citizen with severe autism, dependent for all his care on a third country national relative, where it would be intolerable for the identity of the carer to change. It is clear Mr Blundell was intending to give examples rather than an exhaustive survey. For myself, I would instance significant psychological dependence derived from any well-documented and recognised psychological condition, as a possible example. There may be more. The point is that the category exists, and there can be no argument that the regulation must have an expanded reading in order to avoid redundancy."

15. In the light of these authorities, I am unable to accept there is any material error of law in the decision of Judge Griffith.

16. The parties were in agreement that she directed herself correctly as to the approach explained in *Ayinde & Thinjom*, which has not been changed by *Patel*. She set out the main principles from *Ayinde & Thinjom* at paragraphs 37 and 38. There is no doubt that she recognised the test was one of compulsion and that, therefore, when she assessed the evidence she was asking herself the correct question.

17. In reaching her conclusion, I am satisfied the judge considered all the evidence before her. For example, in paragraph 35, she referred to independent evidence supporting

the claim that the appellant carried out tasks to assist his wife. In paragraph 39, she referred to medical evidence showing that the appellant supported his wife and that the removal of his support may result in added stress and mental tension. She had recorded evidence that Ms [A] is prone to relapsing, needs monitoring to ensure she takes her medication and that the appellant provides emotional and practical support which the NHS cannot provide (paragraph 21). The decision read as a whole shows the judge was conscious of the importance of the support provided by the appellant and of the likely impact on her of removing the appellant.

18. Earlier in her decision, the judge had recorded the evidence to her that the couple had considered whether moving to Cameroon was feasible but concluded it was not because of the lack of healthcare (paragraphs 16 and 20). The judge directed herself to examine critically the claim that a British citizen will leave the UK[2] and concluded that Ms [A] would not be able to live anywhere but the UK (paragraph 40). That was a finding she was entitled to make on the evidence.

19. Finally, the judge noted the absence of a statement by the appellant's mother-in-law. She recorded that the appellant was asked questions about his contact with his mother-in-law and she noted the evidence of Ms [A] that her mother was a foster carer and could make a statement. She found there was an inconsistency as between the appellant and Ms [A]'s evidence as to who was looking after their son on the day of the hearing. She was unable to make any firm findings about the nature and extent of any family support which would be available to Ms [A] in the absence of the appellant and concluded there would be "some assistance" given Ms [A] had lived with her mother before marrying the appellant (paragraph 41). Again, that was a finding she was entitled to make.

20. Once it is clear that the judge had proper regard to all the evidence, the appellant's challenge to her decision must fall away, given the concession that she directed herself correctly in law. It was not suggested her conclusion was irrational and it plainly was not. As seen, the judge's central conclusion was that Ms [A] would not move to Cameroon and that the circumstances were not such that the removal of the appellant would, properly understood, compel her to leave the UK. It would undoubtedly have an adverse effect on Ms [A] and would be suboptimal in many respects. However, the circumstances were not such that Ms [A] would be unable to reside in the UK. The case did not therefore fall within the narrow band of cases foreseen in *Patel* which could succeed.

21. Ms Saifolahi's second ground was that the child would be forced to leave the UK if the appellant were removed. Less attention was paid to this ground at the hearing. It is true the judge did not set out a separate conclusion about the child but her findings did roll up consideration of the child within her assessment of whether Ms [A] would be forced to leave. For example, she referred to the child in paragraphs 39, 40 and 41. The fact the judge's conclusion that Ms [A] would not be forced to leave the

[2] See paragraph 58 of *Ayinde & Thinjom*.

UK was sound has a significant impact on the case insofar as it concerns the child. The child could remain with Ms [A] and the evidence does not go so far as to show that she would be unable to look after the child in the appellant's absence or, for that matter, that her mother would not be able to do so if Ms [A]'s health did deteriorate.

22. Judge Griffith's decision does not contain a material error of law. The appellant's appeal is dismissed.

23. Having looked at the evidence in this appeal, it is clear that there is a case to be made on behalf of the appellant on article 8 grounds concerning whether there are insurmountable obstacles to family life being continued in Cameroon. Ms [A] and the child are British and Judge Griffith has already made a finding that Ms [A] could not relocate to Cameroon. However, there is no article 8 ground before me and much will depend on the up to date position regarding Ms [A]'s state of health.

Notice of Decision

The Judge of the First-tier Tribunal's decision dismissing the appeal does not contain a material error of law and shall stand.

No anonymity direction is made.

Signed Date 17 December 2018

Deputy Upper Tribunal Judge Froom