



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

Appeal Number: EA/03053/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 25 January and 31 May 2019**

**Decision & Reasons Promulgated
On 24 June 2019**

Before

**UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

Between

**T V
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Akinbolu, instructed by Qualified Legal Solicitors
(25/01/19)
Ms E Daykin, instructed by Qualified Legal Solicitors
(31/05/19)
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer
(25/01/19)
Mr T Melvin, Senior Home Office Presenting Officer
(31/05/19)

DECISION AND REASONS

1. The appellant is a citizen of Vietnam and appeals against the decision of the First-tier Tribunal. The appellant appeals with permission against the decision of First-tier Tribunal Judge Moore, promulgated 30 August 2018,

dismissing her appeal under the Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations”) made on 3 April 2018 refusing her application for a derivative residence card as a primary carer of a British citizen.

2. The appellant arrived in the United Kingdom with entry clearance as a visitor in 2009. She has remained here since 19 August 2009, seeking in 2010 for leave to remain outside the Rules which was refused on 29 September 2010; seeking to remain on a family and private life basis on 14 October 2013, refused on 28 November 2013; seeking a derivative residence card pursuant to Zambrano, rejected on 24 February 2014 and again on 2 March 2014, refused on 30 April 2014. A further application was made on this basis on 19 June 2014 giving rise to an appeal which was dismissed, the appellant being appeal rights exhausted on 22 November 2016.
3. Further submissions were made and rejected in 2017, finding on 29 June 2017 the appellant made an application for a derivative residence card which was refused giving rise to this appeal.
4. The appeal was heard on 11 October 2018 and dismissed.

The Appellant’s Case

5. The appellant lives with and looks after her mother who is a British Citizen now 92 years of age. Her mother is illiterate, does not speak English and speaks only Vietnamese. Her mother suffers from dementia, impaired mobility and is no longer able, it is said, to perform daily tasks or to look after herself. She is a culturally traditional woman who eats only authentic Vietnamese food which she requires for her digestive difficulties.
6. The appellant’s mother cannot imagine life without her daughter and refers to her as her “lifeline”. She has informed a memory nurse that she would kill herself if separated.
7. The appellant’s case is that her presence in the United Kingdom is essential to her mother’s care; that her mother would decline in emotional and physical health without her presence and that, were she to move to a care home, it is likely to have a significant detrimental impact on the mother who is at risk of particular isolation due to her lack of English and any emotional disturbance. It is also stated that it may be difficult to find a care agency with a Vietnamese speaking care worker and that there is no other family member who could reasonably care for the mother, the son who previously provided care having died some years ago; the other daughter is estranged from her mother. In reality, the appellant and her mother are dependent on each other, the prospect of separation causing anxiety, fright and distress to both.

The Respondent’s case

8. The respondent's case is that the appellant cannot show on the balance of probabilities that her departure from the UK would compel the mother to leave the United Kingdom. It is noted that he has refused to engage with Social Services indicating that she is not in any immediate need and that the previous Tribunal considered that she would not United Kingdom, and rejected the claim that the other daughter would not assist her mother with her care.
9. The respondent notes also that the family had maintained the same stance when dealing with the Home Office and Social Services for the past six or seven years, yet at no time has the mother accepted any care from Social Services.
10. The respondent did not dispute the mother's age or the diagnosis of Alzheimer's but submits that she would be able to engage with Social Services should she ever need it and there are other family members in the UK who could assist her with treatment. It is also noted that the appellant has no formal training in dealing with persons with dementia or general nursing.

The hearing before the First-tier Tribunal

11. The First-tier Tribunal heard evidence from the appellant directing that account needs to be taken of the First-tier Tribunal decision from 2 September 2015. The judge noted [18] that there had not been not a great deal of change in the mother's condition although noting this in 2016 she had been referred to the social care and rehabilitation team for physiotherapy. The judge noted a letter from Whittington Health NHS Trust that the mother had been provided with medication, she had been accompanied by her daughter and another relative, that being apparently a friend or "niece".
12. The judge concluded [20] that he was not satisfied it was only the appellant who cares for her and provides assistance and support from her mother, the Tribunal in 2015 appearing to say as much at that time and that for some appointments the mother was accompanied by another person who may be a relative or a friend. He noted also that the mother is left at home with a friend or a relative while the appellant went shopping, the person being named as L P.
13. The judge did not accept the appellant's account she is the only person who accompanied her mother to medical appointments given the references to another person who accompanied them, going on to consider that as the appellant had worked for two hours a day until 2016, and that there was no evidence that during the time the mother was unable to cope or seek assistance or had to ask assistance from another relative or a friend, there was no reliable evidence demonstrating that such a relative or a friend would be unable to do the same if the appellant had to be removed to Vietnam.

- 14.** The judge did not find it credible that the mother could not do without the appellant's assistance and support given that she knew that she has provided care for her mother and found it surprising that she was unaware of any involvement of a social worker believing her to be a representative for the NHS.
- 15.** The judge found that there would be adequate care and support for the appellant's mother from the NHS and Social Services if she was forced to leave; did not accept that she would have to leave the United Kingdom and accompany her daughter to Vietnam if required to leave the country; and, by reference to Patel v SSHD [2017] EWCA Civ **2028** that the decision for the mother would not be one of necessity or compulsion but one of choice, there being no medical or care reason which would compel the mother to leave the country.
- 16.** The appellant sought permission to appeal on the grounds that the judge had erred:

 - (i) in failing when finding that the mother could not do without the appellant's assistance did not take into account the evidence from the clinical practitioner (memory nurse) who confirmed that the appellant's presence is essential to her mother's care and she needs to be present in the UK to provide this care;
 - (ii) in failing to take into account the relevance of the mother's dementia in concluding that the provision of NHS care for her was determined by choice, the judge appearing to have no regard to the role played by dementia in the mother's refusal to engage with care provided by anyone other than her daughter.
- 17.** On 23 November 2018 First-tier Tribunal Judge Andrew granted permission on both grounds.
- 18.** At the hearing before me on 25 January 2019 Mr Kotas submitted that the failure to address the evidence of the memory nurse was not material in the light of Patel nor was a failure to engage with the issue of dementia relevant.
- 19.** We consider that the judge did err in concluding that the appellant's claim that her mother could not move out of assistance was not credible as there is an apparent failure to take into account the letter from the memory service that the appellant's presence is essential to the mother's care. That is, we consider, a significant piece of evidence which needed to be taken into account in assessing this issue. Further, we are satisfied that the judge did not appear to have taken into account the appellant's mother's mental health, particularly the dementia diagnosis, in considering the reason for not taking up the care package. In our view it also fails to take into account the mother's subjective viewpoint which is informed by her dementia. There is a significant amount of evidence showing an interdependency of both on an emotional and practical level.

20. In Patel at [84] Irwin LJ said this:-

“During the hearing, we asked the Secretary of State to consider in what circumstances compulsion might arise in respect of adult dependents of those without residence: if there were none, might the regulation so interpreted be a dead letter, forcing a different interpretation to preclude redundancy? Mr Blundell's response accepts that this category of cases might be very narrow. However, he did proffer examples. Where the family share a rare blood group, and blood transfusion or bone marrow transplants might be required, it might be arguable that the carer should remain. He also instanced a British adult citizen with severe autism, dependent for all his care on a third country national relative, where it would be intolerable for the identity of the carer to change. It is clear Mr Blundell was intending to give examples rather than an exhaustive survey. For myself, I would instance significant psychological dependence derived from any well-documented and recognised psychological condition, as a possible example. There may be more. The point is that the category exists, and there can be no argument that the regulation must have an expanded reading in order to avoid redundancy.”

21. In light of the observations as to the significant psychological dependence we were satisfied that the errors referred to above were material in that, had the information been taken into account properly it may well have been the case that the appeal could have been allowed.

22. The matter was then adjourned for further evidence to be obtained.

23. When the matter came before us, we heard submissions from both representatives. We also had before us an additional supplementary bundle containing correspondence between the appellant's solicitor and Islington Adult Social Services, Camden NHS Foundation Trust and MS (Malaysia) v SSHD [2019] EWCA Civ 580.

24. The additional material is of little assistance providing little or no additional detail. It does show that there has been little or no contact between the appellant's mother and Social Services, there being no current referrals.

25. In addition, the mental health nurse was unable to speculate whether the appellant's mother would be able to cope if she were in a home noting that she had said, when asked, that “she would kill herself” if separated but was unable to say how serious this threat is. She said:

“It is likely, given the observed relationship between them, that the patient would be at risk of being isolated (given her limited English) and emotional effect if placed in a care home and separated from her daughter [the appellant]. A move to a care home has a significant impact on most people, including people with dementia.”

26. The letter also states:

“6. Dependency between N and [the appellant]: from my visits and assessments it appears that the patient and her daughter [the appellant] are for the most part dependent on each other. It appears the patient needs [the appellant] to provide support with all activities of daily living to provide emotional support. Neither speaks English and they are dependent on each other for company.”

27. It is of note that the nurse is not aware of any other family members.

28. It is relevant to consider also **MS (Malaysia)** at 23 to 26,

“23. Subsequent to *Patel*, the CJEU has again had occasion to consider these issues in Case C-82/16 *K.A. v Belgium* (8 May 2018). After laying out the *Zambrano* principle in the usual way at [51] to [52], the court stated the position in relation to adult dependencies at [65] as follows:

"As regards, first, [the cases where derivative rights were claimed by adult third country nationals of whom the father or partner was an EU citizen], it must, at the outset, be emphasised that, unlike minors and a fortiori minors who are young children, such as the Union citizens concerned in the case that gave rise to the judgment of 8 March 2011, *Ruiz Zambrano* (C-34/09, [EU:C:2011:124](#)), an adult is, as a general rule, capable of living an independent existence apart from the members of his family. It follows that the identification of a relationship between two adult members of the same family as a relationship of dependency, capable of giving rise to a derived right of residence under Article 20 TFEU, is conceivable only in exceptional cases, where, having regard to all the relevant circumstances, there could be no form of separation of the individual concerned from the member of his family on whom he is dependent."

24. To similar effect at [76] the court said:

"It follows from paragraphs 64 to 75 of this judgment that Article 20 TFEU must be interpreted as meaning that:

- where the Union citizen is an adult, a relationship of dependency, capable of justifying the grant to the third-country national concerned of a derived right of residence under Article 20 TFEU, is conceivable only in exceptional cases, where, in the light of all the relevant circumstances, any form of separation of the individual concerned from the member of his family on whom he is dependent is not possible ..."

25. It is clear, therefore, that what the *Zambrano* principle protects is the right to reside in the Union, as a matter of substance and not of form. The principle does not guarantee any particular quality of life in the Union although, as the consequences for the EU citizen increase in seriousness there will come a point where they are so serious that they will effectively compel the citizen to leave. Whether the boundary (which has impediment on the right to reside on one side and compulsion to leave on the other) is crossed is clearly a matter of fact and degree. What is necessary in each case is to examine the

character and quality of the relationship of dependency between the Union citizen and the third country national who is refused a right of residence, because it is that dependency which would lead to the Union citizen being obliged, in fact, to leave the territory of the Union.

26. The test in the case of adult dependents is a very demanding one, which will be met only exceptionally, but remains one of practical compulsion such that the EU citizen is left with no practical choice but to leave the territory of the Union.”

29. Also relevant is what was held at [42]:

“42. The availability of state-funded medical and social care will, in many cases, make it hard for those who provide care for their elderly relatives to bring themselves within the Regulation. The availability of state care is not, however, to be treated as a trump card in every case, irrespective of the nature and quality of the dependency on the carer which is relied on. Just as the availability of an EU citizen parent to be a carer of a minor child does not render unnecessary an enquiry into the nature of the dependency of the child on her non-EU parent (see *Chavez-Vilchez*), the availability of state care does not avoid the need to enquire into the actual dependency of the EU citizen on her adult carer. The availability of alternative care is a relevant, but not always decisive factor.”

30. We consider that state care would be available in this case is what is whether care is available for her from NHS and/or Social Services; and, whether there is, (as the judge found) the possibility of care from another relative.

31. The evidence with regard to the latter points in different directions. It is evident from the social worker report that the appellant’s other sister was present. It is, however, said that she is estranged and that is confirmed by the memory nurse. It appears that the estrangement is not to the extent as was said by the appellant but that there is insufficient evidence to show that the estranged sister would be prepared to provide the care that the appellant’s mother needs. Insofar as there is another relative or niece, involvement appears in reality to be limited to accompanying too medical appointments. That is significantly different from providing, as the appellant does, continual live in care with little respite. It may be that, in theory, others may be capable of providing more assistance, but that they do not do so; nor is it clear how they could be compelled so to do.

32. Viewing the evidence as a whole, we conclude that the appellant’s mother requires significant help 24 hours a day. It is possible to put together this picture from the letters from doctors, the social work report, the report of the letters from the memory nurse and the observations as to her cognitive ability. There is no suggestion from any of the professionals that there are unmet needs from which it can be deduced that these needs are being met by somebody other than the appellant. They are satisfied that these needs are in fact being met by the appellant.

- 33.** We accept also, given that both the appellant and her mother lack the ability to communicate in English that they are isolated. They have become co-dependent on each other.
- 34.** We accept that the appellant's mother does not wish to receive care from others or to be placed into a home. We accept that the latter is likely to have a detrimental effect on her, the evidence before us suggesting that she is dependent emotionally on her daughter. We accept also that there is a significant chance of her cognitive abilities deteriorating as is inevitable in Alzheimer's. We do not, however, consider that there is any reliable evidence that the mother would leave the United Kingdom.
- 35.** That said, there is not in this case any comprehensive psychiatric report or psychological report either on the appellant or her mother. The evidence is thin but on balance we are satisfied that there is in this case a physical and emotional dependency on the part of the appellant's mother to her daughter and an emotional dependency, albeit less strong, between the daughter and the mother. We bear in mind what was said in **MS (Malaysia)** [38] and [40]:
- "38. Viewed in isolation, Mr Lewis' submissions on this aspect of the appeal have a superficial attraction. Both sides agreed that the test for compulsion must be an objective one. DK's evidence that she would feel compelled to leave, or that she would definitely leave, cannot be conclusive of the issue of whether, on an objective basis, she would be compelled to leave."
- 36.** We consider that the reality of the situation in this case is that, were the appellant to leave the United Kingdom, her mother would have no option but to follow her in order to maintain the relationship but would not. We find in reality that she would be placed in a care home and that there is a real likelihood which will inevitably cause her distress and discomfort. We accept also that she suffers from Alzheimer's which, together with the fact she does not speak English and has specific cultural needs will inevitably make the situation even more difficult for her.
- 37.** Taking all of these factors into the round, we consider that the appellant has shown that if she were to leave, the mother's quality of life would be so diminished as to engage **Zambrano**, given the extent of dependency. Further, and in the alternative it needs to be borne in mind that in cases where children could not be compelled to leave because, for example, they can be taken into foster care or adopted, that is seen as a reduction in the quality of life so great as effectively to amount to a negation of rights. By analogy that is what would happen here.
- 38.** Accordingly, we are satisfied that removing the appellant would be in breach of EU law, and we therefore allow the appeal under the Immigration (EEA) Regulations.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.
2. We remake the decision by allowing the appeal.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 18 June 2019

Upper Tribunal Judge Rintoul