



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

Appeal Number: IA/02514/2020

THE IMMIGRATION ACTS

**Heard at Field House
On 20 January 2022**

**Decision & Reasons Promulgated
On 15 March 2022**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**RAM KUMAR
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the respondent: Mr S Karim and Mr M West, Counsel, instructed by FR Solicitors

DECISION AND REASONS

Introduction

1. It is the Secretary of State who brings this appeal. For ease of reading I shall continue to refer to the parties as they were before the First-tier Tribunal. Thus, the Secretary of State is once more “the Respondent” and Mr Kumar is “the Appellant”.
2. The Respondent appeals against the decision of First-tier Tribunal Judge Sweet (“the judge”), dated 14 September 2021. By that decision, the

judge allowed the Appellant's appeal against the Respondent's refusal to issue him with a derivative residence card pursuant to regulations 16 and 20 of the Immigration (European Economic Area) Regulations 2016 ("the Regulations").

3. By an application made on 7 May 2020, the Appellant, a citizen of India, claimed to be the primary carer of his wife, Prithan Kumar ("Mrs Kumar"), a British citizen. It was said that she had significant health conditions which meant that she required a high degree of care and, if the Appellant was required to leave the United Kingdom, Mrs Kumar would be compelled to go with him, thus engaging the well-known Zambrano principle (Ruiz Zambrano [2012] QB 265).
4. The Respondent refused the application, concluding that the Appellant had: (a) failed to show that Mrs Kumar was unable to meet her own daily care needs; (b) failed to show that any care needs could not be met through alternative sources; and (c) only produced evidence of financial contributions towards care. It was also stated that a derivative residence card had previously been issued to an alternative primary carer of Mrs Kumar.

The TFEU and the Regulations

5. Article 20 TFEU provides:

"1. Citizenship of the Union is hereby established. Every person holding the nationality of a member state shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

a) the right to move and reside freely within the territory of the member states;..."

6. The relevant provisions within regulation 16 of the Regulations provide:

"16.- Derivative right to reside

(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.”

7. Relevant case-law relating to the Zambrano issue will be discussed later in my decision.
8. In the context of this case, there has been no suggestion that regulation 16 is at odds with the TFEU.
9. There is no issue in this case concerning the impact of the United Kingdom’s withdrawal from the European Union. The Regulations were in force at the time of the Respondent’s decision and the instigation of the appeal to the First-tier Tribunal.

The decision of the First-tier Tribunal

10. The judge’s decision is fairly brief and in the circumstances I deem it appropriate to set his findings out in full. These are contained at [8]-[12]:

“8. The burden of proof is on the Appellant and the civil standard of the balance of probabilities applies. The appellant, who is a citizen of India, married his British spouse, Prithan Kumar, on 25 February 2012. She was divorced from her previous spouse on 18 January 2011. It appeared from the medical records and reports now provided, including a psychiatric report from Dr Mariam Kashmiri, dated 18 December 2019 and reports from her GP, Dr Arora (dated 13 August 2018 and 17 May 2021), that the appellant suffers from serious mental ill-health of depression and anxiety, in addition to the physical ailments relating to her shoulder, IVF treatment and related surgeries. The appellant also relied on a social worker report from Thelma Fossung, dated 3 July 2021. That report confirms the very significant care which the appellant provides to his spouse and the serious consequences of his having to return to India leaving his spouse behind. I am persuaded by the extensive evidence, being oral, written and expert evidence, that the appellant is the primary carer of his spouse. No evidence was put forward by the respondent in respect of the alleged other carer (either in the respondent’s bundle of documents or at today’s hearing), and I am satisfied that the appellant’s spouse would not be able to reside in the UK or in another EEA state if he left the UK for an indefinite period. The appellant confirmed that there was no alternative or shared carer.

9. The appellant’s spouse confirmed that she has her son by her first marriage, who is aged 25/26 and lives in Indonesia with his own family. She does not have any relatives in the UK who could take over her care.

10. I am also persuaded that, despite the availability of NHS and local authority care, the appellant’s spouse’s needs are for 7 days a week and 24 hours a day, including night time, and no alternative public healthcare could fully provide the care which the appellant himself has been providing over the years. The expert also confirm the importance of the appellant’s individual and personal care to his spouse.

11. In respect of the submission made by the respondent that the appellant should pursue an application for leave to remain under Appendix FM of the Immigration Rules, which according to the Presenting Officer on the current evidence might succeed, it was submitted on his behalf that no such application was necessary, as those requirements are only set out in guidance to caseworkers and not in any Rules or Regulations. In Counsel's submission there was no reason why the appellant should be compelled to make an alternative application. The Presenting Officer relied on the May 2019 Guidance and the decision in **Patel (2019 UKSC 59)**. However, I am persuaded by a more recent decision of Mostyn J in **Akinsanya (2021 EWHC 1535)**, albeit subject to a pending appeal, which disagrees with the stance that an Immigration application should be made first and the existence of that alternative should extinguish any EEA application the Presenting Officer referred to earlier unsuccessful Immigration applications (details of which were not provided) which might now be successful with the change of circumstances."

12. For all these reasons I am persuaded that the appellant should succeed under Regulation 16 of the EEA Regulations and obtain a derivative right to reside in the UK."

11. The appeal was duly allowed.

The grounds of appeal and grant of permission

12. Three grounds of appeal were put forward. First, it was said that the judge failed to take into account two "key principles": (a) a derivative right of residence does not arise simply because a person is a primary carer; and (b) that there is a high threshold in respect of adult dependents when considering the compulsion test. It was said that Patel was proposition for, amongst other matters, the requirement to take matters of "choice and capacity" into account when considering the test.

13. The second ground was that the judge had erred by making a direct comparison between the level of care provided by the Appellant and that which could be afforded by the state. There had been "little or no consideration" of Mrs Kumar's circumstances if the state stepped in to provide alternative care.

14. The third ground asserted that the judge was wrong to have followed the decision of Mostyn J in Akinsanya. That decision was under appeal to the Court of Appeal and, the Respondent contended, any derivative right under the Zambrano principle was one of "last resort", contrary to what the judge said at [11].

15. Permission to appeal was granted by the First-tier Tribunal on 13 October 2021.

16. Prior to the error of law hearing, the Appellant provided a detailed rule 24 response.

The hearing

- 17.** At the outset of the hearing, was provided with relevant authorities: Patel [2019] UKSC 59; [2020] Imm AR 600; Akinsanya [2021] EWHC 1535 (Admin); and MM (Lebanon) [2017] UKSC 10; [2017] Imm AR 729 (in the event, I was not referred to specific passages in that judgment).
- 18.** I informed the parties that the appeal in Akinsanya had been heard by the Court of Appeal on 7 December 2021 and that judgment was awaited. I was also aware that the Upper Tribunal was due to hear an appeal raising a similar issue to that addressed in Akinsanya and which forms the basis of the Respondent's third ground of appeal (I have been informed that this appeal has now been settled).
- 19.** Mr Lindsay relied on the grounds of appeal and made clear and helpful oral submissions, all of which are a matter of record. I will address the salient points arising from these when setting out my conclusions, below. I note here Mr Lindsay's confirmation that the Respondent had not, and was not, putting forward a perversity challenge. He was right to take this position. The grounds of appeal do not state in terms that any aspect of the judge's decision was irrational, nor is that the implication of the Respondent's challenge. It is of real importance to the fair and efficient conduct of appeal is that a party states any ground of challenge in clear terms. If perversity (or indeed any other error of law) is being alleged, this must be readily identifiable in the original grounds or in any written application to amend those grounds.
- 20.** Mr Karim relied on the rule 24 response. He too provided skilful oral submissions. Again, these are a matter of record and I shall address relevant aspects, below.

Conclusions on error of law

- 21.** In this case it is best to consider the Respondent's three grounds of appeal in turn. Before doing so, I make the following general points. First, as noted by the Court of Appeal in a series of cases over recent years, appropriate restraint should be exercised before interfering with decisions of the First-tier Tribunal: there needs to be actual errors of law made out and these must be material to the outcome. Second, decisions of the First-tier Tribunal must be read sensibly and holistically, having regard to the fact that the authors were appraised of the evidence before them and undertook the fact-finding exercise. I am not conducting a forensic analysis of the judge's decision, nor am I requiring particularly extensive reasoning, or indeed reasons for reasons. Third, brevity in the writing of a decision does not of itself indicate the existence of errors of law and the same applies to certain shortcomings in respect of structure. For the avoidance

of doubt, the judge's decision certainly could have been better structured. Finally, one might view the judge's decision as generous, but generosity does not constitute an error of law.

Ground 1

- 22.** The first point taken by the Respondent is that the judge failed to have regard to the fact that a derivative right of residence does not arise solely because the Appellant was deemed to be the primary carer of his wife. That proposition is clearly correct in light of regulation 16(5) of the Regulations. A right to reside only arises if the person is the primary carer of a British citizen, and the citizen is residing in the United Kingdom, and the citizen would be unable to reside there (or in another EEA state) if the person left the United Kingdom for an indefinite period. The three criteria are conjunctive.
- 23.** There has been no challenge to the judge's finding that the Appellant was the primary carer of Mrs Kumar, nor has been any challenge to the expert evidence or the judge's consideration thereof.
- 24.** Having regard to the above, what I have said in paragraph 21, and what the judge stated at [8]-[10], I am satisfied that he did not erroneously conflate primary carer status with the existence of a derivative right of residence. Whilst the structure could certainly have been better, it is tolerably clear that he was considering these distinct issues separately. My view on this is supported by what the judge himself stated at [2], which comprised an accurate summary of the requirements of regulation 16(5) of the Regulations.
- 25.** The second part of Ground 1 relates to the high threshold applicable to adult dependent cases. It is common ground that the threshold applicable in these cases is a higher than in respect of cases concerning children: see KA [2018] 3 CMLR 28 and Patel, at paragraphs 14, 17, and 27. It will only be in "exceptional circumstances" that a third country national will have a derivative right of residence by reference to a relationship of dependency with an adult Union citizen. That elevated threshold is nonetheless part of the compulsion test. Mr Lindsay accepted that the judge's use of the words "would not be able" at [8] was consistent with the compulsion test.
- 26.** The question is: did the judge apply the elevated threshold to the facts of the case? In my judgment, the answer to this is "yes". I say this for the following reasons.
- 27.** First, the compulsion test (including the elevated threshold applicable to adult cases) is a practical one. Cases are highly fact-sensitive.
- 28.** Second, and with the above in mind, the judge had regard to all the evidence before him and there is no challenge to the way in which he dealt with this (as opposed to the conclusions drawn therefrom).

- 29.** Third, it was open to the judge to conclude that a separation of the Appellant from his wife would have “serious consequences”. Whilst the phrase “exceptional circumstances” is not used, it is tolerably clear in my view that the judge was not assessing the Appellant’s case on an equivalent basis to that of a child dependent. Rather, he was having regard to the “extensive evidence” before him, which included significant medical evidence. Having been referred to specific aspects of that evidence by Mr Karim, it is clear that there was a strong underlying evidential platform for the judge’s conclusion. Overall, I am satisfied that the effect of the judge’s assessment was that he did regard the Appellant’s case has been exceptional.
- 30.** Fourth, as mentioned earlier, there is no perversity challenge to the judge’s conclusions.
- 31.** Fifth, contrary to the suggestion made by Mr Lindsay in his reply, the judge did not stop at the “serious consequences” conclusion. Rather, he went on and stated separately that Mrs Kumar would not be able to remain in the United Kingdom if the Appellant left. That was an application of the compulsion test set out in regulation 16(5)(c) of the Regulations.
- 32.** Ground 1 makes reference to “matters of choice and capacity” in adult cases and that this factor is derived from Patel. For my part, I cannot see any express reference to this in the judgment of the Supreme Court. Mr Lindsay accepted that this phrase was not a direct quote from the judgment. In any event, unlike in Mr Patel’s case, there is no finding here that Mrs Kumar would not in fact leave the United Kingdom. As to capacity, I am unclear as to what the Respondent was attempting to say. Mrs Kumar did, as a matter of law, have capacity, but it has not been explained how this could have had any material bearing on the case.
- 33.** All-told, I conclude that there are no errors of law in respect of the assertions made in Ground 1.

Ground 2

- 34.** Mr Lindsay acknowledged that aspects of this ground overlapped with some put forward under the first. To the extent that any overlap exists, I transpose what I have already said to my assessment of this part of the Respondent’s challenge.
- 35.** The thrust of Ground 2 is that the judge erroneously drew a comparison between the level of care provided by the Appellant and that which might be afforded by the state as an alternative. Mr Lindsay’s focus in oral submissions was on what the judge said at [10]. It was contended that the judge was requiring any state care to be precisely equivalent to that already in place and, if there was any shortfall in the provision of care, that

should have been properly assessed and factored into the overall assessment of the compulsion test.

36. Whilst not without merit, I reject Mr Lindsay's submissions on this issue. In my judgment, the Respondent's position has somewhat missed the bigger picture, having regard to the underlying evidence, the nature of the compulsion test, and the judge's decision as a whole.
37. The evidence (comprising oral, witness statements, medical reports, and an independent social worker's report) demonstrated (to the extent that they supported the judge's conclusions, albeit the details were not stated in the decision) that there was both practical care and, importantly, emotional care/support. The case-law in no way precludes taking into account the latter if it forms a significant element of the overall package, as it were. I agree with Mr Karim's submission that use of the word "fully" at [10] related to the holistic nature of the Appellant's care for his wife. This is supported by what the judge had already said at [8]. It is also supported by the final sentence of [10] itself: the expert evidence confirmed "the importance of the appellant's individual and personal care to his spouse." Reading this sensibly and in light of the rest of the decision, I am satisfied that the phrase "individual and personal" was intended to cover practical and emotional matters.
38. Mr Lindsay submitted that any shortfall in the level of care had to be assessed by the judge. However, in my view this is tantamount to engaging in a forensic analysis of the judge's decision and losing sight of the whole. At [8] the judge had already concluded that there would be "serious consequences" for Mrs Kumar if the Appellant had to leave the United Kingdom and that the former would not be able to reside here if the latter departed. When [8] is combined with [10] it is tolerably clear that the "serious consequences" conclusion covered any alternative care scenario (i.e. that the state would step in in the Appellant's absence). That conclusion was open to the judge and so this aspect of the Respondent's challenge is unsustainable.
39. Mr Lindsay suggested that the judge may have erroneously factored in "family life" under Article 8 when considering the compulsion test. I do not accept that any such error occurred. The judge did not use the term "family life" and the reference to "individual and personal care" at [10] clearly related to the assessment of the practical compulsion test.
40. Ground 2 is not made out.

Ground 3

41. In Akinsanya, Mostyn J concluded that a derivative right of residence based on the Zambrano principle could be asserted notwithstanding that the relevant individual had extant limited leave to remain in the United

Kingdom. In other words, a Zambrano right could not be extinguished by the grant of limited leave under domestic law: see paragraphs 23-41. Mostyn J also addressed Patel, but observed that the Supreme Court had not had to consider the issue with which he was concerned because neither Mr Patel nor the other appellant had had extant leave during that litigation: see paragraph 42-45. The particular issue before Mostyn J related to the Respondent's interpretation of regulation 16 of the Regulations and the contents of Appendix EU to the Immigration Rules. On this issue, he concluded that the Respondent had misconstrued the regulation and so the relevant part of Appendix EU was unlawful.

42. As mentioned earlier, Mostyn J's decision was appealed to the Court of Appeal and the hearing took place on 7 December 2021. On 25 January 2022 (5 days after the hearing before me), the Court of Appeal handed down its judgment: Akinsanya [2022] EWCA Civ 37.
43. The Court (Underhill, Bean, and Andrews LJ) concluded that a derivative right of residence based on the Zambrano principle did not arise for so long as the relevant primary carer had extant leave to remain under domestic law: see paragraphs 54-57. At paragraph 54 it was said that:

"It is clear from *Iida* and *NA* that the Court does not regard Zambrano rights as arising as long as domestic law accords to Zambrano carers the necessary right to reside (or to work or to receive social assistance). To put it another way, where those rights are accorded what I have called "the Zambrano circumstances" do not obtain."
44. In so concluding, Mostyn J's analysis of the issue was rejected: see paragraph 58. However, the Court went on to conclude that the Respondent had erred in her interpretation of regulation 16 of the Regulations and therefore the Respondent's appeal was formally dismissed.
45. Before completing my decision, I carefully considered whether, in light of the judgment in Akinsanya, I should invite further written submissions from the parties. I have concluded that this is unnecessary. First, neither party has sought to provide any further representations of their own volition. Second, and more importantly, there is a clear and unanswerable distinguishing feature in the present case. Unlike the position of Mrs Akinsanya, the Appellant has no leave to remain in the United Kingdom. Indeed, it is the case that he has sought in the past, and been refused, such leave. Whether or not he might be granted any such leave if he made a new application now is beside the point.
46. In light of the above, the fact that the judge followed Mostyn J's decision in Akinsanya does not disclose a material error of law. Whilst Mostyn J's reasoning was rejected by the Court of Appeal, it is common ground that the Appellant had no leave to remain. Therefore, the Appellant was entitled to assert that he had a derivative right to reside under the Zambrano principle.

Anonymity

47. The First-tier Tribunal did not make an anonymity direction and there is no proper reason for me to do so. I make no direction.

Notice of Decision

48. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and that decision shall stand.

Signed: H Norton-Taylor

Date: 10 February 2022

Upper Tribunal Judge Norton-Taylor