



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

Appeal Number: IA/23885/2014

THE IMMIGRATION ACTS

Heard at Field House

On 19 May 2015

Determination

Promulgated

On 17 June 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL MURRAY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MISS FLAVIA MBAZIMA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms Fijiwala, Home Office Presenting Officer

For the Respondent: Miss Arif, Arden Solicitors, Ealing House, North Ealing,
London

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Secretary of State however for convenience I shall now refer to the parties as they were before the First-Tier Tribunal.
2. The appellant is a citizen of Zambia born on 22 February 1981. She appealed against the decision of the respondent dated 20 May 2014 refusing to grant her a derivative residence card as the primary carer of

her father Mr Billy Hardley Mbazima born on 13 September 1935, a British citizen. The appeal was heard by Judge of the First-Tier Tribunal Richards-Clarke on 5 February 2015. The appeal was allowed in a determination promulgated on 19 February 2015.

3. An application for permission to appeal was lodged and permission was granted by Judge of the First-Tier Tribunal Cox on 15 April 2015. The grounds of application are that no reasons have been given for the findings made at paragraph 44(a) and (j) of the First-tier determination, that the appellant's father would be unable to reside in the United Kingdom if the appellant is not granted this derivative right of residence. The permission states that this finding cannot reasonably be inferred from the evidence. The evidence is that the appellant's father is being helped to adapt to his situation and is being enabled to manage on his own. Although it is recorded that the appellant's father needs to be monitored at night, the Judge made no finding about the consequence of the absence of night time supervision leading to the appellant's father being unable to reside in the United Kingdom. The evidence before the First-Tier Judge was that the appellant would raise her father's pillows to deal with choking episodes.
4. The grounds go on to state that the Judge erred when he found that the appellant's father would be unable to reside in the United Kingdom in the absence of his daughter. They state that the judge did not give satisfactory reasons for this finding. The Judge states that the local Social Services have not carried out a full community care needs assessment and on the evidence before him local Social Services will not provide night time care to the appellant's father. This is based on the oral evidence of the appellant. The grounds state that the Judge could not be satisfied as to what the care requirements of the appellant's father are and what care provisions would be forthcoming, without a full care assessment. The judge states that if the appellant were to leave the UK there would be no one to assist her father at night which would put him in difficulty. The judge then states that the appellant's father would be unable to return to Zambia with the appellant due to the lack of health care there and his lack of income but in the absence of any evidence to show that the appellant's father would return to Zambia with his daughter if she were to return, this finding indicates that her father may well choose to remain in the United Kingdom. This of course undermines the claim that he would be unable to reside here in his daughter's absence.
5. Permission was granted on all these grounds.
6. There is no Rule 24 response.

The Hearing

7. Evidence has been supplied by the appellant's solicitor in the form of emails between the appellant and Social Services. The emails show that there was a telephone assessment which gave more details of the appellant's father's needs and that her father was identified as meeting the criteria for a period of enablement which will help him to become more independent at home and promote a better quality of life. It was found that there is no requirement for further social care relating to her father's current independence. The emails refer to care agencies which the appellant can approach independently if the appellant wants this. The emails go on to state that there is no requirement for a community care assessment to take place. I note that these emails are dated in June 2014. The First-Tier hearing took place in February 2015. There is no evidence that the appellant has attempted to obtain a full community care needs assessment for her father. The grounds state "It is respectfully submitted that in the absence of a full community care assessment, when there is no evidence to suggest one would not be forthcoming if requested, the Judge could not be satisfied what the care requirements of the appellant's father are or what care provisions would be forthcoming. It is respectfully submitted that without this information the Judge's finding that the appellant's father would be unable to reside in the United Kingdom in the absence of his daughter has not been shown."
8. I asked about this as the emails indicate that there is not going to be a further community care assessment carried out and it seems that one has not even been requested by the appellant or her father. On this basis I went ahead with this hearing. A full community care assessment was not sought before the First tier hearing and has not been sought since.
9. The Presenting Officer submitted that the First-Tier Judge did not properly assess whether the sponsor could stay in the United Kingdom if the appellant is removed. She submitted that the correct test was not applied by the Judge.
10. She referred to the said emails and the enablement period and submitted that these indicate that there is no requirement for more intervention to assist the appellant's father.
11. The appellant states that she has to remain in the United Kingdom so she can care for her father at night, as he chokes. The Presenting Officer submitted that that is not what the Social Services state. She referred to the list of agencies which could give private care to the appellant's father if he felt that was necessary. She submitted that the Judge did not consider the impact on the appellant's father if the appellant has to leave the United Kingdom.
12. The Presenting Officer submitted that the Judge was aware that a full assessment has not been carried out and because of this the Judge was not entitled to make the finding that the appellant's father cannot stay in the United Kingdom if the appellant has to leave.

13. I was then referred to the relevant case law. The Presenting Officer submitted that the following cases relate to children but are both based on Regulation 15A of the Immigration (European Economic Area) Regulations 2006 which took effect on 8 November 2012 under the Immigration (European Economic Area) Amendment Number 2 Regulations, 2012. This Regulation provides for a derivative right of residence for primary carers of British citizens and is the same Regulation which is relevant in this case. I was referred to the case of **Maureen Hines [2014] EWCA Civ 660**, at paragraph 21, which states that nothing less than compulsion will satisfy the required test. The Presenting Officer submitted that in that case the carer was only entitled to accommodation if the sponsor would be effectively compelled to leave the United Kingdom if the carer left. The case goes on to state that what amounts to circumstances of compulsion may differ from case to case. I was referred to the determination in Ms Mbazima's case when her representative submitted that the sponsor would not leave the United Kingdom and go to Zambia because there is not sufficient health care in Zambia. She submitted that the Judge has not dealt with the quality of the sponsor's life or how his life would be impaired if the appellant leaves the United Kingdom. She submitted that the judge was unable to deal with that situation as there was not sufficient evidence before him.
14. I was then referred to the case of **Jamil Sanneh [2013] EWHC 793** (Admin), at paragraph 19(iv). The Presenting Officer submitted that this states "Nothing less than compulsion will engage Articles 20 and 21 of the TFEU". She submitted that even if the quality or standard of life of the appellant's father is diminished as a result of the appellant leaving the United Kingdom that is not sufficient, it is only if the sponsor is compelled to leave the United Kingdom if the appellant is removed that this appellant's claim can succeed.
15. The Presenting Officer submitted that the Judge failed to engage with the correct test and these requirements. She submitted that the evidence before the Judge did not show that the sponsor requires extra care during the night, based on the Social Services report.
16. The Presenting Officer asked me to dismiss the appeal as the terms of the Regulations have not been met.
17. The appellant's representative submitted that with regard to the first ground of application: - that the Judge has not justified his reasoning, I have to take into account the fact that the sponsor's medical condition is very serious. He has problems breathing and chokes at night and needs woken up. She submitted that the sponsor will die if he is not wakened. She submitted that the Judge has referred to the medical report by the sponsor's GP and she submitted that the consequences of the sponsor receiving no care at night will lead to his death.
18. With regard to the second ground and the fact that there is no full community care needs assessment: - the Judge has considered the GP's

report. The representative submitted that even if there was a full care assessment report, the GP's report must be given more weight and the Judge therefore made correct findings about the sponsor's condition.

19. The representative referred to ground 3, which is that the Judge failed to resolve a conflict in the evidence arising in submissions, as to whether the sponsor can live either in the United Kingdom or Zambia without his daughter, the appellant. The Judge has found that the only night care the sponsor has is from the appellant and so the sponsor cannot survive in the United Kingdom without his daughter and he cannot survive in Zambia because of the health care situation there.
20. She submitted that the said case of **Sanneh** relates to quality of life but in this case it is a question of life and death and the sponsor will not be able to survive if the appellant is returned to Zambia.
21. I asked about private care and was told this is very expensive. There is evidence of this on file. The representative submitted that the sponsor only has a pension and cannot afford private care. I was told the costs of private care would have to be paid by the sponsor himself.
22. The Presenting Officer submitted that if the appellant has to leave the United Kingdom the sponsor will not be left without any care. He is supported by his General Practitioner and by Social Services. She submitted that if the appellant leaves and the sponsor is afraid he may choke at night fatally, he should be contacting the Social Services about this. She submitted that there does not appear to have been any recent attempt to obtain a full care assessment report from Social Services. She submitted that they clearly do not think that extra care at night is essential. She submitted that Social Services are doing all they can to make the sponsor independent.
23. The appellant's representative referred me to the appellant's bundle and the GP report at page 27 which states: "Mr Mbazima needs constant care. He needs his medications and eye drops to be administered due to his poor vision. Due to the choking episodes at night someone needs to monitor him regularly at night. He needs help with self care, e.g. washing hair and cutting toenails." She submitted that the appellant has been told that night care is not available from Social Services. I was referred to the findings of fact by the First-Tier Judge who found the appellant and the sponsor both to be credible.
24. I asked if there is anything in writing to state that night care is not available from Social Services. I was told that there is only the appellant's oral evidence about this and about her conversations with Social Services.

Determination

25. The Judge has found the appellant and her father both to be credible witnesses. He has noted the correct burden and standard of proof in his determination.
26. I note that as the Judge found the appellant to be credible he accepted her oral evidence that Social Services do not provide night time care. This is the only evidence there is about this. The appellant has not contacted Social Services since the email of 25 June 2014 in spite of permission to appeal being granted and the basis on which it was granted. I am not satisfied that night time care is never available from Social Services. In any case it is clear from the emails that Social Services do not believe that night time care is necessary for the appellant's father. It is also clear from the determination that the appellant has not kept in touch with the Department for Work and Pensions about the costs of her father's night time care if it is found that this is needed. This would have been helpful.
27. I have noted in particular the case law supplied by the respondent. This is based on Regulation 15A as is our appellant's claim. It was submitted to the Judge at the First-Tier hearing that if the appellant was genuinely seeking to address her father's situation she would have taken active steps to progress her complaint about Social Services and insisted on a full community care needs assessment for her father but she did not do so. She has still not done this. It was also put to the First-tier Judge that the appellant's father's choking can be controlled by elevating the head of his bed. Because of this and because no reassessment of financial help has been looked at and because the appellant has not insisted on a full community care needs assessment, I find that the burden has not been discharged. The Judge could not have been satisfied that the sponsor cannot remain in the UK without the appellant as there was not sufficient evidence before him to come to this finding.
28. The case law provided makes it clear that the test in this case is whether, if the appellant has to leave the United Kingdom it would be compulsory for her father to leave as well as he could not manage without her. There is no evidence that that is the case here. The appellant is the primary carer but the sponsor also has support from Social Services and his General Practitioner. The appellant's father has stated that he would not go to Zambia with the appellant if she has to leave because of the lack of health care there. This indicates that even if the appellant has to leave the United Kingdom her father intends remaining in the United Kingdom. The Judge should have taken from this, that although it would not be his choice for his daughter to return to Zambia, he can manage without her with the support he has.
29. The First-Tier Judge made a material error of law when he found that the appellant meets the requirements of Regulation 15A(4A) of the 2006 Regulations and that she is entitled to a derivative right of residence in the United Kingdom.

30. The evidence before the Judge does not satisfy the required test. The evidence before him does not indicate that this is a matter of life and death as put to me by the appellant's representative. I find that had the appellant been certain of the facts she wishes the Tribunal to accept she would have been in touch with Social Services after June 2014 and would have obtained the full community care needs assessment report from the Social Work Department. She seems to have, perhaps deliberately, avoided doing this. Social Services have been doing all they can to enable the sponsor to live independently. This was the evidence before the First-tier judge who gave weight to the GP's report but the judge did not know whether Social Services had been made aware of this report. At present they have not provided night time care but they are aware of the sponsor's condition up to June 2014. The appellant has not been in touch with them since then. The judge at the First-tier hearing did not have sufficient evidence before him to come to the decision he did.

Decision

I find that there is a material error of law in the First-Tier Judge's determination.

No further hearing is required.

I dismiss the appellant's appeal and direct that the First-Tier Tribunal's decision be set aside.

No anonymity direction has been made.

Signed

Date

Designated Judge Murray
Judge of the Upper Tribunal