IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006566

First-tier Tribunal No:
EA/50126/2021
IA/05069/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 28 August 2024

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

GUANGYU LI
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A. Badar, Counsel instructed by Archbold Solicitors
For the Respondent: Mr P. Deller, Senior Home Office Presenting Officer

Heard at Field House on 16 January 2024

DECISION AND REASONS

Introduction

1. This is the decision of the Upper Tribunal in the rehearing of the Appellant's substantive appeal against the Respondent's decision (dated 1 November 2019) to refuse her application for a Derivative Residence Card under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") made on 4 September 2019.

2. This decision should be read with this panel's earlier error of law decision, dated 3 October 2023.

3. We express our regret at the time it has taken to promulgate this decision. This has been caused by a number of factors including the reporting of the Upper Tribunal's decision in Maisiri (EUSS; Zambrano; 'Realistic Prospect') Zimbabwe [2024] UKUT 235 (IAC) ("Maisiri").

4. There is no dispute that the relevant parts of the EEA Regulations still apply for the purposes of the consideration of this appeal.

Relevant background

5. The Appellant is a Chinese national, born on 4 January 1960. On 28 December 2006 she first entered the UK with a business visa extant until 8 June 2007. There is equally no dispute between the parties that the Appellant has not had any form of the leave to remain since the expiry of that visa.

6. In March 2007, the Appellant met her now husband Mr Ralph Clayton (a British citizen, born on 19 April 1945); from June 2013 the Appellant became Mr Clayton's sole carer.

7. On 8 April 2015, the Appellant and Mr Clayton were married.

8. On 21 July 2015 the Appellant made an application for leave to remain in the UK on the basis of her family life with Mr Clayton; this was refused by the Respondent on 24 September 2015.

9. The Appellant appealed the decision which was dismissed by the Tribunal in a decision promulgated on 17 October 2016.

10. On 17 August 2017, the Appellant was detained before eventually being released on 8 November 2017.

11. On 18 December 2017, the Appellant made a further application for leave to remain on the basis of her family life which was refused by the Respondent on 14 March 2019 with no accompanying right of appeal.

12. On 1 May 2019, the Appellant applied for a Derivative Residence Card under the EEA Regulations which was refused by the Respondent on 17 May 2019.

13. On 4 September 2019, the Appellant again applied for a Derivative Residence Card which was refused on 1 November 2019.

14. On 28 February 2020, the Appellant applied yet again for a Derivative Residence Card on the basis of being the primary carer for Mr Clayton which was refused by the Respondent on 22 July 2020.

15. The appeal before the First-tier Tribunal appears to be against the refusal of the decision dated 1 November 2019. We have not been told anything

more about the February 2020 decision and so we have concentrated on the assessing the merits of the November 2019 decision.

The preserved findings

16. As we explained at para. 24 of our error of law decision, Judge Zahed's factual findings as to the severity of Mr Clayton's conditions and the ineffectiveness of social services support are maintained. In summary then we reiterate that:

    a. Mr Clayton has a number of physical and mental health problems which cause him to require care on a full-time basis:

        i. Mr Clayton suffers with: osteoarthritis, pseudogout, left knee pain, difficulties with sight and hearing in his left eye. He has also suffered with mental health issues and suicidal ideation at times.

    b. As a consequence of these conditions Mr Clayton is severely limited in respect of his mobility (he walks with a stick and can only manage about 10 metres before having to sit down), he is prone to falls and his ability to carry out everyday tasks such as dressing, cooking, washing and household chores is materially compromised – he is assisted by the Appellant in all of these tasks.

    c. During the period when the Appellant was detained (17 August 2017 until 8 November 2017) Mr Clayton received very little assistance from social services – his living conditions and health seriously deteriorated; he became suicidal and was under the care of his local Mental Health Team.

The issue before the Upper Tribunal

17. We also add to those preserved findings that there is no dispute that the Appellant is Mr Clayton's primary carer; the only question to be resolved then relates to the assessment of whether the Appellant would realistically be forced to leave the UK?

18. We reiterate that this is the only question to be asked as the Respondent has conceded that if the Appellant establishes that she would not be able to reside in the UK then it is also accepted that Mr Clayton would have to leave the UK due to his dependency upon her and the absence of social services or family members to assist him. It is therefore clear that there is the necessary causal link between the Appellant's prospects of remaining in the UK and the residence of Mr Clayton, as per Velaj v Secretary of State for the Home Department [2022] EWCA Civ 767, ("Velaj"), at para. 49.

19. The parties agreed that there was no need for oral evidence and so the hearing proceeded on the basis of submissions only.

The legal scheme

20. The relevant provision is reg. 16(5):

> "16.—
>
> (1) A person has a derivative right to reside during any period in which the person—
>
> (a) is not an exempt person; and
>
> (b) satisfies each of the criteria in one or more of paragraphs (2) to (6).
>
> …
>
> (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."

The parties' submissions

The Appellant

21. In his argument, Mr Badar referred the Tribunal to paras. 16 – 19 of the error of law decision as being a correct summary of the current legal approach. He added that the Appellant had previously made three applications for leave to remain on the basis of her human rights and one Article 8 ECHR claim within her earlier appeal.

22. Mr Badar also referred to the previous determination of Judge Thorne decided in 2016 which dismissed the Appellant's appeal; he argued that the Respondent would be obliged to consider those findings and, in light of the principles in Secretary of State for the Home Department v D (Tamil) [2002] UKIAT 00702* ("Devaseelan"), the Appellant would be unlikely to succeed in any application made under Appendix FM of the Rules. Mr Badar also raised the possibility of the Respondent certifying any future decision to refuse.

23. Mr Badar accepted that the potential for an application to the Respondent was a relevant matter for the assessment of whether Mr Clayton would effectively be compelled to leave the UK but concluded that the Appellant had exhausted this route leaving her more than likely to be forced to leave.

The Respondent

24. In response Mr Deller also argued that the Tribunal should look to the chances of success of a hypothetical Article 8 application but added that the Tribunal was not required to make findings about the particular requirements of the rules.

25. In respect of the Appellant's case, he averred that much had changed in the Appellant's/Mr Clayton's circumstances since the decision of Judge Thorne in 2016 and Devaseelan would not act as a bar to the Appellant succeeding if such an application was made.

26. He further contended that this was a sympathetic case which improved the chances that the Appellant would be successful under Appendix FM or GEN.3.2.

27. Mr Deller was careful to explain that it was not the Respondent's case that the Tribunal was bound to assess whether the hypothetical application would succeed nor was it being argued that an application must be made, but that the question was: is any such hypothetical application bound to fail?

Findings and reasons

28. It is important to set out that the submissions of the parties as summarised above were made before Maisiri was reported. We have considered carefully whether to give the parties the chance to provide further submissions or list the appeal for a further hearing but have decided that it is not necessary to do so and that the appeal can fairly be decided on the basis of the submissions made.

29. In coming to that decision, we note that neither party has requested the opportunity to make further submissions on the impact of Maisiri nor has there been a request for an adjournment to allow a parallel application under Appendix FM (or any other provision of the Rules) to be made.

30. Furthermore, we note that Mr Deller was the Respondent's representative before the panel in Maisiri and it is clear from the decision that he made the same submissions to the Tribunal as he made to us, other than with reference to the High Court's judgment in R (Akinsanya & Aning-Adjei) v SSHD [2024] EWHC 469 (Admin).

31. Whilst Maisiri was an appeal against a decision taken under Appendix EU of the Rules it nonetheless clear enough that the Upper Tribunal's conclusions touch squarely upon the issues arising in these proceedings and the test in reg. 16(5)(c) (as cited above).

32. At para. 93 the Upper Tribunal summarised their key findings:

> *"We conclude, in summary, that it is not incumbent on a decision maker who is considering the application of a person who is said to have a Zambrano right to reside to assess whether that person stands a realistic prospect of securing leave to remain under another provision of the Immigration Rules, including Appendix FM. The Secretary of State's guidance entitled EU Settlement Scheme: person with a Zambrano right to reside has been wrong in suggesting otherwise from 14 December 2022 to date. That approach was not intended when the relevant provisions of Appendix EU of the Immigration Rules were framed, and is not supported*

by the natural and ordinary meaning of the Rules, or by the domestic and European authorities which pre and post date the promulgation of those Rules. The application of the realistic prospect approach in the guidance is likely in any event to give rise to real difficulty in practice, whether initially or on appeal."

33. It is also appropriate to observe that the authorities referred to at para. 93 do not involve appealed decisions under the EUSS but against decisions taken under the EEA Regulations or EU law. The Court of Appeal's decision in Velaj expressly relates to the interpretation of the wording of reg. 16(5)(c) as applicable in this appeal.

***Maisiri* applied to the facts of this case**

34. The case as put by Mr Badar centred upon the consequences of this appeal being dismissed leading to the potential for the removal of the Appellant and the unlikely chance of success in a future application.

35. As summarised, Mr Deller made the difficult submission that a future application under the Rules was a relevant part of the assessment of what is realistically likely to happen.

36. Applying Maisiri we find that the correct approach to the assessment of reg. 16(5)(c) does not involve a consideration of the prospects of success (or of making) an application under the Immigration Rules.

37. In terms of the facts, we start by noting that there has plainly been significant change in the Appellant's case since the decision of Judge Thorne in 2016. There is now clear evidence (accompanied by judicial findings accepting that evidence) that the Appellant plays a crucial role in the day-to-day life of Mr Clayton and that he could not reasonably be assisted by social services in the UK if the Appellant was to leave.

38. Additionally, we note that the legal principle arising from the decision in Devaseelan and subsequent Tribunal/Superior Court authorities is that a decision-maker is required to use an earlier judicial decision as their *starting point* but it is not a strait-jacket which prevents the new decision-maker from reaching a different decision, especially where there is evidence which postdates that earlier decision.

39. Drawing the threads together, and applying the approach in Maisiri, we conclude that Mr Clayton would be compelled to leave the UK if the Appellant left the UK for an indefinite period. This is based on the severity of his physical and mental health problems coupled with Judge Zahed's preserved findings about the ineffectiveness of social service support for Mr Clayton in the past. This is also reflected in the Respondent's concession as recorded at para. 18 above.

Notice of Decision

The appeal under the EEA Regulations is allowed

I P Jarvis

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

28 August 2024