



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

Appeal Number: IA/43044/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 16 December 2015**

**Decision & Reasons Promulgated
On 26 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

JOSEPHINE O

(anonymity order not made)

Appellant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Darryl Balroop - counsel instructed by Shan & Co solicitors

For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer

DECISION & REASONS

1. This is a resumed hearing, following a hearing which took place on 11 November 2015 at which I found that First Tier Tribunal Judge Plumtre had erred materially in law in allowing the Appellant's appeal without considering the requirements of regulation 15A(4A)(c) of the Immigration (EEA) Regulations 2006 and had made no reference to the requirement that the British citizen spouse would be required to leave the United Kingdom. A copy of the error of law decision and reasons is appended to this decision.

2. The appeal came before me for consideration of whether [AN] would be unable to reside in the United Kingdom if his wife is required to leave and Article 8 of ECHR. The second limb of this consideration has now fallen away in light of the judgment of the Court of Appeal in TY (Sri Lanka) v The Secretary of State for the Home Department [2015] EWCA Civ 1233 handed down on 1 December 2015, which in turn endorsed the decision of the Upper Tribunal in Amirteymour (EEA appeals; human rights) [2015] UKUT 00466 (IAC). It is uncontentious that no section 120 notice was served in this case.

3. Mr Balroop began by drawing my attention to a letter from St George's hospital dated 9 December 2015, which had previously been served upon the Upper Tribunal and which makes clear that the Appellant's husband lacks capacity in terms of his ability to give evidence before the Upper Tribunal. He called the Appellant to give evidence and she adopted her statement. The Appellant was asked about the frequency of her husband's hallucinations and she replied that they occurred every day and that he sees people in the house who come to attack him; that he calls the police, they come in and there is no-one there. She said she has been advised to calm him down. Last time she went to the Home Office to sign on he left the house thinking people were coming to attack him as he does not like being in the house on his own. He went outside and sat down waiting for her to come back. She was referred to the letter from her husband's doctor in respect of his medication and she was also asked about what happens at night. The Appellant stated that her husband gets up suddenly with hallucinations and she has to help him to get up and to go to the bathroom and sometimes this happens 4-6 times in the night. She was asked what would happen to her husband if she had to return to Ghana and she said that she went to see Wandsworth council to see what help they could give and this amounted to meals on wheels and they would not be able to provide 24 hour care for him. She was asked whether she had discussed with her husband what would happen if she went back to Ghana and she said that they had talked about it but had not really reached a decision but that if she is not with him he has to go with her to Ghana and he has said this.

4. The Appellant was then cross examined by Ms Holmes. She was asked whether her husband expressed concern about the care available to him in Ghana and she replied that Ghana does not have a care system like the one in the United Kingdom and that there the family takes care of you. She said that her husband had expressed concern about not getting medication and care in Ghana and that he would die quickly. Ms Holmes asked the Appellant if it was likely that if she had to leave he would stay here and the Appellant responded "No." When asked why she said that the Appellant replied that he would not receive the kind of care she provided for him and he would be better off if the two of them went. The Appellant was asked whether she had a letter from Wandsworth council that the only care they could provide was meals on wheels and she said "No". She said that the Council had come to provide them with equipment in the household to make it easier for him in terms of his mobility and other than that there is nothing they can do for them. She said that he had been provided with mobility aids to help him move around the house. When asked whether she thought it was highly likely that he would be cared for

because of his state of health, by the council and the NHS who are aware of him the Appellant accepted that this maybe the case if she was not around.

5. I then asked the Appellant whether there were any alternative carers who could look after her husband and she denied this. She said that he was supported in the UK by way benefits and council accommodation. I asked about her circumstances in Ghana and the Appellant said her husband has an older sister there; they are in contact and she lives in Kodufai. Her husband had children but they had all left Ghana. The Appellant said she has her mother and sisters in Accra and she would have to go there and stay with them. She said in terms of supporting herself she would have to start again. She has worked as a beautician and hairdresser. She said she had checked whether her husband's medication would be available in Ghana but she was not sure whether his medication for Parkinsons disease or his current medication would be available.

6. The Appellant was then re-examined by Mr Balroop. She confirmed that she was the only person who provides care for her husband. She was asked how she had checked the availability of medication for him in Ghana and she said that she had carried out an internet check in respect of the first drugs he had been given but that his hallucinations were so much they had to change. She said she did not know how he would cope with it. She was asked whether it was, in her view, highly likely he would be cared for in the UK and she said that he would be cared for by being provided with meals on wheels. I gave Ms Holmes permission to ask further questions and she asked about the Appellant about her husband's contact with his son, to which she responded that he does not call him and they had not heard from him for a long time and they did not know where he is. She said it was a number of years and that she had never met him nor spoken to him on the phone. There has been no contact with him since she met and married her husband. She stated that he was in the UK at the time of last contact. The Appellant was asked about her social life and she said that this was Church only because her husband does not feel comfortable going to see people and he does not like people to see him since he became unwell. He attends Church with her. She was asked if she had friends who visited and she replied that it was only [IG] who sometimes comes to see them. She said [IG] was sitting at the back of the court and he would drive them if he had time, because of her husband's condition. There were no further witnesses.

7. I then heard submissions from both parties. Ms Holmes took me through the decision in Ayinde & Thinjom [2015] UKUT 00560 (IAC). She submitted that Mr Ayinde looked after his mother who had schizophrenia and high blood pressure. She submitted that the circumstances of Mr Ayinde's mother were more comparable than those of Mrs Thinjom's husband but comparisons can be made with both. At [13] she submitted that this was quite comparable with what the Appellant does for the Sponsor in this case. [17] sets out what Mr Stevens's situation is and that he would need to go to a care home. At [41] and [42] reliance was placed on the broad principles of human dignity but this does not assist the Appellant because while the principle is inviolable, it is necessary to secure the presence of relatives or a carer. In respect of [54] and [55] in her submission in this case it was not possible to contemplate an outcome where the Sponsor would leave. The Appellant has given evidence that she has

spoken to the council and they have said all they could provide is meals on wheels but in practice everything would be done that needs to be done: the medical services are more than aware of his situation and it is not just the local authority who are aware. The Sponsor has a degenerative disease and if left on his own it is likely all the services would come together and he would be cared for. He would not be forced to leave as everything is here that he needs. In respect of [57] and [58] and the assessment of likelihood that he would leave she submitted that it was necessary to compare what would be available in Ghana to what he would have in the UK. She submitted in respect of [59] that it was not enough that the British citizen would prefer his carer to be given leave to remain. In her submission all those points made by Upper Tribunal Judge Jordan applied in this particular case. She submitted in respect of [62] in respect of the Appellant Ayinde, that there was a similarity between the two cases and the Sponsor's need for treatment would be better met in the UK and if his needs cannot be met by carers he would go into a care home. It was not possible to claim Ms Ayinde would be unable to remain in the UK once her son leaves. In respect of the Appellant Thinjom, he stated categorically he would stay in the UK. She submitted that this case is very similar to that of Ayinde because of difficulties and the level of care. In her submission there was only the verbal evidence of the Appellant to say that the only care her husband would receive would be meals on wheels but it is likely to be much more if she were to leave. In terms of the emotional side of things it seems clear the Appellant and Sponsor have friends i.e. [IG] and it was likely if she were required to leave that the Sponsor would not be left entirely on his own and [IG] would continue to be helpful and provide support in terms of friendship. Ms Holmes made clear that she was not submitting that would be comparable to the care provided by the Appellant however. She submitted that the fact that I had not heard from the Sponsor must place a small caveat on the Appellant's evidence. She requested that I dismiss the appeal because the Appellant could not succeed on the basis of the current caselaw.

8. Mr Balroop submitted that the Appellant's circumstances were similar to those of Thinjom, which also involved a husband and wife and drew my attention to [55]. He questioned how it was possible to define the term "unable to remain" and it was clear that the Upper Tribunal says the answer is obvious, that the children would go with their parents. He submitted that in respect of Thinjom, [52] is evidence from Mr Stevens that he would not go. In his submission if you have a husband and wife it is obvious that the husband would go with his wife. He submitted that this case is distinguishable in this context. Mr Balroop invited me to consider the facts of Thinjom at [63] and that he was 82 when he married and so was already elderly and had issues surrounding his care and paying for a carer to visit him twice a week. In this particular scenario he submitted that the Sponsor and Appellant were married before the Sponsor was diagnosed; that he was born in 1955 so he is 56 and the Appellant has been his only carer, not just with regard to his daily task of dressing but she cares for him at night 4-6 times. Mr Balroop submitted that if they returned to Ghana they would stay with the Appellant's mother and sisters in Accra so there is a place to stay and care will continue. This is a different result from Thinjom. In terms of the medication he submitted that the only evidence is

internet research and this is not reliable. He drew my attention to the letter from St Georges Hospital of 9 December 2015 at page 2 which makes clear that the Sponsor's illness will reach a stage where medication will not make a difference. Mr Balroop submitted that this is about care by his wife. He said that any help that Isaac can give does not reach the threshold for care by the wife if she is unable to remain. He submitted that the Sponsor can leave cf [53] of *Ayinde* and it must be right that he satisfies [iv] and the appeal should be allowed.

The Relevant Law

9. Regulation 15A of the Immigration (EEA) Regulations provides *inter alia* as follows:

"15A. Derivative right of residence

(1) A person ('P') who is not an exempt person and who satisfies the criteria in paragraph ...(4A)... 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 -

- i. he is the primary carer of a British citizen ('the relevant British citizen')**
- ii. the relevant British citizen is residing in the United Kingdom; and**
- iii. the relevant British citizen would be unable to reside in the UK or in another EEA state if P were required to leave."**

10. In *Ayinde & Thinjom* (Carers - Reg.15A - *Zambrano*) [2015] UKUT 00560 (IAC) the Upper Tribunal held at 61:

"61. From the foregoing, it is possible to derive the following general principles:

(i) The deprivation of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizens identified in the decision in *Zambrano* is limited to safeguarding a British citizen's EU rights as defined in Article 20.

(ii) 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.

(iii) The requirement is not met by an assumption that the citizen will leave and does not involve a consideration of whether it would be reasonable for the carer to leave the United Kingdom. A comparison of the British citizen's standard

of living or care if the appellant remains or departs is material only in the context of whether the British citizen will leave the United Kingdom.

(iv) The Tribunal is required to examine critically a claim that a British citizen will leave the Union if the benefits he currently receives by remaining in the United Kingdom are unlikely to be matched in the country in which he claims he will be forced to settle."

11. The Home Office guidance "*Derivative Rights of Residence - Ruiz Zambrano cases*" 12.12.12 provides:

"Would the British citizen be forced to leave the EEA if the primary carer was forced to leave?

24. Even where there is evidence of primary and shared responsibility, evidence to show why the British citizen would be forced to leave the EEA (for example because they cannot access alternative care in the UK) is still required.

25. If there is another person in the UK who can care for the British citizen, then a derivative residence card must be refused on the basis that such a refusal would not result in the British citizen being forced to leave the EEA.

26. Therefore caseworkers must assess whether there is another direct relative or legal guardian in the UK who can care for the British citizen and, in the case of a child, who has already had established contact. In making this assessment, the burden of proof remains on the applicant and the standard of proof is the balance of probabilities. This means the onus is on the applicant to demonstrate that their removal would force the British citizen to leave the EEA. If there is no information to demonstrate this, then caseworkers may wish to make further enquiries with the applicant as to the status or whereabouts of the other parent in the case of a child, or alternative care provisions in the case of a British citizen adult.

27. Examples of when it may be appropriate to issue a derivative residence card to a primary carer would be where:

there are no other direct relatives or legal guardians to care for the British citizen; or

there is another direct relative or legal guardian in the UK to care for the British citizen but there are reasons why this carer is not suitable; or

in the case of an adult British citizen, there are no alternative care provisions available in the UK."

Decision

12. I have had very careful regard to the decision in Ayinde & Thinjom (Carers - Reg.15A - *Zambrano*) [2015] UKUT 00560 (IAC) and I find that if the Appellant were to be removed that her husband would be unable to continue to reside in the United Kingdom. My reasons are as follows:

12.1. I accept the Appellant's oral evidence as credible, indeed it was not challenged by Ms Holmes who simply stated that the fact that I had not heard from the Sponsor should place a small caveat on the Appellant's evidence. However, it was not possible to hear from the Sponsor because as the letter from St George's University Hospital dated 16 December 2015 makes clear, it was not considered that he has capacity to give evidence in a court of law due to his cognition problems and visual hallucinations. However, the medical evidence is consistent with the Appellant's evidence before me.

12.2. I find that [AN] would be unable to reside in the United Kingdom if the Appellant left because he is dependent upon her specifically. I found her evidence telling that when she has to leave the house e.g. to go to the Home Office to sign on, her husband goes outside to wait for her to return and her absence makes him anxious. It is clear from the medical evidence that, aside from medication, what [AN] requires is "*ongoing assistance with daily personal activities and domestic activities of living. He requires some assistance to get dressed and his personal care and all domestic activities such as preparing food are done for him*" and he requires on-going management with taking his medication. These are tasks that are carried out by his wife, the Appellant. She also gave evidence that she has to assist him 4-6 times a night when he suffers from hallucinations and she assists him in going to the bathroom. It is clear and I find that the Appellant provides her husband with essential personal care - not simply in terms of general tasks that could be carried out by a carer, but more crucially in calming him when he is anxious - which occurs frequently due to his hallucinations and assisting him during the night. They have been in a relationship since March 2009, at which time [AN] owned and ran a shipping company and they married in March 2011. He was diagnosed with Parkinsons Disease later that year and the Appellant has cared for him since that time.

12.3. I accept the evidence that there is no alternative carer in terms of a family member in the United Kingdom. Their friend [IG] assists e.g. in driving the Appellant and her husband to court but he cannot take on the role of carer. Whilst I accept that if the Appellant were to leave that it is likely the NHS and the local authority would step in to ensure that [AN] receives support and assistance with his daily personal activities this does not resolve matters because he would be without the assistance of his wife, upon whom he is clearly dependent.

12.4. [AN] is originally from Ghana and is familiar with the culture and has a sister who lives there. The Appellant also has her mother and sisters in Accra and she and her husband would be able to live with them, at least in the short term whilst the Appellant re-establishes herself and seeks employment as a beautician/hairdresser. Whilst the Appellant and her husband would not be in receipt of benefits in Ghana [[AN] currently receives housing benefit, council tax benefit and Disability Living Allowance] they would have accommodation

and the Appellant would be able to work to support them both. The Appellant has also conducted internet research and whilst it is not clear whether her husband's current medication is available, medication for the treatment of Parkinsons is available there.

12.5. Of primary importance is the fact that it was the Appellant's evidence that she and her husband have discussed what they would do if the appeal is unsuccessful and her evidence is that, although they had not reached a firm conclusion, he would have to go with her because, although he has concerns that his health would deteriorate and he would die more quickly, they considered that he would be better off with her than remaining in the UK without her because he would not receive the sort of care she provides for him. The letter Alison Leake, specialist nurse at the neurology department of St George's Healthcare Trust dated 7 February 2014 expressly states that: "*Parkinson's disease patients ... require ongoing support from very close family members*" both to support compliance with medication and to support any personal or domestic care requirements. Ms Leake continued: "*I know from [AN] that he struggles when he is not in the company of his wife both physically and mentally and has a history of hallucinations which are disturbing ... Depression is a very common problem in Parkinson's disease and I suspect there is an element of this with [AN] which we continue to monitor and again his wife's support is important to maintain good mental health.*"

13. Consequently, I find that:

- (i) the Appellant is the primary carer of her British citizen husband;
- (ii) there are no alternative carers in the form of a relative residing in the United Kingdom who would be willing and able to provide the care that [AN] requires as a person suffering from Parkinson's disease;
- (iii) the Appellant's husband would be unable to reside in the United Kingdom if the Appellant were required to leave because - in line with the medical evidence - he is dependent upon her not only for physical support but also for emotional and mental support as a consequence of his illness.

14. I further find that, unlike the factual circumstances pertaining in the cases of Ayinde and Thinjom, that [AN] would leave the United Kingdom with his wife if she were to be required to leave as he would be unable to manage without her personal care and emotional support.

15. For these reasons I allow the appeal. The Appellant is entitled to a derivative residence card pursuant to regulation 18A of the Immigration (EEA) Regulations 2006 (as amended).

Deputy Upper Tribunal Judge Chapman

23 February 2016