



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

Appeal Number: IA/13695/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 5 July 2016**

**Decision & Reasons
Promulgated
On 12 July 2016**

Before

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR MUHAMMAD SHOAIB
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Tony Melvin (Home Office Presenting Officer)
For the Respondent: Mr D Chuckooa (Just & Brown Solicitors)

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellant, a national of Pakistan born on 2 December 1988, as the appellant herein. He arrived in this country on 11 April 2011 with leave to remain as a student. This leave was extended to 20 March 2015. On 16

February 2015 he applied for leave to remain as a carer for his grandmother relying on the principle established in **Zambrano [2011] EUECJ C-34/09** as incorporated into UK law by Regulations 15A and 18A in the Immigration (EEA) Regulations 2006.

2. The appellant's application was refused on 23 March 2015.
3. The appeal came before a First-tier Judge on 11 November 2015. The judge summarised the material points of the appellant's case as follows:
 - "10. He lived with his grandmother upon entering the UK and has lived there since that time both as a student and as her carer.
 11. Mrs Asghar is a British citizen who has been in the UK for a long number of years.
 12. The appellant pursued his studies as well as taking some care of his grandmother until toward the end of 2014 as he puts it or, as for the past two or three years as his grandmother puts it, he has become increasingly her full-time carer.
 13. Evidence of Mrs Asghar's doctor is contained in the bundle at pages 6 to 7. They give a picture of a lady who is in a very dependent state and this was confirmed by Mrs Asghar herself when she came with the assistance of the appellant into the courtroom to give evidence.
 14. She is described in the medical report as being an elderly, illiterate and frail lady of 70 years of age.
 15. She has multiple pains in the joints of her hands, back, knees and neck due to widespread osteoarthritis. She is having recurrent falls, at present as the doctor reports getting two or three falls per week. Social Services have done home adaptations such as bed railing and raised bath seats. Due to her chronic disabilities she is described as being unable to perform normal day-to-day activities of daily living.
 16. The appellant is described by the doctor as her full-time carer. He does her shopping, cooking, washing, house cleaning and taking her to hospital and surgery appointments. He reminds her about her medication and makes telephone calls on her behalf due to her inability to communicate properly in English.
 17. She is dependent upon the appellant for her personal care day and night and for emotional support. There is then a summary of her physical problems and a list of fifteen medications which she has to take.

18. The appellant described the assistance which he has to give to his grandmother. Because of the problems with her hands she cannot hold things properly and he has therefore to help her with almost every activity in the house.
19. He takes her to appointments with her doctor. He has to take her to the bathroom and take her from the bathroom although she is able at present to cope with dealing with use of the lavatory on her own once she has been taken to the bathroom.
20. He helps her with bathing by getting her into the bath and as he puts it washing her head whilst she washes the rest of her body.
21. At night time his presence is important because she tends to get into an agitated state if she wakes up and sometimes chokes in the night and he has to be within call to help her with these difficulties.
22. She would not be able to take her medication without his help with regard to giving it to her physically and reminding her of what needs to be taken and when.
23. He undertakes her clothes washing and her shopping and has to deal with communications by people who telephone. If he goes out he has to leave her in the care of a friend or neighbour as she cannot safely be left on her own.
24. Both the appellant and Mrs Asghar said that if the appellant had to leave the UK she, Mrs Asghar, would then have to go back to Pakistan where she has three daughters including the appellant's mother. She does not however wish to do that if it can be avoided because she finds that physical circumstances and in particular food in Pakistan do not agree with her. In addition to that it could be added that as a British citizen she has understandably a desire to live in the UK.
25. Mrs Asghar has a brother and sister living in the UK. The brother lives near Heathrow Airport, the sister near Gatwick. She sees them very seldom. In the case of the brother about once per year at the time of Eid. She has not seen the sister for a period of some two years. There is however some monthly contact by way of telephone with the brother. Neither of them would wish to be involved with the care of the appellant. They each have families of their own.
26. In addition to that, it is stated by the appellant, and this is echoed by the doctor in his report, that Mrs Asghar is dependent upon him for emotional care and without him she would

effectively be alone in the UK with her disabilities and her difficulty of communicating in English.

27. The respondent's case was presented very competently and in an appropriate manner by the respondent's Presenting Officer who relied on the contents of the refusal letter and pointed out that no evidence has been adduced by or on behalf of the appellant as to the availability of care for his grandmother in the UK through agencies such as the National Health Service, the Social Services or by enquires about for example the possibility of her being accommodated in a care home.
28. The respondent, although of course not under any duty to do so because the burden of proof is on the appellant, did not adduce any evidence of the availability of Social Services or other help for the care of Mrs Asghar".

4. The judge then made findings and concluded his determination as follows:

- “30. I find that the appellant is a truthful witness because his evidence was consistent and because I am satisfied having made enquiries into the matter that he was a genuine student in the UK before finding himself in the position of being a carer for his grandmother.
31. I find that Mrs Asghar's state of health is such as that she needs a full-time carer and this is amply borne out not only by the appellant's evidence but also by the evidence of the doctor referred to above.
32. I am satisfied that Mrs Asghar has no family in the UK who could assist her apart from the appellant.
33. I take account of the fact that as well as purely physical care, even if that were available from the Social Services or otherwise, she does need, particularly at her age and with her vulnerability, emotional care and only the appellant is available to provide it to her.
34. I therefore consider the requirements of Regulation 15A(4)(a) and it is clear to me that the appellant is the primary carer of a British citizen, that the relevant British citizen is residing in the UK and that the remaining question is whether Mrs Asghar would be unable to reside in the UK or in another EEA state if the appellant were required to leave the UK.
35. I find that the word 'unable' reflects not simply the legal ability or lack of ability to remain in the UK but also physical and practical ability or lack of it.

36. I find that she would be unable to obtain the sort of 24 hour per day care including emotional care which is provided by the appellant from any other agency.

37. I therefore find bearing in mind that she said she would be forced to go back to Pakistan if the appellant were to leave this country that she would be unable to reside in the UK on her own without the appellant”.

5. The judge accordingly concluded that the appellant satisfied the provisions of Regulation 15A.

6. The Secretary of State applied for permission to appeal. Permission to appeal was refused by the First-tier Tribunal. The application was renewed and Upper Tribunal Judge Kekić granted permission in the following terms:

“It is argued that the judge misinterpreted Regulation 15(4A) and applied his own legally unsustainable interpretation of ‘unable’ in paragraph 35 of the determination. The respondent relies on **Ayinde and Thinjom (Carers - Reg.15A - Zambrano) [2015] UKUT 00560 (IAC)** and argues that the issue before the judge was not whether the EEA national would obtain the same kind of physical and emotional care from someone else but whether she would be forced to leave the EEA if the appellant was removed. It is further argued that the judge was required to critically analyse the reality of any claim that the EEA national would have to leave and that his assessment in that respect was deficient”.

7. Mr Melvin relied on the grounds and submitted that the judge had focused solely on the evidence given at the hearing. The critical question was whether the EEA national would be forced to leave the EEA. It was essential that the claim was analysed critically as established in **Ayinde**. It was said that the appellant’s grandmother could not function without 24 hour care. However the appellant had been a full-time student before. There was no evidence from Social Services and it was acknowledged by the judge in paragraph 28 of his decision that the respondent was under no duty to remedy that deficiency.

8. The critical findings made in the determination were scant and unsustainable. The determination was materially flawed in law and there had been no further evidence supplied and no response to the grounds or a skeleton argument. The only evidence that had been put forward was a GP’s letter and there was nothing from Social Services. There was no evidence of any efforts being made to ascertain the care that could be provided for the appellant’s grandmother by council services.

9. Mr Chuckooa submitted that the judge had referred to the medical evidence in paragraphs 13 to 15 of the determination. Mrs Asghar was frail and had had multiple falls. There had been adaptation to the home by Social Services. The appellant had been described by the doctor as his grandmother's full-time carer.
10. If the appellant were removed she would be looked after by different staff and would not receive the same care as she had received for the previous four years. If, for example, she needed water she could not communicate in English. The appellant also provided emotional support. His grandmother was comfortable with the care she was receiving and would be prejudiced by the appellant's removal. Care would not be on the same basis if she had to leave. She might catch illnesses in Pakistan. There was a rota system in Social Services support and she would not be in the same situation as she was at present and it was inappropriate to reverse the First-tier Judge's decision.
11. In reply Mr Melvin relied on the points that he had made. The test was one of inability rather than what was the most beneficial outcome. The grandmother would not be forced to return to Pakistan in the absence of the appellant. The determination had not been properly reasoned.
12. At the conclusion of the submissions I reserved my decision. I can of course only interfere with the judge's decision if it was materially flawed in law.
13. Regulation 15A provides so far as is material that a person is entitled to a derivative right to reside in the United Kingdom for so long as he satisfies the relevant criteria. The criterion at issue in this case is set out in paragraph (4A)(iii). As Mr Melvin submits in the circumstances of this case it must be established that the appellant's grandmother "would be unable to reside in the UK or in another EEA state" if the appellant were required to leave.
14. In the case of **Ayinde** the Tribunal state as follows in the following extract from the head note:
 - “(iii) The requirement is not met by an assumption that the citizen will leave and does not involve a consideration of whether it would be reasonable for the carer to leave the United Kingdom. A comparison of the British citizen's standard of living or care if the appellant remains or departs is material only in the context of whether the British citizen will leave the United Kingdom.
 - (iv) The Tribunal is required to examine critically a claim that a British citizen will leave the Union if the benefits he currently receives by remaining in the United Kingdom are unlikely to be matched in the country in which he claims he will be forced to settle”.

In paragraph 50 of the decision the Upper Tribunal Judge stated that there was no justification for the decision of the First-tier Judge to exclude from consideration Social Services support. The Secretary of State had properly argued in the refusal letter in that case that if the appellant were not present in the United Kingdom to care for his mother “she could procure assistance from other sources with the help of Social Services. Her ability to do this was a vital consideration in the appeal”. In paragraph 55 the Tribunal states as follows “the differential in the care provided by a family member acting as carer and the standard of care provided by Social Services, care agencies or the NHS does not engage the **Zambrano** principle ...”

In paragraph 57 of its decision the Tribunal states as follows:

“The Tribunal is entitled to look critically at a claim that a person will be forced to leave the EU because of a refusal by the national authorities to grant his carer leave to remain. The reason for such a critical look is because the claim advanced will be the very opposite: it will be a claim that the carer be permitted to remain and the British citizen will not be required to move. Mr Knafler himself referred to this in the course of argument as a paradoxical claim”.

In paragraph 58 the Tribunal refers to the fact that there will be “a significant evidential hurdle in attempting to make out a case that the British citizen will, as a matter of fact, leave the United Kingdom”. If the care available in the UK is not available in the country to which the UK citizen would be compelled to move to, the likelihood of that citizen in fact moving was remote. The Tribunal comment “a bare assertion that the British citizen will be forced to leave the United Kingdom is unlikely to be sufficient; all the more so if this has been his only home for many years”.

15. The judge in this case did not have material from Social Services to support his findings. There was simply a GP’s letter. In paragraph 26 the finding that Mrs Asghar “would be unable to obtain the sort of 24 hour per day care including emotional care which is provided by the appellant from any other agency” was reached without having evidence from Social Services. Moreover the fact that there might be a qualitative difference in the care provided does not justify the conclusion reached in the following paragraph that the appellant’s grandmother would be forced to go back to Pakistan. The determination suffers from the lack of critical analysis which is required. This is particularly so given the complete absence of any evidence from Social Services as to the care that Mrs Asghar would be given. In granting permission, Judge Kekić referred to paragraph 59 of **Ayinde** and the care required before reaching a conclusion that a British citizen would be at risk of a forced departure from the UK:

“... it is not enough that the British citizen would prefer that his carer is permitted leave to remain in the United Kingdom. There is nothing intrinsically lacking in human dignity in being offered the professional help of care workers or being placed into residential accommodation with a sliding scale of support ranging from a home adapted to the individual’s needs, through to accommodation with a warden, through to a residential home; through to full nursing care. It would be plainly incorrect to say that it is a violation of an individual’s rights to human dignity to be placed into care or to receive help from professional health care workers”.

16. As Mr Melvin points out, there has been no response to the grant of permission and no further material has been put in and no skeleton argument provided.

17. I accept the challenge made by the Secretary of State to the findings in this case. The determination is materially flawed in law for the reasons I have given. I substitute a fresh decision: the appeal under the EEA Regulations is dismissed.

Anonymity Direction

18. Anonymity direction not made.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed

Date 11 July 2016

G Warr
Judge of the Upper Tribunal