



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

Appeal Number: IA/07928/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 26th May 2016**

**Decision & Reasons
Promulgated
On 1st June 2016**

**Before
DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW**

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

and

**MR EBENEZER OLADAOYE FARODOYE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

Respondent

Representation:

For the Appellant: Mr L Tarlow, a Home Office Presenting Officer
For the Respondent: Mr S Osifeso, a legal representative

DETERMINATION AND REASONS

Introduction

1. In this appeal, the Secretary of State appeals against a decision of the First-tier Tribunal allowing the appeal of Mr Farodoye ('the claimant') against a decision taken on 9 February 2015 to refuse to issue a residence card as confirmation of a right of residence as the family

member of a European Economic Area ('EEA') national who is exercising treaty rights.

Background Facts

2. The claimant is a citizen of Nigeria. He was born on 16 March 1988. The claimant applied for a residence card as confirmation of a right of residence as the family member of an EEA national who is exercising treaty rights and who is dependent upon the claimant. The Secretary of State refused his application. The reasons for refusal were that the Secretary of State was not satisfied that the claimant had provided evidence that his father was wholly dependent upon him for his primary care, that his mother could not provide care, or that his father would be forced to leave the UK if the claimant did not remain in the UK.
3. The claimant entered the UK as a visitor on 22 September 2009 with leave until 21 February 2010. He was granted leave to remain until 31 December 2012 as a Tier 4 student. On 5 July 2012 the claimant submitted an application for leave to remain on the basis of his family and private life. That application was refused with no right of appeal. The claimant requested reconsideration of the decision which was again refused on 23 September 2013 with a right of appeal. The appeal was unsuccessful. On 8 January 2015 the claimant submitted an application for a derivative residence card as the primary carer of a British Citizen. The Secretary of State refused the application for the reasons set out in paragraph 2 above.

The Appeal to the First-tier Tribunal

4. The claimant appealed to the First-tier Tribunal. In a determination promulgated on 20 October 2015, First-tier Tribunal Judge Adio ('the judge') allowed the claimant's appeal.
5. The First-tier Tribunal made a number of findings of fact the most relevant of which were that the claimant is responsible for the care of his father, that the nature of the care provided by the claimant cannot be replicated by an ordinary carer, that removing the claimant from the UK would affect the quality of life of his father. The judge found that the claimant satisfied the requirements of the criteria for a derivative right of residence.

The Appeal to the Upper Tribunal

6. The Secretary of State sought permission to appeal to the Upper Tribunal. There are 3 grounds of appeal. It is asserted in ground 1 that the judge had misdirected himself by failing to follow *Deevaseelan*, in ground 2 that the judge placed undue weight on a risk assessment carried out by Haringey council and in ground 3 that the judge misdirected himself in law by considering that the only issue was whether the claimant was his father's primary carer and in so doing

failed to apply the principles set out in the case of *C-34/09 Ruiz Zambrano v Office National de employ* [2011] ECR I-1177 ("*Zambrano*"), and that the judge failed to give adequate reasons. On 6 April 2016 First-tier Tribunal Judge Pooler granted the Secretary of State permission to appeal but only in respect of the third ground of appeal. Thus, the appeal came before me.

Summary of the Submissions

- 7.** Mr Tarlow relied on the grounds of appeal in respect of ground 3. He submitted that the claimant gives assistance to his father but that if he were not able to give assistance the local authority or the health service would be mandated to provide the care if the claimant was not here. The care would have to be provided and therefore there is no requirement for the claimant to remain to look after his father. It is submitted that the *Zambrano* requirement is a high hurdle. He referred to paragraph 18 of the First-tier Tribunal decision and submitted that the judge fell into error. He submitted that the judge focused on the quality of the sponsor's life which is not the test to be applied.
- 8.** Mr Osifeso submitted that at paragraph 18 of the First-tier Tribunal decision from the findings of fact what is crucial and what is implicit in the decision is that the level of care given by the claimant is not comparable to the level of the care that the local authority is able to give to him. In light of his degenerative condition it is not only the quality of the sponsor's life but the fact that if the claimant were to leave the UK it would hasten his death. He submitted that it is inherent from the level of seriousness of his father's medical condition. In general terms he submitted it is implicit in the determination that the local authority cannot provide any residential care and that the care provided by the claimant cannot be replicated by ordinary care. He submitted that the judge considers the medical care needs provided by the claimant which go beyond the quality of life. His support helps the sponsor to live as long as possible. He submitted that the judge sums up at paragraph 18 and that you have to look at paragraph 18 as a whole which includes essential requirements of round-the-clock care of the sponsor which is crucial to his life. He submitted that it was not evidenced in paragraph 18 but that evidence was given at the hearing that the council are not willing to give more care than is currently provided.

Discussion

- 9.** The core question is whether, if the claimant is not permitted to remain in the UK, the sponsor (his father) would not, as a matter of practicality, be able to remain in the UK.
- 10.** Regulation 15A(4A) of the EEA Regulations, which was inserted with effect from 8th November 2012 by the Immigration (European Economic Area) (Amendment) (No.2)

Regulations 2012/2560, provides for a derivative right of residence for primary carers of British citizens as follows: -

“(1) A person (‘P’) who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4) (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria. ...

(4A) P satisfies the criteria in this paragraph if—

- (a) P is the primary carer of a British citizen (‘the relevant British citizen’);
- (b) the relevant British citizen is residing in the United Kingdom; and
- (c) the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave”.

11. Regulation 15A(4A) was inserted to comply with the interpretation of the Court of Justice of the European Union (“CJEU”) of Article 20 of the Treaty on the Functioning of the European Union (“TFEU”) in the *Zambrano* case where the Grand Chamber of the CJEU held that Article 20 of the TFEU “precludes national measures which have the effect of depriving citizens of the European Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the European Union” (paragraph 42).

12. At paragraph 17 the judge identifies the issue as:

“...Whether the appellant is the primary carer in the sense that he has primary responsibility for his father’s car wash is equally the responsibility for that persons with another person who is not an exempt person.”

And at paragraph 18 as:

“The only issue is whether the appellant is the primary carer and there is evidence to support it”

13. The judge found that the claimant is the sponsor’s primary carer finding that the care currently undertaken was as follows:

...This starts from helping his father to go to bed, to wake up, to feed, to bath, to give medication, to take into different environments and to church. More importantly he helps his father to go to the toilet at night at a time when his father is in need of a special designed toilet. He helps his father with the cleaning and the cooking... The risk assessment and support plan of the appellant’s father also indicates that it is the son that has taken full care responsibility. The evidence before me indicates that the appellant’s father requires the care of the appellant in his daily living...”

- 14.** However, it is clear from case-law that the requirement is that the removal would lead to the British citizen being **unable** to remain in the UK.
- 15.** In *Hines v Lambeth London Borough Council* [2014] EWCA Civ 660 at paragraph 19 the court, referring to the case of *Harrison v. Secretary of State for the Home Department* [2012] EWCA Civ 1736 ("*Harrison*") set out:

'...Elias LJ's starting point in that case was that the *Zambrano* principle did not extend to cover anything short of a situation where the EU citizen is forced to leave the territory of the EU (paragraph 63). Elias LJ then dismissed the notion that the CJEU in *Zambrano* was leaving open the possibility that the doctrine might apply "more widely and loosely" (paragraph Judgment Approved by the court for handing down. *Hines v. Lambeth* 64). In paragraph 66, Elias LJ makes clear that *Dereci v. Bundesministerium für Inneres* (Case C-256/11) [2012] 1 CMLR 45 (paragraphs 67-72) demonstrated that the reduction of the enjoyment of family life by the family members who remain when non-EU citizens leave was not sufficient to engage EU law. At paragraph 67, Elias LJ explained the matter as follows: -

"... I accept that it is a general principle of EU law that conduct which materially impedes the exercise of an EU 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 or 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 ...**" [emphasis added]

- 16.** At paragraph 8 the court effectively summarised that the court in *Harrison*:

'...held at paragraph 63 that the *Zambrano* principle did not cover anything short of a situation where the EU citizen is forced to leave the territory of the EU.'

- 17.** In *DH (Jamaica) and others v SSHD_2012* EWCA Civ 1736 the Court of Appeal held at paragraph 63:

'I agree with Mr Beal QC, counsel for the Secretary of State, that there 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 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...'

- 18.** In the case of *Jamil Sanneh v (1) Secretary of State for work and pensions and (2) The Commissioners for Her Majesty's Revenue and Customs* [2013] EWHC 793 (Admin) ('*Sanneh*') the court having

considered the *Zambrano* case and subsequent authorities derived a number of propositions from those cases at paragraph 19:

...

iii) It is for the national courts to determine, as a question of fact on the evidence before it, whether an EU citizen would be compelled to leave the EU to follow a non-EU national upon whom he is dependent.

iv) Nothing less than such compulsion will engage articles 20 and 21 of the TFEU. In particular, EU law will not be engaged where the EU citizen is not compelled to leave the EU, even if the quality or standard of life of the EU citizen is diminished as a result of the non-EU national upon whom he is dependent is (for example) removed or prevented from working...'

19. In *MA and SM (Zambrano: EU children outside EU) Iran* [2013] UKUT 00380 (IAC) the Upper Tribunal when applying the EU law principles as summarised in *Sanneh* held at paragraph 56:

'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 (see *Dereci* at paragraph 68, and *Harrison* at paragraph 67).'

20. The above cases repeat and amplify that there is no right to a particular quality of life or standard of living and nothing short of actual compulsion or being forced to leave the UK as a result of the removal of the carer will engage the *Zambrano* principles as enacted in the EEA Regulations. Applying those principles to this case it is clear what is required is that without the care of the claimant the sponsor would be **compelled** to leave the UK.

21. The focus of the judge's reasoning was on the quality of life of the sponsor. At paragraph 18 the judge records and finds:

"... The father himself stated that the absence of his son in his life as a carer would affect his lifespan. I am prepared to find that the nature of the care provided by the appellant to his father cannot be replicated by an ordinary carer. The appellant virtually lives with his father and any carer would be required to come and as the father himself has stated the council does not see the need to provide the sponsor with a carer bearing in mind the full-time assistance he is getting from his son. In view of the bond of father and son and the dependency of his father on his son I am prepared to accept that removing the appellant from the United Kingdom would affect the quality of life of the father and his standard of living ... In effect the father is stating that removing his son from the UK would not make the quality of life he has improve, in fact it will reduce it. This is an important factor in considering the criteria under the *Zambrano* ruling ... The only issue is whether the appellant is the primary carer and there is evidence to support it. I find that there is both oral and documentary evidence to support this fact ... I therefore find that the appellant satisfied the requirements of the criteria for a derivative right of residence. I find that removing the appellant from the UK would in effect be removing the quality of life available to his

father. As there is no one else looking after him this would require the appellant's father to leave the UK as he will not have the same kind of care and treatment and bond which would make life worth living for him ..."

22. The judge did not refer to any of the case-law cited above. The sponsor is a British Citizen. I accept Mr Talrow's submission that if his son were not in the UK the Local Authority and Health Authority would be required to provide a level of care that would meet his needs. As the judge recorded *'the council does not see the need to provide the sponsor with a carer bearing in mind the full-time assistance he is getting from his son,'* That is not a finding that if the son were to leave the UK the Council would be unwilling or unable to provide the care required. It will not be the same level of care but that is not the entitlement under the Regulations. The judge's focus was on the Council being unable to provide the level of care currently provided by the claimant. The judge considered *'As there is no one else looking after him this would require the appellant's father to leave the UK as he will not have the same kind of care and treatment and bond'*. As set out in the extracts of the case-law above even if the quality of life is diminished nothing short of compulsion satisfies the requirements in the Regulations. It is not a right to any particular quality or life or to any particular standard of living. 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.

23. In recording the oral evidence, the judge set out:

9. "The appellant was asked why his father cannot have a carer. The appellant stated that he is his father's son and his father is used to him for the past five years in the UK. A different carer who does not know his father would be a downside to his father's health... He does not agree that his father can stay in the UK without him. His father will be lonely and it will affect his health. The carer will not be like him..."

10. Under re-examination stated that the council propose to give his father a carer and he told them he does not need anyone...

11. ... The Haringey Council told him in 2011 that since his son was staying with him he did not need a carer. They cannot consider a carer for him ...

12. Under cross examination the Sponsor stated that the last approach made by the Council to ask whether he needed a carer was three years ago ..."

24. I find that the judge erred in failing to consider correctly the test to be applied by focusing on the quality of the Sponsor's life if the claimant were to be removed and the current lack of provision of care which is, from the evidence, largely due to the fact that the claimant is currently providing that care. This approach is clear from the judge's conclusion *"As there is no one else looking after him this would require the appellant's father to leave the UK as he will not have the same kind of*

care and treatment and bond". The sponsor, as a British Citizen, is entitled to the level of care he requires whether that is support in his own home or in residential/nursing care. The sponsor would not be compelled to leave the UK to receive the care he needs either now or even in the future on the basis of a worsening of his current medical conditions. The sponsor quite understandably would prefer to have his son care for him. However, the right under the EEA Regulations is not to a particular quality of life that the sponsor would prefer.

Conclusions

- 25.** The decision of the First-tier Tribunal judge involved making a material error of law. I set-aside the decision pursuant to paragraph 12(2)(a) of the Tribunals Courts and Enforcement Act 2007.
- 26.** I re-make the decision. For the reasons set out above the sponsor would not be compelled to leave the UK if the claimant was removed from the UK. He does not therefore satisfy the Requirements of the EEA Regulations.
- 27.** I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Decision

The decision of the First-tier Tribunal involved the making of an error of law. I set aside that decision. I re-make the decision dismissing the claimant's appeal against the decision of the Secretary of State.

Signed P M Ramshaw

Date 30 May 2016

Deputy Upper Tribunal Judge Ramshaw