

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Case No.** CPIP/3334/2017

**Before UPPER TRIBUNAL JUDGE WARD**

**Decision:** The claimant's appeal against the decision of the First-tier Tribunal sitting at Sutton on 23 May 2017 under reference SC154/16/03017 is allowed. The decision of the tribunal was in error of law. Acting under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007, I remake the decision as follows:

The claimant's appeal against the entitlement decision made on 2 June 2016 and the overpayment decision made on 15 June 2016 is allowed. She was not disentitled from Personal Independence Payment from and including 20 February 2014 on the ground of being a "person subject to immigration control". Consequently, she was not overpaid Personal Independence Payment between 20 February 2014 and 28 September 2015.

**REASONS**

1. The claimant was found by the First-tier Tribunal ("FtT") to be a national of Ghana. It is submitted on her behalf, and appears not to be in dispute, that her son, L aged twenty-six at the material time, sustained severe brain damage at birth, is not able to speak, has very extensive care needs and requires constant supervision. The claimant has been his sole carer for at least the past twenty years and had been appointed as Deputy for him by the Court of Protection. L is a British national.

2. On 2 June 2016 the DWP took a decision that the claimant was not entitled to Personal Independence Payment, because she was a "person subject to immigration control" (as defined) and so precluded from Personal Independence Payment by the operation of regulation 16(d)(i) of the Social Security (Personal Independence Payment) Regulations 2013 ("the PIP Regulations"). A decision followed that there had been a recoverable overpayment.

3. The claimant's representative invited the FtT to conclude that the claimant had a derivative right to reside in the UK on the basis of being the primary carer of a British citizen who would be unable to reside in the EU if she were required to leave. This was, of course, a reference to the right declared by the Court of Justice of the European Union in *C-34/09 Ruiz Zambrano* and subsequently reflected in reg.15A(4A) of the Immigration (European Economic Area) Regulations 2006 and then in reg.16(5) of the 2016 Regulations which replaced them.

4. The response of the FtT was that:

"This may be so. However a right to reside in the UK on that basis does not mean that [the claimant] should not be regarded as a person subject to immigration control. If it did, then that category of people would have been included in part 2 to the [Schedule] to the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000" ["the 2000 Regulations"].

That schedule excludes from being “subject to immigration control” for some social security purposes limited categories of people who otherwise would be.

5. The expression “a person subject to immigration control” is defined by s.115(9) of the Immigration and Asylum Act 1999 and extends to among others, a person who is not a national of an EEA State and who requires leave to enter or remain in the United Kingdom but does not have it. However, if the claimant did have a derivative right, she would not require leave to enter or remain, because of the provisions of section 7(1) of the Immigration Act 1988. This would mean that she was not a “person subject to immigration control”, so would not need to have recourse to the Schedule to the 2000 Regulations and reg.16(1)(d)(i) of the PIP Regulations would not apply to her. This much has been accepted by the Secretary of State throughout the Upper Tribunal proceedings.

6. What has until recently been in dispute in these proceedings is whether the claimant was entitled to a derivative right. The FtT judge gave permission to appeal observing that “the legal authorities dealing with *Zambrano* carers related to children under the age of majority rather than adults”.

7. I gave directions for an oral hearing, observing that:

“Even if there be any room for debate as to what *Zambrano* relevantly decided” (as to which I do not express a view at this stage), it is open to national legislators to make more generous provision than EU law may require. My present view, subject to further submissions, is that the Immigration (EEA) Regulations 2006 appear to indicate that the answer is that [the person requiring care does not have to be a minor child]. Paragraphs (2) and (5) expressly stipulate that the person concerned must be under eighteen. Paragraphs (3) and (4) expressly require the person concerned to be in education. Para. (4A) by contrast contains no such limitation.”

8. I subsequently in further directions drew to the attention of the parties the decision of Lane J in *R (Hamid Saeed) v SSHD* [2018] EWHC 1707 (Admin). In relation to that decision I observed that:

“The decision contains at various points references to Home Office material which appears to suggest that SSHD accepts that it is possible to be the *Zambrano* carer of an adult. See for instance para. 8: plainly if a grandchild can for derivative rights purposes be the primary carer of their grandparent, the grandparent will be an adult. In para. 9, it is apparent that Mr Teyyeb Hussain, the person by reference to whom derivative rights were claimed, was an adult. Likewise, the forms discussed at paras. 12 and 13 indicate that an adult qualifies for this purpose.”

9. On 11 January 2019, the Government Legal Department informed the Upper Tribunal that, having taken counsel’s advice, the Secretary of State now accepts that:

“1. Regulation 16(5) of the Immigration (European Economic Area) Regulations 2016 (and regulation 15A (4A) of the 2006 Regulations) applies to

carers of adult British citizens as well as children, and this reflects the relevant EU case law; and

2. On the exceptional facts, the [claimant's] British son would have been compelled to leave the EU if she had been required to leave at any time relevant to the decision under appeal."

It was therefore accepted that the appeal should succeed. While the Upper Tribunal has not received comments on behalf of the Secretary of State specifically on the provisional analysis set out in directions and recited above, I am satisfied as a result of that analysis that the concession on behalf of the Secretary of State is correctly made.

10. Consequently, the decision of the First-tier Tribunal was in material error of law and I set aside and remake its decision as set out above.

**(Signed on the original)**

**C G Ward  
Judge of the Upper Tribunal**

**Dated: 22 January 2019**