



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

Appeal Number: EA/05448/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 3 June 2019**

**Decision & Reasons Promulgated
On 11 June 2019**

Before

**UPPER TRIBUNAL JUDGE PLIMMER
UPPER TRIBUNAL JUDGE KEITH**

Between

**MR ANUOLUWAPO SODIQ SHANGOBIYI
(anonymity direction not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Secretary of State: Ms A Everett, Senior Home Office Presenting Officer

For Mr Shangobiya: Mr M Gaffar, Londonium Solicitors

DECISION AND REASONS

Introduction

1. This is an appeal by Mr Shangobiya (the 'appellant'), against the decision of the First-tier Tribunal ('FTT') promulgated on 7 March 2019, in which the FTT dismissed his appeal against the respondent's refusal of his application for a derivative residence card under regulations 16(2) and (5) of the Immigration (EEA) Regulations 2016 (the 'regulations').

2. In essence, the core points taken against the appellant by the Secretary of State (the 'respondent') focussed on two relationships; the appellant's relationship with his mother; and the appellant's relationship with his half-brother. The respondent disputed that the appellant's mother, who is visually impaired, was unable to care for herself; or that the appellant was her primary carer; or that if she did need care, that third parties such as the local authority would not provide care. In respect of the half-brother, the respondent disputed that the appellant was related to the half-brother as claimed; or that the appellant was the half-brother's primary carer; or that other third parties could not care for the half-brother.
3. The appellant asserted that his mother and half-brother were both British citizens. The respondent's decision was silent as to the half-brother's nationality but proceeded on the assumption that the mother was British.

FTT's decision

4. The FTT found that the appellant's asserted half-brother was under the custody, care, and control of his mother ([6] and [17]) and that whilst the appellant may help around the house with shopping, cooking, and other day-to-day activities; and from time to time help with the care of the claimed half-brother, he was not the primary carer of that brother. The FTT also concluded that the half-brother did not reside in the United Kingdom ('UK') as a self-sufficient person, for the purposes of regulation 16(2)(b)(ii).
5. In relation to the appellant's mother, the FTT assessed the appellant's evidence as inconsistent in relation to whether his mother could bathe, dress, and use the toilet independently and generally look after her personal care ([9]). Whilst the FTT noted the appellant's mother's evidence that the appellant acted as her full-time carer, it noted that the mother had made no application for assistance from social services, which contradicted the appellant's evidence that there had been such an application, which had been declined ([11]). The FTT noted an absence of up-to-date medical evidence for the appellant's mother. The FTT concluded that the appellant's mother's eye condition could be improved with recommended cataract surgery. The FTT noted at [16] that it had not even been suggested that the appellant's mother would be unable to reside in the UK, or in another EEA state, were the appellant to leave the UK indefinitely.
6. For the above reasons, the FTT rejected the appellant's appeal.

The grounds of appeal and grant of permission

7. The grounds were set out at paragraphs [4] to [9]; and [11] to [13]. While not numbered as we have done so below, they appear to be fourfold:
 - ground (1) - the FTT had ignored directly relevant evidence in respect of the appellant's mother, specifically: a Department for Work and Pensions ('DWP') document which indicated that the

mother qualified for the enhanced rate of personal independence payment in respect of daily living, and had limited mobility without the assistance of another person; written evidence from the hospital treating the appellant's mother of 5 February 2019, which had referred to the appellant as his mother's main caregiver; and medical records in the appellant's bundle which referred clearly to his mother having undergone cataract removal surgery on 31 January 2019, followed up by a number of appointments;

- ground (2) - the FTT similarly ignored documentary evidence from the appellant's half-brother's school, mentioning him as the carer of his minor brother;
- ground (3) - the FTT had failed to assess the evidence of the appellant and his mother about why the local council/social services had declined to provide help to the appellant's mother, namely that the appellant had been found to be his mother's full-time carer. As a consequence, the FTT then failed to analyse adequately whether his mother would be forced to leave the UK, unless the appellant could reside in the UK. His adverse conclusion in this regard was not sufficiently reasoned;
- ground (4) - the FTT took into account irrelevant facts, specifically the appellant's immigration history and the competence of the respondent in failing to remove the appellant previously.

8. Grounds (1) and (3) focussed on the appellant's relationship with his mother; ground (2) on the appellant's half-brother. Ground (4) focussed more generally on consideration of irrelevant evidence.

9. First-tier Tribunal Judge Saffer granted permission on 3 May 2019.

The relevant law

10. The following parts of regulations 2; 16(2); and 16(5) of the regulations are relevant:

"2. General interpretation

(1) In these Regulations—

"EEA national" means a national of an EEA State **who is not also a British citizen** [our emphasis];

Derivative right to reside

16.—(1) A person has a derivative right to reside during any period in which the person—

..... (b)satisfies each of the criteria in one or more of paragraphs (2) to (6).

(2) The criteria in this paragraph are that—

(a) the person is the primary carer of an **EEA national** [our emphasis]; and

(b) the EEA national—

(i) is under the age of 18;

(ii) resides in the United Kingdom as a self-sufficient person; and

(iii) would be unable to remain in the United Kingdom if the person left the United Kingdom for an indefinite period....

(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.”

The hearing before us

11. Mr Gaffar relied on the grounds of appeal, and despite specific questions from us, struggled to elaborate in his submissions beyond a few basic points. On questioning about the basis of the appeal under regulation 16(2), he confirmed that the appellant’s half-brother was a British citizen. When asked how a derivative right could arise under regulation 16(2), when it referred to ‘EEA nationals’, the definition for which in regulation 2 expressly excluded British citizens, and whether he could refer us to any authority on the issue, Mr Gaffar was unable to do so. We considered whether the requirement under regulation 2 that the step-brother ‘not also be a British citizen’ might impinge on his rights under the Treaty on the Functioning of the EU (‘TFEU’) and associated EU Directives, noting the case of Zhu and Chen v Secretary of State for the Home Department (Article 18 EC - Directive 90/364/EEC) Case C-200/02, which related to free movement rights. We could not see how such a requirement under regulation 2 could impinge on the half-brother’s rights, as he had recourse to protection under regulation 16(5). Ultimately, it was unnecessary for us to resolve this question, as we concluded that the FTT was entitled to find that the appellant was not the primary carer of his half-brother and so did not meet the requirements of either regulation 16(2) or 16(5).

The appellant’s mother

12. We directed the representatives to the appellant’s bundle (‘AB’) before the FTT, which included correspondence from St Thomas’s Hospital at [37] to [45] AB. Mr Gaffar also reiterated the correspondence from the DWP dated 17 August 2017 at [62] AB, which referred to the appellant’s mother being assessed at an enhanced rate for a personal independence payment

because of her limitations in her independence, as well as scoring '12' in the assessment, because she could not follow the route of a familiar journey.

13. Mr Gaffar then sought to adduce evidence which post-dated the FTT's decision, claiming that the appellant had applied to the local council to be his mother's registered carer. When asked to explain the legal basis of his application to admit post-decision evidence, he was unable to do so. In the absence of any submissions on why such evidence should be admitted, we declined to admit the evidence.
14. When asked how the evidence in relation to the appellant's mother, which was said to have been ignored by the FTT, would have made a difference to the FTT's decision, Mr Gaffar asserted that the only issue in dispute was whether the appellant was his mother's primary carer, and the ignored evidence proved that he was. When we asked whether that was the only disputed issue, and we referred Mr Gaffar to regulation 16(5)(c), which also includes the criterion that the mother would be unable to reside in the UK or in another EEA state if the appellant left the UK for an indefinite period, and whether Mr Gaffar had any submissions in relation to [16] of the FTT decision on that point, he referred to paragraph [4] of the appellant's mother's statement at [7] AB, in which she asserted that the local council could not afford to provide a full-time sole carer for her, and that it was complicated to arrange such care; there was also the significance of emotional support and there was no way she could afford a private carer. She would also not be able to return to Nigeria, because of her poor health and for financial reasons. There was not meaningful attempt by Mr Gaffar to explain how this answered the question of why the appellant's mother would be unable to live in the UK if the appellant left.

The appellant's half-brother

15. Mr Gaffar was unable to comment beyond paragraph [9] of the grounds of appeal, in which it was asserted that correspondence from the school mentioned the appellant's role as carer for his half-brother.
16. At the conclusion of Mr Gaffar's submissions, we indicated to Ms Everett that we did not need any submissions from her and would reserve our decision.

Decision on error of law

Grounds (1) and (3)

17. We conclude that while there were errors in the FTT's decision, specifically that it failed to take into account relevant evidence from St Thomas's Hospital in relation to the appellant's mother's cataract surgery and from the DWP in relation to her physical limitations, these were not material errors of law. We conclude that had the evidence been properly considered, the FTT would have inevitably reached the same conclusion

that the appellant did not meet the requirements of regulations 16(2) and (5), so that the error was not material. We reached that conclusion for the reasons set out below.

18. As we have already identified, there was evidence before the FTT of the appellant's mother having had a cataract operation on 31 January 2019, as confirmed correspondence at [37] AB. The question however was what difference this would make to the eventual decision. The DWP correspondence relating to an assessment of her needs was dated 17 August 2017, prior to the surgical procedure. More recent evidence was correspondence from St Thomas's Hospital dated 5 February 2019, at [38] AB, which referred to the appellant as the *'main caregiver and in view of the recent surgery and poor vision in both her eyes, he needs to bring her for her hospital visits and help with eye drop application at home.'*
19. Assuming, as a result of the above evidence, that the appellant is his mother's primary carer for the purpose of regulation 16(5)(a), we did not accept Mr Gaffar's submission that this was the sole issue in dispute, which was plainly not correct. The FTT had identified at [16] that it needed to consider whether the appellant's mother would be unable to live in the UK if the appellant left the UK for an indefinite period. The FTT noted that it was not even submitted that in the appellant's absence, his mother would be unable so to reside. The FTT expressly referred to the witness statements of both the appellant and his mother. At [11] of the decision, the FTT noted that the mother had given evidence that she had made no application for assistance from social services, in direct contradiction to the appellant's evidence that an application had been made but declined. In the appeal to this Tribunal, it was said that the appellant's mother's explanation for why no other carer was possible had been ignored. The mother's witness statement evidence, paragraph [4], was the only evidence identified by Mr Gaffar on the issue, the gist of which was that the council could not afford such care, which was too complicated to arrange. However, the FTT expressly considered the witness statement, and also the inconsistency of the mother's oral evidence that no application for assistance had been made, whereas the appellant claimed that such assistance had been sought.
20. The FTT was entitled to consider the witnesses' inconsistency in concluding that the appellant's mother would not 'be unable to reside in the UK' without the appellant and so the appellant did not meet the criteria of regulation 16(5). Considering all of the requirements of regulation 16(5), even if we take at its highest, in support of the appellant's case, his assertion that he was the primary carer of his mother, the FTT did not err in law in concluding that the requirements of regulation 16(5) were not met - the role of primary carer is not sufficient to succeed under the regulations, as the appellant's mother would be able to reside in the UK in the event that he leaves. The error of failing to consider evidence about the appellant's mother's medical treatment and vulnerability was not, in the circumstances, material. There was therefore

an error of law on ground (1), but it was not material. There was no error of law on ground (3).

Ground (2)

21. In relation to the appellant's half-brother, the FTT concluded at [15(ii)] of the decision that the brother was in the custody, care and control of the mother. We were referred to correspondence dated 24 April 2017 from the brother's school, at [69] AB, which stated that the appellant brought his brother to and from school. The correspondence makes no other reference, nor provides any further detail about the appellant's claim to be the 'primary carer' of his half-brother. Whilst the FTT made no express reference to this correspondence in the decision, it did refer to the appellant assisting '*with such care as a 12-year old half-brother might require*' ([17] of the decision). The letter from the school was consistent with that finding and does not suggest that the FTT ignored the letter. The letter is also consistent with the FTT's finding that the half-brother nevertheless remained in the control of his mother. Referring more explicitly to regulations 16(2) and (5), on no legitimate view can it be said that the letter was sufficient to show that the appellant was the 'primary carer' for his half-brother. All that the correspondence stated was that the appellant took his half-brother to and from school. In the circumstances, there was no error of law in the FTT's conclusions. Even if we accept that the appellant could seek a derivative right to reside based on his role as carer for a minor British citizen under regulation 16(2), (which is by no means clear), the appellant was simply unable to demonstrate that he was his sibling's primary carer.

Ground (4)

22. Whilst the FTT referred in critical terms to the appellant 'flouting and abusing' the UK's immigration laws ([4] of the decision), and the FTT was critical of what it regarded as the respondent's ineptitude in failing to remove the appellant ([19]), the FTT's analysis of the appellant's role as a carer for his mother and his half-brother; and the question of whether the appellant's mother would be unable to reside in the UK in the absence of the appellant; were resolved without reference to the discrete comments about the appellant's immigration history and the respondent's enforcement actions. In summary, these comments were unnecessary because they did not play any part in the FTT's analysis of the evidence or its conclusions. In the circumstances, it would have been helpful for these extraneous comments not to have been made in the decision, but they do not disclose an error of law.

Notice of Decision

The decision of the First-tier Tribunal did not involve an error of law, such that the decision must be set aside and the appellant's appeal is dismissed.

Signed J.Keith

Date: 5 June 2019

J Keith

Judge of the Upper Tribunal