



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-005599

First-tier Tribunal No: EA/50375/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 1st of February 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

Secretary of State for the Home Department

Appellant

and

Muhammad Faheem Akhtar
(NO ANONYMITY DIRECTION MADE)

Respondent

REPRESENTATION

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms N Brustani, Counsel instructed by Briton Solicitors

Heard at Field House on 11 August 2023

DECISION AND REASONS

INTRODUCTION

1. The appellant in the appeal before me is the Secretary of State for the Home Department (“SSH”) and the respondent to this appeal is Mr Muhammad Faheem Akhtar. However, for ease of reference, in the course of this decision I adopt the parties’ status as it was before the First-tier Tribunal. I refer to Mr Akhtar the appellant, and the Secretary of State as the respondent.
2. The appellant is a national of Pakistan. On 19 October 2020 he applied for a derivative residence card as confirmation of a right of residence under European

Community law. The appellant claimed to be the primary carer of his parents, both of whom are British citizens. The application was refused by the respondent for reasons set out in a decision dated 19 January 2021. In summary, the respondent was not satisfied the appellant has provided sufficient evidence to show that he is the primary carer of his parents, Mr Mohammad Akhtar, and Mrs Mahjabeen Aktar. The respondent concluded that even if it were accepted the appellant is the primary carer of his parents, the appellant has not established that they would be unable to call upon the services of outside agencies including social services, if required.

3. The appellant's appeal against that decision was allowed by First-tier Tribunal Judge Shamash ("the judge") for reasons that set out in a decision dated 8 August 2022.
4. The appellant's immigration history is set out at paragraphs [2] and [3] of the judge's decision. The judge noted the appellant arrived in the UK in May as a student. Leave to remain granted to him was curtailed in 2014 after his sponsor's license was revoked. The judge noted the appellant made an unsuccessful human rights claim in November 2014. She also noted the appellant had made two previous applications for confirmation of his derivative right of residence, both of which were refused by the respondent. In each case an appeal to the First-tier Tribunal ("FtT") was also dismissed.
5. The judge heard evidence from the appellant and his mother as set out in paragraphs [46] to [52] of her decision. The judge's findings and conclusions are set out at paragraphs [64] to [68] of the decision. The judge was satisfied that there has been a significant deterioration in the health of the appellant's father since the previous decisions of the FtT. The judge noted the "ASC Emergency Services request form and assessment" concludes semi-independent living is no longer feasible for Mr Mohammad Akhtar Iqbal.
6. Having reviewed the Care Act Assessment completed, the judge found, at [65], that even with the full care package that the appellant's father is entitled to, there would be a significant gap in the care that could be provided by the State and that Mrs Atkhar who herself requires support, could not assist in caring for him. The judge noted the appellant's mother is eligible for support in her own right and has a number of chronic health conditions. At paragraphs [67] to [69] of the decision, the judge said:

"67. Whilst I accept that in theory one of the other children in the UK could provide support, the practical reality is that this task has fallen on the appellant. His siblings have children of their own and they work. Caring for an elderly relative who has had a stroke is difficult for anyone and would be practically impossible to do along with caring for children. I accept Mrs Akhtar's evidence that if the appellant were removed her husband would need to go into a care home.

68. I am also satisfied on the evidence before me, that the most important aspect of the care which is provided to Mr Iqbal now is not medical care but assistance with

personal hygiene and feeding, companionship and love. There was ample evidence from the documents in the bundle that the appellant's father has consistently expressed the wish to be cared for by his son. I find that there is exceptional dependency on the appellant, and that the appellant's father is both physical and emotionally dependent on him. It is best summed up by the evidence that the appellant sleeps next to his father to stop him from falling in the night.

69. I do not know whether the appellant's father would be able to fly, but I am persuaded that if he was able to board an aeroplane, that he would feel compelled to leave the United Kingdom with the appellant rather than be admitted to a care home and it is for this reason that I find that the appellant is not only his father's main carer but that he is indispensable to his father and that the high threshold test is met in this case."

THE GROUNDS OF APPEAL

7. In summary, the respondent claims Judge Shamash materially erred in law in finding that the appellant's parents would be compelled to leave with the appellant, should the appellant be required to leave the UK. In previous appeals the appellant and his mother had claimed the appellant's parents would not leave the UK as they have access to NHS treatment. The respondent claims the evidence now before the Tribunal that both the appellant's parents would feel compelled to leave the UK, despite the worsening of their medical conditions and additional reliance on NHS and social services care, was designed to secure a more favourable outcome of the appeal and should have been treated by the Judge with caution and circumspection.
8. The respondent also claims Judge Shamash conflated the preference of the appellant's parents to have the appellant provide care for them, with the appellant's parents being compelled to leave the UK. The respondent refers to the decision of the Supreme Court in *Patel and Shah v SSHD* [2019] UKSC 59. The respondent claims Judge Shamash failed to properly consider that decision of the Supreme Court and instead relied upon the decision of the Court of Appeal in *MS (Malaysia) v SSHD* [2019] EWCA Civ 580.
9. Permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Rimington on 9 December 2022. She considered it arguable that the First-tier Tribunal Judge failed to apply *Patel and Shah v SSHD* and materially erred in law in finding that the appellant is entitled to a derivative right of residence under regulation 16(6) of The Immigration (European Economic Area) Regulations 2016.

THE HEARING OF THE APPEAL BEFORE ME

10. Mr Tufan accepts Judge Shamash referred to the previous decisions of Judge Geraint Jones QC (promulgated 21 March 2018) and Judge Kyrie James (promulgated 20 January 2020) and found on the evidence before the Tribunal that there has been a significant deterioration in the appellant's father's health. Mr Tufan submits that in *Patel and Shah v SSHD* the Supreme Court considered the scope of the principle in *Ruiz Zambrano v Office National de l'Emploi (ONEm)* (C-34/09) EU:C:2011:124, [2012] Q.B. 265, and held that *Chavez-Vilchez v Raad van*

Bestuur van de Sociale Verzekeringsbank (C-133/15) EU:C:2017:354, [2018] Q.B. 103, did not relax the level of compulsion required in the case of dependent adults. The Court said that it would only be in “exceptional circumstances” that it would be demonstrated that an appellant could claim to have a derivative right based on a relationship of dependency with an adult relative.

11. Mr Tufan submits the judge referred to the relevant authorities at paragraphs [59] to [63] of her decision and irrationally concluded that there is an exceptional dependency on the appellant and that the appellant’s father would feel compelled to leave the United Kingdom with the appellant rather than be admitted to a care home. Mr Tufan submits that in *Patel and Shah*, Mr Patels’ father suffered from end stage kidney failure and the appellant administered home dialysis for his father and provided him with other primary care. The FtT did not accept that Mr Patel’s parents would be compelled to leave the UK if Mr Patel left, and found that Mr Patel’s father would be provided with a social services care package and appropriate medical treatment. The Supreme Court held that *Chavez-Vilchez* does not relax the level of compulsion required in the case of adults, and that Mr Patel’s appeal must therefore fail. Here, the appellant’s parents have previously maintained that they would not leave the UK. They have family members in the UK and an entitlement to support from the Local Authority. They would not be compelled to leave the UK.
12. In reply, Ms Brustani submits the judge carefully considered the two previous decisions of the FtT and the findings previously made. The appellant’s father suffered a stroke on 6 January 2020 and there had obviously been a change in the family’s circumstances. The judge was right to note that there had been a significant deterioration in the appellant’s father’s health. The judge had the benefit of evidence that was not previously available including a copy of the ‘Adult Social Care Assessment’ dated 30 October 2018, a ‘Care Act Assessment’ dated 7 February 2020 and a report prepared by an independent social worker. The appellant also relied upon letters from ‘Carers First’ dated 3 March 2020 and 12 March 2020 following a referral by the Stroke Association setting out the support they can provide to the appellant about his role in caring for his father.
13. Ms Brustani submits the judge accepted that ‘semi-independent living’ is no longer feasible for the appellant’s father and at paragraph [64], the judge referred to the areas of concern identified in the Adult Social Care Assessment. The Judge accepted the appellant has siblings in the UK and noted they have their own commitments. The judge accepted the evidence of the appellant’s mother that if the appellant is removed, her husband would need to go into a care home. Ms Brustani refers to the evidence of the appellant at paragraph [35] of his witness statement that if he is removed to Pakistan, his parents would have no choice but to relocate with him. The Judge said at paragraph [69] that the appellant’s father would feel compelled to leave the United Kingdom with the appellant rather than be admitted to a care home. Ms Brustani accepts the appellant’s parents do not go as far as saying they will be compelled to leave the UK if the appellant is removed in their witness statements. She submits they do not address that issue, but because of the

care required by the appellant's father, it must follow that they will be unable to remain in the UK if the appellant is unable to do so.

14. Ms Brustani submits that in reaching her decision the judge had regard to the relevant legal test as set out in the authorities that she referred to. The judge accepted that there must be some 'exceptional dependency' and was satisfied that the test was met. That was a conclusion open to the judge based on the evidence before the FtT and findings made.

DECISION

15. It is convenient to set out the relevant provisions of the Immigration (European Economic Area) Regulations 2016 relating to the derivative right to reside in the UK. Insofar as is relevant, Regulation 16 stated:

"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."

16. The judge identified the relevant authorities at paragraphs [59] to [62] of her decision. The appeal before me is concerned with the question of whether the judge properly applied the legal test to the facts, based upon the findings she made. I remind myself of the restraint which an appellate body must exercise when considering an appeal against the decision of a specialist judge at first instance. In *UT (Sri Lanka) v The Secretary of State for the Home Department* [2019] EWCA Civ 1095 the Court of Appeal reminded appellate courts: "It is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in *AH (Sudan) v Secretary of State for the Home Department* at [30]:

"Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

17. The appellant must first establish that he is the primary carer of a British citizen. Here, at paragraph [64] of her decision the judge said the most reliable evidence in relation to the appellant's father, Mr Mohammad Akhtar Iqbal, is that found in the

'ASC Emergency Services request form and assessment'. A copy of that is found at page 136 of the appellant's bundle and includes a copy of the Care Act Assessment completed by the Local Authority. It is dated 7 February 2020, over two years before the hearing of the appeal. The assessment follows from the appellant's father's admission to Newham Hospital on 6 October 2020 with an episode of a stroke. The assessment records that on admission, the appellant's father was assessed by the therapist and medical team, and they expressed that due to the change in his health, he would require support to manage his needs appropriately. The risks were identified. The assessment set out his previous level of functioning and current level of functioning. The 'current level of functioning' was a reference to the position as of 6 February 2020, a month after the appellant's father had a stroke. The assessment set out the service provision arranged which comprised of four visits each day to provide for personal care. The tasks included *inter alia*; 'cleaning, escorting, medication administration, medication prompting, shopping, support with eating/drinking and support with meal preparation.'" It was plainly open to the judge to conclude that there has been a significant deterioration in the health of the appellant's father. The judge said at paragraph [65] that there was evidence that the appellant is considered to be his father's carer. She found, at [69], that not only is the appellant "his father's main carer but that he is indispensable to his father". It can be inferred the judge found the appellant is the 'primary carer' for his father. The focus of the judge's decision is upon the care provided to, and the needs of the appellant's father. Little is said about any care provided to, and the needs of the appellant's mother.

18. The question for the judge was then whether the removal of the appellant would actually cause (compel) his father, the Union citizen to leave the United Kingdom. In *Patel and Shah v SSHD* [2019] UKSC 59, the Supreme Court considered the scope of the principle in *Ruiz Zambrano v Office National de l'Emploi (ONEm)* (C-34/09) EU:C:2011:124, [2012] Q.B. 265, under which a third-country national was entitled to a right of residence to avoid their Union citizen child, or Union citizen dependent adult, being deprived of the genuine enjoyment of their Union citizenship rights as a result of their being compelled, by the third-country national's departure, to leave Union territory.
19. Lady Arden (with whom Lady Hale, Lord Carnwath, Lord Briggs and Lord Sales agreed) said, at [22], that what lies at the heart of the *Zambrano* jurisprudence is the requirement that the Union citizen would be compelled to leave Union territory if the third country national, with whom the Union citizen has a relationship of dependency, is removed. It is for the national court to decide whether the removal of the third country national carer would actually cause the Union citizen to leave the Union. Lady Arden went on to say, at [23], that as explained, in *KA v Belgium* (C-82/16), [2019] C.E.C. 710, the CJEU drew a distinction between an adult Union citizen and a Union citizen who is a child. At paragraph [27], Lady Arden said:

"27. ...In *Chavez-Vilchez*, the CJEU were concerned with the case of a child and it is clear from *KA* that the case of a child is quite separate from that of an adult and that in the case of an adult it will only be in "exceptional circumstances"

that a TCN will have a derivative right of residence by reference to a relationship of dependency with an adult Union citizen. An adult Union citizen does not have a right to have his family life taken into account if this would diminish the requirement to show compulsion to leave. It must be recalled that in *KA* the CJEU effectively reaffirmed the need to show compulsion even after making it clear that the decision in *Chavez-Vilchez* was good law. Accordingly, *Chavez-Vilchez* does not relax the level of compulsion required in the case of adults, and thus provides no assistance to Mr Patel, whose appeal must therefore fail.

20. It was for the appellant to establish that his parents and in particular, his father would be compelled to leave the UK if he is returned to Pakistan. They may prefer to be cared for by the appellant, but that is not to say that they would be compelled to leave the UK, if the appellant is returned to Pakistan. *Zambrano* rights are exceptional and only arise indirectly and contingently in order to prevent a situation where EU citizen dependants are compelled to leave the EU. The derivative right of residence is based upon a "practical test" of compulsion. Here, that is that the appellant's parents will in fact be required to leave the UK, if the appellant cannot remain.
21. The judge referred to the decision of the Court of Appeal in *MS (Malaysia) v Secretary of State for the Home Department* [2019] EWCA Civ 580 in which the Court of Appeal held that the Upper Tribunal had been entitled to find that an adult third country national had acquired a derivative right to remain in the UK. The appellant (MS) was the adult daughter and primary carer of her 87-year-old mother who had mobility issues, suffered from memory loss, deteriorating eyesight and a number of health conditions including diabetes, heart failure and chronic kidney disease. She required help with, inter alia, showering and dressing, applying medication, preparing food and shopping.
22. Lord Justice Floyd said:

"25. It is clear, therefore, that what the *Zambrano* principle protects is the right to reside in the Union, as a matter of substance and not of form. The principle does not guarantee any particular quality of life in the Union although, as the consequences for the EU citizen increase in seriousness there will come a point where they are so serious that they will effectively compel the citizen to leave. Whether the boundary (which has impediment on the right to reside on one side and compulsion to leave on the other) is crossed is clearly a matter of fact and degree. What is necessary in each case is to examine the character and quality of the relationship of dependency between the Union citizen and the third country national who is refused a right of residence, because it is that dependency which would lead to the Union citizen being obliged, in fact, to leave the territory of the Union.

26. The test in the case of adult dependents is a very demanding one, which will be met only exceptionally, but remains one of practical compulsion such that the EU citizen is left with no practical choice but to leave the territory of the Union."

23. The Court of Appeal upheld the decision of the Upper Tribunal (which had upheld the decision of the FtT). Lord Justice Floyd referred to the judgment of judge of Elias LJ in *Harrison (Jamaica) v Secretary of State for the Home Department* [2013] 2 CMLR 23:

"67. ... I accept that it is a general principle of EU law that conduct which materially impedes the exercise of an EU right is in general forbidden by EU law in precisely the same way as deprivation of the right. But in my judgment it is necessary to focus on the nature of the right in issue and to decide what constitutes an impediment. The right of residence is a right to reside in the territory of the EU. It is not a right to any particular quality or life or to any particular standard of living. Accordingly, there is no impediment to exercising the right to reside if residence remains possible as a matter of substance, albeit that the quality of life is diminished. Of course, to the extent that the quality or standard of life will be seriously impaired by excluding the non EU national, that is likely in practice to infringe the right of residence itself because it will effectively compel the EU citizen to give up residence and travel with the non-EU national. But in such a case the *Zambrano* doctrine would apply and the EU citizen's rights would have to be protected (save for the possibility of a proportionate deprivation of rights). Accordingly, to that extent that the focus is on protecting the substance of the right, that formulation of the principle already provides protection from certain interferences with the enjoyment of the right."

24. Lord Justice Floyd accepted the Upper Tribunal conducted a perfectly proper, global, objective assessment, taking account of the evidence of MS and DK and all the other surrounding circumstances. Those included the fact that DK required assistance with every part of her daily existence including her intimate care, 24 hours a day, that she had specialised needs as an orthodox Sikh, and that residential care would be inadequate. It was those considerations that had led the judge to find that DK's quality and standard of life would be "seriously impaired".
25. A fact sensitive assessment is required and as the Supreme Court said in *Patel and Shah*, whether the boundary which has impediment on the right to reside on one side and compulsion to leave on the other is crossed, is clearly a matter of fact and degree. Here, the judge reviewed the Care Act Assessment and found, at [65], that even with the full care package that he is entitled to, there would be a significant gap in the care that could be provided by the State and that Mrs Atkhar, who herself requires support, could not assist with. The judge does not set out what the 'significant gaps in the care' are, that could only be filled by the appellant. I accept the availability of state care is not a trump card, but the availability of state-funded medical and social care is relevant, and if there are said to be gaps, the respondent is entitled to know what those gaps are. As Elias LJ said in *Harrison* and the Supreme Court acknowledged in *Patel and Shah*, the right of residence is a right to reside in the territory of the EU. It is not a right to any particular quality or life or to any particular standard of living.
26. As the judge noted at paragraph [67] of the decision, the evidence of Mrs Akhtar, which the judge accepted, was that that if the appellant were removed her husband would need to go into a care home. At paragraph [5] of her decision, the judge

noted that in March 2018, the appellant claimed in the appeal before Judge Geraint Jones QC that if his appeal was unsuccessful, his parents would not leave the United Kingdom and return to Pakistan. By the time of the appeal heard by Judge James in January 2020, the appellant's father had suffered a stroke. The appellant had given a similar account of the care he now provides to Judge James. At paragraph [18] of her decision, Judge Shamash records the appellant's claim in January 2020 that his parents would not move to Pakistan if he was required to return there. When the appellant's mother was pressed on the point at that time, Judge James said she was 'at best ambivalent', and did not wish to leave the NHS care available in the UK. I accept as the respondent claims, the judge fails to consider why the appellant's parents would now be compelled to leave the UK, when in the past they have always maintained they would not return to Pakistan even if the appellant is removed there.

27. The judge noted, at [68], that there is ample evidence from the documents in the bundle that the appellant's father has consistently expressed the wish to be cared for by his son. The judge said, at [69], that she was persuaded that if he were able to board a plane, the appellant's father would feel compelled to leave the United Kingdom with the appellant rather than be admitted to a care home. The judge fails to give any or any adequate reasons for finding that the appellant's father could not receive adequate care in a care home. There is a distinction between "choice" and "compulsion", and it is difficult in my judgement to discern from the decision of the FtT whether the appellant's parents would choose to live in Pakistan if the appellant were returned there, or be compelled to do so. The judge fails to set out her reasons as to why, on a practical level, the appellant's father would be compelled to leave the UK rather than continue to receive the treatment and support he has been assessed to require. The appellant's father will continue to have the emotional support of his wife and other children who remain in the UK.
28. Although the judge identified the relevant authorities, I am not satisfied the judge properly applied the legal test to the facts and reached a decision that is rooted in the evidence before the Tribunal with adequate reasons. The judge appears to have made a critical finding of fact, that the appellant's father would be compelled to leave the UK, which has no proper basis in the evidence and lacks rational reasons. Standing back and reading the decision as a whole, the judge fails to adequately and rationally explain why this is one of those 'exceptional' cases where the evidence clearly establishes that the appellant's parents will be left with no practical choice but to leave the UK with the appellant.
29. It follows that I am satisfied that the decision of the FtT is vitiated by material errors of law such that the decision must be set aside.#

DISPOSAL

30. As to disposal, I am conscious of the Court of Appeal's decision in *AEB v SSHD* [2022] EWCA Civ 1512, *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC) and §7.2 of the Senior President's Practice Statements. Sub-paragraph

(a) deals with where the effect of the error has been to deprive a party before the Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the FtT, whereas sub-paragraph (b) directs me to consider whether I am satisfied that the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

31. The evidence before the FtT was somewhat dated even when the appeal was heard in March 2022. Having regard to the nature of the errors of law, I accept the appropriate course, in fairness to the appellant, is for the appeal to be remitted for rehearing before the FtT.

NOTICE OF DECISION

32. The decision of FtT Judge Shamash dated 8 August 2022 is set aside and the appeal is remitted to the FtT for hearing afresh with no findings preserved.
33. The parties will be advised of a hearing date in due course.

V. Mandalia
Upper Tribunal Judge Mandalia
Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 January 2024