



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

Appeal Number: EA/01730/2015

THE IMMIGRATION ACTS

Heard at Field House

On 10 October 2017

**Decision & Reasons
Promulgated**

On 06 November 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

**ARSHAD MAHMOOD
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms H Arrif of Arden Solicitors

For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge R J Walker, promulgated on 10 January 2017.
2. The Appellant is a citizen of Pakistan born on 1 August 1976. He entered the United Kingdom in February 2005 pursuant to entry clearance as a visitor issued in November 2004; prior to his entry having he had been working in the United Arab Emirates. He met and subsequently married Ms Sooraiya Moosun, originally a citizen of Mauritius but now a British citizen. Ms Moosun was born on 21 January 1955. On 29 July 2010 the

Appellant made an application for leave to remain as a spouse. This was refused on 5 October 2010 and the decision was subsequently maintained by the Respondent on 14 November 2010, and again on 19 July 2011. Thereafter, the Appellant made a succession of applications seeking to regularise his status in the United Kingdom variously pursuant to EEA Regulations and Article 8 of the ECHR. These applications are summarised at paragraphs 2-9 of the decision of the First-tier Tribunal. It is unnecessary for me to set out the entire history of those applications but I do note that there have been applications to remain on the basis of Article 8 made in July 2012 - refused in July 2013 with no right of appeal; again, in September 2014, refused in December 2014 with no right of appeal; and in February 2015, refused on 2 April 2015 with no right of appeal.

3. Most recently the Appellant made an application on 6 July 2015 for a Residence Card confirming a derivative right of residence as the primary carer of a British citizen. The application was refused by the Respondent on 7 October 2015: it is this decision that is the subject of the proceedings before the IAC.
4. The Respondent refused the Appellant's application because it was not accepted that evidence had been produced to show that he was the primary carer of his spouse, and also the Respondent was not satisfied that the Appellant's spouse would be unable to reside in the UK (or another EEA State) if the Appellant were required to leave because other sources of care would be available to her. The Notice of Immigration Decision issued on 7 October 2015 makes reference to regulations 15A(4A)(c), 15A(7)(b)(i) and 18A(1)(b) of the Immigration (European Economic Area) Regulations 2006.
5. The Appellant appealed to the Immigration and Asylum Chamber. His appeal was dismissed for reasons set out in the decision of First-tier Tribunal Judge Walker.
6. There was evidence before Judge Walker in respect of the Appellant's partner's medical circumstances. The Judge accepted that the Appellant's partner was "*suffering from the various conditions listed and as a result is in need of care and which the Appellant is providing for her on a daily basis*" (paragraph 30). The Judge concluded that the Appellant had demonstrated that he was his wife's sole carer (also paragraph 30). The was consequently satisfied in respect of the first two requirements of regulation 15A(4A) - he was satisfied both that the Appellant was the primary carer and that his wife was a British citizen residing in the UK (paragraph 31). The Judge then posed the key question in the appeal in these terms: "*The important issue to be decided is whether the Appellant's wife would be unable to reside in the UK or in another EEA state if the Appellant was required to leave*" (paragraph 32). The Judge's phrasing in this regard is a clear and adequate reflection of the wording of the Regulations.

7. The Judge, having posed this question, went on to consider it at paragraphs 33 and 34 and came to a conclusion adverse to the Appellant:

“33. There is documentation from Hampshire County Council Adult Services Department and which includes their assessment of the Appellant’s needs dated 16 July 2015. This confirms that Mrs Moosun is eligible for care services to be arranged and which would involve daytime visits. However, adult services do not provide night time assistance with carers. Any night time assistance could only be provided as respite in a care home environment.

34. Whilst I accept that Mrs Moosun would far prefer that her care be provided by her husband it is clear that alternative care is available to her through the local authority. This care is available on a daytime basis with visits from carers or alternatively 24-hour care 7 days a week in a respite care home. As such care is available then it cannot be argued by the Appellant and Mrs Moosun that she would be unable to reside in the UK if the Appellant was required to leave”.

8. The Judge went on to conclude the Decision in the following terms at paragraph 35:

“I do accept that the Appellant appears to be doing a sterling job in caring for his wife and that this is preferred by all involved rather than care being provided by the state. Nevertheless, such state care is available and Mrs Moosun would be able to remain in the UK in the event of the UK being required to leave”.

(It seems that there is a slip in that final clause and it should, of course, read *“in the event of the Appellant being required to leave the UK”.*)

9. The Appellant applied for permission to appeal which was granted by First-tier Tribunal Judge Doyle on 25 July 2017. Judge Doyle considered that it was arguable that the Judge had not explained why he had preferred the evidence from the Hampshire County Council to a psychiatric report provided in support of the Appellant’s case.
10. The grounds of challenge in this regard are articulated with particular reference to paragraph 35 of the report dated 12 December 2016 of Dr M H Husni, a consultant in general adult psychiatry (pages 15-26 of the Appellant’s bundle before the First-tier Tribunal). Paragraph 35 of the report is in these terms: *“In case of her husband’s removal her mental and physical state will deteriorate very rapidly. She will become more depressed and hopeless. She will not be able to take her medication regularly”.*

11. The grounds argue that the Judge failed to consider that Ms Moosun suffered from mental health problems and would be compelled to leave the UK if the Appellant were to leave.
12. In considering this line of challenge it is appropriate and useful, in my judgment, to consider the particular passage relied upon in the context of the psychiatric report overall. I do not propose to rehearse the aspects of the psychiatric report that refer to the Appellant's medical history and current treatments, but to focus on the section with the heading 'Impact of forcing her to live in a care home or to live in Pakistan' (paragraphs 31 onwards). Paragraph 31 rehearses the Appellant's comments and observations as to the practical difficulties of living in Pakistan, it being said that there is no affordable housing and no provision of social housing; reference is also made there to the Appellant's concerns about his ability to meet the cost of medical treatment in Pakistan. Paragraph 32 states: "*Mrs Moosun stated that she would not be able to accompany her husband to live in Pakistan. She does not speak Urdu, she does not know anyone there and she cannot afford the cost of her medication as she is on 15 medications*". Paragraphs 33 and 34 highlight the level of dependency of Ms Moosun on the Appellant by reference to his assistance with activities of daily living and it is then opined that the level of dependency is "*clearly above the normal ties of dependency of a husband and wife*" on the basis that the Appellant was clearly assuming the roles of a carer, providing both emotional and practical support, and that his wife completely relied upon him. It is said that Ms Moosun "*feels safe and dignified with her husband*". Paragraphs 37-40 of the report, under the heading 'Healthcare state in Pakistan' refer to the limited availability of medical services in Pakistan, and in particular that foreign patients are not entitled to free medical care, consultations, tests and medication.
13. The report of Dr Husni itself must be seen in the overall context of the evidence that was before the First-tier Tribunal.
14. In this regard I have discussed with the representatives today certain passages in the witness statement of the Appellant before the First-tier Tribunal. In a witness statement signed on 3 January 2017 the Appellant set out some of the practical difficulties of his wife relocating to Pakistan with him in a similar fashion to those rehearsed in the psychiatric report. At paragraph 9 he refers to the fact that she has never visited Pakistan and does not speak Urdu and does not have family or friends in Pakistan, her brothers and sisters all being in the UK. At paragraph 10 the Appellant then says this:

"I confirm that my wife cannot relocate to Pakistan as she requires medical treatment which is not available free of charge in Pakistan. My wife needs to be in the UK to continue her treatment. I would like to add that the private treatment in Pakistan is very expensive I refer to the cost assessment of private treatment in Pakistan".

Thereafter, at paragraph 11 reference is made to the financial welfare benefits that the Appellant's partner is receiving in the UK and that they would not be available to her were she to relocate. Notwithstanding the very clear reference at paragraph 10 to the inability of the Appellant's partner to relocate, in contrast at paragraph 13 the Appellant then states that if he is to return to Pakistan "*my wife will be forced to return with me since she is disabled and her poor health*".

15. There is a clear tension and ambiguity in exactly what the Appellant was putting before the First-tier Tribunal: whether in the event of his own return to Pakistan his wife would be compelled to leave with him, or whether the situation was in fact that she could not (or would not) relocate to Pakistan and therefore the Appellant's removal would result in the separation of the couple. It seems to me that this was to underscore the difficult nature of the choice, or election, that would confront the Appellant and his partner in the event of his departure from the UK. Dr Husni's evidence, relied upon in the challenge herein, was more to the effect that Ms Moosun would not leave the UK, rather than that she would be compelled to do so, albeit that that the separation from the Appellant would impact upon her emotional health. This might be of relevance in an Article 8 proportionality evaluation, but does not establish a case under the Regulations.
16. The Appellant's Skeleton Argument before the First-tier Tribunal appropriately and correctly identified the very high threshold in cases of this sort: the language of "*would be unable to reside in the UK or the EEA*" used in the Regulations essentially means that the test is one of nothing less than compulsion, e.g. see paragraph 2.6 of the Appellant's skeleton argument which seems to be an adequate reflection of the jurisprudence in this area in such cases as **DH (Jamaica) [2012] EWCA Civ 1736** and **MA and SM [2013] UKUT 380**. What is argued in the Skeleton Argument before the First-tier Tribunal in this regard seems to come down to what is said at paragraphs 2.7 and 2.8 - the unavailability of night care support through Social Services would in effect compel the Appellant's partner to leave the UK. In my judgment the premise of that argument is very clearly met by the Judge's observations and findings at paragraph 34. I note in this regard that there is no express challenge to the finding at paragraph 34 that there would indeed be available 24-hour care seven days a week in a respite care home were the Appellant's partner not to have the support of the Appellant.
17. I cannot detect anything in the materials that articulates the Appellant's case as perhaps it is now articulated in the challenge to the Upper Tribunal - to the effect that the mental health circumstances of the Appellant's partner are so severe that she would be compelled to leave the UK not to lose the emotional support of the Appellant. In those circumstances it seems to me that the Judge was correct, in effect, to identify that the Appellant and her partner were faced with a very difficult choice, but

nonetheless that it was a choice with a preference for one outcome rather than another, and not a case of compulsion.

18. In the circumstances I do not accept that the Appellant has identified a material error of law in the approach of Judge Walker. Accordingly, the decision of Judge Walker must stand.
19. Much of what I have said indicates that the Appellant's case has been most clearly articulated upon lines of 'proportionality' rather than 'compulsion' - indeed much of the evidence and the circumstances of the case have the flavour of an Article 8 appeal. Of course, the Tribunal had no jurisdiction in respect of Article 8. I have already noted above that the Appellant has made a number of applications previously under the head of Article 8, all of which have resulted in refusals with no right of appeal. It is not clear to me what evidence may have been filed in support of any of those applications, and in particular it is not clear to me what the mental health and indeed physical health of the Appellant's partner may have been at the time of the most recent Article 8 application. That said, it remains the case that there has been no recent adjudication by the Respondent on the Appellant's Article 8 circumstances, and no consideration by the Tribunal at any stage.
20. It is not for me to advise either party as to how best to proceed, but it may well be that in light of this decision the Appellant and his partner will wish to give consideration to making a further application under Article 8. Alternatively, and in any event, the Secretary of State may wish to review the circumstances in light of the various evidences that have been filed in this appeal before making any removal decision in respect of the Appellant. These are not matters for me to express any particular view on at this stage: I merely observe that there may be other options for the parties to consider before the Appellant is ultimately required, if at all, to leave the United Kingdom.

Notice of Decision

21. The Decision of the First-tier Tribunal contained no errors of law and stands. The appeal remains dismissed.
22. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed:

Date: 5 November 2017

Deputy Upper Tribunal Judge I A Lewis