



**Upper Tribunal**  
**(Immigration and Asylum Chamber)** Appeal Number: IA/46881/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**  
**On 7 January 2015**

**Determination Promulgated**  
**On 13 January 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM**

**Between**

**AMBER ROSE ARNOLD**  
**(NO ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Seeholf, A Seeholf Solicitors

For the Respondent: Mr L Tarlow, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of the United States of America and her date of birth is 14 April 1993. She made an application for indefinite leave to remain on 18 December 2012 on the basis that she is her mother's carer. The application was made outside of the Immigration Rules. The application was refused by the Secretary of State in a decision of 8 October 2013. The appellant did not meet the requirements of the Rules and according to the decision maker there were no compelling or compassionate circumstances outside of the Rules.

2. The decision maker was of the view that the appellant's mother, Lady Robben could use her disability living allowance and employment support allowance to obtain adequate care and she could use the facilities provided by the NHS and the local authority. It was the view of the decision maker that the appellant's mother was able to obtain such care prior to the appellant's arrival in the UK.
3. The decision maker's view is that care and assistance could be provided by the appellant's stepfather and brother and that the appellant's presence here was not essential for the care of her mother. It was concluded that the appellant's mother's medical condition was not sufficiently compelling for the appellant to be granted leave outside the Rules.
4. The appellant appealed against the decision of the secretary of state and her appeal was dismissed by Judge of the First-tier Tribunal Beg under Article 8 of the 1950 Convention on Human Rights in a decision that was promulgated on 11 July 2014 after a hearing on 3 July 2014. Permission was granted by Upper Tribunal Judge Warr in a decision of 27 November 2014. Thus the matter came before me.
5. Lady Robben is a citizen of the United States and she has indefinite leave to remain here as a result of her marriage to a British citizen, the appellant's stepfather, Michael Penny. The appellant's mother lives with her husband, the appellant and the appellant's brother, Remington Wade Arnold-Penny, who like his mother has indefinite leave to remain here.

### **The Hearing Before the FtT**

6. The appellant came to the UK in May 2011. She graduated from university in the United States on 13 May 2011. Since arriving here she has cared for her mother. Prior to this she came to the UK most summers since the age of 10. Her father lives in the USA and has remarried and the appellant does not get along with her new stepmother. The appellant cares for her mother and this was the basis of her case although she accepted in the grounds of appeal before the First-tier Tribunal that her presence was not essential for the care of her mother but it was essential for the enrichment of her mother's life.
7. Lady Robben has arthritis, fibromyalgia, high blood pressure and asthma. She had a knee replacement in January 2011. She suffered from serious gynaecological problems in October 2011 and in January 2012 underwent a hysterectomy. The evidence

relating to her health is documented by her GP Dr Kopitzko in a letter of 10 March 2014 which was before the First-tier Tribunal.

8. The Judge found that the appellant arrived in the UK on 19 July 2012 as a visitor and that she had arrived for settlement despite having applied for a visit visa. She found the evidence of Lady Robben that she did not know whether her daughter had come to settle in the UK as a carer to be lacking in credibility and found that she was well aware that her daughter came here on 19 July 2012 to look after her and to settle and that she expected her daughter to be her carer when she came to the UK.
9. At [14] the Judge found that the appellant had not spent twenty years in the UK and that she retains social, cultural and family ties to America where her father and his family live as do her maternal grandmother, cousins and aunt. The Judge found that the appellant was in contact with some relatives.
10. At [14] and [15] the Judge decided to consider the appeal under Article 8 outside of the Rules on the basis that the appellant is an adult child carer. The appellant's case is that her mother requires supervision and has a high level of dependency and the issue was the quality of her mother's life. Removal would have a knock-on detrimental effect upon the appellant's stepfather and her brother as they would have to give up work and in these circumstances there would be no private healthcare for the appellant's mother.
11. At [17] and [18] of the determination the Judge directed herself in relation to **Razgar [2004] UKHL 27**, **Huang [2007] UKHL 11** and **VW (Uganda) [2009] EWCA Civ 5**. At [18] the Judge found that the family provided no documentary evidence from the Social Services to confirm that they would not be able to provide a carer. The Judge made the following findings;
  - "18. ... Mr Penny in his evidence said that some years ago before the appellant came to the United Kingdom the family enquired from Social Services about the possibility of carers. They were told that care can be provided in the daytime. However, he admitted that to his knowledge no further enquiries have been made of Social Services since the appellant's arrival in the United Kingdom. The appellant herself said in cross-examination that she believes that Social Services do not provide 24 hour care but can provide carers in the daytime. I find that the family have provided no documentary evidence from Social Services to confirm that Social Services would not be able to provide a carer for Mrs Penny. I find that even if carers are provided during the daytime only, that in itself would help Mrs Penny with assistance in cooking, dressing and mobility during the daytime while her husband is at work. Mr Penny is at home in the evenings.

19. The appellant said that in the evenings she will give her mother food with her medicine at 9pm. If her mother has forgotten something downstairs during the night then she will fetch it. She also helps her go to the bathroom if she is required. I find that all of these tasks could be done by Mr Penny who lives with his wife and is home in the evenings. The appellant's brother provides limited assistance such as doing the gardening and helping his mother move around which sometimes requires lifting her which the appellant cannot do. I take into account that he works full-time. I also take into account that Mr Penny works full-time. However I find that there is no medical evidence before me to suggest that Mrs Penny requires 24 hour care. A letter from Dr Kopitzko Mrs Penny's registrar is dated 10 March 2014. It states that Mrs Penny has been diagnosed with fibromyalgia, arthritis, asthma. Fibromyalgia generally causes pain and tenderness in many parts of the body and tiredness. The report states that she needs extra help on her bad days. This would occur about three days in the week when she would need help to get out of bed, washing and dressing. The report states:

‘On her good days which would appear about four days of the week, she needs minimal input of help which means that she needs help with her blister packs to get her medication and needs some help in getting dressed. She manages on a good day to wash herself, is able to walk and mobilises independently but would need help with cooking.’

The report also states that she has some memory problems and reports falling about once a week when she is trying to push herself to do things.”

12. The Judge accepted at [20] that Lady Robben has some bad days. She accepted the evidence of Dr Kopitzko. However, the Judge took into account that Lady Robben is often well enough to make sandwiches for the village cricket team and is also able to distribute food at these events with her daughter. The Judge found that whilst the appellant provides admirable care for her mother, nonetheless there is no medical evidence that Lady Robben requires care 24 hours a day seven days a week. The Judge noted that she is receiving disability benefits and that there is no evidence that she would not be entitled to some form of daytime care if her health warrants it. The Judge accepted that the care from the appellant gives her mother a better quality of life (see [21]). However, she went on to find that; “that does not translate into the appellant being the only person who can provide care for her mother”.
14. The Judge went on to find that there was family life in the **Kugathas** sense (**Kugathas [2003] EWCA Civ 31**) and that

there was dependency between the appellant and her mother going beyond normal emotional ties but that the appellant's removal would be proportionate to the legitimate aim.

15. The Judge took into account that the appellant has good friends here but found that she could keep in contact with them should she return to the United States and they could visit her there. The Judge found that the appellant has a home in America and there are family members.
16. The Judge found that the medical evidence does not support the contention that Lady Robben requires 24 hour care. She found that the appellant has only been here since 2012 and her mother was looked after before she came here by her husband and son. The Judge did not accept the evidence of the family that removal would be "massively detrimental".
17. The Judge found that Lady Robben's husband and son would be able to provide some level of care for her in addition to care provided by the Social Services and/or local authority and that it does not necessarily follow that Mr Penny would have to give up his employment as a result of the decision to remove the appellant.

### **The Grounds Seeking Permission and the Oral Submissions**

18. The first ground argues that the Judge did not take into account the full history and misdirected herself at [13]. She made a factual error in relation to the date of the appellant's arrival.
19. The second ground of appeal argues that there is no way of predicting what days would be good and what days would be bad days for Lady Robben. The medical evidence was that she is at constant risk of falling. The Judge failed to make findings whether carers would be provided instantly on the NHS in order to cover such a situation.
20. The third ground argues that the Judge did not take into account the appellant's stepfather's evidence that he frequently travels with his work and can be away for seven nights or up to three weeks at very short notice. The Judge did not take into account the evidence relating to the appellant's brother's shift work pattern. The evidence was that their work could not be adjusted to accommodate Lady Robben's needs. The Judge failed to engage with the practical difficulties.
21. The fourth ground argues that the Judge failed to consider whether it was appropriate for Lady Robben's husband and her son to provide the intimate care that is required. Their evidence is that

they are not comfortable with this. There was no reference by the Judge for the need for assistance with washing and whether it was appropriate to expect them to help her with such intimate needs.

22. The fifth ground argues that the Judge erred in a finding that the appellant's stepfather and brother could care for the appellant's mother because this was based on an erroneous misunderstanding of the evidence that they had cared for her prior to the appellant's arrival. This did not take into account the evidence of the deterioration in the appellant's mother's health to which there was no reference made by the Judge.
23. Ground 6 argues that the Judge failed to consider that the appellant's presence would save public expense. In the appellant's absence there will be a need for daytime care for which the state would have to pay.
24. Ground 7 argues that all of the witnesses' evidence was that removal of the appellant would be detrimental to their lives and there was no suggestion by the Secretary of State that their evidence was not credible and it was not open to the Tribunal to make such a finding.
25. Mr Seeholf made oral submissions in which he conceded that the appellant's strongest point is that the Judge erred in relation to the chronology ( when it was the appellant arrived here), but in his view this was a major factual error which infected the overall decision. The Judge did not have regard to the evidence. Indeed she has given the impression that she has not had regard to the evidence and justice must be seen to be done. The appellant does not consider that she had a fair hearing in light of this and that her case has been dealt with fairly.
26. The error impacts on the assessment of the appellant's private life here as she has been in the UK for a year longer than acknowledged by the Judge during which time two serious medical issues have arisen in relation mother (in October 2011 and January 2012).
27. The decision is not fully reasoned. The appellant's mother needs 24 hour supervision. The appellant has had difficulty finding out what care is available as the Social Services will not assess when care is already in place. There is little scope for planning and predicting because of the nature of the illness and she needs 24 hour care on bad days and she is at risk of falling at any time.
28. The Judge anticipated a level of family care is necessary and it is not apparent that she took into account issues relating to the intimate care needed by Lady Robben. It was not explained how

her husband and son could provide care and the decision of the Judge was not rational in the light of the evidence relating to their working hours and shift patterns. The decision was based on them having historically provided care but the Judge did not take into account that Lady Robben's condition had deteriorated. In this context Mr Seeholf raised a further fairness point.

29. Mr Tarlow made oral submissions relying on the Rule 24 response. He accepted that the Judge made an error of law in relation to the chronology. However, in his view this was not material because the Judge was aware of the level of care needed and the allowances available to Lady Robben.
30. Mr Seeholf responded and submitted that it was difficult to extract the error from the final analysis made by the Judge. Both parties agreed that should there be a material error I could go on to remake the decision on the evidence before the First-tier Tribunal. No further evidence had been submitted by either party.

## **Conclusions**

31. The Judge made a mistake of fact. The appellant came to the UK in May 2011 and not 19 June 2012 as thought by Judge Beg. Judge Beg confused the chronology. In addition it was never suggested by the respondent that there was any challenge to the date of the entry or that the appellant had in any way misled the Secretary of State in relation to the reasons for her visit here. I must consider the materiality of the error.
32. It was open to the Judge to find that the appellant's mother had not established that she was in need of 24 hour care or supervision. It was not incumbent on the Judge to make a finding about the care that would be available by the Social Services or the local authority. There is no challenge to the Judge's treatment of the medical evidence and in any event the Judge accepted the evidence of Dr Kopitzko contained in his letter of 10 March 2014. However, there was no evidence adduced by the appellant about the level of care available to her mother from the Social Services and there was no reasonable explanation for this before the First-tier Tribunal. It was not Dr Kopitzko evidence that the appellant's mother was in need of 24 care or supervision and that the appellant was the only individual available to provide this.
33. The Judge in my view was aware of the evidence of good and bad days and it is clear in my view that the Judge understood that there is an unpredictable element to her illness and that she is at risk of falling. However, the Judge found that there was no evidence that the Social Services would not provide a carer notwithstanding the unpredictable nature of her needs.

34. Mr Penny's evidence was that he has to go on business trips often at short notice. It was also the evidence that his stepson works shifts (four nights on and two nights off). This evidence was not challenged by the Secretary of State. The assertion in the ground three is that the Judge did not take this evidence into account but I do not agree with this. The Judge recorded the evidence at [10], [11] and [12] of the determination.
35. The Judge found that there was no evidence that the appellant's mother was not entitled to daytime care as provided by the Social Services or the local authority and that she does not require 24 hour supervision or care seven days a week. What the Judge found is that Lady Robben's husband and son between them can provide a sufficient level of care during the evenings and this in my view was a reasonable and sustainable finding in the light of the evidence before the Judge. Indeed, the evidence of both Mr Penny and that of his stepson was that they do assist with Lady Robben's care.
36. The evidence of the family was that the appellant's mother, stepfather and brother are not comfortable about providing the intimate level of care required. In my view there is nothing to substantiate the claim that the Judge did not take this into account in the balancing exercise. The Judge found that it was of benefit to Lady Robben to have her daughter care for she accepted that the appellant provided good care and there was a close relationship between them and ultimately that the appellant gave her mother a better quality of life.
37. At [8] the Judge recorded the evidence of the appellant's mother that prior to her daughter coming here she was in a reasonable state. (However, I note that she had knee surgery in January 2011, which was five months prior to the appellant's arrival here). The evidence was that her health had deteriorated and in my view this was accepted by the Judge who accurately recorded the chronology in relation to Lady Robben's health condition. The Judge's finding that Lady Robben's son and husband could provide adequate care is not simply based on the Judge finding that they did so historically. It was the evidence of both Mr Penny and Wade Arnold-Penny that they attend to Lady Robben's care needs. Although I note that Lady Robben's evidence was that her husband's caring abilities were "utter nonsense" (see [8]), Mr Penny's evidence at [11] was that he has private medical insurance which covers the cost of carers after an operation, that he had taken time off work to look after his wife after her recent hysterectomy, which was about two years ago, and he drives his wife around and helps her to get out of bed. In addition he gets



her food in the evenings when he is at home and he reminds her to take her medication. He stated (see [10]) that his wife is able to dress for herself but a lot of the time either he or the appellant will help her and she has trouble with socks and shoes. His evidence was that his stepson helps out when he can but he works on a shift system. Mr Wade Arnold-Penny's evidence was that when he is required he will help his mother get in and out of bed and fetch her toiletries and he said that he was generally useful on mobility issues, for example lifting her, and that he works four nights on and two nights off in a shift pattern with two early starts and two late starts.

38. The Judge found that care and supervision needs were not as great as asserted by the appellant and her mother and that daytime care would be provided by the social services and or local authority and that between them Mr Penny and her son could attend to night time care.
39. The appellant's presence in the UK may in the short term save the state extra money but it is not reasonable to expect a Judge to make a crude financial analysis of the cost of the appellant's mother's care to the state and what cost would be saved as a result of the appellant's presence here. In any event it is the appellant's case that her mother is in receipt of both DLA and ESA. Any cost analysis depends on a whole host of factors.
40. It was open to the Judge to find that there was insufficient evidence to establish that the appellant's removal would be "massively detrimental" to the lives of her other family members (see [23]). The Judge in my view did not make as adverse credibility finding, but she found that objectively the evidence was insufficient to establish that removal would have the impact suggested by the parties.
41. The determination of the First-tier Tribunal in my view is adequately reasoned and the decision is lawful and sustainable. The Judge erroneously assessed proportionality in the context of the appellant having been here since 2012 and not 2011. This error made no material difference to the outcome of the appeal. The Judge accepted that the appellant had private and family life here and the determinative issue was that of proportionality. It is clear in my view that the Judge's decision in relation to proportionality did not turn on her having been here since 2012 (as opposed to 2011). The findings in relation to the mother's care needs are not infected by the error. The Judge took into account the appellant's private life here outside caring for her mother (see [22]). Unfairness was not raised in the grounds seeking permission, but for the first time in oral submissions. The appellant has not been deprived of a fair hearing. It is clear to the parties

why the appellant lost her appeal. The Judge gave adequate reasons for findings on the central issues in this appeal and the fact-finding process cannot in my view be legitimately criticised.

42. The appeal of the appellant is dismissed and the decision of the First-tier Tribunal is maintained.

Signed Joanna McWilliam

Date 12 January 2015

Deputy Upper Tribunal Judge McWilliam