Neutral Citation Number: [2019] EWCA Civ 580

Case No: C5/2017/0029

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Upper Tribunal Judge Kopieczek
IA/38332/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/04/2019

Before:

LORD JUSTICE UNDERHILL
(Vice President of the Court of Appeal, Civil Division)
LORD JUSTICE FLOYD
and
LORD JUSTICE HOLROYDE

- -

Between:

MS (MALAYSIA)	**Respondent**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**

- -
- -

Gwion Lewis (instructed by **Government Legal Department**) for the **Appellant**
Michael Biggs (instructed by **Mayfair Solicitors**) for the **Respondent**

Hearing date: March 21, 2019

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Approved Judgment

Lord Justice Floyd:

1. This appeal raises the question of whether the adult primary carer of her EU citizen parent can acquire a derivative right to remain in the United Kingdom based on her parent's dependency on her for her care. The appeal turns on the application of Regulation 15A(4A) of the Immigration (European Economic Area) Regulations 2006 ("the Regulations") which seeks to give effect to the jurisprudence of the Court of Justice of the European Union explained in Case C-34/09 *Ruiz Zambrano v Office National de l'Emploi* [2012] QB 265 ("*Zambrano*") and subsequent cases. That jurisprudence was recently the subject of review in this court in *Patel v SSHD and SSHD v Shah and another* [2017] EWCA Civ 2028 *("Patel").*

2. The appellant, MS, is a citizen of Malaysia. She was born on 16 November 1960, and is therefore now 58. Her mother, DK, is a British and EU citizen who was born on 12 July 1931, and so is now 87. MS has at all material times been DK's primary carer.

3. On 5 March 2014, MS applied for a derivative residence card as her mother's primary carer. The Secretary of State refused that application on 28 April 2014. A subsequent application for administrative review of that decision was refused on 8 September 2014. MS appealed to the First-tier Tribunal ("FTT") and, in a decision published on 24 August 2015, FTT Judge James allowed her appeal, concluding that DK would not be able to reside in the UK, or any other EU member state, if MS was required to leave the UK. The Secretary of State was granted permission to appeal to the Upper Tribunal ("UT").

4. On 16 March 2016, UT Judge Pinkerton set aside the FTT's determination on the basis that the FTT had erred in law, because it had "*not reasoned, or sufficiently reasoned, how the Appellant is able to satisfy the requirements of [Regulation 15A(4A)]*". The substantive appeal to the UT came before UT Judge Kopieczek in order for him to remake the decision. In a decision published on 9 August 2016, he dismissed the Secretary of State's appeal, with the result that MS was entitled to a derivative residence card.

5. The Secretary of State is dissatisfied with the decision of UT Judge Kopieczek, and appeals again to this court, with permission granted on 25 May 2018.

The facts

6. DK is a widow and a devout, orthodox Sikh. In addition to MS she had two daughters and a son. The two daughters are, for reasons which are not material, unable to care for their mother. The son, SS, came to the UK in 2005 to care for his mother, and did so again in 2007, but very sadly died in Malaysia in 2012. Both her husband and SS are buried here in the UK. During the period when SS cared for his mother, MS also attended her mother to provide intimate personal care that her son was unable to provide.

7. It is necessary to set out some details about DK's state of health and her care needs as recorded by the FTT. DK has restricted mobility and she uses a walking stick and Zimmer frame in the house, and a wheelchair outside. She suffers from short-term memory loss, which means that she must be assisted to take her daily medication (which includes 9 different drugs). Her partial eyesight is deteriorating. In addition,

she has diabetes, hypertension (high blood pressure), heart failure, chronic kidney disease, cerebrovascular disease, osteoarthritis and peripheral vascular disease.

8. As to her care needs, DK needs help with showering and dressing, being unable to do so independently, and requires a carer to apply medication to her arms, legs and feet. She is doubly incontinent, requiring assistance with wearing and disposing of incontinence pads. She needs to have food prepared for her, according to her religious dietary requirements and beliefs, three times a day. Her carer needs to deal with washing, drying and ironing her clothes. Various adjustments have been made to her home to assist with her restricted mobility, such as a special shower and stair lift. She needs help with shopping and the paying of bills and bank transactions. She speaks Punjabi and has limited English, so she needs help with appointments at the doctor's surgery, and elsewhere.

9. The FTT found that there was a significant gap between the services provided by social services and those provided by MS and (while he was alive) SS. The FTT concluded that residential care would not be "*an adequate alternative arrangement*", and that "*the quality and standard of [DK's] life will be seriously impaired by the removal of [MS] from the UK if she is required to leave*".

The law

10. Article 20 TFEU provides that every person holding the nationality of a member state shall be a citizen of the Union and have, amongst other things, the right to reside freely within the territory of the member states.

11. The Regulations provide so far as material as follows

> "15A. Derivative right of residence
>
> (1) A person ("P") who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4) [(4A)] or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.
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> …
>
> (4A) P satisfies the criteria in this paragraph if–
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> (a) P is the primary carer of a British citizen ("the relevant British citizen");
>
> (b) the relevant British citizen is residing in the United Kingdom; and
>
> (c) the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave.
>
> …
>
> (7) P is to be regarded as a "primary carer" of another person if

> (a) P is a direct relative or a legal guardian of that person; and
>
> (b) P–
>
> > (i) is the person who has primary responsibility for that person's care;
> >
> > ..."

12. Regulation 18A provides that the Secretary of State must issue a person with a derivative residence card when that person provides proof that he or she has a derivative right of residence under regulation 15A.

13. In *Zambrano*, the applicant and his wife were Colombian nationals. They had two children who had Belgian nationality and who were therefore citizens of the European Union. The applicant was refused unemployment benefit because the prior work on which he relied to obtain that benefit did not count, as he had not held a work permit at the relevant time. His case was that Articles 20 and 21 TFEU conferred on a relative in the ascending line who was a third country national, a right of residence in the member state of which his children were nationals and in which they resided, and also exempted him from having to obtain a work permit. The Grand Chamber of the Court of Justice found that Article 20 precluded national measures which have the effect of depriving citizens (such as the Belgian children of these Colombian parents) of the genuine enjoyment of the substance of the rights conferred on them as citizens of the European Union. A refusal to grant a right of residence to the third country national with dependent minor children, and a refusal to grant a work permit, has such an effect, because such measures would lead to a situation where the children who are EU citizens would have to leave the EU in order to accompany their parents (see paragraphs 42 to 44).

14. In Case C-256/11 *Dereci v Bundesministerium fur Inneres* [2012] All ER (EC) 373 at [68], the CJEU concluded that the mere fact that it might appear desirable to a national of a member state, in order to keep his family together, for the members of the family who do not have the nationality of a member state to be able to reside with him in the territory of the member state, "*is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not given*". The limited scope of application of the derivative right was expressed in the Opinion of Advocate General Bot in Joined Cases C-356/11 and C-357/11 *O v Maahanmuuttovirasto; Maahanmuuttovirasto v L* [2013] Fam 203 ("*O and L*") at [44] as follows:

> "44. The reasons linked to the departure of the citizen of the Union from its territory are therefore particularly limited in the case law of the court. They concern situations in which the Union citizen *has no other choice* but to follow the person concerned, whose right of residence has been refused, because he is in that person's care and thus entirely dependent on that person to ensure his maintenance and provide for his own needs." (my emphasis).

15. At [47] of its judgment in *O and L* the court expressed the derivative right as arising in "*situations characterised by the circumstance that the Union citizen had, in fact, to leave…*". At [48] it described the right as "*specific in character"* and applying "*exceptionally"* where the "*effectiveness of the Union citizenship enjoyed by that national would otherwise be undermined".* At [56] the court gave its guidance in the following way:

> "On the other hand, both the permanent right of residence of the mothers of the Union citizens concerned who are minors and the fact that the third country nationals for whom a right of residence is sought are not persons on whom those citizens are legally, financially or emotionally dependent must be taken into consideration when examining the question whether, as a result of the refusal of a right of residence, those citizens would be unable to exercise the substance of the rights conferred by their status. As the Advocate General observes in point 44 of his Opinion, *it is the relationship of dependency between the Union citizen who is a minor and the third country national who is refused a right of residence that is liable to jeopardise the effectiveness of Union citizenship, since it is that dependency that would lead to the Union citizen being obliged, in fact, to leave not only the territory of the Member State of which he is a national* but also that of the European Union as a whole, as a consequence of such a refusal (see *Ruiz Zambrano*, paragraphs 43 and 45, and *Dereci and Others*, paragraphs 65 to 67)." (my emphasis).

16. Turning to the English authorities, in *Harrison (Jamaica) v Secretary of State for the Home Department* [2013] 2 CMLR 23 Elias LJ (with whom Ward and Pitchford LJJ agreed) pointed out at [29] that the court in *Zambrano* had not accepted that an *impediment* on the EU citizen's right short of denial would fall within the scope of the principle. Earlier in his judgment, Elias LJ said at [19] that:

> "... by referring to action which deprives children of the "substance of the right", the Court is intending to say that the right may be infringed if in practice the children will be forced to leave with their ascendant relative even though they could in theory, as a matter of strict law, remain in the state of which they are nationals. It would be no answer for the state to say that the parents should be denied the right to remain because the children can be adopted, for example. That approach was consistent with the fundamental tenet of EU law that it looks to substance rather than form."

17. At [67] in *Harrison* Elias LJ said :

> "… 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."

18. The more recent decision of the CJEU in Case C-133/15 *Chavez-Vilchez and others v Raad van bestuur van de Sociale verzekeringsbank and others* [2018] QB 103, concerned, in large part, non-EU mothers who had primary responsibility for the care of their children who were citizens of the Netherlands. The fathers, who were all separated from the mothers and who provided no, or limited care, were EU citizens. The mothers' claims for residence permits were rejected by the Dutch authorities broadly on the grounds that the fathers could care for the children if the mothers were no longer allowed to reside in the Netherlands. The court rejected the suggestion that it was sufficient merely to point to the possibility of the father caring for the children in place of the mother. At [70] and [71] the court said:

> "70 In this case, in order to assess the risk that a particular child, who is a Union citizen, might be compelled to leave the territory of the European Union and thereby be deprived of the genuine enjoyment of the substance of the rights conferred on him by article 20FEU if the child's third-country national parent were to be refused a right of residence in the member state concerned, it is important to determine, in each case, which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national parent. As part of that assessment, the competent authorities must take account of the right to respect for family life, as stated in article 7 of the Charter of Fundamental Rights of the European Union, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in article 24(2) of that Charter.
>
> 71 For the purposes of such an assessment, the fact that the other parent, a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient

> ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would be compelled to leave the territory of the European Union if a right of residence were refused to that third-country national. In reaching such a conclusion, account must be taken, in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium."

19. It must be borne in mind that cases involving children who are EU citizens involve additional factors concerning the importance of the best interests of the child. Nevertheless, in *Patel*, Irwin LJ (with whom Lindblom and Thirwall LJJ agreed) concluded that, in the light of this and other passages in *Chavez-Vilchez*, the *Zambrano* principle had been left undisturbed, albeit that it had been emphasised that a careful process of enquiry is required into the relationship of dependency of the child on the third country national with no right of residence which is relied on: see paragraph 25 of *Patel*. In each case under consideration in *Chavez*, the context was "*if the non-EU citizen mother leaves and the EU citizen father remains, will the EU citizen child be compelled, in practice, to leave*?"

20. In *Patel*, this court dealt with three linked cases. In the first (*Patel*) the applicant was a non-EU national whose parents were both UK nationals. The applicant was the primary carer for his parents. In the other two cases (*Shah* and *Bourouisa*) the applicants were non-EU nationals whose wives were UK nationals and the applicants were also primary carers for their children who were also UK nationals. All the applicants claimed derivative rights of residence. The most relevant case for the purposes of this appeal is *Patel*. In his case, the FTT judge had held that the comparison between the care which would be available in India and in the UK meant that the notion of the applicant's father choosing or feeling obliged to leave for India was "*simply untenable*". He therefore rejected the claim that the parents would be unable to reside in the UK if the applicant were required to leave. An appeal to the UT was dismissed. At [80] to [83] Irwin LJ declined to interfere with the conclusions reached by the tribunals below. The evidence in the case "*was too equivocal to amount to compulsion, however one looked at the matter*". If the parents did choose to follow their son to India that was "*choice not compulsion*".

21. Irwin LJ went on in paragraph 84, in a passage which Mr Lewis, who appeared for the Secretary of State, accepts is not part of the *ratio* of the decision, to say this:

> "During the hearing, we asked the Secretary of State to consider in what circumstances compulsion might arise in respect of adult dependents of those without residence: if there were none, might the regulation so interpreted be a dead letter, forcing a different interpretation to preclude redundancy? Mr Blundell's response accepts that this category of cases might be very narrow. However, he did proffer examples. Where the family share a rare blood group, and blood transfusion or bone

> marrow transplants might be required, it might be arguable that the carer should remain. He also instanced a British adult citizen with severe autism, dependent for all his care on a third country national relative, where it would be intolerable for the identity of the carer to change. It is clear Mr Blundell was intending to give examples rather than an exhaustive survey. For myself, I would instance significant psychological dependence derived from any well-documented and recognised psychological condition, as a possible example. There may be more. The point is that the category exists, and there can be no argument that the regulation must have an expanded reading in order to avoid redundancy."

22. This passage, which simply explores the possibility that the Regulations, if too narrowly interpreted, might be emptied of content, expressly disavows its use as exhaustive guidance on the limits of the factual situations (and in particular the medical conditions) which might trigger the derivative right under the Regulation. The court or tribunal is required in each case to examine the character and quality of the dependency on the non-EU national to determine whether the EU citizen would be compelled to leave the territory of the European Union if a right of residence were refused to that non-EU national. This is an intensely fact sensitive enquiry to be carried out by reference to all the relevant circumstances and is not constrained by reference only to the category of medical condition of the EU citizen concerned.

23. Subsequent to *Patel*, the CJEU has again had occasion to consider these issues in Case C-82/16 *K.A. v Belgium* (8 May 2018). After laying out the *Zambrano* principle in the usual way at [51] to [52], the court stated the position in relation to adult dependencies at [65] as follows:

> "As regards, first, [the cases where derivative rights were claimed by adult third country nationals of whom the father or partner was an EU citizen], it must, at the outset, be emphasised that, unlike minors and a fortiori minors who are young children, such as the Union citizens concerned in the case that gave rise to the judgment of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), an adult is, as a general rule, capable of living an independent existence apart from the members of his family. It follows that the identification of a relationship between two adult members of the same family as a relationship of dependency, capable of giving rise to a derived right of residence under Article 20 TFEU, is conceivable only in exceptional cases, where, having regard to all the relevant circumstances, there could be no form of separation of the individual concerned from the member of his family on whom he is dependent."

24. To similar effect at [76] the court said:

> "It follows from paragraphs 64 to 75 of this judgment that Article 20 TFEU must be interpreted as meaning that:

> – 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…"

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.

The Upper Tribunal's decision

27. The UT Judge (henceforth "the judge") started by summarising the oral evidence which had been given before him, all of which it appears he accepted. He started with the evidence of MS. MS had a "*strong bond*" with her mother, with whom she had lived all her life. She was "*the last pillar*" for her mother, after she had lost her husband and son. Her mother "could not be on her own. She would have to leave the country with [MS]". Her mother was emotionally dependent on her as well as dependent on her for her care. Despite being faced with the contrast in the available support between the United Kingdom and Malaysia, and it being put to her that in reality she would decide to stay, MS had responded that "for her mother, she was her life" repeating that her mother was very emotionally attached to her having lost her husband and son. MS also said that the quality of care available in the UK would shorten her mother's life. It is clear that her evidence was completely unshaken.

28. DK confirmed in her evidence that her daughter "is her life". MS looked after her, cooked for her, bathed her and did everything for her. At paragraphs 20 to 22 of the decision the judge described the way in which DK expressed her views about what would happen if MS left the UK. Touchingly, she said that she would go because she would worry for her daughter's welfare.

29. The judge went on to summarise the preserved findings of the FTT, most of which I have set out in paragraphs 6 to 9 above. The judge also treated as preserved the FTT's findings which I have referred to at paragraph 9 above, namely that (a) residential care would not be an adequate alternative arrangement for DK and (b) the quality and

standard of DK's life would be seriously impaired by the removal of MS from the UK.

30. The judge correctly identified at [48] that the critical question was whether DK would be unable to reside in the UK if MS were required to leave. He went on to say at [49], applying the Upper Tribunal's decision in *Ayinde and Thinjom* [2015] UKUT 00560 (IAC), that the appellant must establish as a fact that the British citizen "*would be forced to leave the territory of the European Union*".

31. After some discussion of the potential relevance of the different standards of care in the UK and the destination country the judge said at [53]:

> "Nevertheless, in a sense once it was conceded that the evidence given to me was credible, the answer to the appeal is clear. The appellant's mother said in evidence that she could not be without her daughter. In other words, if her daughter left she would leave."

32. Then at [55] and [58] the judge said this:

> "55. As is clear from my summary of the evidence, whilst it was apparent from the [MS's] evidence that her view was that [DK] would, albeit reluctantly, choose to go with her to Malaysia, [DK's] evidence required some exploration in order to understand her view on whether she would stay or go. I did not consider that this was because she did not have a strong view on the matter, or that she was being deliberately vague or evasive. It was my impression that [DK] simply found it impossible to contemplate living without her daughter. I do not consider it necessary to resolve the issue of whether she would feel compelled to leave because of concern for her daughter or because of her need for her daughter's care and the emotional attachment between them, or a combination of the two. It is perfectly possible for a person to be unable to reside in the UK in accordance with reg 15A(4A) for more than one reason.
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> …
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> 57. My impression of [DK's] evidence was that she was aware of the state provision that she was getting in the UK, in particular in terms of medical care, but her desire not to be separated from her daughter was paramount.
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> 58. It is also clear that [DK] does not want to leave the UK and feels that she should not have to. But I am entirely satisfied that if MS was removed from the UK [DK] would inevitably leave with her. It is for those reasons that I am satisfied that the conditions in ref 15A(4A) are satisfied. In particular, I am satisfied that [DK] would be unable to reside in the UK if [MS] were required to leave. That is the clear import of [MS's] and

> [DK's] evidence. It is also consistent with the (preserved) findings of fact made by the FtJ, including the absolute impossibility of there being any other family member to care for her in the UK, given the personal circumstances of [MS's] sisters."

Discussion

33. In approaching the issues on this appeal, which essentially concern the question of whether the judge applied a legal test which he had correctly identified to the facts, we should bear in mind that the appeal is from a specialist immigration tribunal. As Baroness Hale explained in the well-known passage in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] 1 AC 678 at [30] "*it is probable that in … applying the law in their specialist field the tribunal will have got it right*. … *Appellate courts should not rush to find … misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."* Appellate courts, such as this court, should apply "*an appropriate degree of deference"* where the issue on appeal is as to the evaluation of facts by the trial judge: see per Green LJ (with whom Moylan and Baker LJJ agreed) in *SB (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 160 at [45] and [63].

34. The question for both tribunals, as they fully appreciated, was whether the facts which they were evaluating crossed the threshold identified in *Harrison* and *Patel* and the CJEU cases between "choice" and "compulsion". This is a paradigm of the situations in which this court should be cautious about substituting its own evaluation. As Lord Hoffman said in *Biogen Inc v Medeva* [1996] UKHL 18 at 54:

> "Where the application of a legal standard ... involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation."

35. Mr Lewis made no criticism of the judge's initial identification of the legal standard in paragraphs 48 and 49 of the decision, or of the way that later on, in paragraph 58, the judge expressed his conclusion by reference to that standard. He submitted that, in between these passages, there were signs that the judge was, in fact, applying a lower standard. Thus, he submitted that in paragraph 55 of the decision the judge had explicitly avoided addressing the key question of why DK would be compelled to leave the United Kingdom. The judge had declined to decide whether DK would feel compelled to leave because of concern for her daughter or because of her need for her daughter's care and the emotional attachment between them, or a combination of the two. Mr Lewis accepted that the issue of compulsion had to be addressed globally, taking account of all relevant circumstances. He also accepted that a mother's concern for her daughter's welfare could, in principle and in a sufficiently compelling case, be a material factor. He submitted, however, that it was an error to rely on a combination of considerations where one of the considerations, DK's concern for her daughter, could not possibly amount to compulsion on its own.

36. I do not accept this argument. The judge's reference to DK's concern for her daughter arose out of the answers which she gave when giving evidence in the UT,

which the judge recorded at paragraphs 20 to 22 of his judgment, and which I have referred to at paragraph 28 above. Read in context, I agree with the submission made by Mr Biggs, who appeared for MS, that these passages were simply the way in which DK chose to express her emotional attachment to her daughter. It is quite plain that this attachment was just one aspect of her exceptional dependency, both physical and emotional, on MS. This evidence did not form anything like the whole of the evidence of DK's dependency on MS, and the judge was perfectly entitled to take it into account when conducting the analysis required by the authorities. He did not have to resolve its precise contribution to the overall dependency.

37. Next, Mr Lewis submitted that, in the same paragraph, the judge had wrongly addressed the question whether DK would "*feel compelled to leave*". This substituted a subjective analysis for that required by the Regulations, which required actual compulsion, assessed objectively. He further submitted that paragraph 53 of the judgment also revealed the same erroneous approach in law. In that paragraph the judge had accepted the evidence of DK that she could not be without her daughter, and would leave if the daughter was removed, and had treated that evidence as conclusive of the issue of compulsion. The answer to the appeal was not clear, as the judge had said, once that evidence was accepted. It was necessary to explore why DK would leave.

38. Viewed in isolation, Mr Lewis' submissions on this aspect of the appeal have a superficial attraction. Both sides agreed that the test for compulsion must be an objective one. DK's evidence that she would feel compelled to leave, or that she would definitely leave, cannot be conclusive of the issue of whether, on an objective basis, she would be compelled to leave.

39. The judge did not, however, suspend further consideration of the appeal at the point where he concluded that he accepted DK's evidence, nor did he expressly say that he was treating DK's evidence as conclusive, as opposed to giving it weight. He went on to explain why, by reference back to all the evidence given before him (including that of MS) and the preserved findings of fact from the decision of the FTT, he considered that DK would inevitably *be* compelled to leave with MS. Whatever the advantages (to some) might be of remaining in the United Kingdom, what was paramount for DK, and what deprived her of an effective choice, was her need to remain with her daughter.

40. In my judgment, therefore, the judge was conducting a perfectly proper, global, objective assessment, taking account of the evidence of MS and DK and all the other surrounding circumstances. These 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 these considerations, having seen and heard the oral evidence of DK and MS, which had led the FTT judge to find that DK's quality and standard of life would be, as Elias LJ put it in *Harrison*, "seriously impaired". The judge, who also saw and heard these witnesses give evidence in the UT, applied the correct test in law and arrived at a conclusion which was open to him.

41. Mr Lewis also submitted that the judge had failed to factor into his overall assessment the availability of state medical and social care. I do not think that is a fair criticism of the judgment. The judge made frequent reference to the availability of medical and

social care from the state and took into account the preserved and reasoned finding of the FTT that state provision would be inadequate for DK's needs.

42. The availability of state-funded medical and social care will, in many cases, make it hard for those who provide care for their elderly relatives to bring themselves within the Regulation. 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. Just as the availability of an EU citizen parent to be a carer of a minor child does not render unnecessary an enquiry into the nature of the dependency of the child on her non-EU parent (see *Chavez-Vilchez*), 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.

43. In short, I do not consider that any of the Secretary of State's grounds as advanced before us undermine the judge's evaluation of the issue of whether DK would be unable to reside in the Union if MS were to leave. For the reasons I have given I would dismiss the appeal.

Lord Justice Holroyde:

44. I agree.

Lord Justice Underhill:

45. I also agree.