Upper Tribunal
(Immigration and Asylum Chamber)

Ayinde and Thinjom (Carers – Reg.15A – *Zambrano*) [2015] UKUT 00560 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 30 April 2015

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) GEORGE OLUWASHEUN AYINDE
(2) SONTHAYA THINJOM

Respondents

Representation:

For the Secretary of State:	Ms J. Smyth, instructed by the Government Legal Department
For the first Respondent:	Mr Stephen Knafler QC and Ms G. Mellon instructed by Irving & Co.
For the second Respondent:	Mr Stephen Knafler QC and Ms A. Benfield instructed by Camden Community Law Centre

(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.

DECISION AND REASONS

1. The Secretary of State appeals against two decisions of the First-tier Tribunal. Each appeal raises a similar issue. In each case, the First-tier Tribunal Judge allowed the appeal against the decision of the respondent to refuse to issue them with a derivative residence card. In doing so the Judge purported to apply the principle developed by the Court of Justice of the European Union in *Ruiz Zambrano (European citizenship)* [2011] EUECJ C-34/09 as incorporated into domestic United Kingdom law by the insertion of regs. 15A and 18A into the Immigration (European Economic Area) Regulations 2006.

2. For the sake of continuity Mr Ayinde and Ms Thinjom will be referred to as the appellants as they were in the First-tier Tribunal.

3. The EEA Regulations as they took effect from 8 November 2012 provided:

> "15A. Derivative right of residence
>
> (1) A person ('P') who is not an exempt person and who satisfies the criteria in paragraph …(4A)… of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.
>
> [Neither Mr Ayinde nor Ms Thinjom is an exempt person.]
>
> (4A) P satisfies the criteria in this paragraph if -
>
> i. he is the primary carer of a British citizen ('the relevant British citizen')

ii. the relevant British citizen is residing in the United Kingdom; and

iii. the relevant British citizen would be unable to reside in the UK or in another EEA state if P were required to leave. [*My underlining*]

(7) P is to be regarded as a 'primary carer' of another person if -

(a) P is a direct relative or a legal guardian of that person; and

(b) P -

(i) is the person who has primary responsibility for that person's care…

(8) P will not be regarded as having responsibility for a person's care for the purpose of paragraph (7) on the sole basis of a financial contribution towards that person's care."

4. Regulation 18A of the 2006 EEA Regulations requires the Secretary of State to issue a person with a derivative residence card on application and production of a valid passport and proof that the applicant has a derivative right of residence under reg. 15A of the 2006 Regulations.

5. The European Operational Policy Team provided guidance to UK Border Agency staff on considering applications from persons claiming a derivative card in a document entitled '*Derivative Rights of Residence – Ruiz Zambrano cases*' of 12th December 2012 (Issue number: 21/2012). It included the following passage:

> Would the British citizen be forced to leave the EEA if the primary carer was forced to leave?
> 24. Even where there is evidence of primary and shared responsibility, evidence to show why the British citizen would be forced to leave the EEA (for example because they cannot access alternative care in the UK) is still required.
> 25. If there is another person in the UK who can care for the British citizen, then a derivative residence card must be refused on the basis that such a refusal would not result in the British citizen being forced to leave the EEA.
> 26. Therefore caseworkers must assess whether there is another direct relative or legal guardian in the UK who can care for the British citizen and, in the case of a child, who has already had established contact. In making this assessment, the burden of proof remains on the applicant and the standard of proof is the balance of probabilities. This means the onus is on the applicant to demonstrate that their removal would force the British citizen to leave the EEA. If there is no information to demonstrate this, then caseworkers may wish to make further enquiries with the applicant as to the status or whereabouts of the other parent in the case of a child, or alternative care provisions in the case of a British citizen adult.
> 27. Examples of when it may be appropriate to issue a derivative residence card to a primary carer would be where:
>
> there are no other direct relatives or legal guardians to care for the British citizen; or
>
> there is another direct relative or legal guardian in the UK to care for the British citizen but there are reasons why this carer is not suitable; or

in the case of an adult British citizen, there are no alternative care provisions available in the UK.

6. Originally, this appeal contained three linked cases. The third appeal concerned a claimant, a citizen of Algeria, the mother of a British citizen born 4 January 2012, who sought leave to remain in the United Kingdom with her son and the child's father. Significantly, although this was also a claim by a foreign national seeking to remain as the carer of a Union citizen, the application was made pursuant to Article 8 of the ECHR and in pursuit of a protected private and family life and not under the EEA Regulations. It was, therefore, of a radically different character from the two appeals now before me. At the outset of these appeals, the Secretary of State offered to make a fresh decision and the parties in the third appeal settled the appeal before me in the form of an order to which I gave my consent.

7. Neither appellant has a right to remain under the Immigration Rules as they fail to meet the requirements of the Rules for leave to remain in any capacity. Both are the primary carers of Union citizens. In the case of Mr Ayinde as the son of Mrs Animashaun who is a British citizen; in the case of Ms Thinjom, as the wife of Mr Stevens, also a British national. Having rejected the application for a derivative residence card, the Secretary of State informed each claimant that the decision did not require them to leave the United Kingdom and invited each claimant to make a claim under Article 8 with reference to Appendix FM and paragraph 276ADE if they wished to do so. In the case of Ms Thinjom, the grounds of appeal to the Tribunal did not raise an Article 8 claim. In the case of Mr Ayinde, the grounds of appeal to the Tribunal raised a formulaic assertion (amongst others) that the Secretary of State's decision was in breach of Article 8 but there is no suggestion this was pursued before the First-tier Tribunal. The Judge made no mention of a viable Article 8 claim and there is no cross-challenge before the Upper Tribunal that the First-tier Tribunal Judge should have determined such a claim. Hence, neither has an Article 8 claim before the Upper Tribunal.

The compass of the appeals

8. Mr Knafler asserts that their actions as carers render them able to benefit from the principle in *Zambrano* which, he submits, enables non-nationals who are the primary carers of dependent British citizens the right to reside and to work on the basis that, without their support and their earnings *it must be assumed* that the British citizen would ultimately have to leave the EU with their carers. The words in italics are taken from the skeleton argument advanced by both appellants.

9. Likewise, he submits, the Courts have recognised that the concept of European citizenship entails more then a bare right of residence and have acknowledged that a '*serious impairment*' of the EU citizen's standard or quality of life, resulting from the carer having to leave the EU, could in practice compel the EU citizen to follow. The *Zambrano* threshold is therefore not whether it would be *impossible* for the citizen to remain in the United Kingdom (because the Union citizen enjoys a right of residence) but rather to extract an underlying principle from *Zambrano* that, without the care of

their primary carer on whom they are dependent, the Union citizen's right of residence would be theoretical and ineffective due to the extent of their dependence on their primary carer. Accordingly, he says, the '*genuine*' enjoyment of the right of residence must entail a real and practical right of enjoyment and not one which is merely theoretical or illusionary. If the effect of this is to require the carer to remain, then in light of *Zambrano,* the carer is entitled to a derivative residence card.

10. The Secretary of State disputes this. In a nutshell, the Secretary of State's position is that the fundamental flaw in the appellants' case is obvious from the case-law of the Court of Justice and domestic courts which make it clear beyond doubt that the *Zambrano* principle only applies when a Union citizen will, *as a matter of fact*, be forced to leave the Union. The principle does not apply where that is not the case, even if the quality of life of the Union citizen would be substantially diminished as the result of the primary carer's departure. As there was, in neither case, sufficient evidence before the First-tier Tribunal to justify a finding that the British citizen would be forced to leave the Union as the result of the refusal to grant a residence card, both appeals were bound to fail. It should be noted that the expression used in reg. 15A (4A) is '*unable*' to reside in the United Kingdom, that is, '*forced*' to leave.

George Ayinde

11. Mr Ayinde was born on 11 June 1973. He is now aged 41. He is a citizen of Nigeria. He first entered the United Kingdom on 14 February 2001 and claimed asylum. His asylum claim was refused and he did not exercise a right of appeal against that decision. On 3 November 2004 he applied for indefinite leave to remain outside the Immigration Rules. This was refused on 6 August 2007 and the appeal which he commenced, without having a right to do so, was eventually concluded on 20 October 2010. In 2011 he made two applications for leave to remain as a carer of a British citizen. In doing so, he sought to apply the *Zambrano* principle. These applications were refused in November 2011 and March 2012 respectively. Undeterred, on 19 July 2012, he sought a derivative residence card under reg. 18A of the 2006 EEA regulations. This provision was inserted into the rules with effect from 16 July 2012.

12. The Secretary of State refused the application on the basis that the evidence provided did not establish that the appellant's mother (who was born on 18 August 1948 and was then aged 65 and whose carer the appellant claimed to be) could not call upon the services of others for her daily needs, including those provided by the NHS. She had been admitted as a hospital in-patient on five occasions, the last being in 2008. The Secretary of State contended that adequate assistance was provided for her care, including access to social services. She concluded, therefore, that the appellant had failed to demonstrate that his mother would be unable to reside in the United Kingdom if he were required to leave.

13. The evidence provided by Mr Ayinde is uncontroversial, although the conclusions that a Tribunal can properly draw from it is not. The evidence itself is set out in paragraph 8 of the determination of First-tier Tribunal Judge Blandy:

> "The appellant confirmed that his mother wanted to remain in the United Kingdom. She is naturalised as a British citizen. If he had to leave he did not know what she would do. She was scared of returning to Nigeria. The health facilities in Nigeria could not meet her requirements. Her children in Nigeria could not support her there. In this country she had her house that she liked, was able to go to church every week, with his assistance and had friends. He was able to provide a good level of care for her. In Nigeria he would not be able to afford the medication that she needs. She had her tumour monitored in this country. They needed to check it for re-growth. She also had a problem with her thyroid which was regularly monitored. His mother needed daily care which could not be given if he had to leave."

In addition, the appellant gave evidence that his mother suffered from paranoid schizophrenia, type II diabetes, was partially sighted and was suffering the residual effects from a brain tumour which was excised in February 2009. She was on a variety of medications. He had been living with her since November 2008, performing the routine tasks of assisting to bathe her, preparing food and doing the shopping. He was responsible for ensuring that the bills were paid. She was not then receiving any assistance from social services. It was his understanding that if he did not perform these tasks she was going to have to go into a care home as a permanent resident. She did not wish to do that.

14. Judge Blandy's reaction to this material was to acknowledge that the Secretary of State had adopted the methodology of regs. 15A and 18A and had applied the very words of the policy document, cited in paragraph 3 above, concerning derived rights of residence. He found that the appellant's mother did indeed suffer from a combination of physical and mental disabilities which prevented her from having the capacity to manage her own daily needs. He accepted that the appellant's mother relied on the appellant and that no care was provided by the NHS or the local authority. He found [18] this situation was permanent and that:

> "…no other sources of care are available save, of course, the ordinary systems of social security and the resources of the National Health Service in this country."

15. He referred to paragraph 27 of the policy note, set out in full in paragraph 3 above, which gave examples of cases where it might be appropriate to issue a derivative residence card, one of which read:

> "in the case of an adult British citizen, [where] there are no alternative care provisions available in the United Kingdom."

16. He then continued, in allowing the appeal:

> "I find that it is clear that this paragraph does not permit the respondent to treat the agencies of the social services or the NHS as potential alternative carers whose involvement would enable the British citizen to remain in the UK. Clearly every British citizen in this country is entitled to be cared for by those agencies in the absence of any other available carer. Paragraph 27 explicitly ignores those agencies as a potential alternative. I find that it therefore is not appropriate to argue, as the respondent did in the refusal letter, that if the appellant were not present in the United Kingdom to care for his mother she could procure assistance from other sources with

> the help of Social Services. I find that the appellant has been cared for by her son so competently and so well for so long that if he were forced to leave the United Kingdom then she would be left with no real alternative but to go with him. To rely on the intervention of the social services or the NHS would not be a reasonable alternative for her. To effectively force her to go with her son, I find, would indeed be contrary to the principles of the case of *Zambrano*."

Sonthaya Thinjom, now Mrs Stevens

17. Ms Thinjom is a national of Thailand. She was born on 5 May 1967 and is now 48 years old. On 18 July 2012, she applied for a derivative residence card as the primary carer of her husband Donald Stevens, born 24 May 1930 and is now 85. The appellant entered the United Kingdom in June 2012 in order to visit her sister, aunt and uncle. Shortly after, Mr Stevens invited the appellant to join him on a cruise and the couple married on 13 August 2012. Mrs Stevens stated that, in the year preceding her appeal (the determination of which was promulgated on 19 August 2014), his health had deteriorated to the extent that he had become increasingly reliant upon his wife's care. They live in sheltered accommodation in Camden. Mr Stevens is in receipt of pension and benefits. Although he has two daughters, he does not see them. He has an older sister who is seriously ill. First-tier Tribunal Judge Samini described how Mr Stevens had had three 'mini strokes', suffered from diabetes and hypertension and is in remission from cancer of the bladder. Prior to his marriage, Mr Stevens had been paying for a carer who visited him twice a week for two hours on each occasion. Since then, he stated that his health had deteriorated to the extent that he cannot now walk very far and his wife helps him with bathing, shaving cooking, shopping washing and cleaning. His GP confirmed the level of care provided by his wife. Mr Stevens explained that he is wholly dependent upon his wife for every aspect of his physical care and that, were she to leave, he would have to be taken into care in a residential home which he would not wish.

18. Judge Samini found the appellant and her husband to be credible and to have provided an accurate description of their relationship and the nature and extent of the care provided to her husband by the appellant. She accepted the evidence of Mr Stevens' deteriorating condition and the consequential increase in the care that is provided to him by his wife. She concluded:

> "[Mr Stevens] does need 24 hour support and having heard and having had the benefit of hearing the oral evidence of the appellant and [Mr Stevens] I accept that he does need the full extent of the physical and emotional care that is now provided by the appellant towards [his] physical care. I accept that if the appellant were forced to return to Thailand, [Mr Stevens] would have to be looked after in a nursing home, which is an option that he clearly opposes."

19. Accordingly, the Judge found that the appellant was the primary carer of her husband. Having referred to the decision in *Zambrano*, and in particular, paragraph 42 with its reference to Article 20 precluding national measures which have the effect of depriving citizens of the Union of the 'genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union', the judge

concluded that the direct consequences of the respondent's decision would be that the appellant's husband would in reality be deprived of the ability to live in the United Kingdom. She found that this would not be a reasonable option, as Mr Stevens was an elderly gentleman who had spent the majority of his life in the United Kingdom and had "explained that living in Thailand at his age would be an extremely difficult task and one which would not be possible for him at his age." Approaching the case in this way, the Judge allowed Ms Thinjom's appeal under Article 15A of the EEA Regulations.

20. In reaching their decisions, both judges concluded that it would not be *reasonable* to require the respective appellants to leave the United Kingdom, see paragraphs 14 and 18 above.

21. The substance of the appellant's case is that it is illogical to draw a distinction between a Union citizen who would, as a matter of fact, leave ('forced to leave') the Union but is permitted to remain by operation of the *Zambrano* principle enabling his carer to remain in the United Kingdom and the Union citizen whose condition is such that he *cannot leave* the Union but who cannot invoke his EU rights to prevent the departure of his carer.

22. At the heart of this appeal is Article 20 of the Treaty on the Functioning of the European Union ("TFEU"). Mr Knafler principally relies upon paragraph 1 which is in the following terms:

> "1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."

The decision in Ruiz Zambrano (European citizenship) [2011] EUECJ C-34/09 – the Zambrano principle

23. It was this provision which acted as the catalyst for the decision of the Court of Justice in *Ruiz Zambrano* in which the Grand Chamber confirmed that Article 20 TFEU confers the status of citizen of the Union on every person holding the nationality of a Member State.

24. *Zambrano* concerned the denial of work and residence permits to Colombian national parents of whose minor children became Belgian nationals by reason of their birth in Belgium. Mr Zambrano lost his employment, which he had been undertaking without the required work permit. He was refused unemployment benefits. He sought to argue before the courts in Belgium that Articles 20 and 21 TFEU required Belgium, as a Member State, to grant him, as an ascendant relative upon whom his minor EEA citizen children depended, an exemption from the obligation to hold a work permit.

25. The Grand Chamber, on a reference from the Tribunal du travail de Bruxelles, concluded as follows:

"41. As the Court has stated several times, citizenship of the European Union is intended to be the fundamental status of nationals of member states…

42. In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of their rights conferred by virtue of their status as citizens of the Union.

43. A refusal to grant a right of residence to a third country national with dependent minor children in the member state where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.

44. It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union."

45. Accordingly, the answer to the question referred is that art 20 TFEU is to be interpreted as meaning that it precludes a member state from refusing a third country national upon which his minor children, who are European Union citizens, are dependent, a right of residence in the member state of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizens."

The appellant's argument – the 'genuine enjoyment' test

26. Mr Knafler puts at the forefront of his argument the words found in paragraph 42 of *Zambrano: 'the genuine enjoyment of the substance of their rights conferred by virtue of their status as citizens of the Union'*. In *Dereci & Ors (European citizenship)* [2011] EUECJ C-256/11 the Court of Justice re-stated the "genuine enjoyment" test. In *Dereci*, it said:

"66. It follows that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.

67. That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as *the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined*."

However, the Court went on to say:

> "68. Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted."

27. In *Yoshikazu Iida v Stadt Ulm* [2012] EUECJ C-40/11 (8 November 20120 the Court of Justice stated:

> "71. Finally, there are also very specific situations in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence exceptionally cannot, without undermining the effectiveness of the Union citizenship that citizen enjoys, be refused to a third-country national who is a family member of his if, as a consequence of refusal, that citizen would be obliged in practice to leave the territory of the European Union altogether, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status (see *Dereci and Others*, paragraphs 67, 66 and 64).
>
> 72 The common element in the above situations is that, although they are governed by legislation which falls a priori within the competence of the Member States, namely legislation on the right of entry and stay of third-country nationals outside the scope of Directives 2003/109 and 2004/38, they none the less have an intrinsic connection with the freedom of movement of a Union citizen which prevents the right of entry and residence from being refused to those nationals in the Member State of residence of that citizen, in order not to interfere with that freedom.
>
> 76 In those circumstances, it cannot validly be argued that the decision at issue in the main proceedings is liable to deny Mr Iida's spouse or daughter the genuine enjoyment of the substance of the rights associated with their status of Union citizen or to impede the exercise of their right to move and reside freely within the territory of the Member States (see *McCarthy*, paragraph 49)."

However, the Court went on to say:

> 77 It must be recalled that the purely hypothetical prospect of exercising the right of freedom of movement does not establish a sufficient connection with European Union law to justify the application of that law's provisions (see Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 16). The same applies to purely hypothetical prospects of that right being obstructed."

28. Less than a month later the Court of Justice re-visited these themes in *O & S v Maahanmuuttovirasto v L* [2012] EUECJ C-356/11 (6 December 2012)

> "47 The criterion of the denial of the genuine enjoyment of the substance of the rights conferred by the status of citizen of the Union referred, in the *Ruiz Zambrano* and *Dereci and Others* cases, to situations characterised by the circumstance that the

Union citizen had, in fact, to leave not only the territory of the Member State of which he was a national but also that of the European Union as a whole.

48 That criterion is therefore specific in character inasmuch as it relates to situations in which a right of residence, exceptionally, may not be refused to a third country national who is a family member of a national of a Member State, as the effectiveness of the Union citizenship enjoyed by that national would otherwise be undermined (*Dereci and Others*, paragraph 67).

49 In the present case, it is for the referring court to establish whether the refusal of the applications for residence permits submitted on the basis of family reunification in circumstances such as those at issue in the main proceedings entails, for the Union citizens concerned, a denial of the genuine enjoyment of the substance of the rights conferred by their status.

56 …As the Advocate General observes in point 44 of his Opinion, it is the relationship of dependency between the Union citizen who is a minor and the third country national who is refused a right of residence that is liable to jeopardise the effectiveness of Union citizenship, since it is that dependency that would lead to the Union citizen being obliged, in fact, to leave not only the territory of the Member State of which he is a national but also that of the European Union as a whole, as a consequence of such a refusal (see *Ruiz Zambrano*, paragraphs 43 and 45, and *Dereci and Others*, paragraphs 65 to 67)."

29. The cases cited above identify a related expression of the genuine enjoyment test. A common theme is the use of the words 'effective' or 'effectiveness'. Thus, for example, in paragraph 48 of *O & S v Maahanmuuttovirasto v L* we read*:* 'the *effectiveness* of the Union citizenship enjoyed by that national would otherwise be undermined.'

The Charter of the Fundamental Rights of the European Union

30. Mr Knafler places considerable reliance upon the Charter of the Fundamental Rights of the European Union which provides:

"Article 1 – Human Dignity

1. Human dignity is inviolable. It must be respected and protected.

Article 3 – Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.

Article 7- Respect for family and private life

1. Everyone has the right to respect for his or her private and family life, home and communications.

Article 21 - Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other

opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Article 25 – The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Article 34 - Social security and social assistance.

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.

2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.

3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices."

31. Thus the appellants argue that the genuine enjoyment of the substance of their rights conferred by virtue of their status as citizens of the Union includes the right to maintain their dignity which in the cases of persons like the appellants who suffer the effects of increasing age, infirmity or illness should be protected by permitting them to retain their home and the level of care which has been provided by their carers. Hence, Mr Knafler argues that the rights of a Union citizen (and therefore the rights of a British citizen) as developed in *Zambrano* and the succeeding case law establish that the principle of genuine enjoyment is independent of the requirement that an individual is forced, as a matter of fact, to leave the territory of the Union.

Analysis

32. For the reasons that follow, I consider Mr Knafler's submissions as it relates to the scope of the rights protected by Union citizenship are flawed.

33. The starting–point must be a more detailed consideration of Article 20 of the TFEU. Its full text is in these terms:

"Article 20

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States;

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder."

34. The rights associated with citizenship of the EU are the rights created by the European Treaties and include, amongst others, freedom of movement, the right to participate in elections to the European Parliament as well as in elections in their place of residence, the right to enjoy diplomatic protection abroad where the Union citizen's own consular assistance is not present but that of another Member State is, as well as access to the European Parliament and its institutions. It is noticeable that the rights do not trespass upon the rights derived from being a citizen of the individual's country of nationality. The relationship between Article 20 rights and freedom of movement is made clear by Article 21:

"Article 21

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

35. There is a demarcation between the rights created and preserved by the TFEU and those rights that are created or preserved under national law. As Articles 20 and 21 demonstrate, EU rights are distinct and limited in character.

36. The attempt to expand the scope of an individual's Treaty rights to go beyond forced removal was rejected by the Court of Appeal in *Damion Harrison (Jamaica) & AB (Morocco) v SSHD* [2012] EWCA Civ 1736 (21 December 2012). Indeed, the argument advanced by Mr Drabble in that case was in essence the same argument as Mr Knafler advanced before me. *Damion Harrison (Jamaica)* was a case in which the appellants were the subject of deportation proceedings and each had British citizen children. In each case it was found as a fact that if the appellant were to be removed from the United Kingdom, their Union citizen children would not be compelled to leave. The appellants submitted that if they were to be removed this would adversely affect the quality of life of their British citizen children and that Article 20

TFEU and the *Zambrano* principle would be engaged. In rejecting this submission Elias LJ, giving the judgement of the Court said:

> "57 There are four strands in Mr Drabble's submission that the scope of the doctrine might arguably extend beyond the situation of forced removal. First, he submits that certain passages in the judgments can be read that way, and he relies in particular on the way in which the Court answered the question in *Zambrano* ...see paragraph 45, set out in paragraph [24] above. It is at least arguable, he says, that depriving an EU citizen of the 'genuine enjoyment of the substance of the rights' attached to EU citizenship could embrace decisions which leave the right intact but less valuable because the enjoyment is diminished. It may be enough that the right is impeded even though not lost. Mr Drabble does not go so far as to say that this formulation of the principle by the CJEU carries the day; he merely claims that there are hints that the court was recognising a potentially wider jurisprudence and that the language, no doubt carefully framed, is consistent with the Court envisaging a possible development along those lines.
>
> 62 Finally, Mr Drabble prays in aid certain observations of Professor Gareth Davies from Amsterdam University who has written a paper entitled 'The family rights of European children: expulsion of non-European parents' which discusses *Zambrano* in considerable detail. It includes a number of passages supporting Mr Drabble's argument that the position in EU law is at least fluid, that the current state of the law is not entirely coherent, and that the precise scope of the *Zambrano* principle remains uncertain."

37. Having considered this passage, I can see no significant difference between the argument advanced to me and that made by the appellant's counsel in *Damion Harrison*. It was roundly rejected by the Court of Appeal:

> "63. … [T]here is really no basis for asserting that it is arguable in the light of the authorities that the *Zambrano* principle extends to cover anything short of a situation where the EU citizen is forced to leave the territory of the EU. If the EU citizen, be it the child or wife, would not in practice be compelled to leave the country if the non-EU family member were to be refused the right of residence, there is in my view nothing in these authorities to suggest that EU law is engaged. Article 8 rights may then come into the picture to protect family life as the court recognised in *Dereci*, but that is an entirely distinct area of protection…
>
> 66. Even if the non-EU national is not relied upon to provide financial support, typically there will be strong emotional and psychological ties within the family and separation will be likely significantly to rupture those ties, thereby diminishing the enjoyment of life of the family members who remain. Yet it is plainly not the case, as *Dereci* makes clear and Mr Drabble accepts, that this consequence would be sufficient to engage EU law. Furthermore, if Mr Drabble's submission were correct, it would jar with the description of the *Zambrano* principle as applying only in exceptional circumstances, as the Court in *Dereci* observed. The principle would regularly be engaged.
>
> 67. As to the submission that EU law might develop in that direction, I accept that it is a general principle of EU law that conduct which materially impedes the exercise of an EU law right is in general forbidden by EU law in precisely the

same way as deprivation of the right. But in my judgment it is necessary to focus on the nature of the right in issue and to decide what constitutes an impediment. The right of residence is a right to reside in the territory of the EU. It is not a right to any particular quality of life or to any particular standard of living. Accordingly, there is no impediment to exercising the right to reside if residence remains possible as a matter of substance, albeit that the quality of life is diminished. Of course, to the extent that the quality or standard of life will be seriously impaired by excluding the non-EU national, that is likely in practice to infringe the right of residence itself because it will effectively compel the EU citizen to give up residence and travel with the non-EU national. But in such a case the *Zambrano* principle would apply and the EU citizen's rights would have to be protected (save for the possibility of a proportionate deprivation of rights). Accordingly, to the extent that the focus is on protecting the substance of the right, that formulation of the principle already provides protection from certain interferences with the enjoyment of the right."

38. Ms Smyth takes up the words of Elias LJ that '[i]t is not a right to any particular quality of life or to any particular standard of living' and classifies the current appeals as a wish to secure a better quality of life for the British citizens concerned which is outside the right to reside in the United Kingdom. That right remains possible as a matter of substance. In essence, she asserts, the British citizens seek both the right to reside in the United Kingdom (which they currently enjoy and which is guaranteed them both as British citizens) and the right to reside with the lifestyle of their choice with carers of their choice and in a place of their choice (which is not guaranteed under European law). The corollary of the claims of the two British citizens is that the relevant carers must also be provided with the benefit of a right of residence. However, as their family members do not enjoy the rights they claim as European citizens, the two appellants are not entitled to derivative residence cards.

39. The decision of Hickinbottom J in *Sanneh, R (on the application of) v the SS for Work and Pensions & Anor* [2013] EWHC 793 (Admin) focuses upon a very different area of law but makes the same point that if an individual seeks to rely on his EU rights, it is not enough that a British citizen suffers a detriment if that detriment does not jeopardise her rights as an EU citizen. Hickinbottom J said

> "95. In my judgment, the Claimant's claim in these proceedings falls at the first hurdle, because she cannot make good the first proposition upon which the claim is based, namely that the failure of the Defendants to pay the Claimant the benefits pending the ultimate resolution of her entitlement puts her daughter's rights as an EU citizen to reside in the United Kingdom in jeopardy….
>
> 96. As I have indicated, it is generally for this court, on the available evidence, to make a finding of fact as to whether the decision to deny the Claimant the three benefits pending resolution of her entitlement to those benefits puts her daughter's rights to reside in jeopardy (paragraph 19(iii) above). If I were required to make a finding on the evidence, I would unhesitatingly conclude that it does not. The Claimant and her daughter have been in the United Kingdom for nearly four years, for the most part without significant benefit support.

> Whilst no one would suggest that money is not scarce for the Claimant and her daughter – finances for them are, to say the least, very tight – the Claimant does have (i) accommodation in the form of a two-bedroomed house, provided by the Council; (ii) income, the amount of which (whilst not being entirely clear) appears to include £70 per week from the Council as part of their section 17 support (see paragraph 87 above) and about £50 per week from Mr Bah through the Child Support Agency (the Claimant's 15 November 2012 Statement, paragraph 9); and (iii) the right to work…. She has management and human resources skills, and is keen and very hopeful of finding work…. Furthermore, although the ultimate resolution of her entitlement to the benefits may take some time, as the various proceedings move through the judicial system, we are concerned here with a matter of months and not, as Mr Zambrano was, with many years. In any event, all of the evidence points to the Claimant being absolutely determined to stay in the United Kingdom, and there being no realistic possibility of her leaving because of financial circumstances during the currency of the substantive proceedings…."

40. The submission advanced before me is little different from that attempted by Mr Knafler before Hickinbottom J but on which he was not successful:

> "99. First, he submitted that paragraph 44 of *Zambrano* means that it must be assumed (irrebuttably and hence, essentially, as a matter of law) that a person in the place of the Claimant must be accorded both the right to residence and the right of access to a particular level of funds by way of earnings or benefits. However, I cannot accept that submission.
>
> 100. As a matter of principle, EU law creates rights, but it is left to member states as to how those rights should be made effective and effectively protected within their territory. It would be remarkable if the European Court had laid down a particular way adequately to protect the right of residence of a minor with no EU ascendant carer relatives, which each member state would be bound to implement. That is simply not how the EU works."

41. Reliance on broad principles of human dignity as contained within the Charter of the Fundamental Rights of the European Union does not assist the appellants. Whilst the principle is inviolable and must be respected and protected, it does not lead to the conclusion that, in order for there to be compliance, it is necessary to secure the presence of a relative as a carer. Similarly, Article 7 of the Charter (the equivalent to Article 8 of the ECHR) and the Union citizen's right to respect for his or her private and family life and home does not require a non-national to reside in the country by reason of his role as a carer. Nor can broad principles of non-discrimination assist. The Immigration Rules create distinctions between those who are permitted to remain and those who are not. In the sense that the law treats one category more favourably than another, it discriminates between them. If the discrimination arises because one group is under the age of 65 and the other over the age of 65, it discriminates on the basis of age but this is not the type of discrimination that is prohibited by the Charter or by the ECHR. Implicit in the meaning of discrimination is the drawing of distinctions that are unfair or unwarranted. In order to permit the elderly to lead a life of dignity and independence, the country of which he or she is a

national must provide adequate facilities for their care but that does not imply this requires the national authorities to permit a right of residence to the carer of choice of its elderly citizens.

42. 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.

The error of law - Ayinde

43. The evidence provided in Ayinde's appeal pointed in one direction only. His mother wanted to remain in the United Kingdom. She is a naturalised as a British citizen. If he had to leave, he said he did not know what she would do. Pointedly, he did not say she would accompany him. Indeed, he said she was scared of returning to Nigeria. The health facilities in Nigeria could not meet her requirements. Her children in Nigeria could not support her there. In the United Kingdom, she had the house she liked, was able to go to church every week and her friends were here. They could not access the medication she needed in Nigeria. She had her tumour monitored in this country as well as the problem with her thyroid. His mother needed daily care which could not be given if he had to leave.

44. The entirety of this evidence pointed to her remaining in the United Kingdom in the environment she knows and likes, without having to up-root herself.

45. Indeed, the substance of Mr Knafler's submission is that an assumption should be made, or a hypothesis should be adopted, in which the fact of moving outside the Union is built into the assessment. The word '*assumed*' is found in paragraph 44 of Ruiz Zambrano; '*It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents*.' On a proper reading of the decision of the Court of Justice, however, it was not an assumption that the Court was making but a finding of fact or

a prediction of what would inevitably occur: it was obvious the parents would take their children with them if they were forced to leave.

46. Mr Knafler's approach to me was a repetition of his argument to Hickinbottom J who recorded the submission in paragraph 99 of *Sanneh, R (on the application of) v the SS for Work and Pensions & Anor* (see paragraph 37 above) in these terms: '*paragraph 44 of Zambrano means that it must be assumed (irrebuttably and hence, essentially, as a matter of law)*'. Hickinbottom J rejected this submission.

47. The fact that Mr Knafler advances his case on the basis that such an assumption is necessary is telling for it implicitly acknowledges that the evidence itself does not support such a finding. No assumption would be necessary if the appellant had established as a matter of fact that the mother was leaving.

48. The First-tier Tribunal Judge did not find as a fact that she would leave. Indeed, the approach of both Judges was that it would not be reasonable for them to do so. In the context of these appeals, this was no more than another way of saying that they would not. The First-tier Tribunal Judges' solution in adopting a reasonableness test, namely, that it would not be reasonable for the British citizen mother and husband to leave the United Kingdom, diluted the relevant test, perhaps even distorted it. In any event, a reasonableness test is difficult to apply in the context of appeals of this nature. If an assessment of reasonableness is applied simply as between the appellant and his mother or the appellant and her husband, the result is a foregone conclusion. Of course, given the choice, it would not be reasonable for the appellants to *require* their mother or husband to join them outside the Union or to *expect* the British citizens to demand to leave the country.

49. A reasonableness test, however, first demands to know the answer to the question, 'reasonable as between whom?' If the reasonableness of the decisions involves a consideration of the competing claims of family members legitimately wishing to remain together, to enjoy the benefits and burdens of a shared family life, on the one hand and, on the other, the justifiable interest of the community at large in limiting the right to settlement (and the burden this imposes) in the case of those who may not be able to contribute to the financial implications of it, the answer may well be very different. A reasonableness test becomes almost impossible to evaluate where the carers (as in these two appeals) will both potentially *increase* the burden upon the state with further recourse to public funds but at the same time may also *lessen* the burden to the tax-payer by offering care that would otherwise have to be provided by the state or the local authority. Whatever may be the legitimate approach to the solutions to these appeals, it is not to be found in adopting a reasonableness test. In adopting a reasonableness test that confined itself to a consideration of only part of the competing factors, the First-tier Tribunal undoubtedly erred.

50. When construing the words of reg. 15(4A)(iii) that Mr Ayinde's mother would be 'unable to reside in the United Kingdom' if Mr Ayinde were to leave, the Judge excluded from consideration services provided by the local authorities' social services department and the NHS when the policy itself clearly stated the opposite.

He did so he said because, 'every British citizen in this country is entitled to be cared for by those agencies in the absence of any other available carer'. This was no justification for the Judge to exclude the provision of such care; in particular, no justification arises because such care is provided by way of an entitlement to it under the NHS. The Judge erred in law in construing the words of the regulation in this way. The respondent properly argued in the refusal letter that, if the appellant were not present in the United Kingdom to care for his mother, she could procure assistance from other sources with the help of social services. Her ability to do this was a vital consideration in the appeal.

51. In summary, the Judge erred by failing to appreciate that an essential element of the *Zambrano* principle was that it had to be established that Mrs Animashaun would leave the Union if her son left. On the evidence, the appellant failed to establish this. Indeed, the evidence established she would not. Secondly, the Judge applied a reasonableness test which was inapplicable when the question was whether Mrs Animashaun was unable to remain in the United Kingdom. Thirdly, he excluded from his consideration the provision that would be made by social services and the NHS when this was a vital part of the assessment. These errors require me to set aside his determination and enable me to re-make the decision.

The error of law - Thinjom

52. Mr Stevens is 85 years old and truthfully explained that living in Thailand would not be possible for him at his age. The First-tier Tribunal Judge rejected that solution as one that it would not be reasonable for him to make. The Judge accepted that if the appellant were forced to return to Thailand, he would have to be looked after in a nursing home, which is an option that he clearly opposed. In other words, his intention was to remain in the United Kingdom and his wish was to do so with the appellant.

53. In summary and for the reasons I have already provided in the appeal of Ayinde, the Judge erred by failing to appreciate that an essential element of the *Zambrano* principle was that it had to be established that Mr Stevens would leave the Union whereas the evidence established that he would not. Secondly, the Judge applied a reasonableness test which was inapplicable when the question was whether Mr Stevens was *unable to remain* in the United Kingdom. In fact, he was *unable to leave* the United Kingdom.

Generally

54. These situations are very different from the situation in *Zambrano*. Whilst a minor child can survive without his parents in that adoption, foster-care or a children's home may provide a proper and adequate level of care, such alternative care is only likely to be contemplated if there are serious reasons for breaking the relationship between a child and one or both of his parents. Serious wrong-doing on the part of both parents (or, more often, of one of the parents) may justify the separation. However, elderly adults can more readily survive without a family member to act as their carer if there are adequate support mechanisms in existence to provide them

with alternative care to an appropriate standard. It is beyond the range of proportionate responses that a minor should be required to go into some form of alternative care (be it adoption, foster-care or residential care) in order to enjoy his EU rights were both his parents required to leave. The same consideration does not normally apply in relation to the infirm or elderly.

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. In *Ruiz Zambrano*, it was not the difference between the standard of care that the *Zambrano* parents provided to the children at home and the standard of care provided by child care agencies that prompted the Court of Justice to reach its decision. A comparison of alternative care arrangements was not being considered. It was not, therefore, the quality of life or care that was in issue but what would *happen* to the *Zambrano* children, that is, whether they would remain or leave. For the *Zambrano* children, the answer was obvious: the children would go with their parents. It was impossible to contemplate an outcome in which they would not be driven to leave. That is a far cry from the situation facing Mrs Animashaun and Mr Stevens, neither of whom will leave the United Kingdom.

56. The recognition that children are in need of specific forms of protection is acknowledged in the UN Convention on the Rights of the Child which recognises that children should grow up in a family environment. Article 9.1 of the Convention provides that the United Kingdom normally provides that a child should not be separated from his parents against their will, except in defined and limited circumstances. Similarly, the Immigration Rules and the IDIs reinforce the special place that children have in the deportation of a parent who falls within the definition of a foreign criminal. It is an exception to the public interest in favour of removal if it is established that removal is 'unduly harsh' to a qualifying child, see s. 117C (5) of the Nationality, Immigration and Asylum Act, 2002, as amended. No comparable system of regulation applies in relation to the needs of the elderly, certainly in the context of recognising the rights of family members to maintain family life together. The distinction is intentional. It informs a consideration of the *Zambrano* principle when attempts are made to apply it to persons other than minor children.

57. The Tribunal is entitled to look critically at a claim that a person will be forced to leave the EU because of a refusal by the national authorities to grant his carer leave to remain. The reason for such a critical look is because the claim advanced will be the very opposite: it will be a claim that the carer be permitted to remain and the British citizen will not be required to move. Mr Knafler himself referred to this in the course of argument as a paradoxical claim.

58. Secondly, if the claim is based on the British citizen being forced to leave the Union, the likelihood of this occurring has to be assessed by reference to the benefits the Union citizen is receiving in the UK and will be entitled to receive were the appellant to leave. Hence, if the British citizen is in receipt of free healthcare, subsidised accommodation (or an allowance to assist in the payment of rent) and state benefits, pensions and fringe benefits in the form of concessions available to the elderly, there

will be a significant evidential hurdle in attempting to make out a case that the British citizen will, as a matter of fact, leave the United Kingdom. In reality if these benefits are not available in the country to which he claims he will be forced to travel by reason of the refusal of a grant of a derivative residence card to his carer, the likelihood of his doing so is likely to be remote. Hence the Tribunal will also have to compare the conditions that a British citizen will meet on being forced to settle elsewhere when assessing whether he is being forced to leave the United Kingdom. The greater the disparity, the less likely it will be that the British citizen will in fact leave the United Kingdom. A bare assertion that the British citizen will be forced to leave the United Kingdom is unlikely to be sufficient; all the more so if this has been his only home for many years.

59. Thirdly, whilst these appeals were put on the basis that the British citizen has a right to human dignity which is inviolable and must be respected and protected, (the violation of which acts as the spur to his claim to be at risk of a forced departure from the United Kingdom), some care must be taken before reaching such a conclusion. It is not enough that the British citizen would prefer that his carer is permitted leave to remain in the United Kingdom. There is nothing intrinsically lacking in human dignity in being offered the professional help of care workers or being placed into residential accommodation with a sliding-scale of support ranging from a home adapted to the individual's needs, through to accommodation with a warden, through to a residential home; through to full nursing care. It would be plainly incorrect to say that it is a violation of an individual's rights to human dignity to be placed into care or to receive help from professional healthcare workers.

60. This leads us back to the words of reg. 15(4A) (iii) that the British citizen must be *unable to reside in* the United Kingdom if the appellant were to leave. These words can readily be applied in both appeals: Mrs Animashaun and Mr Stevens are *able* to reside in the United Kingdom

61. From the foregoing, it is possible to derive the following general principles:

    (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* 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.

Re-making the decisions – Ayinde

62. Far from being unable to reside in the United Kingdom, the evidence is that the appellant needs to reside in the United Kingdom if she is to maintain the same level of care for her paranoid schizophrenia, her type II diabetes and the residual effects from the brain tumour. Her need for treatment, medication and monitoring are more likely to be better met in the United Kingdom. This leaves the tasks that are performed by the appellant in the form of routine assistance in helping her to bathe, preparing food, shopping and ensuring that the bills are paid. If these cannot be performed by carers under the supervision of social services, then she will need to go into a care home. Either way, it is simply impossible to claim that she is unable to remain in the United Kingdom once her son leaves.

Re-making the decisions – Thinjom

63. The couple met in 2012 and married on 13 August 2012. Mr Stevens was then aged 82. Had they not married, Mr Stevens would undoubtedly have remained in the United Kingdom and, as his heath deteriorated, would have had to look to social services increasingly for help until the point was reached when he could not live on his own and would have been forced to go into residential nursing care. The sheltered accommodation in which he lives may or may not continue to be a practical solution to his needs. Prior to his marriage, Mr Stevens had been paying for a carer who visited him twice a week for two hours on each occasion. He now needs care in the daily tasks.

64. Once again far from being unable to reside in the United Kingdom, the reality is that it is unlikely that Mr Stevens is able to reside anywhere else. He could not, realistically, hope to achieve the same level of care were he to start what would be at the age of 85 a new life in Thailand. Hence, there is no real likelihood that he would do so.

Conclusion on the re-making

65. For these reasons, the claim that in each of these appeals the Zambrano principle should be extended to permit their carers to remain in the United Kingdom must be rejected. That, as Hickinbottom J said in *Sanneh, R (on the application of) v the SS for Work and Pensions & Anor,* 'is simply not how the EU works.'

The right forum

66. It is for these reasons that such a claim is more readily conceived in terms of Article 8. The factors that render the forced departure of a British citizen less and less likely (dependence on the raft of assistance provided by the state, the local authority and the health service) are likely to add weight to a human rights claim whilst diminishing the strength of a claim based upon forced departure. Where, however, the competing claims are expressed in the alternative, namely *either* I will be forced to go *or* it is a violation of my, and my carer's, human rights to require my carer to leave, there is plainly an inconsistency in approach which may well prove difficult to argue.

67. In saying this, I do not seek to imply what the appropriate outcome will be in either of these two appeals. It re-enforces, however, the soundness of the respondent's approach in the third of these formerly conjoined appeals. As I said in paragraph 4 above, the third appeal concerned the Algerian mother of a British citizen aged 3 who sought leave to remain in the United Kingdom with her son and the child's father. Although she had sought leave to remain as the carer of a Union citizen, the application was made pursuant to Article 8 of the ECHR in pursuit of a protected private and family life and not under the EEA Regulations. Sensibly, the Secretary of State agreed to make a fresh decision. Whilst significantly different on the facts, it underlines the place in the legal system where the claims of these appellants properly lie. The claims do not lie under the Immigration (European Economic Area) Regulations 2006 as amended.

DECISION

In each case, the Judge made an error on a point of law and I substitute a determination dismissing each of the appeals on all the grounds advanced.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
21 May 2015