



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2023-003064
First-tier Tribunal No:
EA/08958/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 04 December 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MARIA ALNA FERNANDEZ MANALO
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr A. Basra, Senior Home Office Presenting Officer

For the Respondent: Mr C. Rahman, Counsel instructed by Ashfield Solicitors

Heard at Field House on 17 November 2023

DECISION AND REASONS

Introduction

1. In this appeal, the Secretary of State for the Home Department is the Appellant but for ease of reference with the decision of the First-tier Tribunal, we refer to the parties as they were at that hearing.
2. The Respondent appeals against the decision of First-tier Tribunal Judge Dineen¹, and hereafter “the Judge”, in which he allowed the appeal of the Appellant against the Respondent’s refusal under Appendix EU, dated 17 September 2022.

¹ dated 25 May 2023

3. Permission to appeal was initially refused by First-tier Tribunal Judge Austin on 20 June 2023 but later granted, after application directly to the Upper Tribunal, by Upper Tribunal Judge Perkins on 15 September 2023. For completeness, the Respondent's application was very slightly out of time and Upper Tribunal Judge Perkins considered that it was reasonable to extend the time limit to apply (see para. 1 of the grant of permission).

The relevant background

4. The Appellant is a national of the Philippines, born on 29 June 1977. On 25 March 2022, she applied as a *person with a Zambrano right to reside* under Appendix EU of the immigration rules. The application was based upon her relationship with her mother who is a British citizen born on 10 August 1955.
5. In the refusal, the two points raised by the Respondent were the assertion that the Appellant did not meet the definition of a person with a Zambrano right to reside (as detailed in Annex 1 to Appendix EU) for a *continuous qualifying period* in the UK between 2 December 2020 and 25 March 2021.
6. The Respondent did not accept that the Appellant was in fact the primary carer of her mother during this period and therefore concluded that she did not satisfy the requirements of reg. 16(5)(a) read with reg. 16(8) of the 2016 EEA Regulations.
7. The Respondent asserted that the Appellant had provided insufficient evidence (such as a report from social services or a GP's letter) to support the contention that she was involved in her mother's care. Added to that, the Respondent also contended that the Appellant had failed to provide any information as to alternative care arrangements which could be made for her mother in her absence.

The decision of the Judge

8. The Judge firstly recorded that the medical evidence provided by the Appellant in respect of her mother's health conditions was not disputed by the Respondent (para. 5). On this basis the Judge found that the Appellant's mother suffers from a variety of conditions including diabetes, sciatica, osteoarthritis, incontinence, depression, poor concentration and memory loss, (para. 10).
9. These conditions have led to significant limitations and, as recorded by the Judge at para. 11, she needs help with her daily needs including being supervised to take her medication, washing and dressing, personal hygiene, use of the lavatory and night-time care.
10. In looking at all of the evidence, the Judge accepted that the Appellant was her mother's primary carer during the required period (para. 20) and also found that the Respondent had failed to provide any evidence of services which would be available to the Appellant's mother if the Appellant was no

longer available to care for her. The Respondent concluded that it was not for the Appellant to prove a negative (para. 19).

The grounds of challenge

11. The Respondent raised two distinct grounds of appeal:
 - (a) **Ground 1** - the Judge did not adequately consider the question of whether the Appellant's mother could be appropriately cared for by social services in the United Kingdom.
 - (b) **Ground 2** - the Judge had failed to grapple with the fact that the Appellant did not have Leave to Remain/Enter granted under Appendix EU at the specified date (31 December 2020) or at the date of her application but was in fact residing in the United Kingdom as a visitor with Leave to Enter granted on arrival which ran from 2 December 2020 for a 6 month period.
12. In response to the grant of permission to appeal, the Appellant served a r. 24 response dated 7 October 2023.

The error of law hearing

13. At the beginning of the error of law hearing we sought help from the parties as to the focus of the Respondent's case at the First-tier Tribunal hearing. It was confirmed to us that the Respondent's case concentrated on whether the Appellant was the primary carer of her mother.
14. We also asked the representatives to make submissions on whether the two points made in the Respondent's grounds of appeal constituted 'new points' and if so, whether the Upper Tribunal should allow them to be argued.
15. To assist the parties as fully as possible, we gave time to both representatives to consider a recent authority from the Court of Appeal: Azhar v All Money Matters t/a TFC Home Loans [2023] EWCA Civ 1341 ("Azhar").
16. At para. 19, of Azhar, Lewison LJ referred to the dicta of Snowden J in Notting Hill Finance Ltd v Sheikh [2019] EWCA Civ 1337 which itself sought to clarify the approach to the consideration of a point being raised for the first time on appeal. The Court concluded that the approach was not a binary one and included a spectrum of potential responses.
17. The Court of Appeal cited paras. 27 & 28 of the Notting Hill Finance Ltd v Sheikh judgment, which identified possible scenarios at one end of the spectrum including a new point which would require the appellate court to carry out further factual enquiry leading to the potential for significant prejudice to the other party and at the other, a pure point of law which the other party has had the time to assess and counter.

18. We are also required to take this approach in light of the Upper Tribunal's emphasis upon the need for procedural rigour at para. 5 of the Headnote in The Secretary of State for the Home Department v TC [2023] UKUT 164 (IAC):

“The need for procedural rigour at every stage of the proceedings applies with equal force when permission to appeal to the UT is sought and in the UT, including a focus on the principal important controversial issues in the appeal and compliance with directions. The requisite clear, coherent and concise ‘issues-based’ approach continues when a judge considers whether to grant permission to appeal. This means that the judge should consider whether a point relied upon within the grounds of appeal was raised for consideration as an issue in the appeal.”

19. In his submission, Mr Basra submitted that the Respondent's second ground of appeal in respect of the specific requirements of the definition of a *person with a Zambrano right to reside* was a pure point of law which did not require any further factual enquiry such as to mean that there was no prejudice to the Appellant in the point being raised.

20. In respect of the Respondent's first ground of appeal, Mr Basra submitted that he could not take the point any further and merely relied upon the grounds as settled.

21. In response, Mr Rahman emphasised the strength of connection between the Appellant and her mother and the Judge's finding that the Appellant is her primary carer.

Findings and reasons

22. We start by confirming the view, which we gave orally after hearing the competing submissions, that the Respondent's first ground of appeal in respect of the issue to do with the constructive removal of the Appellant's mother from the UK was not a point pursued by the Respondent in the First-tier Tribunal hearing. In our judgement it is a new point which would require further factual enquiry and material prejudice to the Appellant. We therefore conclude, in accordance with the guidance confirmed by the Court of Appeal in Azhar, that the Respondent should not be allowed to advance this ground of appeal at this late stage.

23. In respect of ground 2, we agree with Mr Basra that this constitutes a pure point of law and so, albeit it is plainly a new point, we conclude that it does not cause material prejudice to the Appellant in the sense that the evidential focus in the proceedings before the Judge would have been different had it been raised. In coming to that conclusion, we take account of the fact that the Appellant provided a r. 24 response which sought to respond to this issue.

24. Taking a step back and considering the Appellant's response to ground 2 both in the r. 24 (as authored by Mr Swain) and from Mr Rahman's oral submissions, we conclude that the Respondent's argument is made out.
25. For present purposes, we are of the view that the following quoted part of the Annex 1 requirement is the relevant criteria for this appeal (our emphasis):

person with a Zambrano right to reside

a person who has satisfied the Secretary of State by evidence provided that they are (and for the relevant period have been) or (as the case may be) for the relevant period they were:

(a) resident for a continuous qualifying period in the UK which began before the specified date and throughout which the following criteria are met:

- (i) they are not an exempt person; and
- (ii) they are the primary carer of a British citizen who resides in the UK; and
- (iii) the British citizen would in practice be unable to reside in the UK, the European Economic Area or Switzerland if the person in fact left the UK for an indefinite period; and
- (iv) they do not have leave to enter or remain in the UK, unless this:**
- (aa) was granted under this Appendix; or**
- (bb) is in effect by virtue of section 3C of the Immigration Act 1971; or**
- (cc) is leave to enter granted by virtue of having arrived in the UK with an entry clearance in the form of an EU Settlement Scheme Family Permit granted under Appendix EU (Family Permit) to these Rules on the basis they met sub-paragraph (a) (ii) of the definition of 'specified EEA family permit case' in Annex 1 to that Appendix; and**
- (v) they are not subject to a decision made under regulation 23(6)(b), 24(1), 25(1), 26(3) or 31(1) of the EEA Regulations, unless that decision has been set aside or otherwise no longer has effect; or...

-
26. In reality, Mr Rahman did not engage with the highlighted requirements in the definition at all in his oral submissions and did not directly rely upon the Appellant's r. 24 response.
27. For completeness however, the relevant parts of the rule 24 response are at paras. 17 - 19. In summary it is contended that the Appellant did meet the specific requirement in (a)(iv) of the definition (as above) on the basis that the Appellant entered the UK on 2 December 2020 with a six month visit visa valid until 25 May 2021 and had evidenced that she was the

primary carer of her mother from her date of arrival, through the specified date of 31 December 2020 until (at the very least) the date of her Appendix EU application on 25 March 2021.

28. The Appellant argues further that, on the basis that the application under Appendix EU was made in time, the Appellant met the definition of (a)(iv) (bb) as she was permitted to remain in the United Kingdom pending the determination of the EUSS application by virtue of s. 3C of the 1971 Immigration Act.
29. In our view, the Appellant's argument is misconceived. The chronology is clear: from the Appellant's point of entry into the UK, through the specified date of 31 December 2020 until the date the application was made in March 2021, the Appellant was residing in the United Kingdom as a visitor with Leave to Enter in that capacity.
30. It is therefore tolerably clear that at those material dates the Appellant was not residing in the United Kingdom with Leave to Enter or Remain granted under Appendix EU.
31. Our conclusion is reinforced by the Upper Tribunal's decision in Sonkor (Zambrano and non-EUSS leave) Ghana [2023] UKUT 276 (IAC) which confirms that the holding of non-EUSS limited or indefinite Leave to Remain at the relevant time does not meet the requirements of the definition of a *person with a Zambrano right to reside* in Annex 1 of Appendix EU, (para. 2 of the Headnote).
32. We should also add that it is apparent that the Judge did not, through no fault of his own, engage with this issue as it was not the subject of argument before him. Our findings should therefore not be read as a criticism of the Judge's otherwise admirably brief and clear disposal of the appeal at the First-tier Tribunal.

Notice of Decision

33. We therefore indicated to the parties that we would allow the Respondent's appeal on the basis that the Judge had materially erred on the point of law detailed above and that we would set aside the decision. We, however, preserved the findings of fact made by the Judge that the Appellant was and is her mother's primary carer.

Substantive disposal

34. We gave the representatives the further opportunity to make any submissions in respect of our remaking of the decision but neither representative added anything of further substance.

Case No: UI-2023-003064

First-tier Tribunal No: EA/08958/2022

35. As a consequence, we therefore also indicated to the parties that, having set aside the decision of the Judge, we remade the decision by dismissing the appeal on the same legal basis.

I P Jarvis

Judge of the Upper Tribunal
Immigration and Asylum Chamber
29 November 2023