IAC-HW-AM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/16553/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd October 2015	**On 11th November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR SALMAN ASHRAF KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I Khan, Solicitor
For the Respondent: Ms A. Holmes, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Pakistan born on 7th October 1980. He appealed against a decision of the Respondent dated 26th March 2014 to refuse to issue him with a residence card as confirmation of a derivative right of residence in the United Kingdom pursuant to Regulation 15A (4A) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). The basis of the Appellant's

application was that he was the primary carer of his father a British citizen who would be unable to reside in the United Kingdom if the Appellant was required to leave. His appeal was allowed at first instance by Judge of the First-tier Tribunal Morgan sitting at Taylor House on 22nd April 2015. The Home Office appeals with leave against that decision and the matter therefore comes before me in the first place as an appeal by the Respondent. For the reasons which I set out below at paragraphs 10 to 12 I have set aside the decision of the First-tier Tribunal by reason of material error of law and have proceeded to rehear the matter. For the sake of convenience therefore I will continue to refer to the parties as they were known at first instance.

2. Regulation 15A as amended took effect from 8th November 2012 and provided that a person who is not an exempt person and who satisfies the criteria in paragraph 4A of this Regulation is entitled to a derivative right to reside in the United Kingdom for as long as the person satisfies the relevant criteria. Paragraph 4A defined that criteria as meaning that the person must be the primary carer of a British citizen and that the British citizen is residing in the United Kingdom and would be unable to reside in the United Kingdom or in another EEA State if the applicant were required to leave. The applicant is to be regarded as a primary carer of another person if the applicant is the person who has primary responsibility for that person's care but will not be regarded as having responsibility for a person's care on the sole basis of a financial contribution towards that person's care. The burden of proof of establishing that the requirements of the Regulation are met rests upon the Appellant and the standard of proof is the usual civil standard of balance of probabilities. The circumstances are to be considered at the date of the hearing.

The Proceedings at First Instance

3. At paragraph 7 of his determination Judge Morgan set out the factual background to the matter as follows:

> "The Appellant's father first arrived in the United Kingdom in 1980 and has been a British citizen since September 2003. The father has owned a shop in the United Kingdom for over 24 years. He worked full-time in the shop until two years ago when he was no longer able to continue because of ill-health. He now rents out the shop and receives rent payments of £700 per week which enables him to financially support himself and his family in the United Kingdom. The Appellant has been looking after his father since his father was forced to give up work two years ago. The father is a diabetic with high blood pressure, heart problems, difficulty breathing and walking and other related illnesses. He requires daily care and assistance. The father's mobility is poor and he suffers from back and knee problems. The support provided by his son starts first thing in the morning when the Appellant helps his father out of bed. The Appellant is with his father 24 hours a day. The Appellant regularly massages his father and takes his father to his doctor's appointments and physiotherapy sessions. The Appellant takes his father to the park for fresh air and does the shopping for his father. When the Appellant's father's hands cramp up the Appellant assists the father in feeding himself."

4. The Respondent's case was that even if the Appellant was his father's primary carer requiring the Appellant to leave would not cause the Appellant's father to be unable

to reside in the United Kingdom. There was no evidence that the primary care currently provided by the Appellant could not be provided by outside agencies such as Social Services if required. Where the British citizen in question was over 18 a higher level of evidence was required to demonstrate primary responsibility because it can generally be assumed that adults have the capacity to care for their own daily needs.

5. The Appellant argued that it was wrong to suggest that the father's primary care could still be provided by the State. If that was the case neither children nor adults would ever be able to satisfy the requirements of paragraph 15A of the 2006 Regulations. What was required was simply an assessment of the level of care provided by the primary carer in this case the Appellant. If it were to be removed the British citizen would be unable to provide for his or her own day-to-day needs. The Judge indicated at paragraph 11 he was persuaded by this counter argument. At paragraph 11 the Judge wrote:

> "Whilst I accept the Respondent's submission that adults generally have the capacity to care for their own daily needs, on the particular facts of this case, given the Appellant's father's age [he was 63] and infirmity I find that he does require the round the clock care provided by his son the Appellant and without this care he would be unable to reside in the United Kingdom".

The Judge found as a fact that the Appellant was the person who had primary responsibility for his father's care and allowed the appeal.

The Onward Appeal

6. The Respondent appealed against that decision arguing that the Judge had failed to resolve conflicts of opinion and had made a material misdirection of law. No definitive evidence had been provided to show that the Appellant's father would be unable to remain in the United Kingdom in the Appellant's absence. The Sponsor claimed to have various ailments but there was no medical evidence to support those assertions or show that they necessitated the personal attendance of the Appellant. The Appellant had had over a year since the decision to obtain the documentary evidence which had been called for in the refusal letter yet had produced none of it. It was for the Appellant to submit sufficient credible evidence to address the issues in the refusal notice and prove on the balance of probabilities that the Appellant satisfied the requirements of Regulation 15A(4A). The Sponsor had said he had rented out his shop and received £700 a week which was used to support himself and his family. There may therefore be other members of the family present in the United Kingdom who would be able to provide the Appellant's father with any assistance needed if the Appellant were required to leave.

7 The application for permission to appeal came on the papers before First-tier Tribunal Judge Pirotta on 31st July 2015. In granting permission to appeal she wrote that:

> "The determination shows that the IJ made findings without cogent evidence apart from the Appellant's' and Sponsor's preference, that the Appellant was the Sponsor's

> primary carer without considering that there were other members of the family and that there was no independent evidence of the Sponsor's medical condition, physical needs or alternative sources of help. It is arguable that the overall findings reached were not properly open to the Judge on the evidence".

There was no Rule 24 reply from the Appellant to the grant of permission. Following the grant the Upper Tribunal made a direction that the parties should prepare for the forthcoming hearing on the basis that if the Upper Tribunal decided to set aside the determination of the First-tier Tribunal any further evidence including supplementary oral evidence that the Upper Tribunal might need to consider if it decided to remake the decision could be so considered at that hearing.

The Error of Law Stage

8. In consequence of the grant the matter came before me to determine whether there was an error of law. In submissions the Presenting Officer relied on the grounds for permission. Apart from the oral evidence of the Appellant and the Sponsor there had been no evidence given that the Sponsor needed the care which the Appellant was said to provide. There was a need for such evidence. It was completely inadequate to say that the Sponsor needed round the clock care without such evidence. It was difficult to know where the Judge got his assertion from that reliance on Social Services was irrelevant. The Judge should have investigated the question of whether other family members could offer care. There was not enough of an evidential basis to justify the Judge's findings.

9. In reply the Appellant's solicitor stated that the Judge did not make any errors of law but applied the facts as he found them. The Sponsor the Appellant's father was suffering from medical problems and it was open to the Judge to conclude in the light of the evidence he received that the Sponsor required the care of the Appellant. As the Judge pointed out, both the Appellant and the Sponsor had come under fierce cross-examination during the hearing. Their evidence was unshaken and the Judge made adequate findings.

10. Having heard the submissions I announced my decision that I found there was a material error of law in the determination such that it fell to be set aside and the matter reheard. The Respondent's challenge in this case was essentially a reasons-based one. The Judge had based his findings both that the Sponsor needed care and that the Appellant was the only one who could provide it on the oral testimony of the Appellant and the Sponsor. He had no medical evidence of any substance on which to base either conclusion. It is not the case that corroborative evidence is required in an immigration appeal as a matter of course. However where it is reasonable to expect that supporting evidence will be available, but it is not produced such evidence should be forthcoming. This is particularly so where the Respondent (as in the case here) had specifically written in the refusal letter that the Appellant had not submitted sufficient documentary evidence to demonstrate that the Sponsor would be unable to reside in the United Kingdom if the Appellant were required to leave.

11. Basing his decision solely on the oral testimony of the parties when the absence of medical or documentary evidence had been specifically flagged up by the Respondent was in my view an error of law because it meant that the Judge could not adequately explain his reasoning. The Judge had not explained why the Sponsor's age at 63 meant that he required round the clock care. The issue was the claimed infirmity of the Sponsor. It was not possible for the losing party, in this case the Respondent to understand why they had lost the appeal. The determination was insufficiently reasoned which amounted to an error of law.

12. The Sponsor as a British citizen would be entitled to appropriate Social Services' care if that was required. There was no evidence before the Judge that any enquiries had been made of Social Services to see what if any care the Sponsor might need. In those circumstances it was a further error of law to reject the Respondent's point which was not that no one could ever succeed because they always would have to have recourse to Social Services (as to which see paragraph 18 below). Rather the point being made in the refusal letter was that preference and convenience were not sufficient reasons for the Appellant to assert that another responsible adult procured privately or through Social Services would be unable to care for the Sponsor. In failing to address that point correctly the Judge had also erred.

The Substantive Rehearing

13. Following on from the finding of a material error of law was the issue of whether I should proceed there and then to rehear the matter in the light of the directions from the Upper Tribunal (see paragraph 7 above) or whether I should remit the matter back to the First-tier Tribunal to be considered afresh. The latter course was urged upon me by the Appellant's solicitor but I declined to do so because there had already been a hearing at which substantial evidence had been given in the form of the oral testimony of the Appellant and the Sponsor. There was no fresh medical evidence and the matter was a question of construction on the basis of the existing evidence rather than consideration of any fresh evidence. The matter proceeded thereafter.

14. As the Appellant's solicitor indicated he did not wish to call either the Appellant or the Sponsor to give evidence I proceeded to submissions. For the Respondent it was argued that there was nothing to demonstrate that the Sponsor would have to leave the United Kingdom if the Appellant had to leave. The Appellant and Sponsor had now had a very long time indeed to provide evidence and the only conclusion one could draw as to why that evidence had not been provided was because it did not exist. There was no evidence to show that the Appellant could satisfy the requirements of the 2006 Regulations.

15. In closing for the Appellant his solicitor indicated that he had already made his submissions on the merits of the case. There was medical evidence that the Sponsor was suffering from multiple injuries. This was a reference to a page which was in the Respondent's bundle apparently submitted with the application. It was a letter addressed to 'Whom it may concern' from the Appellant's and Sponsor's General

Practitioner, Dr Vinay Sharma whose surgery was in Newcastle upon Tyne. The last entry on this record was 22nd January 2010 which stated that the Sponsor had chronic obstructive airways disease and had been a chain smoker for his first 29 years. It listed some long term medications which the Sponsor was taking although this too was not up-to-date as it referred to tablets taken in April and July 2013. These included benovate cream for the skin and eye drops for allergic eye symptoms.

Findings

16. Beyond the assertions of the Appellant and the Sponsor that the Sponsor required round the clock care from the Appellant which only the Appellant could provide, there was no evidence at all indicating that the Sponsor required any form of medical or other assistance. The GP record such as it was was already old by the time it was submitted in November 2013. Nothing has been obtained in almost two years since then to indicate: (i) that there is any need for care; (ii) that only the Appellant can provide it or (iii) that the Sponsor would have to leave the United Kingdom if the Appellant was not here. The evidence received by the Judge at first instance was not credible on the point that the Sponsor required such care and that only the Appellant could give it. It was difficult to resist the conclusion (as was submitted to me by the Respondent) that the evidence had not been provided because it did not exist.

17. In the recent case of **Ayinde [2015] UKUT 00560** the Upper Tribunal made clear that the provisions of Regulation 15A as amended apply when the effective 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. Mere assertions by the Appellant and Sponsor that that is what would have to happen is not sufficient as the Respondent pointed out in the refusal letter. As I have indicated the Judge made a material error of law by accepting the evidence of the Appellant and the Sponsor's unsupported evidence as sufficient to establish that the Appellant's father would have to leave if the Appellant were required to leave.

18. The Upper Tribunal pointed out in **Ayinde** 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. In remaking the decision in **Ayinde** the Upper Tribunal specifically addressed the issue of Social Services' involvement. In that case the Sponsor needed to reside in the United Kingdom in order to receive certain medical treatment. The Upper Tribunal continued:

> "This leaves the tasks that are performed by the Appellant in the form of routine assistance in helping [the Sponsor] to bathe, preparing food, shopping and ensuring that the bills are paid. If these cannot be performed by carers under the supervision of Social Services, then [the Sponsor] will need to go into a care home. Either way it is simply impossible to claim that she is unable to remain in the United Kingdom once [the Appellant] leaves".

19. Applying the ratio in **Ayinde** to the facts in this case, the Appellant may be carrying out what was described in **Ayinde** as routine assistance (although as I have indicated there is no medical evidence to show that the Sponsor requires even a routine level of care). The Tribunal found in **Ayinde** that even if carers under the supervision of Social Services were not available it was still open to the Sponsor to go into a care home. Thus the relevance of Social Services' provision is a factor to be taken into account and not as the Judge at first instance did to be disregarded.

20. In this case the evidence does not get that far since there is no objective information to show that the Sponsor requires anything like the assistance which both the Appellant and Sponsor claimed was being provided. If it was being provided it is reasonable to have expected such evidence to have been produced but it was not. I conclude that the Appellant is unable to meet the requirements of Regulation 15A. It is not possible to say from the medical evidence such as it is what the Sponsor is said to be suffering from. Certainly to be 63 is not so old that it can be assumed that a person of that age would require round the clock treatment without more.

21. No argument appears to have been raised at first instance concerning Article 8 (right to respect for private and family life) of the Human Rights Convention and no such argument was raised before me. That must be right because in the absence of removal directions or a section 120 notice there can be no human rights appeal in an EEA appeal (see **Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC)**). That decision is subject to appeal to the Court of Appeal but in any event if the Appellant cannot succeed under Regulation 15A it is difficult to see how he can establish that his relationship to his father extends beyond normal emotional ties. It is not a compelling and/or compassionate circumstance such that his appeal should be allowed outside the Immigration Rules. In relation to his private life the Appellant has only been in the United Kingdom for some nine years during which time he has had leave to remain as a student. His removal would be in accordance with the legitimate aim of immigration control. His status was precarious and little weight could be attached to any private life he may have established during that time when assessing he proportionality of any interference with his private life in the balancing exercise under Article 8. I dismiss the Appellant's appeal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I have remade the decision by dismissing the Appellant's appeal against the Respondent's decision to refuse to issue a residence card.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 10th day of November 2015

Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

A fee of £140 was payable by the Appellant on lodging his appeal. In allowing the appeal Judge Morgan made a fee award of the amount of any fee which had been paid as he found that the Appellant had persuaded him that the residence card should have been granted by the Respondent. I have reversed that decision and I therefore revisit the fee award in this case. Given that I find that there was a material error of law in the First-tier decision for the reasons which I have set out above, I rescind the fee award made in this case such that no fee is payable by the Respondent to the Appellant.

Signed this 10th day of November 2015

Deputy Upper Tribunal Judge Woodcraft