



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: EA/00166/2021

(UI-2021-001802)

THE IMMIGRATION ACTS

**Heard at Manchester CJC
On 13 January 2023**

**Decision & Reasons Promulgated
On 22 February 2023**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR AMMAR BILAL
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Tan, Senior Home Office Presenting Officer

For the Respondent: Mr Byrne, Counsel, instructed Addison and Khan Solicitors

DECISION AND REASONS

1. Although the Secretary of State for the Home Department is referred to as the Appellant in these proceedings, due to the fact he is the party appealing the First-tier decision, we intend hereafter to refer to the parties as they were in the First-tier Tribunal with Mr Bilal being referred to as the Appellant and the Secretary of State for the Home Department as the Respondent.
2. The Appellant, whose date of birth is 14 December 1990, is a Pakistani national. He entered the United Kingdom on a Tier 4 (General) Student

visa on 13 January 2012. This visa enabled the Appellant to study in this country until 12 February 2013.

3. The Appellant applied to extend his stay on family/private life grounds on 21 November 2014 but this was refused on 13 February 2015. He then applied for asylum on 22 April 2015 but this application was refused by the Respondent on 31 July 2018.
4. On 26 June 2018 the Appellant sought to remain in this country on a Zambrano residence card as the primary carer of his grandmother, Hamida Bibi, who was a British citizen. This application was refused by the respondent on 10 December 2018.
5. The Appellant then lodged the current application for a derivative residence card as the primary carer of a British citizen on 1 July 2019.
6. The Respondent refused this application on 24 July 2020. Whilst the Respondent accepted their relationship she found the Appellant had failed to demonstrate he met the requirements of Regulation 16(5) of the Immigration (EEA) Regulations 2016 as he had failed to provide sufficient evidence that his grandmother's care needs could not be met through an alternative source such as another relative, the NHS or a local authority.
7. The Appellant appealed this decision to the First-tier Tribunal and his appeal came before Judge of the First-tier Tribunal Chowdhury (the FTTJ) on 6 July 2021. In a decision promulgated on 23 September 2021 the FTTJ allowed the Appellant's appeal on the basis of the documentary evidence of his grandmother's needs and the evidence of the level of care the Appellant had provided.
8. The Respondent appealed this decision and permission to appeal was granted on 9 November 2021. In granting permission to appeal the Judge agreed that the grounds, as presented, were clearly arguable. Those grounds were as follows:
 - (a) The appeal has not been determined with proper regard to the correct test for the existence of a derivative right to reside under regulation 16(5).
 - (b) The FTTJ had no regard to the leading authority in the Supreme Court decision in Patel v Secretary of State for the Home Department [2019] UKSC 59. Regard to the Supreme Court decision would have required a deeper analysis as to whether the care from the State would be equivalent to that provided by the Appellant, and although it is accepted that the factors considered were relevant to the initial question, they did not solve the crucial question on the compulsion to leave point, both at large and by reference to whether that compulsion was fanciful or theoretical whilst the Appellant's departure was not in contemplation.

- (a) The FTTJ considered the case based on a comparison of available care from the State versus the Appellant/ carer and made no effort to address the question of whether the Appellant's grandmother would be unable to remain in the UK were the Appellant required to leave indefinitely.
- (b) The question also arose as to whether the derivative right exists where there was a realistic possibility of an application for leave to remain on another basis following the decision of Mostyn J in *Akinsanya* [2021] EWHC 1535 (Admin).

PRELIMINARY ISSUES

- 9. Mr Tan confirmed he would not be pursuing at today's hearing the Akinsanya point as it was not something raised before the FTTJ.

SUBMISSIONS ON ERROR IN LAW

- 10. Mr Tan submitted the FTTJ had wrongly assessed the evidence. Contrary to her findings there was care available in this country either from other family, the local authority or the NHS. In deciding the question of whether grandmother could remain in the UK if the Appellant had to leave the country the FTTJ failed to apply the exceptionality test set out in paragraphs [22] and [27] of Patel. Whilst the FTTJ referred to MS (Malaysia) v Secretary of State for the Home Department [2019] EWCA Civ 580 Mr Tan submitted her assessment was flawed.
- 11. The FTTJ had placed great weight at paragraphs [28] and [29] of her decision on the GP evidence and the fact the Appellant was his grandmother's primary carer. However on page 40 of the Appellant's bundle there was a second letter from GP which made it clear that his previous letter, found on page 41 of the Appellant's bundle, was based on what he had been told rather than what the doctor personally felt. This error feeds into the overall assessment and the FTTJ's findings at paragraph [27] of her decision is flawed because the concerns were not corroborated by the evidence. Given the previous finding about the Appellant's credibility, Mr Tan submitted the FTTJ's approach was therefore flawed.
- 12. Mr Tan submitted that FTTJ's assessment about the level care available for the Appellant's grandmother was also flawed. At paragraph [31] the FTTJ found no one else could provide care that the Appellant provided but there was no evidence from either the local authority or the NHS as to what was available for her. There was clear evidence that when it suited the family the grandmother was willing to access NHS care from her local GP and not rely on third parties. Mr Tyan submitted this was a choice the family made and as there are other family members and possible NHS support the FTTJ should have considered whether these factors countered her claim that she would have to leave the UK if the Appellant was removed.

13. Finally, Mr Tan argued that at paragraph [34] of her decision the FTTJ said there were strong parallels between this case and the facts of DK in MS. Mr Tan referred me to paragraphs [7] and [8] for DK's conditions and submitted that contrary to what the FTTJ had said their problems were not on the same level. Given this was a reason for allowing the appeal Mr Tan submitted the FTTJ's ultimate conclusion was flawed.
14. Mr Byrne responded and invited the Tribunal to find that there was no error in law and the FTTJ had made findings open to her.
15. With regard to whether the FTTJ had relied too heavily on what the GP had said, Mr Byrne referred to page 41 of the Appellant's bundle and submitted that with the exception of paragraph [4] of the said letter the doctor had made his own findings about the Appellant and the level of care provided. The FTTJ also had the grandmother's medical records as well as a psychiatric report. He submitted Mr Tan's first submission had no merit.
16. As to whether the FTTJ's assessment on the level of care was flawed, Mr Byrne submitted the Tribunal should look at paragraph [30] of the FTTJ's decision. The FTTJ placed weight on psychiatrist's report and concluded that without the Appellant's support and access to anti-depressant the Appellant's grandmother's health would deteriorate. At paragraph 9 on page 57 of the Respondent's bundle the consultant psychiatrist concluded that given the strong attachment to the Appellant and the need for treatment it would be wrong to refuse the application. Mr Byrne submitted the FTTJ was entitled to reach the conclusion she did.
17. Finally, Mr Byrne disagreed with Mr Tan's submission that the Appellant's grandmother's symptoms were on a different level to those experienced by DK in the MS case. He referred to paragraph [33] of the FTTJ's decision where the FTTJ concluded the Appellant's grandmother needed daily assistance from Appellant and that if they were separated the grandmother's life would be seriously impaired.
18. The FTTJ made a clear finding at paragraph [31] of her decision that the Appellant was the sole carer and that there was no other suitable care available. Mr Byrne submitted all of the FTTJ's findings were open to her.

DISCUSSION AND FINDINGS

19. Whether or not specifically identified herein, I confirm that all the relevant documents available to me on the court file, together with the oral submissions have been carefully taken into account in the determination of this application.
20. Permission to appeal had been granted for the reasons given by First-tier Tribunal Judge. Mr Tan submitted that the FTTJ had erred firstly in placing too much weight on both the GP evidence and what the Appellant said and thereafter failed to adequately consider what outside help was available or apply the Patel test on exceptionality. Whilst those grounds were

individually argued, Mr Tan concluded his submissions by submitting collectively they amounted to an error in law.

21. With regard to Mr Tan's submission that the FTTJ placed too much weight on the GP evidence and what the Appellant himself claimed it is important to look at the FTTJ's decision ad a whole as against selectively picking out paragraphs that may assist a particular argument.
22. In her assessment the FTTJ correctly noted the previous credibility finding made by Judge Devlin and noted at that time there was no independent evidence to show his grandmother:
 - (a) Would require long term care.
 - (b) Was dependent on the Appellant.
 - (c) Had no other relatives who could provide such care.
 - (d) Could not access the required care from either social services or the NHS.
23. The FTTJ makes clear at paragraph [25] pf her decision that her starting point was what Judge Devlin had concluded namely

"the judge was not provided with any documentary evidence of his grandparents' condition or their relationship with the appellant, other than what the appellant told him, which the judge found was very vague and wholly insufficient to demonstrate that compelling circumstances had been established."
24. Having established this as a starting point the FTTJ then looked at the new evidence that had been submitted and concluded there were sufficient reasons to depart from this position. Mr Tan's submission was that she placed too much weight on both the GP evidence and the Appellant's and grandmother's evidence. She found their evidence was consistent with the independent evidence that was now before her.
25. Mr Tan argued that the GP was basing his findings on what he had been told by the Appellant and his grandmother and he referred me to the two letters on pages 40 and 41 of the Appellant's bundle. Mr Byrne argued Mr Tan's approach had no merit as the doctor made his own findings and did not simply repeat what he had been told. The FTTJ sets out what the GP says in paragraphs [28] and [29] of her decision. The letter on page 41 of the bundle is clearly a response to questions posed to him. It is arguable that paragraph 4 of this letter is based on what he is told and the doctor accepts this in a follow up letter. The remainder of the letter could be viewed as his opinion or simply a statement of fact based on what he was either told or knew. Significantly, the doctor has been the grandmother's doctor for over six years and was therefore in a position to make the observations contained in his report and the FTTJ took this factor into account when considering the evidence as well as the psychiatric report

and the fact the Appellant had been her primary carer for the last ten years. Looking at the totality of the evidence I find the FTTJ did not base her conclusion on simply the GP evidence but had regard to the totality of the evidence.

26. The second issue raised centred around the level of care available and who could provide that care. The finding on this is found in paragraph [31] of the FTTJ's decision.

"I find on the balance of probabilities that his grandmother's attachment to him has become so strong the NHS or local authority would not be able to provide the same level of care, which is of both of an emotional as well as a physical nature. I accept to the requisite standard of proof that neither the Appellant's grandmother's daughter nor her son can provide the required level as the Appellant due to the daughter's own circumstances (personal/family and medical) and the fact the son does not have a relationship with his mother."

27. Mr Tan submitted the FTTJ failed to consider third party support from either the NHS or social services. The FTTJ noted at paragraph [34] of her decision that the grandmother was a practising Muslim and it would be unlikely that an outside carer would be aware of her beliefs and cultural traditions. The FTTJ was clearly aware of the importance of considering the availability of state medical and social care as she refers to extracts from MS which refer to these factors. The Court in MS made it clear:

"The availability of state care is not, however, to be treated as a trump card in every case, irrespective of the nature and quality of the dependency on the carer which is relied on.... the availability of state care does not avoid the need to enquire into the actual dependency of the EU citizen on her adult carer. The availability of alternative care is a relevant, but not always decisive factor."

28. In such circumstances I find Mr Tan's second submission that the FTTJ failed to consider other alternatives, be that family or state provided, is without merit.
29. The final ground of appeal centred around Mr Tan's submission that the FTTJ erred by not considering Patel. There is no dispute that the FTTJ failed to mention the Patel case but that does not mean there is an error. The important question is whether the FTTJ applied the correct test.
30. Both MS and Patel refer to an exceptionality test in the case of an adult and both cases discussed the requirement to consider whether an EU citizen or in this case a British citizen would have to leave the United Kingdom.
31. The FTTJ was aware of both these issues and did consider the question of whether the Appellant's grandmother would have to leave if the Appellant

was required to leave the country. She concluded having conducted a “global, objective assessment, taking account of the evidence of the Appellant and Ms Bibi and all the surrounding circumstances” that not only would the removal of the Appellant lead to her quality and standard of life being seriously impaired but that she would also be compelled to leave with the Appellant.

32. In all the circumstances, I find Mr Tan’s submissions do not demonstrate an error in law.

NOTICE OF DECISION

33. There is no error in law and the FTTJ's decision stands.

Signed

Dated

A handwritten signature in black ink, appearing to read "SPAL" with a flourish underneath.

Deputy Upper Tribunal Judge Alis