Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04771/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 July 2019	**On 22nd July 2019**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS ZOHRA EL GANA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Ms K Joshi, Counsel, instructed by Kamberley Solicitors

DECISION AND REASONS

Introduction

1. For ease of reference, I shall refer to the Appellant in the proceedings before the Upper Tribunal as the Secretary of State and to the Respondent as the Claimant.

2. This is a challenge by the Secretary of State against the decision of First-tier Tribunal Judge A J Blake ("the judge"), promulgated on 7 March 2019, in which he allowed the Claimant's appeal. That appeal was against the Secretary of State's decision of 22 June 2018, refusing to issue the

© CROWN COPYRIGHT 2019

Claimant with a derivative residence card pursuant to regulations 16(5) and 20 of the Immigration (European Economic Area) Regulations 2016 ("the regulations").

3. The Claimant, a Moroccan national, came to the United Kingdom in 2006. In 2014 she had made application for leave to remain based on article 8 ECHR. This was refused and a subsequent appeal dismissed in January 2015. That decision has no bearing on the current proceedings.

4. In June 2015 the Claimant married Mr El-Mime ("the spouse"), a British national. They have resided together ever since. By an application made on 22 February 2018, the Claimant sought a derivative residence card. The Secretary of State refused the application on the grounds that the Claimant had not shown that she was her spouse's primary's carer, or alternatively, that her departure from United Kingdom would not compel him to leave.

The judge's decision

5. The judge had before him documentary evidence and he heard oral evidence from the Claimant and her spouse. He regarded the evidence as a whole to be reliable. On the basis of that evidence, the judge found that there was a "very deep bond" between the couple, and that there existed a "strong interdependency" in terms of emotional support. The judge accepted the spouse's evidence that he would not be able to receive the same level of treatment in another country as he could in the United Kingdom, and it he would have felt compelled to leave this country if the Claimant had to go. The judge accepted that the Claimant had taken on the role of her spouse's primary carer, a finding that was supported by a letter from the spouse's GP. The judge found that it was likely that the spouse would have to cease his full-time employment if the Claimant were to leave this country. Ultimately, the judge concluded that the spouse "would not be able to reside" in the United Kingdom if his wife was removed for an indefinite period.

The grounds of appeal and grant of permission

6. The Secretary of State put forward two grounds. First, it is said that the judge failed to apply the appropriate legal test, namely the high threshold of compulsion established by the case-law, including Harrison [2013] 2 CMLR 23. Second, it is said that the judge's findings were irrational.

7. Permission to appeal was granted by First-tier Tribunal Judge Lever on 1 May 2019.

The hearing before me

8. Mr Whitwell relied on the grounds of appeal. He provided me with a copy of Patel [2018] 1 WLR 5245, and referred me to paragraph 84. It was submitted, firstly, that the judge has simply not applied the high test established by Patel and other cases. Alternatively, on the evidence before

the judge and his findings, the conclusion that the spouse would be compelled to leave the United Kingdom was perverse.

9. Ms Joshi relied on her rule 24 response. In summary, this stated that the judge had had the benefit of receiving oral evidence and had clearly reached sustainable findings of fact. Those findings were consistent with the relevant test and I should not interfere with his decision. Ms Joshi emphasised the judge's finding that there was a particularly strong relationship between the Claimant and her spouse.

10. In reply, Mr Whitwell suggested that the judge had treated the appeal more like an article 8 case than one involving the high test applicable in derivative rights cases.

Decision on error of law

11. I am acutely aware of the need to read the judge's decision sensibly, as a whole, and bearing well in mind the fact that he had heard oral evidence. I should be slow to interfere with a properly reasoned decision of the First-tier Tribunal.

12. However, in the particular circumstances of this appeal, I conclude that the judge has materially erred in law.

13. Regulation 16(1) and (5) of the regulations states:

> **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.

14. The collective effect of the relevant case-law on the Zambrano principle (Ruiz Zambrano [2012] QB 265), including Harrison, Patel, K A v Belgium Case C- 82/16, and most recently MS (Malaysia) [2019] EWCA Civ 580 (this case post-dates the hearing before the judge) can be summarised as follows (at least for the purposes of this appeal):

    i. the test is that of practical compulsion, not simply choice;

    ii. the test is an objective one;

iii. in cases involving adult dependents (including a spouse), the test is “very demanding”, and will be met only, “exceptionally”;

iv. all cases are highly fact-specific.

15. Of course, the factual circumstances are primarily a matter for the judge. However, such findings must then be placed in the proper legal context. For the following reasons, I conclude that the judge has failed to direct himself to the very high threshold set by the practical compulsion test and the objective assessment that it requires.

16. First, at no point in his decision does the judge provide any self-directions as to the applicable test. Citing authorities is of course not a requirement, but references to relevant binding authorities would provide an indication that the relevant test has been taken into account and applied.

17. Second, substance is almost always more important than form. Notwithstanding the absence of the citation of authority, there is no reference to “compulsion”, exceptionality, or any indication of the importance of applying an objective standard.

18. The judge has referred to the wording of the regulations and did conclude that the spouse would “not be able to reside” in the United Kingdom without the Claimant. The point here is that the “compulsion” test has been the subject of important judicial interpretation and the particularly high threshold required in cases concerning adult dependents is not apparent on the face of regulation 16(5).

19. It is also right that the judge has used terms such as “very” and “strong” (see in particular paragraph 79). Viewed in the context of consideration of the evidence as a whole, this does not allay my significant cumulative concerns as to the threshold that the judge had in mind when reaching these conclusions. Further, these findings related to subjective elements of the case and, for reasons set out below, there has been a failure to place them in the context of an objective assessment.

20. I have considered whether other materials before the judge may have directed him to the appropriate test and its high threshold. I note that the skeleton argument relied on by the Claimant at the hearing makes no reference to any of the case-law, nor does it set out the demanding test in any other form.

21. Third, what the judge has actually said indicates that he was applying a subjective test only, or at least that the objective element was not given adequate consideration. There is an emphasis on the spouse’s evidence as to what he would “feel” about leaving the United Kingdom if the Claimant had to go. The same applies to the spouse’s view as to the level of treatment he might receive elsewhere. It is right that the judge relied on what the spouses GP said in the letter referred to and cited in full at paragraph 68 of the decision. The “care” referred to in paragraph 78 must relate to the emotional support provided by the Claimant to her spouse.

The judge's finding that this type of support could not be provided by the NHS, even if justified, was to a large extent a subjective element in the case. That did not render it irrelevant, but it nonetheless required being placed within the context of a global objective assessment.

22. The error of approach in this case is clearly material and I set the judge's decision aside on this basis.

23. Turning to the Secretary of State's second ground, and although not strictly necessary given my conclusion on the first ground, I find that this is an example of a relatively rare case in which it can properly be said that the judge's ultimate conclusion is irrational, notwithstanding the elevated threshold applicable to such challenges and the fact-specific nature of case of this nature.

24. Having found the evidence as a whole to be reliable, the judge has made the following core findings:

    i. the spouse suffered from depression, trigerninal neuralgia (a condition causing pain in the face), and hypertension;

    ii. the Claimant was her spouse's primary carer and she provided emotional support for him, resulting in a "very deep bond" and a "strong interdependency" between the couple;

    iii. the Claimant also undertook certain practical tasks such as reminding him to take medication, cooking and doing laundry;

    iv. the spouse was under treatment from his GP and felt that he would not get the same treatment in another country (in this case, Morocco);

    v. an NHS nurse could not provide the same emotional support as the Claimant;

    vi. the spouse held the view that if the Claimant left the United Kingdom, he would have to go with her;

    vii. the spouse had played a role in helping the Claimant to overcome mental health issues that she had in the past.;

    viii. the Claimant's departure from this country would probably result in her spouse ceasing his full-time employment.

25. There was no finding that either the NHS or social services (whose assistance the spouse would have been entitled to if his primary carer - the Claimant had departed) would not have been able to provide practical (as opposed to emotional) support in terms of medication and certain household tasks. There was no finding that the spouse's own daughter would be unable to provide any sort of assistance to her father. Any differential level of medical treatment in Morocco was, in the circumstances of this case, irrelevant to the compulsion test. The same applies to the inability of the spouse to continue with his full-time employment. Indeed, the fact of that employment must be of significance:

the spouse had been working for many years, held a managerial position, and was able to function for many hours away from the Claimant during the working week. There was no independent evidence before the judge to indicate that the spouses mental and/or physical health would be very severely compromised by the Claimant's departure. The subjective elements in terms of the significant bond between the couple and their emotional support for one another were certainly very relevant, but setting the context of the other factors, they could not, by themselves, go to satisfy the very demanding threshold in a case such as this.

26. In my view, when this factual matrix is set against the "very demanding" threshold, the judge was not, wiht respect, entitled to reach the conclusion that the compulsion test had been satisfied.

27. On this alternative basis, I set the judge's decision aside.

Remaking the decision

28. Having canvassed their respective views at the hearing, both representatives agreed that I could and should remake the decision on the evidence currently before me.

29. Ms Joshi submitted that the evidence did satisfy the high test applicable in cases concerning adult dependents and derivative rights of residence.

30. Mr Whitwell relied on his submissions made in respect of the error of law issue.

31. I remake the decision in this appeal with reference to the evidence that was before the judge, his findings made thereon, and the legal framework set out, above.

32. I do not propose to repeat what I have already set out in the error of law decision. Put shortly, the test is "very demanding", and it will only be in "exceptional" cases that it can be shown that an adult dependent will be compelled to leave the territory of the EU.

33. I now undertake a fact-specific evaluative assessment of the Claimant's case.

34. The Claimant has a very strong relationship with her spouse, and this has been created in part by her support for him, but also in respect of support that he has provided her in the past, support that has assisted her in overcoming mental health difficulties of her own. This factor is important, and clearly counts very much in the Claimant's favour.

35. I find that the Claimant is the primary carer for her spouse. This of course is not determinative, as it is only one limb of the assessment under regulation 16(5) of the regulations.

36. On the evidence before me I find that the Claimant does not currently suffer from mental health problems. The GP patient record printout at 64 of the respondent bundle confirms that the PTSD “ended” in February 2016. It is of course impossible to say what might happen in the future, but in my view it is unlikely that significant mental health problems would re-occur even if her removal were to take place.

37. I find that the spouse suffers from the conditions set out previously my decision. He receives appropriate treatment from his GP but there is no evidence to suggest that he requires specialist Consultant-led input, and I find that he does not. He works, and has worked for many years, in a full-time job bearing managerial responsibilities. Whilst in no way seeking to denigrate his medical conditions, the fact and nature of his employment must go to indicate that his overall health is not so severely affected as to prevent at least a reasonable level of functionality on a day-to-day basis. The reference in the GP letter to the spouse having difficulty with his concentration must be read in the context of the nature of his employment: any such difficulties are, in my view, limited.

38. On the evidence before me, there is nothing to show that practical assistance with such matters as the taking of medication, cooking, and attending relevant appointments, could not be provided by either the NHS or social services. The GP letter only goes so far as to state that emotional support could not be provided by an NHS nurse. I accept that the same type of emotional support currently provided by the Claimant could not, for understandable reasons, come from such a person. Having said that, I find that appropriate therapy from, for example, a CBT counsellor, could be put in place if necessary. This may not be an equivalent to the Claimant’s provision, but it would nonetheless be available and there is no sound reason to conclude that the spouse would be simply unable to engage with such a service. The GP letter does not provide any analysis/reasons as to why any therapy/report from a third party would be practically impossible. The judge’s findings do not specifically address the issue of such alternative support (bearing in mind that I am not considering an equivalent type of emotional support to that provided by the Claimant, only a source that would be likely to offer meaningful assistance). The possibility of alternative care is not a decisive factor, although it is significant in the context of this case.

39. The GP letter does not give an opinion on the consequences to the spouses mental and/or physical health should the Claimant leave the United Kingdom. I find that there is no independent evidence to justify a conclusion that his overall health would be significantly jeopardised by the Claimant’s departure. I take full account of the spouse’s belief that he would not obtain the same level of medical treatment in Morocco as he is currently receiving in this country, but this cannot add much to the Claimant’s case.

40. Turning to the spouse’s daughter, I acknowledge that in his oral evidence he expressed the view that she would not be able to help him. This

particular point was not the subject of a finding by the judge, although the spouse was found to be a credible witness. In the absence of specific evidence from the daughter, I can see no sound reason for finding that she would be unable and/or unwilling to assist her father. She has a family of her own, but this of itself would not preclude the possibility of some form of assistance whether it be emotional or purely practical. I do note that the spouse gave evidence that he was in touch with his daughter on a weekly basis.

41. The Claimant's departure would no doubt cause emotional upset, require practical readjustments to be made, and quite possibly give rise to difficult choices to make in respect of the couple's future. I accept that the spouse may well feel compelled to leave the United Kingdom, and I take this subjective element fully into account. It may be that the spouse would in fact decide to leave with his wife. However, it would be a choice (albeit a difficult one) and not a question of compulsion.

42. In all the circumstances, the Claimant's appeal must fail.

43. I would add a final observation. This case has of course been concerned entirely with EU law: Article 8 ECHR has not played a part. There have been findings of fact which may be supportive of an Article 8 claim, although I in no way express an opinion on the prospects of success of any such claim. Whether the Claimant wishes to pursue that avenue is of course a matter for her.

Anonymity

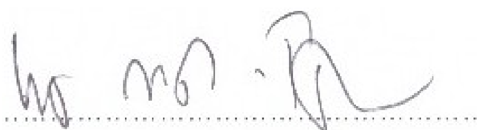
44. The First-tier Tribunal did not make an anonymity order and nor do I.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I re-make the decision by dismissing Mrs El Gana's appeal.



Signed .... Date: 16 July 2019

Upper Tribunal Judge Norton-Taylor