



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/04925/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 9 May 2019**

**Decision and Reasons Promulgated
On 04 June 2019**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

The Secretary of State for the Home Department

Appellant

And

Syed Ferdous Ahmed
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Presenting Officer.

For the Respondent: Mr N Ahmed, of Lincoln's Chambers Solicitors.

DECISION AND REASONS

1. Following a hearing on 19 February 2019, Judge of the First-tier Tribunal Davidson allowed the appeal of Mr Syed Ferdous Ahmed (hereafter the "claimant"), a national of Bangladesh born on 7 October 1986, against a decision of the Secretary of State of 29 June 2018 to refuse his application of 20 March 2018 for a derivative residence card to confirm that he was the primary carer of Mrs. Tayamun Nessa Khatun, a British citizen born on 2 January 1936 (hereafter the "sponsor"). The sponsor is the appellant's maternal grandmother.
2. The Secretary of State's decision was made under regulation 16(5) of the Immigration (European Economic Area) Regulations 2016 (hereafter the "2016 EEA Regulations"). In the decision letter, the Secretary of State noted that the claimant was registered as a carer with Hillingdon Carers. However, he was not satisfied that the claimant was the sponsor's primary carer or that she would be unable to live in the United Kingdom or another EEA state if he was required to leave the United

Kingdom for an indefinite period. The Secretary of State considered that the sponsor could procure assistance from other sources with the help of Social Services. He noted that the assessment from Hillingdon Council that had been submitted by the claimant stated that the sponsor would be re-referred to Adult Social Care if the claimant did not provide care for the sponsor.

3. The Secretary of State therefore concluded that the claimant had not shown that alternative care, whether from the local authority or private care providers, was unavailable or unsuitable.
4. At the hearing on 9 May 2019, I heard submissions from the parties as to whether Judge Davidson had materially erred in law. I reserved my decision on this issue and then heard submissions on whether (if I were to conclude that Judge Davidson had materially erred in law) I could proceed to re-make the decision on the appeal without any further adjournment.
5. Mr Ahmed initially submitted that I should remit the appeal to the First-tier Tribunal ("FtT"). However, upon being pressed to explain why a remittal would be appropriate, given the very limited issue in the appeal and the fact that the claimant had not made an application to admit further evidence, he agreed that the Upper Tribunal could proceed to re-make the decision and hear submissions on that issue.
6. I record that no application was made, whether prior to the hearing on 9 May 2019 or at the hearing, to admit evidence that was not before Judge Davidson. I also record that Mr Ahmed did not suggest that the claimant or anyone else would give oral evidence. He did not request that the hearing be adjourned part-heard for submissions to be made on another date concerning the re-making of the decision.
7. I therefore proceeded to hear submissions on 9 May 2019 concerning the re-making of the decision on the claimant's appeal, which I said I would consider if I decided that Judge Davidson had materially erred in law.

Previous appeals

8. The claimant had had two previous appeals which concerned the same issue, as follows:
 - (i) An appeal against a decision of 23 December 2014 which refused his application for a residence card as confirmation of a derivative right of residence as the primary carer of the sponsor. This decision was made under regulation 15A of the Immigration (European Economic Area) Regulations 2006. This appeal was heard on 28 July 2015 before Judge of the First-tier Tribunal Robinson who dismissed the appeal.
 - (ii) An appeal against a decision of 21 April 2016 which refused his application for a residence card as confirmation of a derivative right of residence as the primary carer of the sponsor. This decision was made under regulation 15A of the Immigration (European Economic Area) Regulations 2006. This appeal was heard on 15 June 2017 before Judge of the First-tier Tribunal Hodgkinson who dismissed the appeal.
9. Judge Robinson heard oral evidence from the claimant and the sponsor. He did not find the claimant credible. He rejected his evidence that he had lived with the sponsor in her sheltered accommodation (para 24). He noted that there was no medical

statement of the sponsor's conditions and no evidence of the medication or treatment that the sponsor was receiving (para 26). Although she was receiving local authority accommodation, there was no information as to whether any assistance had been offered or was available from the local authority. However, the evidence showed that she had access to a duty manager around the clock and he found that it was unlikely that she could not access assistance from a manager because of language difficulties (para 27). On the basis of the oral and written evidence before him, Judge Robinson said that he was satisfied that the claimant was the sponsor's main carer but he was not satisfied that she would be unable to remain in the United Kingdom if he were required to leave. He took the view that she would continue to have access to medical treatment and her needs would be assessed by the local authority if she were unable to manage without the help of the claimant. He considered that this was especially so as she was living in sheltered accommodation and was known to the local authority (para 29). He therefore concluded that the claimant had not demonstrated that he had a derivative right of residence (para 30) and dismissed the appeal.

10. An issue before Judge Hodgkinson was whether the claimant was related as claimed to the sponsor. Judge Hodgkinson resolved this issue in the claimant's favour. He accepted that the sponsor had significant disabilities and illnesses (para 20), that the claimant was the sponsor's primary carer and that the sponsor was heavily dependent upon the claimant (para 26). He noted discrepancies between the claimant's evidence and the sponsor's evidence and concluded that the extent of the sponsor's dependency on the claimant had been exaggerated to an indeterminate extent (para 26). He noted that the sponsor lives in sheltered accommodation but there was no evidence that established that any real attempts had been made to obtain any kind of care package outside the care that the claimant was providing to her and that there was no evidence which indicates that any enquiries at all had been made in relation to possible residential accommodation for the sponsor so that she could be looked after by alternative carers in a residential setting. He found that the evidence did not unequivocally indicate that the sponsor would elect to return to live in Bangladesh or that she would be unable to continue to live in the United Kingdom if the claimant were not in the United Kingdom (para 27).
11. As can be seen, both Judge Robinson and Judge Hodgkinson were not satisfied that the sponsor would be compelled to leave the United Kingdom because there was no evidence before them that the sponsor could not obtain alternative care if the claimant were not in the United Kingdom to care for her.

Judge Davidson's decision

12. Judge Davidson heard evidence from the claimant and the sponsor which she summarised at paras 5-8 of her decision. They gave evidence that the sponsor's condition has deteriorated, in that, she has been diagnosed with dementia, presenting currently as forgetfulness, and that she also suffers from stress and heart problems. She has been a victim of burglary and is nervous around people she does not know. She speaks no English and is illiterate. She is entirely dependent on the claimant since the deaths of two of her daughters. Her other daughters live in Bangladesh.
13. The claimant said that he had been told by the local council that they are unable to provide the level of care that he can provide, although this was in a verbal conversation and there was no documentary evidence to support this. As well as providing her with physical care and dealing with her medication and other medical

needs, the claimant gives her emotional support and practical support by looking after her financial affairs, assisting her with her daily prayers and taking her out.

14. Judge Davidson said that she adopted the findings of the previous judges in relation to the claimant's relationship to the sponsor and that the claimant was the primary carer of the sponsor (para 14). She also took into account the fact that it had previously been found that the sponsor suffered from significant disabilities and illness and that the part played by the claimant in her care, including acting as interpreter, had been accepted (para 15). She said that, on the evidence before her, the sponsor was heavily reliant on the claimant, not only for her physical care but for all the other support a vulnerable person needs (para 16).

15. Judge Davidson then said, at paras 17-20, as follows:

"17. The evidence shows that **she is eligible for adult social care from Hillingdon Council but there is no detail of what that would entail and whether it would replace all the care given by the Appellant.**

18. I take into account the sponsor's forgetfulness, as a symptom of mild dementia and the impact on her of being a victim of burglary. I find that, in the light of these issues, and the significant language and cultural barriers encountered by the sponsor, that **the care given by the local authority would not be an adequate replacement for the care given by the sponsor.**

19. I accept that the sponsor prefers her care to be given by her grandson rather than a stranger but this is not the test. I must be satisfied that the sponsor would be unable to reside in the United Kingdom if her grandson were to be removed. **I find that it would cause her enormous hardship if her grandson were to be removed, such that the family may have to consider whether she could remain in the United Kingdom. I find that the sponsor's need for [the claimant] goes beyond preference and convenience.**

20. I accept that there are no other family members in the United Kingdom who could provide care, since the sponsor's brother is himself elderly and in need of care.

21. I therefore conclude that [the claimant] has shown that he has a derived right of residence under the Regulations."

(my emphasis)

16. Although Judge Davidson referred to an independent social worker's report at para 10 of her decision, she did not mention it, in terms, in her assessment of the case, at paras 14-21 of her decision.

17. The report in question was a report from Mr Maswood Ahmed, an independent social worker, dated 25 January 2019 (pages 44-65 of the claimant's bundle). At page 52, the social worker said that the sponsor would be eligible for support following an assessment under the Care Act 2014, the criteria for which he set out at page 53. At page 54, he said that it was unlikely that the sponsor would be considered suitable to remain in the community if she were to live on her own or without the support of the claimant and that it was likely that a high costs package of support with extremely complicated routines would be required to manage her needs around the clock in a residential home for the elderly. At page 55, he said that the complicating factors in her case were that she does not speak English at all, that she has limited knowledge of the wider society and how it functions and that she is likely to find it difficult to settled into a residential home. There was a severe shortage of residential homes that have facilities that can meet all of the sponsor's cultural and religious needs as well as provide *"around the consistent staffing with her linguistic background"*.

Whether Judge Davidson had materially erred in law

The grounds

18. Mr Clarke relied upon the grounds but distilled the lengthy grounds into three bullet points, i.e. adequacy of reasoning, failure to follow precedent and failure to follow Devaseelan * [2002] UKIAT 00702. Since I will need to deal with the written grounds in any event, I have summarised them as follows:
- (i) (Para 1 of the grounds) (Ground 1) Judge Davidson had found that the claimant was the primary carer of the sponsor but there was no medical evidence or social worker's report to confirm the sponsor's specific medical and care requirements.
 - (ii) (Paras 2-4, paras 7 and 10 of the grounds) (Ground 2) Judge Davidson gave inadequate reasons for finding that the sponsor could not access adequate alternative care.
 - (iii) (Paras 5-6 of the grounds) (Ground 3) Judge Davidson had not adequately reasoned her finding that the sponsor would be compelled to leave the United Kingdom and there was no evidence to support the claimant's assertion that this would be the case.
 - (iv) (Paras 6, 8-10 of the grounds) (Ground 4) Judge Davidson had failed to apply relevant authorities, i.e. Ruiz Zambrano [2011] EUECJ C34/09, Ahmed (Amos; Zambrano; Reg 15A (3)(c) 2006 EEA Regs) Pakistan (Rev 1) [2013] UKUT 89 (IAC), Devaseelan * [2002] UKIAT 00702 and Ayinde and Thinjom (Carers – Reg.15A – *Zambrano*) [2015] UKUT 00560 (IAC).
 - (v) (Para 11 of the grounds) (Ground 5) Judge Davidson failed to consider the public interest considerations in s.117B of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act").

Submissions

19. Mr Clarke referred me to paras 65 and 66 of the decision of Upper Tribunal Judge Jordan in Ayinde and Thinjom and the head-note in the case which reads:
- (i) The deprivation of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizens identified in the decision in Zambrano [2011] EUECJ C-34/09 is limited to safeguarding a British citizen's EU rights as defined in Article 20.
 - (ii) The provisions of reg. 15A of the Immigration (European Economic Area) Regulations 2006 as amended apply when the effect of removal of the carer of a British citizen renders the British citizen no longer able to reside in the United Kingdom or in another EEA state. This requires the carer to establish as a fact that the British citizen will be forced to leave the territory of the Union.
 - (iii) The requirement is not met by an assumption that the citizen will leave and does not involve a consideration of whether it would be reasonable for the carer to leave the United Kingdom. A comparison of the British citizen's standard of living or care if the appellant remains or departs is material only in the context of whether the British citizen will leave the United Kingdom.
 - (iv) The Tribunal is required to examine critically a claim that a British citizen will leave the Union if the benefits he currently receives by remaining in the United Kingdom are unlikely to be matched in the country in which he claims he will be forced to settle."

20. Mr Clarke reminded me that Judge Hodgkinson and Judge Robinson had found that there was a paucity of evidence to show that the care that the sponsor needed could not be obtained from the local authority and therefore a paucity of evidence to show that the sponsor would be compelled to leave the United Kingdom. The only evidence before Judge Davidson was the evidence summarised by her at para 5, i.e. the oral evidence of the claimant that he had been told by the local authority that it is unable to provide the sponsor with the level of care that he can provide. However, there was no documentary evidence to support his evidence.
21. Mr Clarke referred me to the independent social worker's report. He submitted that it was clear from the report that, if the claimant were to leave the UK, the sponsor would be assessed for her needs. It was likely that she would not be considered suitable to remain in the community. She would require a package of around-the-clock care, which would need to include assistance with language and other cultural and religious needs, within a residential home. However, the social worker's report was not evidence that such care would not be available. It simply stated that such care would be very expensive.
22. At para 17 of her decision, Judge Davidson had said that the sponsor was eligible for adult social care from Hillingdon Council but that there was no detail of what that would entail and whether it would replace all of the care given by the claimant. At para 18, she said that she found that the care given by the local authority would not be an adequate replacement for the care given by the claimant. Mr Clarke submitted that this finding was wholly unreasoned because there was no evidence at all before the judge as to what care the local authority would provide. He submitted that the judge therefore erred in failing to provide reasons for her finding at para 18, that the care given by the local authority if the claimant were to leave the United Kingdom would be inadequate.
23. In Mr Clarke's submission, the main error was at para 19, where the judge found that *"... it would cause her enormous hardship if her grandson were to be removed, such that the family may have to consider whether she could remain in the United Kingdom."* This was wrong because it shows that the judge had applied the wrong test. He submitted that Judge Davidson did not make a finding that the sponsor would be compelled to leave the United Kingdom and so she had inadequately reasoned her finding that the claimant had shown that he had a derivative right of residence.
24. Mr Clarke submitted that, in summary, the judge had failed to engage with the evidence before her, failed to recognise the lack of evidence to show what care the sponsor would receive from adult social services or the local authority and applied the wrong test at para 19.
25. In response, Mr Ahmed submitted that, although the decision of Judge Davidson was short, it was nevertheless a sound decision. The findings that she made were open to her. She gave her reasons at paras 15-19 of her decision. On the evidence that was before her, there had been a material change in the sponsor's circumstances since the decisions of Judge Robinson and Judge Hodgkinson, as Judge Davidson summarised at paras 5-8 of her decision. In addition, Judge Davidson had the benefit of the independent social worker's report. In these circumstances, he submitted that Judge Davidson was justified in departing from the findings of Judge Robinson and Judge Hodgkinson. She was entitled to find that the care that the sponsor would receive from the local authority would not be an adequate replacement for the care that the claimant gives. If the claimant were to leave, the circumstances would

compel her to leave the United Kingdom. She would not be able to ask for support without the claimant's help. She would not even be able to telephone for help.

26. Mr Ahmed reminded me that Judge Davidson had more evidence before her than Judge Robinson or Judge Hodgkinson had had, in the form of the independent social worker's report. He submitted that it was clear that Judge Davidson adopted the conclusions of the social worker.

Assessment

27. At the hearing before me, Mr Clarke submitted (para 23 above) that the main error was at para 19 of Judge Davidson's decision, in that, she had not made a finding that the sponsor would be compelled to leave the United Kingdom.
28. I can see substance in this submission. Although the final sentence of para 15 and the second sentence of para 19 of Judge Davidson's decision show that she was aware that the question she had to decide was whether the sponsor would be unable to reside in the United Kingdom if the claimant left, she fell short of making such a finding, as the third sentence of para 19 shows. However, as this ground was not in the Secretary of State's written grounds and no application was made for the Secretary of State's grounds to be amended, it would be unfair to take this point against the claimant. I have therefore left it out of account.
29. I can deal with ground 5 briefly. Section 117B of the 2002 Act sets out the public interest considerations that a court or tribunal must take into account when deciding the "*public interest question*" (s.117A(1), (2) and (3)), i.e. whether a decision is proportionate. In other words, it applies in cases in which Article 8 is considered. It has no application in deciding whether an individual has established that he or she has a derivative right of residence under the 2016 EEA Regulations. Ground 5 is therefore misconceived.
30. In relation to ground 4 and, in particular, the reference to Devaseelan, it is clear that the Secretary of State relies upon the findings of Judge Robinson and Judge Hodgkinson, that the claimant had not established that the sponsor could not obtain the care that she needed from the local authority because there was a paucity of evidence before them. To the extent that the Secretary of State relies upon these findings as a starting point, the submission is misconceived. The principle in Devaseelan, that the findings of a judge in a previous appeal are a starting point, concerns findings of fact as to whether or not certain events said to have taken place in the past did take place; for example, an asylum seeker's account of events in the past which he relies upon in order to establish his asylum claim. The findings of Judge Robinson and Judge Hodgkinson, that there was a paucity of evidence before them to show that the sponsor could not obtain the care that she needed from the local authority, concerned the state of the evidence before them concerning a future event, as opposed to being findings as to whether any particular events had occurred in the past.
31. The relevance of the findings of Judge Robinson and Judge Hodgkinson is that they put the claimant on notice of the evidential gap in his case as presented to Judge Robinson and Judge Hodgkinson. Instead of producing documentary evidence of the care that the local authority would provide to the sponsor, he gave oral evidence to the effect that the local authority had confirmed to him that it is unable to provide the level of care that he can provide and said that they was no documentary evidence to

support this. Even if it can be said that the judge was entitled to accept the claimant's oral evidence to that effect as sufficient to discharge the burden of proof upon him to the standard of the balance of probabilities (an issue I have not taken against the claimant in deciding whether Judge Davidson had materially erred in law because it was not raised in the Secretary of State's grounds), the fact is that the claimant's oral evidence did not constitute evidence of the care that the local authority would provide. It was simply evidence that the local authority was unable to provide the level of care that *he can provide*, which is not the same.

32. The authorities relied upon in ground 4 also establish that any assessment of whether a British citizen would be compelled to leave the territory of the EU is highly fact-sensitive. The test for compulsion is an objective one. The Zambrano principle does not guarantee any particular quality of life in the EU, although there would come a point where the consequences would become so serious for the EU citizen that they would effectively be compelled to leave. The test was one of practical compulsion, i.e. that the EU citizen would be left with no practical choice but to leave the EU if the carer left. Whether the boundary was crossed was a matter of fact and degree.
33. I noted that:
- (i) On the evidence of the claimant and the sponsor as summarised at para 5 of the decision of Judge Davidson, the case presented was that the local authority had stated that it is unable to provide all of the care that the claimant provided but he did not give evidence of the care that the local authority would provide.
 - (ii) At para 17, Judge Davidson said that the sponsor was eligible for adult social care from Hillingdon Council but that there was no detail of what that would entail and whether it would replace all the care given by the claimant.
 - (iii) The report of the social worker was to the effect that the sponsor would be re-assessed, that she would require a 24-hour package of care to include language and other cultural and religious needs in a residential home. The report was to the effect that such a package of care would be very expensive and that there are huge financial constraints on local authorities but it did not state that such a 24-hour package of care in a residential home would not be provided. The social worker did not state that the sponsor would not receive care that addressed her cultural, language and religious needs.
 - (iv) It was not suggested in evidence before Judge Davidson that the sponsor's emotional dependency on the claimant was such that she would still be compelled to leave the United Kingdom even if the local authority provided 24-hour care that addressed the totality of her other needs (including her religious and cultural needs). It is clear that, in referring to "*the sponsor's need for [the claimant]*" in the final sentence of para 19, Judge Davidson was referring to the care that the sponsor was receiving from the claimant as opposed to her emotional dependency on him: it is difficult to see why else she referred to such need going "*beyond preference and convenience*".
34. Given the lack of evidence as explained at (i) above, it is impossible to see why Judge Davidson found, at para 19, that the sponsor's need for the claimant went beyond preference and convenience, a finding which was wholly unreasoned.

35. Furthermore, given the gaps in the evidence before Judge Davidson as described at (i), (ii) and (iii) above and given (iv) above, it is impossible to see why she reached her finding, at para 18 of her decision, that the care given by the local authority would not be an adequate replacement for the care given by the claimant. It is therefore impossible to see why she allowed the appeal.
36. I am therefore satisfied that grounds 2, 3 and 4, taken together, are established. It is plain that grounds 2, 3 and 4 were material to the judge's decision to allow the appeal. I therefore do not need to deal with ground 1.
37. For all of the reasons given above, I set aside the judge's decision to allow the appeal, and her finding, implicitly made, that the sponsor would be compelled to leave the United Kingdom.

Re-making the decision on the claimant's appeal

Submissions

38. Mr Clarke reminded me that the burden was upon the claimant to show that the sponsor would be compelled to leave the territory of the United Kingdom if he were to be required to leave the United Kingdom. He submitted that the most that the evidence shows is that the claimant had said in evidence before Judge Davidson that the local council had informed him that they would be unable to provide the necessary care.
39. In Mr Clarke's submission, there was no evidence from the local authority as to what care the sponsor would need if the claimant were to leave the United Kingdom and whether such care would be provided, if necessary by the provision of care in a residential home. The social worker's report highlights the problems of funding for local authorities and states that the sponsor would need to go into a residential home for the elderly whereas she is at present in sheltered accommodation.
40. Mr Clarke therefore submitted that it is necessary for the claimant to demonstrate that residential home care would not be available to the sponsor. The social worker states that there is a problem because there are budget constraints on local authorities. The social worker also states, at page 55, that the sponsor is likely to find it difficult to settle into a residential home. In the second paragraph on page 55, he refers to the sponsor having cultural and religious needs. However, there was no evidence that such assistance would not be available to her.
41. Accordingly, Mr Clarke submitted that it was simply not open to me to find that the sponsor would be compelled to leave the United Kingdom. He asked me to dismiss the appeal.
42. Mr Ahmed relied upon his skeleton argument and the social worker's report. He submitted that the social worker's report was a comprehensive report. The social worker had said that the care that the claimant was providing to the sponsor was "*not likely to be available to her in a way that will be acceptable and reassuring for her or at the same level as can be provided by [the claimant] as he is able to meet all of her religious, cultural and practical care needs*" (para 1, page 45). It was the social worker's opinion that the sponsor would "*seriously struggle to be able to live in the UK*" without the help and support of the claimant (para 3, page 45). It was his professional opinion that "*it would be of considerable benefit to [the sponsor] if [the*

claimant] was to continue with his established private and family life in the UK on the basis that he is a key family member and primary carer for [the sponsor]" and that granting the claimant's application would "greatly assist [the sponsor] who is indeed a very vulnerable and elderly lady now 82 years old, who is in need of around the clock 24 hours support, 365 days a year, that cannot reasonably be substituted by any state provisions that would be able to meet all of her needs particularly her cultural needs providing the personalised care that [the claimant] as a family member is able to provide" (para 3, page 45).

43. Mr Ahmed submitted that given the circumstances of the sponsor, i.e. that she is disabled, that she is unable to speak English, that she is illiterate, she has been burgled and her medical condition, she would be compelled to leave the United Kingdom. He submitted that the care that the local authority would be able to provide would not meet her needs.

Assessment

44. I have summarised the key principles that emerge from the authorities at para 32 above and quoted the head-note in Ayinde and Thinjom at para 19 above.
45. The burden of proof is upon the claimant to establish, to the standard of the balance of probabilities, that, if he were to leave the United Kingdom, the sponsor would be compelled to leave the United Kingdom and therefore the territory of the EU. It has not been suggested by the Secretary of State that she could live in some other part of the EU.
46. The claimant is plainly aware from the decisions of Judge Robinson and Judge Hodgkinson that his appeals before them failed because there was a lack of documentary evidence from the local authority establishing precisely what care it would provide for the sponsor. No such evidence was produced before Judge Davidson. As I said at para 6 above, no application was made to admit evidence that was not before Judge Davidson. I therefore re-make the decision on the claimant's appeal on such evidence as is before me.
47. The claimant's oral evidence, summarised at para 5 of Judge Davidson's decision, that the local authority informed him that it is unable to provide the care that he provides to the sponsor, is unsatisfactory for two reasons. Firstly, it is not evidence of the care that the local authority would provide. Secondly, in any event, his oral evidence is insufficient to discharge the burden of proof upon him to establish relevant facts to the standard of the balance of probabilities, particularly in view of the fact that he has had two previous appeals by which he was put on notice of the evidential gap in his case.
48. Furthermore, the claimant's failure to produce documentary evidence from the local authority to support his oral evidence goes against the credibility of his evidence. If it is true that he had had such a conversation, it is wholly lacking in credibility that he did not obtain documentary evidence in support. He has been legally represented throughout. He had legal representation at the appeals before Judge Robinson, Judge Hodgkinson and Judge Davidson. In all of the circumstances, I am in no doubt that the reason why no documentary evidence has been submitted is not because he has not considered the need for such evidence but because the written evidence he has received or that he knows he will from the local authority does not/will not support his case.

49. I have considered the independent social worker's report with care. Mr Ahmed relied, in particular, on the following:
- (i) The fact that the social worker had said that the care that the claimant was providing to the sponsor was "*not likely to be available to her in a way that will be acceptable and reassuring for her or at the same level as can be provided by [the claimant] as he is able to meet all of her religious, cultural and practical care needs*" (para 1, page 45).
 - (ii) It was the social worker's professional opinion that "*it would be of considerable benefit to [the sponsor] if [the claimant] was to continue with his established private and family life in the UK ...*" and that granting the claimant's application would "*greatly assist [the sponsor] ... cannot reasonably be substituted by [state provision] ...*".
50. However, it is not a case of considering what level of care can reasonably be provided by the state, nor is it a case of considering what level of care is acceptable to the sponsor or of benefit to the sponsor.
51. Mr Ahmed submitted that the sponsor would not even be able to use the telephone to call for help. This was an attempt to give evidence, which is unacceptable and which I reject in any event. I do not accept that, if she required assistance, the sponsor would be unable to use the emergency systems that will no doubt have been in place for residents at the sheltered accommodation where she lives to call for immediate assistance. I do not accept that any assistance she requires with language would not be provided. There is no evidence to that effect, in any event.
52. The sponsor has mild dementia (social worker's report, page 55) which currently presents as forgetfulness. She also suffers from stress and heart problems. She has dizzy spells and suffers from falls. She also suffers from pain. The medication she takes includes anti-depressants. She has been a victim of burglary and is nervous around people she does not know. She does not speak English. She is illiterate.
53. Local authorities arrange to provide care for people suffering from various medical conditions and who are vulnerable for various reasons. They arrange care for people who need interpreters and for people who have different types of cultural and religious needs. In the instant case, the independent social worker does not suggest that the care provided by the local authority to the sponsor would not address her cultural, language and religious needs.
54. If the claimant were to leave the United Kingdom, the sponsor would be assessed under the Care Act 2014, as the independent social worker states in his report. She is in sheltered accommodation. She is therefore already known to the local authority. At its highest, and as Mr Clarke submitted, the independent social worker's report is to the effect that a 24-package of care and support in a residential home, which I acknowledge includes language and other cultural and religious needs, would be very expensive. However, as I said at para 33(iv) above, the report does not state that such care would not be provided.
55. There is simply no evidence that the sponsor would not receive adequate care in the United Kingdom, if the claimant were to leave the United Kingdom. In the absence of such evidence, I do not accept the opinion of the independent social worker that the sponsor would "*seriously struggle to be able to live in the UK*" without the help and

support of the claimant. It is obvious that he reached this conclusion on the basis that, in view of the financial constraints on local authorities, it would be unreasonable to expect the local authority responsible for the sponsor's care to address all of her needs in a residential home. I have already explained why the claimant's oral evidence is lacking.

56. Whilst I accept that the social worker's report shows that the sponsor is emotionally dependent on the claimant, it was not suggested in evidence before Judge Davidson or in the social worker's report, and as I said at para 33(iv) above, that the sponsor's emotional dependency on the claimant was such that she would be compelled to leave the United Kingdom even if the local authority provided 24-hour care that addressed the totality of her other needs (including her religious and cultural needs). I would be sceptical about the credibility of any such belated evidence, given that this is the claimant's third appeal on the same issue.
57. Given that there is no such evidence before me and given the evidential gaps in the evidence before me, as explained above, I am simply not satisfied that, if the claimant were to leave the United Kingdom, the sponsor would be left with no practical choice but to leave the United Kingdom.
58. The claimant therefore does not satisfy regulation 16(5) of the 2016 EEA Regulations. I therefore re-make the decision on the appeal by dismissing his appeal against the Secretary of State's decision.
59. It will be seen that I have decided this appeal on the basis of the findings of fact of Judge Davidson, including her findings that the claimant is the sponsor's primary carer and that he provides her with 24-hour care. I have not taken into account, against the claimant's credibility, the fact that the evidence given that the claimant provides the sponsor with 24-hour care is difficult to reconcile with the fact that she lives in sheltered accommodation and the claimant does not live with her.

Decision

The decision of Judge of First-tier Tribunal Davidson involved the making of material errors of law sufficient to require it to be set aside. The decision was set aside.

I re-make the decision by dismissing the claimant's appeal against the Secretary of State's decision.



Upper Tribunal Judge Gill

Date: 2 June 2019