Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/01853/2020**

THE IMMIGRATION ACTS

Heard at Field House
On 20 October 2021

Decision & Reasons Promulgated
On 17 November 2021

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

TRACY IJEOMA OGBECHIE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Ms J Isherwood

DECISION AND REASONS

1. On 9 August 2021, I issued my first decision in this appeal. I held that the First-tier Tribunal (Judge Lloyd) had erred in law in allowing the appellant's appeal against the respondent's refusal to issue a Derivative Residence Card and I set that decision aside in full. I directed that the appeal should be retained in the Upper Tribunal so that the decision upon it could be remade afresh.

Background

2. In my first decision, I described the relevant background as follows:

> [3] The appellant is a Nigerian national who was born on 5 July 1987. The date on which she entered the United Kingdom and the means by which she did so are not clear from the papers before me. She stated in a witness statement made to the FtT that she came to the UK for the purpose of schooling in 2011. Whatever the position as to that, it is clear that she married a British citizen named Afamefuna Aniweta Maduabbuchi Ilene on 23 December 2013. Mr Ilene was born on 10 December 1970.
>
> [4] On 9 January 2020, the appellant made an application for a DRC. She completed form DRF1 to make that application. She gave her address in Croydon and a Yahoo email address. She stated that she was Mr Ilene's primary carer and that he was more comfortable with her. His British passport was provided in support of the application, as was their marriage certificate from the London Borough of Newham.
>
> [5] Also provided with the application was a single letter from South London and Maudsley NHS Foundation Trust dated 14 October 2019 recording the outcome of a telephone assessment which had taken place between Mr Ilene and a Clinical Support Worker on that date. The letter stated that Mr Ilene had reported symptoms of moderate depression and severe anxiety. He was said to have told the Clinical Support Worker that he was 'better off not being here' and that he felt his options were limited. He said that he did not want to be in the UK. He had no active suicidal plans. He had an adult daughter who gave him positive energy and he tried to think positively. He knew that if he was suicidal 'he would speak to his mother and his sister'. There was some concern over neglect, in that he did not eat much but he was said to be 'able to get out and get the shopping done and get something to eat.' A further telephone appointment had been booked for 19 November 2019.
>
> [6] The respondent refused the application on 10 February 2020. She set out the salient parts of regulation 16 of the Immigration (EEA) Regulations 2016. She considered the appellant to have provided unsatisfactory evidence to show that she was Mr Ilene's primary carer. The letter from the NHS did not establish that he required primary care provided by the appellant. The respondent noted that the appellant was not even mentioned in the NHS letter and that reference was made to him receiving support from his mother and sister. The substantive decision ended with the following paragraph:
>
> *As you have failed to provide evidence that your sponsor requires primary care provided by yourself, and that they would be unable to reside in the UK if you were to leave your application falls for refusal on this occasion.*

Resumed Hearing

3. The resumed hearing came before me on 20 October 2021, with the appellant representing herself and Ms Isherwood, a Senior Presenting Officer, representing the respondent. After my explanation of the issues in the appeal and the procedure which would be followed, the appellant sought an adjournment so that she could secure legal representation. She said that she had previously approached a member of the Bar to act on a Direct Access basis and that she hoped to be able to raise the necessary funds to pay the fee she had negotiated. I noted that the appellant had had ample time to secure representation and that it was far from certain that she would be able to raise the sum of money in question (£850) within a reasonable time. In the circumstances, having had regard to the over-riding objective, I considered that it would be fair to proceed with the appellant representing herself. I took additional time to explain the issues in the case and to reassure the appellant that she and her husband would be asked comparatively few questions by Mr Isherwood.

4. The court file contains the following documents. From the respondent, there is a bundle containing the letter of refusal and the documents submitted by the appellant in support of her application. From the appellant, there is a bundle of nine items which was prepared by the appellant in advance of the hearing before the FtT, stamped as received by that Tribunal on 3 August 2020. There is a skeleton argument, prepared by solicitors on an 'unbundled services' basis, and received by the Upper Tribunal on 20 July 2021. There are two additional items of medical correspondence appended to that skeleton argument. There are also seven colour photographs of the appellant and her family.

5. I heard oral evidence from the appellant and her husband, AI. I will not rehearse the oral evidence in this decision, but will refer to it insofar as it is necessary to do so to explain my decision.

Submissions

6. Ms Isherwood submitted that the appeal fell to be dismissed. The evidence came nowhere near establishing that the appellant was her husband's primary carer. The evidence had been evasive and vague. He was clearly able to function independently of the appellant. Other family members were available to help. He had mental health problems but this was a long-standing condition. The appellant's intentions spoke for themselves; she intended to work as many as 30 hours per week once she was permitted to do so.

7. The appellant was required to show that her husband would experience a de facto compulsion to leave the UK in the event of her removal. The refusal letter had highlighted the need for the appellant to show that her husband would receive inadequate care in the event of her removal but there remained nothing from social services or the NHS. It was noteworthy that he continued to receive no support from his General Practitioner and the absence of evidence of the same was a point which militated in favour of the respondent. The reality of the case was that the appellant's husband was able to run a business and to see people. Insofar as he requires care, no thought had been given to the alternative ways in which that care might be provided. It was held in Patel v SSHD [2019] UKSC 59; [2020] Imm AR 600 that it will only be in exceptional circumstances that a third country national will have a derivative right of residence by reference to a relationship of dependency with an adult Union citizen. That high threshold had not been crossed in the appellant's case.

8. The appellant submitted that she is her husband's primary carer. She was a carer by training and she was able to provide him the care that he required; it was the same level of care she would provide if she was assigned by the local council. His ability to cope varied by the day. Some days she had to care for him like a child, other days he was not so bad. The moments when he was at his worst were private moments and it would not be appropriate to take a video. If she had known that she was required to prove her case, she would have gathered more evidence. She had taken him to the GP and to Talking Therapies, but he did not want to go because of his mental state. She is not a qualified nurse, but she did wonder what would have happened to him if she had not been around. She had worked in the past with people who suffered from mental illness. There is no diagnosis or prognosis, but the issue is significant and he would not agree to do certain things.

9. Ms Isherwood had submitted that the appellant's husband could call upon family support. The only person was his sister and the appellant had mended their relationship, but he could not call on her for the type of assistance which is required. His daughter was not now in the UK. He talked to relatives, but he could not speak to them about his mental health problems. He was getting better and he no longer talked to strangers on the road as he used to when his condition was really bad. They had been at their worst in 2014, when her first application for derivative residence card had been refused. They had made real progress since then. She understood the need for documentary evidence but she had been thinking of her husband and not the case. She had never used his situation to try to get anything for herself.

10. I reserved my decision at the end of those submissions.

Analysis

11. The Immigration (EEA) Regulations 2016 provide at regulation 16 that a person who satisfies various criteria has a derivative right to reside in the United Kingdom. In respect of a relationship such as that at issue in this appeal, the relevant part of regulation 16 is regulation 16(5), which is as follows:

> (5) The criteria in this paragraph are that—
> (a) the person is the primary carer of a British citizen ("BC");
> (b) BC is residing in the United Kingdom; and
> (c) BC would be unable to reside in the United Kingdom or in another EEA State if the person left the United Kingdom for an indefinite period.

12. Regulation 16(8) provides a definition of the term 'primary carer' which is, as far as it relates to this appeal, that the person 'has primary responsibility for [the other person's] care'.

13. Various points can be resolved immediately in the appellant's favour. There is no requirement that the appellant and AI are in a genuine and subsisting spousal relationship but it is abundantly clear that they are. The appellant's knowledge of AI's mental health and the evidence she gave about the way in which she has rebuilt his relationship with his family had the ring of truth to it. There can be no doubt, in my judgment, that they are a happily married couple. Nor is there any question that AI is a British citizen. So much is clear from the copy of his British passport which appears at page 28 of the respondent's bundle.

14. There are, as I explained to the appellant at the hearing, two real questions in this appeal. The first is whether she is AI's primary carer. The second is whether he would be compelled, in

reality, to leave the United Kingdom in the event that she were to be removed to Nigeria. I take those questions in turn.

15. I begin my answer to the first question by considering the medical evidence before me. In doing so, I note that there is no requirement in either the Regulations themselves or the authorities for there to be specific evidence of a medical condition or of a care need. The position in that regard differs from the detailed requirements often found in the Immigration Rules, for example as regards Adult Dependent Relatives. Nevertheless, where it is contended that there is a medical need which is said to necessitate a person such as AI receiving care, it is appropriate to look to the medical evidence in order to consider the existence and severity of that need.

16. Before the FtT, there was evidence to show that AI had sought the assistance of Croydon Talking Therapies on 14 October 2019. He took part in a telephone assessment on that date and it was reported that he was experiencing symptoms of depression and anxiety. The extent of his depression was moderate. The extent of his anxiety was severe. He reported no suicidal plans. In the event that he had any such thoughts he would 'speak to his mother and sister'. His appetite was low but he was able to get out to do shopping and to get something to eat. He was recommended a course of guided self-help modules based on CBT principles.

17. There is additional medical evidence before me. In a letter dated 30 June 2021, AI's General Practitioner writes as follows:

> [AI] is registered at Thornton Road Surgery since November 2017. A few of our GP colleagues have seen him due to ongoing mental health issues such as anxiety and depression.
>
> He lives with his wife, Mrs Ogbechie, and I gather that she is his primary carer. His wife appears to be a protective factor to look after him and his mental health issues.
>
> He is currently taking antidepressant medicines for anxiety and depression, and he continuously has follow-up appointments in primary care.
>
> I understand that [AI] is going through immigration issues for his partner, which has also impacted his mental health.

18. Appended to that letter is a printout from the surgery's records, showing AI's recent consultations. Three are recorded. On 7 October 2019, there was a consultation which led to AI's referral to Croydon Talking Therapies. The records add nothing to the letter which followed the referral. Nearly two years later, on 4 June 2021, there is the second entry. This states that AI had reported that his anxiety and depression had worsened over the preceding six months. His sleep and his appetite were affected. CBT had helped in the past. He was commenced on Sertraline with advice to follow up in two weeks.

19. On 23 June 2021, AI had called the surgery for a follow-up appointment. He was taking Sertraline with no side effects noted. He was happy to continue taking the medication. No counselling or therapy had been booked. He was advised to continue taking the medication and to make contact in the event of any deterioration.

20. Before me, the appellant and AI were both asked questions about his mental health. He said that he continued to work in Information Technology, as a web designer. He had previously worked for companies including Siemens and Xerox but he now undertook work for friends and associates on a self-employed basis. He did not work regular hours but he usually worked every day. His mental health fluctuated, to use the appellant's term. He said that he could sometimes work for 12 or 13 hours per day, but that on other days he could not work at all. He did not take his medication all the time, only when 'things get terrible'. He said that the appellant was responsible for ensuring that the house did not become 'disgusting' as it had in the past. He enjoyed her company. She did the shopping and the cleaning.

21. The appellant was asked to describe AI's average day. She said that he is currently 'OK'. She had come with him to court. She had to remind him to have a shower and she would also get him to do some cleaning so that he is active and so that he didn't just sit at the computer straight away. At night, they would take a walk to the park or the shops and then watch television. If he experienced anxiety, she would calm him down.

22. The appellant stated that AI is calmer when she is around and if she was not, he might forget to eat. Sometimes they would see his sister in Harrow or his mother in Bermondsey and she had repaired those relationships. He sometimes had difficulty sleeping. He would not want to get help from the NHS because he is proud. There had been a period before June when he had not been sleeping and he had been screaming. There had been a similar episode in February. At the end of his evidence, AI asked Ms Isherwood whether she understood the problem; he could not just ask someone for a glass of water and then be fine, he added.

23. Taking account of the limited medical evidence before me, together with the oral evidence I have summarised above, it is quite clear that AI suffers from mental health problems. I accept that he was referred to Croydon Talking Therapies in 2019 and that he self-referred to his GP in 2021. He has been prescribed some medication, although he explained to me that he is reluctant to take it. That assertion is supported to some extent by the fact that he named the medication as Temazepam, whereas the medical evidence before me only makes reference to him being prescribed Sertraline.

24. I also accept that the severity of AI's mental health problems worsens and improves on occasion. It seems that he has sought professional help at those times when it has been worse than usual. It also seems that he is at a better stage at the moment. He and the appellant were consistent about that, as they were in the essential core of their evidence. As Ms Isherwood submitted, however, the fundamental question is whether AI requires care. It is perhaps important to recall the origin of these principles in Community Law, stemming as they do from the relationship between parent and child in the paradigm case. That is not to say that other relationships cannot satisfy the requirements of Community Law, as transposed into the Regulations by regulation 16, but the extent of the care required might properly be informed by recalling cases such as Zambrano v Office national de l'emploi (Case C-34/09) [2012] QB 265 and Chavez-Vilchez v v Raad van bestuur van de Sociale verzekeringsbank (Case C-133/15) [2018] QB 103, in which what was contemplated was the separation of a third country national parent from children who were nationals of a member state.

25. Even accepting, as I do, that AI has good days and bad days, I am unable to find that he requires care of the type protected by these principles. He is no longer able to work for companies such as Xerox and Siemens, seemingly as a result of a conviction which resulted in a sentence of imprisonment, but he is still able to work on a self-employed basis in a demanding field. As he said, there are some days when he is able to work for 12 hours or

more. The evidence that he gave did not suggest that the relationship between him and the appellant was one of patient and carer. He explained that she does the cooking and the cleaning and that she is also responsible for the shopping but he is evidently able to bathe himself and to make a meal, even if he sometimes forgets to eat, as the appellant claimed.

26. I do not suggest that mental health conditions cannot be just as debilitating as physical ill-health. That is plainly not the case and a person with a serious mental health condition may need care just as much as a person with restricted mobility, for example. But neither the medical nor the witness evidence in this case comes close to suggesting that AI requires a carer.

27. I am reinforced in that conclusion by the evidence that the appellant gave about her intentions in the event that she was permitted to work in the UK. She did not say that she would continue to provide constant care for her husband. She said that she would like to return to work in the care sector and to work for thirty hours per week. It was only when she was asked about those plans in a little more detail that she suggested that she would try to return to work gradually to see whether AI could manage without her. In my judgment, the earlier answers shed a good deal of light on the amount of care that AI actually requires. The appellant knows that he would be able to manage for extended periods of time in the event that she was no longer around. The house may not be so clean, the shelves may not be so well-stocked, but there is insufficient evidence to show that AI requires the appellant's care or that she can properly be described as his primary carer.

28. That conclusion suffices to dispose of the appeal but I should state that I also agree with Ms Isherwood's alternative submissions about regulation 16(5)(c). She submitted in that regard that AI would not be compelled to leave the United Kingdom in the event of the appellant's removal to Nigeria. That submission was based on two points. The first concerned the support which might be available from AI's mother and sister. There is no evidence from them. Given AI's age, I think it likely that his mother is well into her eighties, as he claimed. In the event that he required physical support, with bathing and toileting for example, she would obviously not be able to assist. Even if AI does require reminding to take a shower or to clean the house, however, I cannot see why she would be unable to provide that reminder by telephone.

29. AI's sister is not far away and it is also not clear to me why she would be unable to provide similar assistance. I recognise, of course, that this is unlikely to be the same as having a spouse in the house but the material question is whether the appellant's absence would amount to a de facto compulsion for AI to leave the United Kingdom. I note in this connection that he said to the doctor in 2019 that he would speak to his mother or his sister in the event of difficulty. Given the limited support he is said to require, and given the presence of his mother and sister in the UK, I do consider that support to the level said to be required is available in the UK.

30. Ms Isherwood's second point – made with her customary concision – was that AI could turn to the state and the NHS to provide any care that he might require. It is to be recalled in that connection that the Supreme Court in Patel v SSHD adopted what had been said by the CJEU in KA & Ors v Belgische Staat (Case C-82/16) [2018] 3 CMLR 28 when it concluded that it would only be in exceptional cases that the relationship between adults might give rise to a derived right of residence on the part of the third country national. I accept that AI might be reluctant to turn to the NHS to receive assistance which he would prefer to receive from his

wife but there is nothing before me to show that the NHS and the local authority would be likely to fail in its duty of care towards AI in the event that such assistance was required.

31. Despite the composed and dignified manner in which the appellant presented her case before me, I come to the clear conclusion that she has failed to discharge the burden upon her of establishing that she is entitled to a derivative right to reside in the UK. She has not established on the balance of probabilities that her husband requires care or that she is his primary carer. And she has not established that he would be compelled to leave the United Kingdom in the event that she was returned to Nigeria.

32. As I explained in my first decision in this appeal, the appellant is not entitled to rely on the Human Rights Act 1998 in an appeal of this nature. In the event that she wishes to make such a claim, the proper course is to make an application to the respondent on such grounds. If she wishes to submit, for whatever reason, that she would not be safe in Nigeria or that her family life could not continue there, she must make an application to the respondent. Insofar as her witness statement strays into such territory, it is not for me to consider those assertions in this context.

Notice of Decision

The decision of the FtT having been set aside, I remake the decision on the appeal by dismissing it.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber
9 November 2021