Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/11443/2016

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision sent to parties on**
On 15 October 2018	**On 5 November 2018**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

JENNIFER [L]
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Vidal of Counsel instructed by Haris Ali Solicitors
For the Respondent: Mr I Jarvis, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Watson that she is not entitled to a derivative right of residence as the carer of her mother, pursuant to Regulation 15(4A) of the Immigration (European Economic Area) Regulations 2006.

2. The appellant is a Jamaican citizen and her mother is a British citizen. It was accepted by the First-tier Tribunal that the appellant is currently her mother's primary carer.

3. The application was made on 8 March 2016 and was therefore considered under the 2006 Regulations, not the 2016 Regulations. The appellant lives together with her mother, her sister, and her sister's children aged 22, 17, 12 and 8. When she made this application, the appellant had been living unlawfully in the United Kingdom for fifteen years.

4. The appellant's mother has complex medical needs; she has a combination of vascular dementia and Alzheimer's, together with type 2 diabetes which has caused renal impairment. She was said to be untrusting of people she did not know. There was no up-to-date medical evidence before the First-tier Tribunal and no evidence as to what Social Services provision was available. There was in the decision an arguable factual error as to which other members of the family had diabetes, but I do not consider that to have been operative in the First-tier Tribunal's decision.

5. The appellant is not able to work in the United Kingdom because she is here unlawfully: the First-tier Tribunal accepted that she had been her mother's primary carer for a number of years. It was accepted that the appellant accompanied her mother to all her appointments.

6. The First-tier Tribunal held that the appellant had not demonstrated that her mother would be unable to reside in the United Kingdom or another EEA state, if the appellant were required to leave the United Kingdom. The appeal was dismissed.

7. The appellant appealed to the Upper Tribunal.

Permission to appeal

8. The appellant in her grounds of appeal argued that such Social Services support as her mother received was accessed solely through the appellant's assistance, and that there was "nothing but an assumption that other bodies will step in to fill the vacuum that will be left if the appellant is removed".

9. Permission to appeal was granted on the following basis:

> "The First-tier Tribunal Judge found that the appellant was the primary care-giver for her mother and it would be to her mother's detriment if the appellant left the United Kingdom. It is arguable that the judge failed to give adequate reasons for finding that *the mother's standard of living would not be so badly affected that it fell below a reasonable level*. The grounds are arguable." [*Emphasis added*]

10. The test set out in the passage in italics in the grant of permission, whilst it is identifiable in the grounds, is not the subject of any decided authority and is not the correct test, as Ms Vidal accepts.

Rule 24 Reply

11. There was no Rule 24 reply on behalf of the respondent.

Upper Tribunal hearing

12. The applicable provision in the 2006 EEA Regulations is Regulation 15A(4A):

> **"Derivative right to reside**
>
> 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. …"

It was not in dispute that the appellant's mother is not an exempt person, nor that the appellant is her primary carer and that her mother is a British citizen residing in the United Kingdom.

13. The issue in this appeal was whether the appellant's mother would be unable to reside in the United Kingdom or another EEA state if the appellant were required to leave. Both parties relied on the guidance of the Court of Appeal given by Lord Justice Irwin, with whom Lady Justice Thirlwall and Lord Justice Lindblom agreed, in *Patel and Others v The Secretary of State for the Home Department* [2017] EWCA Civ 2028 and in particular at [72]-[75] and [80]-[83] thereof.

14. At [75], Irwin LJ acknowledged impressive strength of family life in relation to the appellants Shah and Bourouisa and the determination of their British citizen parents to stay with the family and move abroad if the husband and father were to leave. I am told today that unfortunately, given the present state of the appellant's mother's dementia, she is no longer in a position to reach a similar decision about her future.

15. Paragraphs [81]-[83] are of the most assistance in the *Patel* decision and are as follows:

> "81. I recognise the force of the submission that if state provision in terms of medical or social services care is both a right of the dependent adult and is in fact available then the class of dependent adults who can demonstrate "compulsion" to follow a non-British carer abroad may be limited. I also recognise that devotion to and care of elderly frail parents is to be applauded and praised not condemned. It is clear that Mr Patel is to be praised for his admirable care of his parents. But I do

not see any error in the legal approach taken by the First-tier Tribunal or the Upper Tribunal in this case. The question remains compulsion.

82. And it further seems to me that the evidence in this case was too equivocal to amount to compulsion however one looked at the matter. There was absolutely no doubt as to the parents' devotion to their son or his to them. Were he to leave to India there was no doubt that the parents said they would follow despite the findings below but that really represented their cultural and individual commitment to each other. That again is choice not compulsion.

83. Objectively the choice was, and presumably still is, a difficult choice. ... Part of the appellant's case was that medical facilities would be more limited in India as I have indicated above. However, if remaining in England, the parents will be faced with medical and social care support that is likely to be lesser in quality (and certainly more impersonal) than the care currently provided by their son. Upper Tribunal Judge Hanson considered, on the evidence he heard, it was inevitable the parents would in fact remain. But even if that were wrong, this situation can in no way be regarded as one of compulsion to leave."

16. The facts in this case are weaker than the stated facts in *Patel* because of the other family members who share accommodation with the appellant's mother: the appellant's sister, and four nieces and nephews aged at least 22, 17, 12 and 8. It is said that because they work or study they would not be able to fill the role that the appellant currently fills, but there is no up-to-date evidence one way or the other about that.

17. The appellant has cared for her mother, and she is to be applauded and praised, not condemned, for what she has done for her parent. However, the factual matrix is not capable of demonstrating a *compulsion* for the mother to leave the EEA if the appellant is removed, even if she were still sufficiently well to decide to go with her daughter. The reality is that her Alzheimer's and vascular dementia is now so serious that she may soon require enhanced support from social services, perhaps even residential care.

18. It remains open to the appellant to make an Article 8 ECHR application on family and private life grounds.

19. I am satisfied that the appellant has not discharged the burden of showing that her removal would compel her mother to leave the EEA has not been demonstrated. The requirements of Regulation 16(2) are not met and the appellant is not entitled to a derivative right to reside.

20. There is no material error of law in the decision of the First-tier Tribunal. I uphold the decision of the First-tier Tribunal and dismiss the appeal.

Signed: Judith A J C Gleeson Date: 25 October 2018

Upper Tribunal Judge Gleeson