



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/01773/2019

THE IMMIGRATION ACTS

Heard at Bradford
On 28th January 2020

Decision & Reasons Promulgated
On 4th February 2020

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

RM
(anonymity direction made)

Appellant

And

Secretary of State for the Home Department

Respondent

For the Appellant:
For the Respondent:

Mr Holmes, Counsel instructed by Thornhills Solicitors
Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Pakistan born in 1988. He appeals with permission against the decision of the First-tier Tribunal (Judge Brooks) to dismiss his appeal under the Immigration (European Economic Area) Regulations 2016.

2. It was the Appellant's case before the First-tier Tribunal that he had acquired a 'derivative' right of residence under Regulation 16 of the Regs because he is the primary carer for a British citizen who would be "unable to reside in the United Kingdom or another EEA state" if the Appellant were to leave the United Kingdom.
3. The British citizen concerned is the Appellant's brother, A. I return to the medical evidence in more detail below but at present it suffices to note that A has been diagnosed with various conditions which severely restrict his mobility, including spinal stenosis, lumbar disc degeneration, disc prolapse and neurological functioning disorder. He avers that the Appellant is his primary carer, upon whom he is entirely dependent. Part of A's evidence concerned his difficulties during the night. His spinal problems mean that he often loses control of his bladder and wets his bedding; in his sleep his body can get numb and freezes in one position. It is his brother who cleans him and manages this paralysis by moving his position and massaging the affected areas until sensation returns. Without this attention, A says, he would not be able to manage. In his statement he gives a number of examples of accidents that resulted from this temporary paralysis in the past, which resulted in the emergency services being called.
4. The First-tier Tribunal, and indeed the Respondent, accepted that A suffers from the various medical conditions outlined in the voluminous medical evidence in this case. It was further accepted that at present, the Appellant does in fact live with A and that he cares for him. The appeal was however dismissed under the Regulations on the grounds that the care given by the Appellant could be given by other people [§25]. The Tribunal considered that the issue of night-time care was "key" but that the evidence given on that matter had come from the Appellant and A, rather than independent medical assessment [§27]. It was not therefore prepared, for instance, to accept the evidence of the family GP Dr Francis, because in the First-tier Tribunal's estimation, Dr Francis was simply repeating what she had been told. The Tribunal concluded that whilst it was A's preference to have his brother care for him, that was not the appropriate test. The First-tier Tribunal then says this [at its §32]:

"Following MS Malaysia availability of care is a relative but not always a decisive factor. I must also examine the character and quality of the relationship of dependency between the sponsor and appellant. The sponsor states that if his brother cannot continue to care for him, he will have no choice but to leave the United Kingdom. However, the sponsors evidence that he would feel compelled to leave cannot be conclusive of the issue of whether on an objective basis the sponsor would be compelled to leave"

Concluding that in fact A could pay privately for care, and that the evidence adduced in support of the claim was “not credible” the Tribunal dismissed the appeal.

The Grounds

5. The Appellant submits that the determination of the First-tier Tribunal is materially flawed for the following reasons:

i) Failure to take relevant evidence into account

The evidence before the First-tier Tribunal from Bradford Social Services was that A would not be provided with a night-time carer since his needs were not time-specific (ie social services were not prepared to pay for a carer to spend the night in the house every night just in case A wet the bed or suffered from temporary paralysis). Evidence was further adduced that night-time care from the private sector was prohibitively expensive for A and that he had been advised that the only realistic solution would be to live in a care home at the minimum cost of £5000 per month. The decision of the First-tier Tribunal does not engage with that evidence.

ii) Irrationality

It is submitted that there was no rational reason to reject the evidence of the GP about the extent of A’s needs at night. First, there was no evidential basis for the conclusion that the doctor was just repeating what she had been told; she was a medical professional with access to all of the relevant records. Second the Tribunal here took a point that was not taken by the Respondent: even if the doctor’s evidence was based on ‘self-reporting’ that was irrelevant given that the Secretary of State did not challenge A’s evidence about his ongoing difficulties.

Findings on ‘Error of Law’

6. I can here be brief since Mr Diwnycz did not resist either of the grounds I set out above.

7. In respect of ground (i), the Tribunal was correct to say that the issue of night-time care was “key”. In fact it mattered little whether social services or private providers were able to provide assistance during the day if A was still left alone

at night. The evidence of Bradford Social Services, in their 'Social Care and Wellbeing Assessment' dated 14th September 2018 was unequivocal: A had been advised that they could not provide a carer to spend the entire night with him, and that their night-time provision was limited to "time-specific" appointments. This was, as I have set out above, no good to A because he cannot predict when he is going to need someone there. I am accordingly satisfied that the failure to take into account this element of Bradford's assessment was material.

8. Ground (ii) is also made out. The submissions of the HOPO are set out at paragraphs 7-10 of the decision. It is clear from this that it was not part of the Respondent's case to challenge the evidence as to the medical needs of A. Nor was Dr Francis' integrity or expertise impugned. If the Tribunal found reason to disbelieve A, and indeed Dr Francis, about his overnight care needs, then that point should have been put to him to enable him to respond. In truth reading the determination I am at a loss to understand what that reason might have been. I am sure that the Tribunal did not intend this to be the case, but one is left with the impression that the witnesses were disbelieved simply because they were not "independent". Unless there was an identifiable reason to reject the unchallenged evidence of Dr Francis and A about the pain and distress he suffers during the night, it should logically have attracted some weight.

The Re-Made Decision

9. The relevant part of Regulation 16 of the Immigration (European Economic Area) Regulations 2016 reads as follows:

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

(a) is not an exempt person; and

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

...

(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.

10. There is no dispute that the Appellant is the primary carer for A. This much was accepted by the First-tier Tribunal and indeed by Mr Diwnycz before me. I am accordingly satisfied that the Appellant meets the requirements of Regulation 16 (5) (a).
11. A resides in the United Kingdom. I am satisfied that the Appellant meets the requirements of Regulation 16(5)(b).
12. The only matter remaining is whether the A would be unable to reside in the United Kingdom or in another EEA state if the Appellant left the United Kingdom for an indefinite period.
13. A himself is unequivocal in his written and oral evidence: that he would have no choice but to leave the United Kingdom, and therefore the EEA, if the Appellant were to return to Pakistan. His position can be summarised as follows:
 - i) He has significant and complex medical needs. The combined effects of his spinal problems are that he is confined to a wheelchair; he can suffer intermittently from incontinence and a numbness in his body which leaves him unable to move unaided; he needs personal care in washing and dressing himself. He has also suffered neurological damage to one side of his brain, depression and anxiety; when his brother was refused a residence card he felt so “hopeless” that he tried to end his own life by taking an overdose. He takes a number of strong medications which affect his diet and cause significant side effects including drowsiness.
 - ii) If his brother were to return to Pakistan he may receive some care assistance during the day (either by way of Bradford Social Services or private provision) but the real difficulty arises at night. Bradford have stated that they will not pay for such provision and A cannot afford to pay privately. He has been advised that the most appropriate setting for providing his night-time care needs would be a home. Private care homes cost in the region of £5000-6000 per month. A does not want to live in a home and cannot afford this much money. The alternative would be paying privately for night-time care, but this costs approximately £17 per hour and again is unaffordable.
 - iii) A already has experience of trying to live in the United Kingdom without the assistance of any family member – he recounts the difficulties he had in trying to move around his home unaided and the problems he experienced being dependent on carers provided by social services. He suffered a number of accidents in

the home including on one occasion when he suffered a numbness episode leading to paralysis: he was unable to move to let paramedics in and had to wait 5 hours for the police and fire crews to arrive to force entry so that he could receive assistance.

- iv) A has a meaningful private life in the United Kingdom. He serves as a Local Councillor in his neighbourhood in Yorkshire and is also the Disability Officer for his Constituency Labour Party. In order to perform these community/political roles he is entirely dependent on his brother, who takes him to and from meetings and surgery, helps him manage his diary and generally acts as his unpaid personal assistant.
 - v) If his brother were to return to Pakistan, A would not be able to continue with his community/political work. He simply cannot afford to pay for personal assistant/full time carer to help him cope with these roles.
 - vi) Apart from the Appellant all of A's family live in Pakistan. His parents and two sisters live in Taxila. His father is a retired civil servant and receives a pension so whilst they are not wealthy, they are comfortable. Both the Appellant and A could be accommodated in the family home, where other family members could assist the Appellant in caring for A.
 - vii) Taking all of that into account A sees no alternative but to leave the United Kingdom and return to Pakistan with his brother. He does not wish to remain in the United Kingdom if he is in effect confined to either a care home or his own home.
14. A's medical history is set out in a number of documents in the evidence: a letter of the 25th September 2018 from Mr S Patil, Consultant in Spinal Injuries and Rehabilitation, letters dated the 16th April 2018, 19th May 2019 and 24th July 2019 from Dr M Francis of Bingley Medical Practice, a Social Care and Wellbeing Assessment conducted by Bradford Social Services on the 14th September 2018, a letter dated the 13th May 2019 from Dr Charlene Thwaites of the Airdale NHS Trust and the report of Consultant Clinical Psychologist Professor R. Skinner dated the 24th June 2019. I note that all of the clinicians and professionals who have provided evidence refer to the Appellant as A's main carer.
15. The background to A's current difficulties is as follows. He was a healthy and able-bodied man who in 2008 started experiencing low back pain, accompanied by sudden onset weakness in the legs. He was subsequently diagnosed with spinal stenosis, a prolapsed disc and lumbar disc degeneration. He underwent spinal surgery but in 2013 he was involved in a road traffic accident which left

him incontinent and a catheter had to be fitted; the “unpredictable onset of weakness” in his legs returned. He was subsequently diagnosed with Functional Neurological Disorder. A’s GP Dr Francis describes him as having “severe mobility problems”, and states that he can suffer from severe pain and numbness in his limbs which mean that he can require assistance with his “daily activities including preparing food, dressing, toileting and bathing. He has a significant stutter and has some difficulty communicating. He also reports significant fatigue as a side effect of his medication”. Dr Francis and Bradford Social Services both note the unpredictable nature of A’s difficulties. He is able to stand, but his legs can quickly become numb and ‘go’ from under him. He has suffered a number of falls as a result. He now does not go out alone.

16. Bradford Social Services record that A needs to go to the toilet five or six times during the night, and that he suffers unpredictable episodes of numbness where his body becomes “locked”. The report notes:

“[A] requested night care support and rang the access team last year to get support for night time carers but was told that our service is time specific and [A] is wanting to have someone there throughout the night in case he needs support and was advised to purchase this service privately I reiterated this and [A] has said he understood but he cannot afford to employ private care seven nights a week. [The Appellant] has been providing this support in this remit since he has been in the UK”

17. As referred to above, the Secretary of State has not to date challenged A’s evidence about the difficulties he faces at night; I add for the sake of completeness that the bundles also contained a letter from A’s ex-wife who refers to these episodes herself and how she would have to stay awake during the night to make sure that he was comfortable. The couple were divorced in 2018 – the marital breakdown being attributed in part to her exhaustion in caring for A – and she has since remarried.
18. Dr Francis confirms A’s evidence about his mental health issues and that his significant low mood left him suicidal for a period. This is further repeated by Clinical Psychologist Dr Charlene Thwaites. The report of Consultant Clinical Psychologist Professor R. Skinner refers in turn to additional reports dated between 2016 and 2019 from a Neuro-psychiatrist and a Spinal Injuries Consultant confirming the history given by Dr Francis. In his very brief report Professor Skinner opines that A is at risk of relapsing into a severe depression should he have to give up his current roles in local government and the Labour Party.
19. Other documentary evidence provided in support of A’s evidence includes:

- i) Bank statements showing regular payments of EESA from the DWP;
- ii) His father's pension book;
- iii) A letter from John Brazendale, Bingley Town Councillor, confirming that he knows A and that at all meetings etc A is accompanied by the Appellant. Mr Brazendale says it is clear to him that A depends on his brother for his day to day care needs;
- iv) Further letters from Ros Dawson, the Chair of Bingley Town Council, and Councillors Ashraf Miah and John Goode who confirm the same;
- v) Correspondence between A and various professional care providers showing that he has made enquiries about the possibility of obtaining night-time care. 22 companies give various reasons why they are unable to assist. Alchita Care Ltd quote for a live-in care package of £1250 per week or a night-time carer rate of £18.50 per hour. Care Dynamics offer care at £16.24 per hour which goes up to £24.36 on bank holidays. Care Mark will charge £17.00 per hour for experienced night-care workers. A has also found a care home specialising in the care of the under-65s with spinal injury: Staveley Birkleas charge a basic weekly rate of £1088 which does not include the £15.00 per hour that would be charged on top if A needed someone to accompany him on trips out of the home. Similar figures are given by the Hales Group who alternatively could provide a night carer at £17 per hour.

20. I have taken all of that evidence into account.

21. The concern expressed by the First-tier Tribunal was that A would simply *prefer* the care he needs to be provided by his brother. Reference is made to his evidence that he did not have a good experience of care provided by Bradford before his brother's arrival: carers did not arrive as scheduled, he was uncomfortable with female carers etc. I note however that the "relevant care package" that the Tribunal believed would be available to A should the Appellant depart was, on Bradford Social Services' own evidence, only available during the day. A has been advised in no uncertain terms that the kind of night-time care he requires is simply not available in the home: as I understand it the point is that the council would pay for a carer to come to the house between say 2am and 3am, but this is no good for A because he does not know when he might wet himself or become unable to move.

22. The alternative is that A find the £17 per hour needed to pay for a private carer. Assuming that this carer would be on duty from, say 10pm 'til 7am in the morning, this amounts to £1071 per week. The First-tier Tribunal, presumably accepting that A's income currently consists mostly of DWP benefits, suggested that A could look to his paternal uncle for this money, a man who lives in Pakistan and is "financially very strong". There is absolutely no evidence before me that this uncle could or would find c£4500 per month to pay for his nephew's care in the United Kingdom.
23. I am satisfied that in respect of his physical care needs, A is dependent upon his brother, and that if that care was removed A would find himself in serious difficulty during the night. He would have to wait until carers arrived in the morning to clean him and help him to move. If he found himself unable to move in the night he may have to call the emergency services as he has done in the past. During the day he may receive in-home care but his ability to continue his involvement in public life – the essence of his private life – would be substantially reduced, dependent upon his ability to pay privately for carers to accompany him to meetings etc. Having heard his oral evidence I am wholly satisfied that A does not regard this as a feasible option for himself.
24. This is not a case where the British national is heavily dependent upon the medical treatment he receives in the United Kingdom (cf. Ayinde and Thinjom (Carers – Reg.15A – *Zambrano*) [2015] UKUT 00560 (IAC)). In this case his care consists primarily of day-to-day assistance and personal attention provided by a close family member. I am wholly satisfied that as a matter of fact A would consider himself unable to remain in the United Kingdom in the absence of that care. Given the consequences that he would face should he 'choose' to remain, his conclusion is perfectly understandable. In Pakistan he will have the care of his brother, his sisters and parents, and will be able to live comfortably in the family home. In this country he will be confined to his home, and would have to give up most, if not all, of the work and community activism that he currently finds so important; he will have to face each night with trepidation, knowing that he may well end up soiled or in an ambulance. I am satisfied that the Appellant has demonstrated that he meets the criteria in Regulation 16(5)(c).
25. I note for the sake of completeness that on the very day that permission was granted in this matter by First-tier Tribunal Judge Keane (the 16th December 2019) the Supreme Court has handed down its decision in Patel (FC) v Secretary of State for the Home Department [2019] UKSC 59. Whilst primarily concerned with whether a distinction should be drawn between *Chavez-Vilchez* children and adult dependents, the Court generally reviewed the principles applicable in derivative rights cases. Two points relevant to this decision arise.
26. First, that the court cited with approval the dicta in the CJEU decision of KA v Belgium (Case C-82/16) [2018] 3 CMLR 28:

“where the Union citizen is an adult, a relationship of dependency, capable of justifying the grant to the third-country national concerned of a derived right of residence under article 20 TFEU, is conceivable only in exceptional cases, where, in the light of all the relevant circumstances, any form of separation of the individual concerned from the member of his family on whom he is dependent is not possible”

For the reasons I have set out above, I am satisfied that this is such an exceptional case. The objective reality underpinning A’s ‘choice’ is that should the care provided by his brother be removed, he would be far better off in Pakistan than he would be here, where he legitimately fears a deterioration in his mental health and physical neglect.

27. Second, the Court underlined that the compulsion test in Regulation 16(5)(c) must be applied in a practical way. The term “unable” should not be interpreted to mean that it is physically *impossible* for the EEA national to remain in the country. It is a question of fact, of whether the individual concerned would in reality leave with his carer [at §32]:

“ In those circumstances I consider that the Court of Appeal made an error of law when it treated as determinative what could happen to Mr and Mrs Shah’s son if the father left the UK, rather than what the FTT had found *would* happen in that event. In other words, it was not open in law to the Court of Appeal to hold that Mr Shah had no derivative right of residence because the mother *could* remain with the child in the UK even if the father was removed”.

[emphasis added]. Here, there obviously is an option for A to remain in the United Kingdom without his brother: no matter how lonely, physically challenging and restricted that life would be, he *could* do it. The fact remains that he *would* not.

Anonymity Order

28. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I am satisfied that the identification of the appellant in this case would lead to the identification of his brother, whose confidential medical history is discussed herein. I therefore consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction

applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Decision

29. The decision of the First-tier Tribunal is set aside for material error of law.
30. I remake the decision by allowing the appeal under the Immigration (European Economic Area) Regulations 2016.
31. There is an order for anonymity.

Upper Tribunal Judge Bruce
29th January 2020