Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01483/2020 (V)

THE IMMIGRATION ACTS

Heard at Field House via Microsoft Teams	**Decision & Reasons Promulgated**
On 31 August 2021	**On 12 October 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

MR JERIN KOLLAKUNNEL PHILIP

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr A Maqsood, Counsel instructed by Iconsult Immigration

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Malcolm promulgated on 23 December 2020 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 29 January 2020, refusing his application for a derivative residence card as the primary carer of a British citizen (his mother). The decision is

made under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). The relevant paragraph of the EEA Regulations is paragraph 16(5)(c) ("Paragraph 16").

2. The Appellant is a national of India. He came to the UK as a student on 14 October 2009. His leave was extended but then curtailed on 11 July 2012. On 3 May 2013, he applied for leave to remain based on his private life in the UK. That application was refused on 5 June 2013 with no right of appeal. He applied on 1 June 2016 as the carer of his mother. That application was refused on 12 December 2016. An appeal against that decision was dismissed on 27 March 2018. A further application was made on 6 November 2018 and refused on 13 December 2018. A third application was made on 20 December 2019 and refused by the decision under appeal.

3. The Appellant's mother is a British citizen. She suffers from various physical and mental health problems. I will come to some of the detail of those problems below. Having considered those health concerns and the alternative care facilities which would be available to the Appellant's mother as a British citizen, the Judge concluded that the requirements of Paragraph 16 were met. Again, I will come to the detail of her findings and conclusion below. She therefore allowed the appeal.

4. The Respondent asserts in her grounds that the Judge has misdirected herself in law and has failed properly to consider whether the Appellant's mother would be compelled to leave the UK if the Appellant were removed. The Respondent draws attention to the case of Patel v Secretary of State for the Home Department [2019] UKSC 59 ("Patel") and to the high threshold which applies in a case such as this where the derivative right relied upon arises from the care of an adult. It is said that the Decision focusses erroneously on the care provided by the Appellant when compared with that on offer from the State and the impact on the Appellant's mother's health. The other ground turns on the failure by the Judge to consider the alternative option of making an application under Article 8 ECHR based on the Appellant's family life with his mother.

5. Permission to appeal was refused by Upper Tribunal Judge Martin sitting as a First-tier Tribunal Judge on 25 January 2021 in the following terms so far as relevant:

> "... 2. The sole issue was whether the appellant's mother would be compelled to leave the UK if he were to return to India.
> 3. The grounds suggest that the judge has given no proper consideration to this question and not taken into account the high threshold in such cases.
> 4. The grounds are without merit. The judge was clearly aware of the high threshold and noted at [53] that physical care could be provided by Social Services and he could not allow the appeal on the basis that she preferred her son as carer. However, that was not the only care that she required. She has mental health issues and could not live alone. The judge was entitled to take that in account and because of her added mental health needs she could not remain in the UK without her son.
> 5. Neither the grounds nor the Decision and Reasons disclose any arguable error of law."

6. On renewal of the application to this Tribunal, permission to appeal was granted by Upper Tribunal Judge Stephen Smith on 5 March 2021 in the following terms:

> "1. I consider that it is arguable that the judge should first have considered whether the appellant should have been required to make an Article 8 application.
> 2. The remaining grounds are a disagreement of weight with the findings of fact reached by the judge, as is clear from the terminology of the grounds (*'proper consideration has not been given', 'the judge has not properly addressed…'*).
> 3. The judge gave unarguably sufficient reasons for concluding that the sponsor's mental health conditions, taken with her physical conditions, would lead to the sponsor following the appellant, were he to leave, such was her dependency upon him. She accepted that the adequate physical care would be available to the sponsor, in the event the appellant were to leave, expressly accepting, at [53], that the appeal could not succeed on that basis alone. It is clear, therefore, that the judge cannot arguably be said to have failed to give 'proper' consideration to the prospect of state-provided care for the sponsor. The judge's operative conclusion at [56], concerning the criterion in reg. 16(5)(c) of the Immigration (European Economic Area) Regulations 2016 being met was a finding of fact that was open to her.
> 4. Nor is it arguable that the judge failed to consider *Patel v Secretary of State for the Home Department* [2019] UKSC 59. These are adversarial proceedings. As the grounds of appeal note, the Secretary of State did not raise the point below. She cannot now contend that the judge failed to consider something that she was not invited to consider. Permission is refused on all other grounds."

7. Judge Stephen Smith indicated in the heading to his decision that permission was granted "solely in relation to whether the judge should have considered if the appellant should first have made an Article 8 application". He did not say in the heading, in terms, that permission was refused on all other grounds.

8. The Appellant has not filed a Rule 24 Reply. For that reason, at least one of the submissions made by Counsel for the Appellant took Mr Melvin by surprise. He was however able to respond to what was said and I am satisfied that the Respondent was not disadvantaged by the late stage at which the points were raised.

9. The matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. The hearing was conducted via Microsoft Teams. There were no technical issues affecting the conduct of the hearing.

DISCUSSION

10. Although Judge Stephen Smith purported to limit the grounds on which permission to appeal was granted, the recent guidance given by this Tribunal in EH (PTA: limited grounds; Cart JR) Bangladesh [2021] UKUT 0117 (IAC) ("EH") indicates that this was not the effect of his decision. As is stated at [2] of the headnote in EH, rule 22(2)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 "has the effect that in the absence of any direction limiting the grounds which may be argued before the Upper Tribunal, the grounds contained in the application for permission are the grounds of appeal to the Upper Tribunal, even if permission is stated to have been granted on limited

grounds". As such, and in the absence of such direction having been made by Judge Stephen Smith, I accepted Mr Melvin's submission that I should consider all the grounds raised and not just that on which permission had been granted. Again, whilst Mr Maqsood might not have expected that to occur, he was able to address me on all grounds.

11. The Respondent's grounds broadly divide into a challenge to the Judge's failure to consider an argument that the Appellant should have made an Article 8 application prior to the application under the EEA Regulations ("the Article 8 application issue") and the challenge to the Judge's reasoning, findings and conclusion in relation to Paragraph 16 ("the derivative rights issue"). I take those in turn.

The Article 8 Application Issue

12. I can take this issue relatively shortly. Mr Maqsood drew my attention to the judgment of Mostyn J in R (oao Akinsanya) v Secretary of State for the Home Department [2021] EWHC 1535 (Admin) ("Akinsanya"). Akinsanya was a case concerning a challenge to a refusal to confer a derivative right in circumstances where the applicant has limited leave to remain under the Immigration Rules ("the Rules") based on family life. The claimant had been granted limited leave to remain under Appendix FM to the Rules based on her relationship with her children. She applied for indefinite leave to remain under the EU Settlement Scheme. That application was refused on the basis that, because she had been granted limited leave to remain, she could not fall within the definition of a person "with a Zambrano right to reside", that is to say a derivative right. Having reviewed relevant case-law of the domestic courts and CJEU, the Judge concluded at [37] of the judgment as follows:

> "In my judgment a proper analysis of the EU cases clearly demonstrates that the court did not consider a limited leave to remain under national law to be a *Zambrano* extinguishing factor. Similarly, the domestic cases do not, when properly analysed, support the general extinguishment theory advanced on behalf of the Secretary of State."

13. Although I accept that Akinsanya was concerned with whether it was lawful to refuse a derivative right of residence to a person already granted limited leave, and not whether a person in the Appellant's situation should be obliged to make an application under Article 8 ECHR first, it makes little sense to suggest that this course ought to be followed before an EU law based application can be considered. If the Appellant were to make an application and be granted limited leave, based on the judgment in Akinsanya, that would not prevent him pursuing an application based on a derivative right (now under the EU Settlement Scheme). There was therefore no error made by Judge Malcolm in failing to consider whether the Appellant should make such an application before being considered under the EEA Regulations.

14. Mr Melvin informed me that there is an appeal pending in Akinsanya but he had been unable to obtain a copy of the grant or grounds raised by the Respondent. That is no criticism of him as Mr Maqsood drew attention to this case only immediately before the hearing. However, whilst Akinsanya is not binding on me, it remains good law

unless and until it is overturned. I was not persuaded by the Respondent's arguments that it is wrong in any event.

15. There is one additional point to be made in relation to this first issue. As was indicated at [10] and [11] of the Decision, it was agreed between the parties at the outset of the hearing before Judge Malcolm that the only issue which required to be considered was "whether the sponsor would be able to reside in the UK or in another EEA state if the appellant left the United Kingdom". In other words, only the Paragraph 16 issue was put forward as requiring determination. Mr Melvin accepted that the Article 8 application issue did not appear to have been raised by the Presenting Officer before Judge Malcolm although I would accept that it is raised tangentially in the Respondent's decision under appeal. It is difficult to see, though, how the Judge can be faulted for failing to deal with an argument which was not put forward in relation to an issue which was not said to arise for determination by the Judge.

16. For those reasons, there is no error of law in relation to the Article 8 application issue. That was the issue on which permission was expressly granted.

The Derivative Rights Issue

17. I agree with Judge Stephen Smith and Judge Martin that it cannot sensibly be argued that Judge Malcolm failed to consider the alternative care available to the Appellant's mother. The Judge set out the evidence in this regard at [14] to [18] of the Decision. It was accepted on the Appellant's behalf that a referral had been made to the local authority in 2018 and a care package was not put in place only because it was not necessary, due to the availability of the Appellant to care for his mother ([34] of the Decision). It was accepted on the Appellant's behalf that the care package was at that time "adequate" ([41] of the Decision).

18. The Judge dealt with that evidence and the submissions at [47] of the Decision as follows:

> "The local authority is in a position to put in place a care package to provide assistance to the sponsor and whilst the sponsor clearly wishes to continue to have her son care for her, I consider that the daily living activities with which the appellant assists his mother could be carried out by carers."

19. The Judge therefore addressed the issue of the care which could be offered by the State and made findings about it. As the Judge went on to say, however, it was not simply physical care needs which require to be catered for in this case. The Appellant's mother is said to have mental health problems. The Judge found at [48] of the Decision that "she relies heavily on her son for both emotional and psychological support". It is that finding which appears to have led the Judge to the conclusion she reached (as I come to below).

20. I have carefully considered the Respondent's ground that the Judge failed to have regard to the Supreme Court's judgment in Patel and the high threshold which applies

in relation to derivative residence rights where what is at issue is the care of an adult. I do not consider it appropriate to ignore that part of the grounds simply because the Presenting Officer did not draw Judge Malcolm's attention to the case-law. The judgment is a recent one of the highest court on precisely the issue in this case (albeit arising under the earlier EEA Regulations). The Judge could be expected to be aware of it.

21. Moreover, Paragraph 16 itself makes clear that the threshold is a high one. Under Paragraph 16, the applicant must show that the British citizen being cared for by that applicant "would be unable to reside in the United Kingdom … if the person left the United Kingdom for an indefinite period". That makes plain that the issue is whether the person being cared for would be compelled to leave not merely that he or she might choose to do so. As the Supreme Court said at [27] of the judgment in Patel, "in the case of an adult it will only be in 'exceptional circumstances' that a TCN [third country national] will have a derivative right of residence by reference to a relationship of dependency with an adult Union citizen. An adult Union citizen does not have a right to have his family life taken into account if this would diminish the requirement to show compulsion to leave."

22. At the outset of the hearing of this appeal, I was concerned that the Judge might have misunderstood the test which applies and the need for the Appellant to show that his mother would be compelled to leave if he were to return to India. I was somewhat concerned that the Judge did not set out the terms of Paragraph 16 so far as relevant and may not therefore have grasped the level of the threshold which applies. As I come to below, there is no express finding that the Appellant's mother would be compelled to leave if the Appellant were removed.

23. The Judge set out her reasoning for determining the appeal in the Appellant's favour at [53] to [56] of the Decision as follows:

> "53. The appeal cannot succeed simply because the sponsor would prefer to be cared for by her son than by carers put in place by the local authority however in this case there is an additional element to be considered which is the mental health of the appellant and whilst I consider that the appellant's needs could be met by an appropriate care package the information in the report prepared by Dr Hussain is supportive of the argument put forward by Mr Maqsood that without the care of her son there is a danger that there would be a deterioration in the appellant's mental health.
> 54. The appellant also gave evidence that if her son was required to leave the UK, she would also follow him which is indicative of the level of dependence which the sponsor feels that she has on her son.
> 55. Having given full consideration to all of the available evidence and information I consider that the information provided in Dr Hussain's report is supportive of the level of dependence which the sponsor has on her son and more importantly provides an opinion as to the effect on the sponsor's mental health if her son was required to leave the UK.
> 56. Given the information in this report I am satisfied that the requirements of paragraph 16(5)(c) are satisfied and that the appeal should succeed."

24. The Appellant's mother gave evidence recorded at [13] of the Decision that if the Appellant were to go, she too "would have to go with him as she cannot live alone". Her evidence is of course relevant. That she might choose to go in order to have her son continue to care for her rather than be cared for by the State is not however determinative.

25. As I have already noted, the Judge accepted that the physical care needs of the Appellant's mother could be dealt with by care provided by the local authority. However, as she there found, the Appellant's mother was dependent on her son in relation to her mental health care. The Judge referred in particular to the report of Dr Razia Hussain which diagnosed mixed anxiety and depressive disorder. At [51] of the Decision, the Judge summarised the conclusions of Dr Hussain as follows:

> "As highlighted by Mr Maqsood the psychiatrist has also stated that withdrawal of the support of the appellant is likely to cause significant deterioration in the sponsor's mental health going on to comment 'the continuous support from her son who is providing considerable care to Ms Philipose, **is essentially required** to enable her to live an emotionally stable life, particularly in view of her physical and mental health problems as well as her mobility issues."
> [my emphasis]

26. This case is not concerned with the difference in the care which would be provided by the State in comparison with that provided by the Appellant nor merely the impact on the health of the Appellant's mother if he were to leave. However, I accept that those matters have a bearing on the relevant issue of compulsion to leave. The Judge records at [43] of the Decision Mr Maqsood's submission that "the issue is not about whether the withdrawal of the son's support has to show a deterioration of the sponsor's mental health to a particular level of severity, that it is the deterioration itself which is important and that if there is evidence of this (as set out in the expert's report) it is therefore clear that the sponsor's evidence is not merely a preference to have her son with her but a cogent genuine need on the basis of which she is saying that if her son did require to leave she would be forced to follow him."

27. That is the way in which the Judge therefore dealt with the issue of compulsion. Having recorded as she did at [51] of the Decision that the Appellant's support was "essentially required" for his mother's care, at [53] of the Decision that, without that care, the Appellant's mother's mental health would deteriorate, at [54] of the Decision that the Appellant's mother would in fact leave because of her own view of her dependence on her son and that this dependence was made out by Dr Hussain's report ([55]), the Judge was entitled to reach the conclusion she did that the Appellant's case satisfies the test in Paragraph 16. It might have been helpful if the Judge had made an express finding that the Appellant's mother would be compelled to leave if the Appellant were to go. I am however persuaded that the Judge did recognise the test which was to be applied and reached a conclusion which was open to her on the evidence for the reasons she gave.

28. For those reasons, I am satisfied that there is no error of law in relation to the Judge's conclusion on the derivative rights issue.

CONCLUSION

29. For the foregoing reasons, I am satisfied that there is no error of law in the Decision. I therefore uphold the Decision with the result that the Appellant's appeal remains allowed.

DECISION

The Decision of First-tier Tribunal Judge Malcolm promulgated on 23 December 2020 does not involve the making of an error on a point of law. I therefore uphold the Decision with the consequence that the Appellant's appeal remains allowed.

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: 16 September 2021