



IAC-YW-LM-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/00463/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 13th October 2014
Prepared 16th October 2014**

**Determination Promulgated
On 7th November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**MS AUGUSTIA SANTA ANA
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C. Physsas of Counsel
For the Respondent: Mr S. Whitwell, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Philippines born on 6th August 1971. She appealed against a decision of the Respondent dated 10th December 2013 to refuse to grant her a derivative right to reside in the United Kingdom pursuant to Regulation 15A of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") (a

derivative residence card). The Appellant argued that she was the primary carer of her mother, Tinsley Tinsley, born 20th May 1949, a British citizen (“Mrs Tinsley”).

2. The Appellant entered the United Kingdom on 18th May 2001 on a visit visa valid until 7th June 2001. Her leave was extended, inter alia, to enable her to obtain private medical treatment until 3rd January 2003. On 29th August 2003 the Appellant sought a work permit which was refused on 12th February 2004. She had no leave thereafter but made the present application on 30th January 2013, the refusal of which on 10th December 2013 has given rise to these proceedings.
3. Regulation 15A provides that a person who satisfies the criteria in paragraphs 2, 3, 4, 4A or 5 thereof is entitled to a derivative right to reside in the United Kingdom. Sub-paragraph 4A provides that the criteria is satisfied if the applicant is the primary carer of a British citizen residing in the United Kingdom and the British citizen would be unable to reside in the United Kingdom or in another EEA State if the applicant were required to leave. Sub-paragraph 7 provides that the applicant is to be regarded as a primary carer of another person if they are a direct relative of that person and the applicant is the person who has primary responsibility for that person’s care. Responsibility for a person’s care is not made out on the sole basis of a financial contribution towards that person’s care (sub-paragraph 8).

The Explanation for Refusal

4. The Respondent refused the application on the basis that the Appellant had not provided evidence which would demonstrate that her mother could not call upon the services of outside agencies, including Social Services or private care if required. Mrs Tinsley had already had contact with the NHS with regard to her medical treatment. They in turn had noted the Appellant’s current residence in the United Kingdom and remarked that it would be beneficial for Mrs Tinsley if the Appellant could provide help regarding the domestic situation. Mrs Tinsley was in receipt of financial support from the Department for Work and Pensions along with a private income. If the Appellant were not present in the United Kingdom to care for her, Mrs Tinsley could procure assistance from other sources with the help of Social Services. Preference and convenience were not sufficient reasons for the claimed primary carer, the Appellant, to assert that another responsible adult procured privately or through Social Services would be unable to care for the Sponsor.
5. No evidence had been provided of the claim that the Appellant and Mrs Tinsley had lived together since the Appellant’s arrival in the United Kingdom in 2001. Mrs Tinsley lived at 8 Valetta Road but there was no evidence to show that the Appellant had ever lived at that address with her. The representative had now stated that the Appellant lived at an address 37 Hubert Road in the Romford area but there was no indication that Mrs Tinley lived there with the Appellant. From London W3 to Romford RM13 was almost 22 miles. It was unusual that the Appellant would choose to move 22 miles away from the Sponsor when claiming to be her primary carer. The Respondent also refused the application under Article 8,

citing the requirements of the Immigration Rules contained in Appendix FM and paragraph 276ADE which it was said the Appellant did not meet.

The Hearing at First Instance

6. The Appellant adopted her statement in which she outlined the care she provided for her mother who is now 64 years old. Mrs Tinsley had undergone surgery for breast cancer in September and December 2012. She enjoyed a good quality of life despite her medical condition because of the assistance given by the Appellant. The Appellant prepared her mother's meals in accordance with her dietary needs and was her only companion.
7. Explaining the discrepancy over the addresses she said that the address in the Romford, Essex area was the residence of a close family friend of her mother. They had both been invited to spend some time there. When her mother fell ill she informed her solicitors of the Romford address and was uncertain as to how long they would spend there. In 2014 the landlady of the premises at Valetta Road had agreed to the Appellant being joined on the tenancy agreement.
8. In cross-examination the Appellant told the Judge that neither she nor Mrs Tinsley had approached Social Services to ascertain the availability of care for the Appellant's mother. If the appeal failed the Appellant's mother would have to return to Philippines with the Appellant. Social Services could not provide the level of care required such as cooking, cleaning, dressing and administration of medication.
9. The Appellant had put forward a letter from Mr Ragheed Al Mufti, consultant surgeon who was treating Mrs Tinsley, as confirmation of the medical condition. The letter stated that Mr Al Mufti understood that Mrs Tinsley was "living on her own and has no other close family members with her in London ... her daughter [the Appellant] is currently visiting London to visit her mother and to be with her". He asked that the Appellant be allowed to stay with Mrs Tinsley for as long as possible.
10. The Appellant stated in cross-examination that Mr Al Mufti had misunderstood her mother's circumstances when he stated that she lived alone. He was informed of the error but he did not correct the letter. The Appellant's landlady had agreed to include the Appellant in the tenancy agreement as the Appellant had submitted an application to regularise her immigration status. The Appellant did not know why the letter from the solicitors to the Respondent informing the Respondent that the Appellant was now living at the Romford address had failed to mention that Mrs Tinsley was also living at the Romford address, nor why had they failed to mention that this was only a temporary address.

The First Tier Determination

11. The Judge began his findings at paragraph 30 by asserting that Regulation 15A could not apply to two adults but only in the context of a parent and minor child. As the

Appellant and her mother did not fall into this category there was no evidence to demonstrate that the Appellant could succeed under the 2006 Regulations.

12. I pause to note here that that was an error of law and had the Judge stopped there in his determination it would have fallen to be set aside. The Regulation is not expressed to relate only to parent and child and the Respondent had not sought to take that point in any event. The Judge went on to deal with the merits of the claim as to whether the Appellant was in fact the primary carer of her mother. He did not accept the Appellant's explanation why the Respondent had been notified of an address in Romford for the Appellant but not for Mrs Tinsley, nor why there had been a failure to notify the Respondent of the resumption of residence at the original address. The letter from the Appellant's representative to the Respondent was very brief indeed and there was no reasonable explanation why the representative had failed to include material information in the change of address letter. That was said to damage the Appellant's credibility. Nor did the Judge accept the explanation that Mr Al Mufti had made an error relating to Mrs Tinsley's sole occupation of her home or the Appellant's status as a visitor. After dealing with Article 8 he dismissed the appeal.

The Onward Appeal

13. The Appellant appealed against that decision, arguing that Regulation 15A was not restricted to a parent and minor child and that the Respondent had failed to consider Article 8 when considering the Appellant's application. That was unlawful and the decision to refuse the derived residence card was not in accordance with the law. The Respondent had stated the Appellant should make an application under the parent or partner route. The Judge's adverse credibility findings were irrational and perverse and not supported by the evidence and the Judge's Article 8 assessment was fundamentally flawed since he had failed to apply the five stage test set out in **Razgar [2004] UKHL 27**.
14. The application for permission to appeal came on the papers before First-tier Tribunal Judge Grimmett. She granted permission on 20th August 2014, stating that there was an arguable error as paragraph 15A(7) included a person who was a direct relative with the primary responsibility for another person's care as being entitled to a derivative right. All grounds may be argued.
15. The Respondent filed a reply under Rule 24 on 9th September 2014, stating that any error in the determination was immaterial as it was clear that the Appellant's mother would not be forced to leave the United Kingdom if the Appellant was not granted a derivative right since there was no adequate evidence that alternative arrangements were not possible. The refusal letter had made it clear that for a person to succeed in this category as a carer for an adult there would need to be shown very considerable difficulties which had not been established in the case of Mrs Tinsley. The Appellant was clearly lacking in credibility in certain matters. The Appellant could not succeed under Regulation 15A.

The Hearing before Me

16. In oral submissions Counsel argued that the application had been made correctly in this case under the 2006 Regulations. The Judge had found the application misguided and that had infected his view of the evidence. It was acknowledged that the letter from the solicitors notifying the Respondent of the Romford address should have contained more information and made it clear that it was a temporary address. A further letter dated 7th January 2014 was not included in the bundle although it should have been which made the position clearer. There should also have been a letter from the general practitioner before the Judge. The Regulation did not require there to be evidence that Social Services could not provide care. Social Services might be able to provide daily care but the Judge ought to have considered the medical evidence as to what other care was needed. The Judge had not considered Mrs Tinsley's statement that she would be unable to afford medical care in the Philippines and would be returning to poverty. At present Mrs Tinsley was receiving sick pay from her employment which was the reason why disability living allowance was not being claimed.
17. There was a letter from the friend who had invited the Appellant and Mrs Tinsley to stay at the Romford address but it appeared that that letter was not put before the Judge. The tenancy agreement had not been considered at all. The Judge should have explained why he preferred the contents of Mr Al Mufti's letter on the accommodation of the Appellant as opposed to the documentary evidence of the tenancy agreement. Mr Al Mufti had now provided a further letter dated 17th September 2014 (which detailed the surgery he had performed on Mrs Tinsley) and again urged that the Appellant be allowed to stay with her mother in the United Kingdom.
18. The Judge had made no positive findings in relation to Article 8 and his errors flowed from the fact that he had not considered all the evidence. The matter should be remitted back in any event because Article 8 had not been assessed in the refusal letter. The Respondent was under a common law duty to consider Article 8.
19. In reply the Presenting Officer stated that the Respondent agreed that Regulation 15A could apply to two adults but there was no material error of law in the determination. The Appellant had chosen not to put the further documents referred to by Counsel in the bundle. The Judge had found that there was an adult British citizen living in London W3 with a daughter living 22 miles away. The information supplied by Mr Al Mufti must have come from the Appellant herself. He had said that the Appellant was not living with the Sponsor and here on a visit visa. He could only have found that out from either the Appellant or the Sponsor. It was open to the Judge to find that the Appellant and Sponsor were not living together. Although 15A could apply to two adults, where it was an adult caring for another adult a higher test was needed than where an adult was caring for a child. Mrs Tinsley, had not approached Social Services to have her case assessed on an individual basis. Mrs Tinsley had not been medically retired from her work, she was absent on sick pay.

The level of care being given to her by the Appellant was not a particularly high level in the absence of evidence from Social Services or the NHS.

20. There was no common law duty on the Respondent to produce a decision under Article 8. This was an EEA case with no removal directions. It was open to the Appellant to apply on form FLR(O) or under the carer's policy. The Judge had considered the case of Razgar at paragraph 36 of his determination and had carried out the balancing exercise.
21. In conclusion Counsel for the Appellant submitted that where documents had not been included in the bundles before the Tribunal the Appellant should not suffer from an oversight by her representatives. The letters from friends had not been considered by the Judge either. There ought to have been a proper investigation under Article 8.

Findings

22. I have to decide whether there has been such a material error of law that the determination in this case should fall to be set aside and the matter reheard, if not then the decision of the First-tier Tribunal will stand. It is not in dispute that the Judge was in error in thinking that Regulation 15A could not apply to a situation where an adult is the primary carer of another adult. However, the Judge also found that the Appellant in this case was not in fact the primary carer of her mother. He based that on his adverse credibility findings, the evidence from Mr Al Mufti and the letter from the solicitors notifying the Respondent of the change of address.
23. I do not consider that the Judge's error in his understanding of what Regulation 15A applied to infected the remainder of his findings since if the Judge had maintained the view that Regulation 15A could not apply there was in fact no need for him to go on to consider anything else except perhaps in the context of Article 8. What is clear from reading the determination is that the Judge was in effect deciding the case on an even if basis. Even if there was a right of appeal under Regulation 15A (as was the case) the Appellant still could not succeed because she could not demonstrate that she was the primary carer of her mother. That was a finding of fact by the Judge. The disagreements put forward with that finding are merely that, disagreements. They do not show any error of law.
24. The Judge had a report from Mrs Tinsley's specialist which contained information which could only have come from the Appellant and/or the Sponsor. The Respondent had been notified by the Appellant's solicitors that she was living at an address 22 miles away from her mother. That point was specifically raised in the refusal letter and yet no clarification was given to the Judge save for the oral testimony of the Appellant (which he did not accept). It was hardly an error of law for the Judge not to consider evidence that was not before him. Subsequent attempts to remedy the gap in the Appellant's case caused by the brief solicitors' letter are not relevant to the matters I must decide. The Judge was only obliged to consider the evidence that was before him.

25. Further, he was not required to set out each and every piece of evidence in the case. That he made no reference to the letters of support or the tenancy agreement is also not a valid criticism of the determination. The Judge made clear what the evidence was that he relied upon in arriving at his conclusions and that was neither perverse nor irrational. The Judge gave reasoned findings. On that basis the Appellant could not succeed under Regulation 15A and it was open to him to say as he did that there was no reliable evidence to demonstrate that the Appellant should be afforded the opportunity to rely upon European law to regularise her immigration status (paragraph 30).
26. Given that the Judge did not find that the care arrangements were as claimed, the issue of whether Mrs Tinsley would be required to leave the United Kingdom in the event that the Appellant's appeal was dismissed did not arise. It was not therefore an error for the Judge not to consider that point.
27. No authority was cited to me for the proposition that where the Respondent had not considered Article 8 her decision would not be in accordance with the law. In any event it was not correct to say that the refusal letter had failed to mention Article 8. What the Respondent had said was that if the Appellant wished to make an application for Article 8 she should do so on the appropriate form and notification of that form and where it could be obtained was provided in the refusal letter.
28. The Judge had considered Article 8 and had directed himself in accordance with the five stage test set out in **Razgar**. He was aware that what was required was the assessment of the proportionality of any interference with protected rights. He could not find that the relationship between the Appellant and her mother went beyond normal emotional ties because of the credibility issues he had dealt with. Since I do not accept the criticism made of the Judge's treatment of credibility, I do not accept that that means that his analysis of Article 8 was necessarily flawed. The Judge also took into account in his Article 8 assessment not only the fact that the Appellant had no leave to remain but that the Appellant's mother must also have been aware of that and must have colluded with it. Those were all factors which could be addressed when assessing the weight to be given to the public interest in maintaining immigration control and whether someone here without leave should nevertheless succeed outside the Rules. In the light of the Judge's findings of fact it could not be argued that the Judge should have gone on to find compelling circumstances which would take the case outside the framework of the Rules.
28. In any event, as the Judge pointed out at paragraph 39, no removal directions had been set and it was still open to the Appellant to make an appropriate application (which presumably would be supported by better evidence than was put to the Judge at first instance). The conclusions the Judge reached under Article 8 were open to him on the evidence before him. They do not disclose any error of law.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of a material error of law and will stand. The Appellant's appeal against the decision of the First-tier Tribunal is dismissed.

Appeal dismissed.

No anonymity order is made as there is no public policy reason for so doing.

As the appeal was dismissed no fee award can be made.

Dated this 6th day of November 2014

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Deputy Upper Tribunal Judge Woodcraft