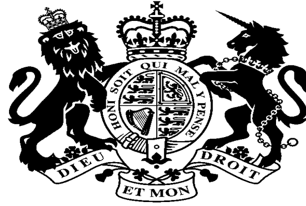

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/01480/2017

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre
On 28th January 2019

Decision & Reasons Promulgated
On 3 April 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Mahmood Mohamed
(no anonymity direction made)

Appellant

And

Secretary of State for the Home Department

Respondent

For the Appellant: **Mr Worrall, Deane and Bolton**
For the Respondent: **Mrs Aboni, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of South Africa born in 1969. He appeals with permission[1] the decision of the First-tier Tribunal (Judge Evans), who on the 21st November 2017 dismissed his appeal under the Immigration (European Economic Area) Regulations 2006.

[1] Permission granted on the 25th September 2018 by Upper Tribunal Judge Frances

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2. The Appellant seeks confirmation of a right to reside in the United Kingdom on the basis of 'derivative rights'. He states that he is the primary carer of his British wife and her two British children. As such he asserts a right of residence with reference to Regulation 15A of the 2006 Regulations. Insofar as is relevant this provides:

> '**15A.—**
>
> (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**.
>
> …
>
> **(7) P is to be regarded as a "primary carer" of another person if**
>
> > **(a) P is a direct relative or a legal guardian of that person; and**
> >
> > **(b) P—**
> >
> > > **(i) is the person who has primary responsibility for that person's care; or**
> > >
> > > **(ii) shares equally the responsibility for that person's care with one other person who is not an exempt person.**
>
> (7A) Where P is to be regarded as a primary carer of another person by virtue of paragraph (7)(b)(ii) the criteria in paragraphs (2)(b)(iii), (4)(b) and (4A)(c) shall be considered on the basis that both P and the person with whom care responsibility is shared would be required to leave the United Kingdom.
>
> (7B) Paragraph (7A) does not apply if the person with whom care responsibility is shared acquired a derivative right to reside in the United Kingdom as a result of this regulation prior to P assuming equal care responsibility.
>
> (8) P will not be regarded as having responsibility for a person's care for the purpose of paragraph (7) on the sole basis of a financial contribution towards that person's care.
>
> (9) …'

3. In his application the Appellant first relied on Regulation 15A(4A) in that he is the primary carer for his wife, who is severely disabled. He also asserted that he is the

primary carer for his two stepchildren, who at the date of the First-tier Tribunal decision were aged 7 & 5: Regulation 15A (7).

4. The Respondent refused to grant a residence card on both grounds and the First-tier Tribunal, in its decision of the 21st November 2017, agreed.

The Appellant's Stepchildren

5. In his letter of the 30th January 2017 the Respondent pointed out that the Appellant cannot hope to succeed under Regulation 15A (7) since he is not a "direct relative" or "legal guardian" of either of the children concerned.

6. Before the First-tier Tribunal Counsel representing the Appellant agreed that this was so. The Tribunal accordingly dismissed the appeal on this ground.

7. The Appellant does not seek to challenge that finding. He nevertheless submits that the Tribunal erred in failing to make findings, or draw conclusions therefrom, about the extent to which he is caring for his stepchildren. This was relevant not just to the application of Regulation 15A(7), but to its wider consideration of whether or not his wife is dependant upon him. I address this matter below.

The Appellant's Wife

8. It is accepted that the Appellant's wife is British, and that she suffers from a serious and debilitating illness called polymyositis. It is described by her doctor as a "rare muscular disorder resulting in a severe physical disability". Since her diagnosis in 2015 her condition has deteriorated. She is unable to work and is now in receipt of both the 'daily living' and 'mobility' components of the Personal Independent Payment (PIP). The Appellant does all of the housework; he helps his wife with her personal care, with washing and dressing. He also looks after the children: he gets them up in the morning, cooks breakfast for them and takes them to and from school.

9. The First-tier Tribunal was satisfied, on the basis of the foregoing evidence, that the Appellant is the primary carer for his wife. He gives her substantial levels of care 'round the clock'. Without such assistance she would not be able to care for herself.

10. Having satisfied itself that the tests in Regulation 15A(4A)(a) and (b) were met, the Tribunal directed itself to the decision of Upper Tribunal Judge Jordan in Ayinde and Thinjom (carers-Reg 15A- Zambrano) [2015] UKUT 00560 (IAC) in respect of Regulation 15A(4A)(c). In particular, to the ruling at paragraph (b) of the headnote to that decision:

> *The provisions of reg. 15A of the Immigration (European Economic Area) Regulations 2006 as amended apply when the effect of removal of the carer of a British citizen renders the British citizen no longer able to reside in the United*

Kingdom or in another EEA state. This requires the carer to establish as a fact that the British citizen will be forced to leave the territory of the Union.

11. As to this third limb of the test, the First-tier Tribunal found that neither the Appellant or his wife had stated in terms that she would in fact have to leave the United Kingdom if he were to return to South Africa. The reality was that this was very unlikely. The evidence indicated that she would not be able to receive treatment for her rare condition in South Africa, or in India (her original country of nationality). At present she is receiving high levels of PIP in the United Kingdom and there was no evidence that she would be able to receive anything comparable in India or South Africa. She had stated that she did not want to live in South Africa. She could get care here. Her children live here and they are British. Having considered all of these factors the Tribunal found that the Appellant had failed to demonstrate as a matter of fact that his wife would be compelled to leave the United Kingdom if he were to leave.

12. The Appellant contends that the Judge took a restrictive approach. It was speculative to suggest that she would be able to manage on the basis of benefits and associated support such as the NHS, when on his own findings it was clear that the care provided by the Appellant was "essential and irreplaceable". It is further submitted that the Judge failed to consider the welfare of the children in his assessment, who would also need to find an alternative carer should the Appellant leave the United Kingdom. Reliance is placed on Chavez-Vilchez and Others v Raad van Bestuur van de Sociale Verbekeringsbank and Others (10 May 2017) (Case C133/15) (Grand Chamber), [2017] 3 WLR 1326.

13. For the Respondent Mrs Aboni opposed the appeal on all grounds. She submitted that the arguments advanced were in essence Article 8 ECHR submissions and that the proper forum for these was a paid human rights application.

Findings and Conclusions

14. It is clear from the decision in Ayinde and Thinjom that the task for decision-makers in respect of Regulation 15A(4A)(c) is not whether the family would face difficulties if the applicant were to leave the United Kingdom; nor is it whether such a departure would lead to an interference with Article 8 rights. Pursuant to the decision in Zambrano [2011] EUECJ C-34/09 the question is simply one of fact: will the British citizen be forced to leave the United Kingdom if his or her carer is not given a residence card?

15. In Ayinde and Thinjom Judge Jordan had regard not only to the relevant ECJ authorities, but to the decision of the Court of Appeal in Damion Harrison (Jamaica) & AB (Morocco) v SSHD [2012] EWCA Civ 1736. Rejecting the argument that the test required a broad evaluation of the genuine enjoyment of the substance of free movement rights, at paragraph 36 he said this:

"… Indeed, the argument advanced by Mr Drabble in that case was in essence the same argument as Mr Knafler advanced before me. *Damion Harrison (Jamaica)* was a case in which the appellants were the subject of deportation proceedings and each had British citizen children. In each case it was found as a fact that if the appellant were to be removed from the United Kingdom, their Union citizen children would not be compelled to leave. The appellants submitted that if they were to be removed this would adversely affect the quality of life of their British citizen children and that Article 20 TFEU and the *Zambrano* principle would be engaged. In rejecting this submission Elias LJ, giving the judgement of the Court said:

> 57. There are four strands in Mr Drabble's submission that the scope of the doctrine might arguably extend beyond the situation of forced removal. First, he submits that certain passages in the judgments can be read that way, and he relies in particular on the way in which the Court answered the question in *Zambrano* ...see paragraph 45, set out in paragraph [24] above. It is at least arguable, he says, that depriving an EU citizen of the 'genuine enjoyment of the substance of the rights' attached to EU citizenship could embrace decisions which leave the right intact but less valuable because the enjoyment is diminished. It may be enough that the right is impeded even though not lost. Mr Drabble does not go so far as to say that this formulation of the principle by the CJEU carries the day; he merely claims that there are hints that the court was recognising a potentially wider jurisprudence and that the language, no doubt carefully framed, is consistent with the Court envisaging a possible development along those lines.
>
> 62. Finally, Mr Drabble prays in aid certain observations of Professor Gareth Davies from Amsterdam University who has written a paper entitled 'The family rights of European children: expulsion of non-European parents' which discusses *Zambrano* in considerable detail. It includes a number of passages supporting Mr Drabble's argument that the position in EU law is at least fluid, that the current state of the law is not entirely coherent, and that the precise scope of the *Zambrano* principle remains uncertain."

37. Having considered this passage, I can see no significant difference between the argument advanced to me and that made by the appellant's counsel in *Damion Harrison*. It was roundly rejected by the Court of Appeal:

> 63. … [T]here 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 the 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, there is in my view nothing in these authorities to suggest that EU law is engaged. Article 8 rights may then come into the picture to protect family life as the court recognised in *Dereci*, but that is an entirely distinct area of protection…
>
> 66. Even if the non-EU national is not relied upon to provide financial support, typically there will be strong emotional and psychological ties within the family and separation will be likely significantly to rupture

> those ties, thereby diminishing the enjoyment of life of the family members who remain. Yet it is plainly not the case, as *Dereci* makes clear and Mr Drabble accepts, that this consequence would be sufficient to engage EU law. Furthermore, if Mr Drabble's submission were correct, it would jar with the description of the *Zambrano* principle as applying only in exceptional circumstances, as the Court in *Dereci* observed. The principle would regularly be engaged.
>
> 67. As to the submission that EU law might develop in that direction, I accept that it is a general principle of EU law that conduct which materially impedes the exercise of an EU law 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 of 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. Of course, to the extent that the quality or standard of life will be seriously impaired by excluding the non-EU national, that is likely in practice to infringe the right of residence itself because it will effectively compel the EU citizen to give up residence and travel with the non-EU national. But in such a case the *Zambrano* principle would apply and the EU citizen's rights would have to be protected (save for the possibility of a proportionate deprivation of rights). Accordingly, to the extent that the focus is on protecting the substance of the right, that formulation of the principle already provides protection from certain interferences with the enjoyment of the right."

16. If the question is then, simply one of fact, it is difficult to see what quarrel the Appellant can have with the First-tier Tribunal's findings in this case. The Tribunal considered the evidence and gave a number of good reasons for finding, as fact, that the Appellant's wife would not leave the United Kingdom (and thereby EU) with him. Those reasons were a) she was dependent upon the medical care she receives here b) she is in receipt of considerable state benefits here which were not likely to be replicated elsewhere c) the care that her husband gives her could be provided by her local council/the NHS and d) her children are British and are living here. To this might be added the fact that the lady nowhere asserted, in her written or oral evidence, that she would in fact be forced to leave.

17. The arguments against these findings were, in essence, arguments that could very properly be raised in the context of a proportionality balancing exercise under Article 8. This was not however an Article 8 assessment. The Tribunal therefore had no need to consider the *quality* of the care available to the Appellant's wife in his absence: it may not be the same as the care he provides but if she would not – could not – leave this country the enquiry ended there.

18. Mr Worrall made various well made submissions about the children, and in particular relied on Chavez-Vilchez to submit that the Tribunal had erred in failing to take into account the fact that the children too looked to the Appellant for their care. Again, these are all powerful arguments in the context of Article 8, but it is difficult

to see their relevance in the context this Regulation 15A decision. In Patel & Ors v Secretary of State for the Home Department [2017] EWCA Civ 2028 the Court of Appeal specifically considered whether Chavez-Vilchez had materially extended the Zambrano principle:

> "72. In my judgment, the decision in Chavez-Vilchez represents no departure from the principle of EU law laid down in Zambrano, although it does constitute a reminder that the principle must be applied with careful enquiry, paying attention to the relevant criteria and considerations, and focussing not on whether the EU citizen child (or dependant) can remain in legal theory, but whether they can do so in practice. There is no alteration in the test of compulsion.
>
> 74. It follows in my view that Chavez-Vilchez does not represent any kind of sea-change to the fundamental approach to be taken. It does not mean that English reported cases implementing Zambrano but pre-dating Chavez-Vilchez (such as Harrison, and Sanneh) hold diminished authority,"

19. The clear finding of the Tribunal was that the mother and children would not leave the United Kingdom. They would not therefore be 'forced' to do so. The family would undoubtedly suffer detriment if the Appellant were to be removed and they remain here, but that detriment was not such that they would be forced to take leave of their home and lives here as a result. Unlike the children in Zambrano this is a family unit who can remain in their own home and receive support from outside agencies.

Decisions

20. The decision of the First-tier Tribunal contains no material error of law and it is upheld.

21. There is no order for anonymity.

Upper Tribunal Judge Bruce
24th February 2019