



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/04515/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 22 June 2016**

**Decision and Reasons
Promulgated
On 5 July 2016**

Before

**UPPER TRIBUNAL JUDGE C LANE
DEPUTY UPPER TRIBUNAL JUDGE DOYLE**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**Miss MARIA CHRISTINA GUARIN OLERMO
(Anonymity direction not made)**

Respondent

Representation:

For the Appellant: Miss J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr S Karim (counsel) instructed by Ashfield, Solicitors

DECISION AND REASONS

1. We have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence we do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a

decision of First-tier Tribunal Judge Bradshaw, promulgated on 9 November 2016 which allowed the Appellant's appeal.

Background

3. The Appellant was born on 14 July 1979 and is a national of the Philippines.

4. The appellant came to the UK on 7 February 2009 as a tier 4 student. Although the respondent extended leave to remain as a tier 4 student that leave was curtailed on 14 August 2013 so that it expired on 3 January 2014. On 20 May 2013 the appellant applied for a residence card as a derivative right to reside in the UK. That application was refused on 25 October 2014.

5. On 25 November 2014 the appellant applied for a residence card as confirmation of her derivative right to reside in the UK as the primary carer of her British citizen mother. That application was refused on 19 January 2015.

The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Bradshaw ("the Judge") allowed the appeal against the Respondent's decision.

7. Grounds of appeal were lodged and on 4 May 2016, Acting Resident Judge Zucker gave permission to appeal stating *inter alia*

"2. The grounds take issue with the finding that the appellant was the primary carer. That is a finding of fact that was open to the judge and for the avoidance of doubt permission is not granted to challenge the finding. However it is arguable that the judge has failed to consider the application of regulation 15A[4A](c) and that such amounts to an error of law. The guidance in the case of Ayinde and Thinjom (Carers - Reg.15A - Zambrano) [2015] UKUT 560 may offer some assistance."

The Hearing

8. (a) Ms Isherwood, for the respondent, told us that the decision contains a material error of law because the Judge omitted one crucial part of the test set out in regulation 15A(4A) of the Immigration (European Economic Area) Regulations 2006. Ms Isherwood accepted there can be no challenge to the Judge's finding that the appellant is the primary carer of her British citizen mother, but argued that the Judge failed to consider what would happen to the appellant's British citizen mother if the appellant is required to leave the UK (which is the final part of the test set out in regulation 15A(4A) of the 2006 Regulations)

(b) Ms Isherwood took us to [13] of the decision. The first sentence of [13] is a finding that the appellant works 24 hours a week. Ms Isherwood told us that that fact is not mentioned in the care plan referred to at [16] of the decision, so that an inconsistency in the evidence before the Judge has not been resolved. Ms Isherwood relied on at [41] & [42] of *Ayinde and Thinjom (carers- Reg 15A - Zambrano)* (2015) UKUT 00560, and reminded us that the appellant's mother already receives NHS care in the UK. She told us that even if the appellant's mother requires 24-hour care, that care is available to the appellant's mother regardless of the whereabouts of the appellant.

(c) Ms Isherwood took us to [17] of the decision, and told us that there, when the Judge weighs the various facts as he found them to be, the Judge applied the wrong test. At [17] the Judge finds that the appellant's mother requires daily 24-hour care, which, he finds would be

.... difficult and detrimental to her health...

without the appellant's assistance. She reminded us that the pertinent question set by regulation 15A(4A) is

will the appellant's mother be unable to reside in the UK or in another EEA state if the appellant leaves the UK?

(d) Ms Isherwood urged us to set the decision aside and then to substitute our own decision dismissing the appeal.

9. Mr Karim, counsel for the appellant, told us that the decision does not contain any errors of law, material or otherwise. He adopted the terms of the skeleton argument prepared for the appellant, and relied on *Shizad (sufficiency of reasons: set aside)* [2013] UKUT 85 (IAC). He argued that the respondent's submissions are irrelevant. He told us that the Judge acknowledges that the appellant works part time, before finding that the appellant's presence in the UK is a crucial part of her mother's overall care-plan. He took us to [3] of the decision, where the Judge sets out the correct test in law, and then told us that the Judge's findings throughout the decision are informed by the correct self-direction found at [3]. He asked us to dismiss the respondent's appeal and allow the decision to stand.

Analysis

10. EEA Regulation 15A (4A) says

15A. (1) A person ("P") who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.

.....(4A) P satisfies the criteria in this paragraph if—

- (a) P is the primary carer of a British citizen (“the relevant British citizen”);
- (b) the relevant British citizen is residing in the United Kingdom; and
- (c) the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave.

11. In *Ayinde and Thinjom (carers- Reg 15A - Zambrano)* (2015) UKUT 00560 it was held that (i) The deprivation of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizens identified in the decision in *Zambrano* [2011] EUECJ C-34/09 is limited to safeguarding a British citizen’s EU rights as defined in Article 20; (ii) The provisions of reg. 15A of the Immigration (European Economic Area) Regulations 2006 as amended apply when the effect of removal of the carer of a British citizen renders the British citizen no longer able to reside in the United Kingdom or in another EEA state. This requires the carer to establish as a fact that the British citizen will be forced to leave the territory of the Union; (iii) The requirement is not met by an assumption that the citizen will leave and does not involve a consideration of whether it would be reasonable for the carer to leave the United Kingdom. A comparison of the British citizen’s standard of living or care if the appellant remains or departs is material only in the context of whether the British citizen will leave the United Kingdom' (iv)The Tribunal is required to examine critically a claim that a British citizen will leave the Union if the benefits he currently receives by remaining in the United Kingdom are unlikely to be matched in the country in which he claims he will be forced to settle.

12. The Judge correctly sets out the test to be applied at [6] of the decision. The Judge sets out his findings between [10] & [20] of the decision. At [19] the Judge finds that the appellant is her mother’s primary carer. It is accepted that the appellant’s mother is a British citizen. Those findings of fact are sufficient to address regulation 15A(4A)(a) & (b).

13. What the Judge does not do is address regulation 15A(4A)(c) of the 2006 regulations. Throughout his findings of fact, the Judge considers the appellant’s mother’s mental health and associated needs. He finds that the appellant is instrumental in providing care, and that the appellant’s mother will face challenges without the assistance offered by the appellant, but the Judge does not consider the appellant’s mother’s ability to reside in the UK if the appellant has to leave, nor does he make any findings in fact which drive at the test set out in regulation 15A(4A)(c) of the regulations.

14. We find that the failure to consider regulation 15A(4A)(c) of the regulations is a material error of law, because it leads to an incomplete

assessment of the appellant's case. We must therefore set the Judge's decision aside. Although we set the Judge's decision aside, there is sufficient material before us to enable us to make our own findings of fact and substitute our own decision.

Our findings of fact

15. The appellant came to the UK from the Philippines on 7 February 2009 as a tier 4 student. She has remained in the UK since then. The appellant lives with her mother, who is a British citizen. The appellant's two sisters live in the UK. They are also British citizens.

16. The appellant's mother suffers from psychotic depression with cognitive impairment. She is tormented by paranoid ideation and has poor memory. Her condition is treated by oral medication. The appellant helps in the administration of that medication.

17. The appellant has lived with her mother since June 2013. She assists her mother with the ordinary activities of daily living both during the day and during the night. The appellant's mother also now receives night-time assistance from NHS carers two nights each week. A care plan was drawn up for the appellant's mother in September 2015. That care plan says that without the appellant the appellant's mother would require constant care, and would struggle if she had to enter residential care.

18. The appellant works 24 hours per week. Her sisters are British citizens who live in the UK. One of her sisters helped with the appellant's mother's care until recently. Because of her own health concerns, she is no longer able to offer assistance with the appellant's mother's care.

Discussion

19. It is clear from the evidence in this case that the appellant's mother suffers from a mental disorder and that the appellant provides a great deal of care to her mother. The finding that the appellant is her mother's primary carer has been preserved. The care plan relied on by the appellant indicates that the appellant's mother already receives NHS care. If the appellant does not stay in the UK, her mother will rely more heavily on NHS resources.

20. At [42] of *Ayinde and Thinjom* this Tribunal said

The appellants argue that the genuine enjoyment of the substance of the rights of their British family members includes the right of those suffering the effects of increasing age, infirmity or illness should be protected against losing their home and losing the care provided by their family members. The submission runs dangerously close to arguing that those who are unable to benefit from carers from within their family are at risk of suffering a violation of their rights by being cared for by local authority carers or social workers or by the NHS or by being placed in a care-home. This is

simply misconceived. The support provided by local authorities, care agencies, residential homes and hospitals has at its core the preservation of the dignity of those under their care. Care workers would justifiably feel aggrieved at the suggestion that their care falls below a standard that preserves the dignity of their patients. The fact that examples can be found of care falling below acceptable standards is not to the point. Whilst, in the course of argument, Mr Knafler disavowed any suggestion to the contrary, it is the inevitable consequence of his reliance upon the Charter. If he were not suggesting the two British citizens involved in these appeals would suffer a loss of their protected right to dignity if they were required to go into residential care, there would have been no point in relying on the Charter.

21. There is no reliable evidence that the appellant's mother's mental health is so fragile that she cannot accept either an increase in NHS care or a transfer to residential care. The weight of reliable evidence indicates that if the appellant leaves the UK, her mother will be cared for; there are facilities available for the appellant's mother. We have to consider whether or not the appellant's mother would be unable to reside in the UK. The weight of reliable evidence indicates that, because of the available care for the appellant's mother, she will be able to reside in the UK. A high threshold is set by Regulation 15A(4A)(c) of the 2006 regulations. The test is unambiguously whether or not the appellant's mother will be unable to continue to reside in the UK. The appellant's mother is not well and requires care. Care is available. Those facts indicate that the appellant's mother is able to continue to reside in the UK.

22. The appellant cannot fulfil the requirements of the final part of the test set out in Regulation 15A(4A) of the 2006 regulations. We therefore have to dismiss the appellant's appeal.

Decision

23. The decision of Judge RJ Bradshaw promulgated on 9 November 2015 contains errors of law such that it falls to be set aside. We therefore set the decision aside.

24. We have remade the decision.

25. The appeal against the respondent's decision dated 19 January 2015 is dismissed.

Signed

Date: 5th July 2016

Deputy Upper Tribunal Judge Doyle