IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005341
First-tier Tribunal No: EA/10669/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 12 March 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE BEN KEITH

Between

FATEMEH ASGHARZADEH
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Toal, Counsel
For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

Heard at Field House on 28 February 2024

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Rothwell ("the Judge") heard at Hatton Cross on 29 September 2023 and promulgated on 23 October 2023.

2. The Appellant was born on 26 March 1945 and is a national of Iran. She appealed against the decision of the Secretary of State made on 8 October 2022 under the European Union Settlement Scheme (EUSS) as "a person with a Zambrano right to reside" as the primary carer of a British citizen, namely her adult son Abbas Karimi born 17 November 1976 (the sponsor).

3. The factual history is set out in detail by the Judge but in brief the Appellant has been visiting the United Kingdom on and off since 2005 in which I understand she arrived and stayed on a six monthly basis then leaving to return to Iran. However, in 2013 she came to the United Kingdom and has been residing here ever since without leave to remain. She has in that time stated that she has been caring for her son as he suffers from a number of chronic health conditions including being an ex-drug user, hepatitis, depression, post-traumatic stress disorder, paranoia, anxiety, obesity, high blood pressure, neuropathic pain,

osteoporosis, chronic leg ulcers, MRSA and anaemia. Those are the health conditions that were before the First-tier Tribunal Judge.

4. Mr Toal advances four grounds of appeal.

Ground 1

5. Mr Toal has amended his Ground 1 slightly because he understandably misplaced the correct set of the Immigration Rules which he has helpfully provided to me today. Mr Toal's central submission is that the First-tier Tribunal Judge assessed whether or not the Appellant was a **Zambrano** carer and had a **Zambrano** right to reside using the wrong date. The date of the application for leave to remain was made on 14 June 2021 see page 489 of the bundle. However, the judge at paragraph 34 said the following:

> "… I accept that the appellant provides care to the sponsor, and at one stage she was his primary carer, and because of her failing health in light of the assessment of the evidence above, I did not accept that she is now his primary carer within the terms of Regulation 16(5)(c) and the *Zambrano* principles".

6. Mr Toal's simple point, examining the Immigration Rules relevant at the time, is that the assessment of whether or not the appellant had a **Zambrano** right to reside and was caring for her son as his primary carer had to be made at the time of the application rather than at the time of the hearing. It seems to me that that submission is correct. The judge has made an assessment of whether or not the Appellant is her son's primary carer as at the date of the hearing taking into account the factual scenario at the time. That is not to say that that evidence is not relevant in a decision making but having made a decision based on the three years after the application in my judgment is an error of law. It is material because it is one of the questions that must be answered under the Immigration (European Economic Area) Regulations 2016/1052 Regs 16 Derivative Right to Reside Rule 16(5). The first question is, is sub-Section (a) "the person is the primary carer of a British citizen" (b) second question is "the British citizen is residing in the United Kingdom" and (c) "the British citizen 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". Therefore in order to answer the question of whether or not the Appellant was the primary carer at the relevant date was the date of application.

7. That reasoning also infects the key question in the case which is 16(5)(c) which I will turn to in more detail in the following grounds because 16(5)(c) requires an assessment of whether or not the sponsor is able to reside in the United Kingdom or another EEA state if the person left the United Kingdom for an indefinite period and that assessment must be coloured in my judgment by whether or not the appellant was the sponsor's primary carer at the date of application. I therefore find a material error of law under Ground 1.

Ground 2

8. Ground 2 is that the First-tier Tribunal did not give adequate reasons for concluding the appellant was no longer her son's primary carer. Mr Toal has referred to a number of functions that the appellant performs for her son including personal care, cleaning, shopping, calling emergency services, the fact

that her and her son who live alone together, amongst many other factors. The judge concludes that the appellant is not the sponsor's primary carer at the point of the hearing. At paragraph 34 the judge states:

> "I accept that the appellant provides care to the sponsor, and at one stage she was his primary carer, but because of her failing health in light of the assessment of the evidence above, I did not accept that she is now his primary carer within the terms of Regulation 16(5)(c) and the *Zambrano principles*".

9. In my judgment the Judge has not provided sufficient reasoning as to why the appellant is no longer the primary carer of the sponsor. Whilst I accept there is substantial evidence of professional intervention including nursing and caring help and GP appointments those are not in my judgment primary care functions. They are important and valuable functions performed by medical and caring professionals but they are not a substitute for the primary carer. The judge has rejected that the appellant is the primary carer but to reject that contention the judge in my judgment was required to give proper reasons as to why that was the case. Having not done so was my judgment a material error of law.

Ground 3 and Ground 4

10. Ground 3 and ground 4 which I will deal with together deal with whether or not the appellant's removal to Iran would result in the suicide of the sponsor. It is not clear to me that the judge has addressed the text correctly. The judge cites the case of **Patel v Secretary of State for the Home Department [2019] UKSC 59. Patel** states at paragraph 17:

> "17. The distinction noted between dependence in the case of an adult union citizen and that of a union citizen child is then explored. A TCN could have a relationship of dependency with an adult union citizen capable of justifying a derived right of residence under article 20 TFEU only in 'exceptional circumstances' citation [2018] 3 CMLR 28:"

11. Therefore in my judgment whilst there maybe doubts as to whether there is sufficient evidence to show that there is a real risk of completed suicide in my judgment the judge was bound to assess whether or not there were exceptional circumstances as defined by **Patel** under Regulation 16(5)(c). The judge has not done so and therefore in my judgment both grounds 3 and 4 are made out essentially for the same reasons I have given in the previous grounds, because they are not properly reasoned.

12. This is a difficult case and I express some considerable sympathy with the First-tier Tribunal Judge having to make a decision about what is a potentially very problematic issue namely whether the removal of the appellant will likely cause the sponsor to commit suicide. In discussion with counsel have said that the evidence before the First-tier Tribunal Judge did not include a Section 12 Mental Health Act qualified psychiatrist which means that the diagnosis made by the clinical psychologist was backed up only by a GP and GP records. I would have expected to see a full clinical psychiatry report in order to make a proper assessment of whether or not there was a suicide risk. However, given that the judge had not reasoned out whether or not there is one, I find that there is material errors of law in relation to all four grounds.

13. I heard submissions from both parties about how I should dispose of the case. In my judgment this requires a full re-assessment of the medical evidence and the evidence of the Appellant and the sponsor and also any other supporting evidence that is required. As a result that is a task best performed by the First-tier Tribunal and I direct that the case be remitted to the First-tier Tribunal.

Directions

(1) I find a material error of law in relation to all four grounds.

(2) The case should be reheard before the First-tier Tribunal.

Ben Keith

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

28 February 2024