



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/04370/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
Oral decision given following hearing  
On 12 September 2018

Decision & Reasons Promulgated  
On 19 September 2018

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

WENEYS AWAD MOUSA ABDELMALAK  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr A M Khan, Legal Representative  
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant in this case is a national of Egypt who was born on 17 January 1956. He arrived in this country as long ago as July 2001 as a visitor, so he has been here now

for over seventeen years. Whilst he was here his sister, Miss [A], became unwell and her husband and son are also very unwell. The appellant's case is that because of their medical conditions he did not leave the country but cared for them, becoming their full-time carer in or around 2010. In April 2014 he applied to remain here as a primary carer but the application was refused under the Rules with no in country right of appeal.

2. The appellant now claims that he is entitled to a derivative right of residence under *Zambrano* principles because he is the primary carer of his sister and she would be compelled to leave this country if he was to be removed. The respondent refused his application for a residence card and he appealed against this decision pursuant to paragraph 36 and Schedule 2 of the 2016 EEA Regulations. The relevant part of Regulation 16 states as follows:

“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.

...

(8) A person is the 'primary carer' of another person ('AP') if –

- (a) the person is a direct relative or a legal guardian of AP; and
- (b) either –
  - (i) the person has primary responsibility for AP's care; or
  - (ii) shares equally the responsibility for AP's care with one other person who is not an exempt person”.

3. The appellant's appeal was heard before First-tier Tribunal Judge Rastogi sitting at Hatton Cross on 2 May 2018 but in a decision promulgated on 17 May 2018 Judge Rastogi dismissed the appellant's appeal. I note, and it is a matter to which I will return, that in the refusal letter the respondent stated in terms that a human rights claim had not been made and that if the appellant wished to make such a claim this would be considered on its merits. In the refusal letter, the respondent stated as follows with regard to a potential Article 8 claim:

"Your representatives have stated that you also wish to rely on family or private life established in the UK under Article 8 of the ECHR. The Immigration Rules now include provisions for applicants wishing to remain in the United Kingdom on the basis of their family or private life. These rules are located at Appendix FM and paragraph 276ADE respectively.

If you wish UK Visas & Immigration to consider an application on this basis you must make a separate charged application using the appropriate specified application form (FLR(M) for the 5-year partner route, or FLR(O) for the 5-year parent or 10-year partner or parent route, or FLR(O) for the 10-year private life route). For more information please consult the UKVI website ...

Since you have not made a valid application for Article 8 consideration, consideration has not been given as to whether your removal from the UK would breach Article 8 of the ECHR. Additionally, it is pointed out that a decision not to issue a residence card does not require you to leave the United Kingdom if you can otherwise demonstrate that you have a right to reside under the Regulations".

4. In other words, and this is common ground, the appeal before Judge Rastogi was under the EEA Regulations only, and the judge did not have jurisdiction to consider the appellant's Article 8 position.
5. In the course of a very thorough and detailed decision, Judge Rastogi considered the appellant's case with commendable care. Although he made certain adverse credibility findings, in particular that the appellant had attempted to bolster his case by overstating the care he had provided to his sister before 2017, and certainly before 2015, and noted that the appellant had given evidence about living in the family home of his sister, whereas in fact he lived an hour away, nonetheless at paragraph 31 the judge found "the present position to be different". Based on the DWP assessments from 2017 the judge found that the appellant's brother-in-law's condition had "obviously deteriorated since 2015" and in light of these assessments "I am satisfied that [the appellant's brother-in-law] would not be able to provide his wife with the extent of care she requires on a day to day basis".
6. Then at paragraph 32, the judge found as follows:

"32. As a matter of fact, as at the date of hearing and notwithstanding the damage done to the appellant's credibility, I am satisfied based on the more recent documentary evidence from reliable sources such as the DWP, that

it is more likely than not that Ms [A] requires care in many aspects of her life including with mobility both in and out of the house and with certain other aspects of her care as identified by the DWP. I am also satisfied to the same standard that the appellant is presently the primary person who provides that care as I do not find Mr [A] able to do so and as the children are both in full time education and therefore not, as a matter of fact, doing so”.

7. In other words, some of the requirements set out within Regulation 16 of the 2016 Regulations were satisfied in that the appellant was the primary carer of his British citizen sister and she was residing in the United Kingdom. However, that left open the critical requirement in this case which is that the appellant’s sister 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 (Regulation 16(5)(c)).
8. With regard to this critical requirement the judge found against the appellant and gave two reasons for so finding. The first was that “even on the appellant’s case, there is no medical reason preventing his niece [his sister’s daughter] from caring for her parents”. The judge noted that she would soon be 18 and implicit in this finding is that she should somehow be regarded as being able to provide care for her mother, such that her mother would not be “compelled” to leave the UK to go to a non-EEA country.
9. Although Mr Jarvis on behalf of the respondent has advanced the argument that when one considers “compulsion” under EU law this test is so demanding that one cannot disregard this option, if this were the only factor capable of sustaining the judge’s decision that the appellant’s sister would not be compelled to leave the UK, I would find this to be an error of law. In my judgement it is wholly unreasonable to expect a child who in the normal course of events is entitled to leave home to go to university (as on the evidence she intended to do) to sacrifice her future prospects in order to provide care which (as will be apparent below) the local authority is under a statutory obligation to provide.
10. However, that is not the only factor which the judge had in mind, because he noted at paragraph 33 that although it was the appellant’s claim that the local authority would only provide the family with two hours of care a day “I do not have any supporting evidence” that this was correct. Further:

“Even were this to be the case, it would be necessary to examine the basis upon which the offer was made and the factors taken into consideration. For example, was this offer made on the assumption that the appellant will also provide care? If so, then it will be incumbent on the appellant to identify what care would actually be provided by the Local Authority if the appellant were not available”.

11. The judge then went on to find as follows:

“As this evidence is not before me, the appellant has failed to satisfy me that, given the Local Authority has a duty to provide adult care to people who require

it and who meet the eligibility criteria (which Ms [A] has been noted as doing by Harrow Council), that the Local Authority cannot provide Ms [A] with the care she requires”.

12. The judge also noted at paragraph 34 that the evidence which had been put before him did not support a claim that the appellant’s sister would be forced to leave the UK were the appellant to be returned and he had in mind the consistent evidence of all the witnesses that she would not do so for the reasons which were given. So far as this last point is concerned, the evidence which was given touched on the difficulties that the appellant’s sister would have were she to return to Egypt, but Mr Jarvis fairly accepted on behalf of the respondent that this did not necessarily affect the issue of compellability, because that depended on whether or not if the appellant left the UK the circumstances in which his sister would be required to remain was such that there would be a compulsion for her to leave the country.
13. However, the judge did have regard at paragraph 35 to the decision of *Patel* [2017] EWCA Civ 2028 in which the Court of Appeal had made it clear that the test remained one of compulsion to leave the EU territory. In that decision the Court of Appeal had:

“recognised that due to the availability of care provided by the state, the class of people likely to benefit by relying on derived rights and *Zambrano* is likely to be very limited indeed notwithstanding the commendable human desire for family members to care for each other”.

As the judge noted, “The CA endeavoured to draw the distinction between choice (even an unenviable choice) and compulsion and reiterated it is only in the latter case, that such a claim is likely to succeed”.

14. The judge had regard to the respondent’s guidance in *Zambrano* cases dated 27 February 2018 in which the respondent had emphasised for the claim to be successful, the British citizen would have to be forced to leave the territory of the EU, which the judge regarded as having the same meaning as “compulsion” (at paragraph 36).
15. At paragraph 38, having regard to all these factors the judge considered that the appellant could not show that if he returned to Egypt his sister would be “forced to follow him” for the reasons he had given and that:

“It would boil down to a choice to be made by [the appellant’s sister] and her family as to what course to take. Factors such as cultural issues, standards of care, availability of treatment on return, impact on their children and all other factors will no doubt be considered. But, the evidence in this case falls significantly short of demonstrating a compulsion to leave the UK”.

16. Regardless of the considerable compassionate circumstances in this case, to which I will refer below, so far as the EEA claim is concerned, I am unable to find any arguable material error of law in the judge’s findings. Although I have stated my view that insofar as the judge may have thought that the appellant’s niece could reasonably be expected to sacrifice her future prospects to look after her mother this was an error, it

is not a material error for the following reason. It is common ground that the local authority is under a statutory obligation to provide sufficient adult care to persons who need it. It is also the case, and I take judicial notice of this, that local authorities are well aware of cultural requirements and part of their obligation in cases where there are cultural sensitivities would include providing where necessary appropriate female carers to look after female patients who for cultural reasons would not wish to undress in front of males who are not close members of their family. Moreover, as Mr Khan representing the appellant before this Tribunal was obliged to accept, no evidence had been put before the First-tier Tribunal (or indeed to this Tribunal) capable of establishing that in the event that the appellant was to return to Egypt the local authority would be unable to comply with its statutory obligation to provide sufficient care for his sister. In order to succeed in this claim it would have been necessary for the appellant to provide some evidence that despite the obligation which would be on the local authority that authority would not as a matter of fact be able to provide that assistance. The judge had this in mind and that was the main reason why he dismissed the appeal.

17. Although for this reason I am obliged to uphold the judge's decision with regard to this appeal which has been brought under the EEA Regulations, I make it clear that that is not necessarily the end of the matter because as was noted in the refusal letter the appellant has not yet made an Article 8 claim and it remains open to him to do so.
18. Mr Jarvis on behalf of the respondent very fairly accepted that on the basis of the facts as they appear to be from Judge Rastogi's decision, if the appellant was now to make an Article 8 claim this could not properly be certified as being clearly unfounded. I entirely endorse what Mr Jarvis said in this regard. On the facts as they appear from Judge Rastogi's decision such a claim could not properly be said to be "bound to fail".
19. It follows that in the event that an Article 8 claim was made and was refused, the appellant would have a right of appeal to the First-tier Tribunal and on ordinary *Devaseelan* principles a judge considering an appeal against refusal would have to start from the findings which Judge Rastogi made from paragraph 31 onwards. In particular he or she would have to have in mind the very serious medical conditions suffered by both the appellant's sister and brother-in-law and that the appellant is now his sister's primary carer. He would also have to have in mind that the removal of the appellant, who has been now in this country for some seventeen years and would appear to enjoy a family life with his sister (because this relationship certainly appears to be beyond the normal emotional ties to be expected between adult siblings), would impose a considerable additional strain on the local authority at the public expense. The impact on the appellant's sister were he to be removed would also have to be considered within the proportionality exercise.
20. These are not matters before me today, however, and for present purposes my decision has to be that the appellant's appeal must be dismissed for the reasons I have given.

**Decision**

**There being no material error of law in the decision of the First-tier Tribunal the appellant's appeal is dismissed.**

**No anonymity direction is made.**

Signed:

A handwritten signature in black ink, appearing to read "Ken Craig". The signature is written in a cursive style with a long, vertical tail on the letter "g".

Upper Tribunal Judge Craig

Date: 17 September 2018