



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001654
FtT No: EA/50604/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 25 July 2023

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN
DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAFIA BIBI
(ANONYMITY ORDER SET ASIDE)

Respondent

Representation:

For the Appellant: Mr A Basra, Senior Presenting Officer

For the Respondent: Mr L Youssefian, Counsel, instructed by Kamran & Co Solicitors

Heard at Field House on 28 June 2023

DECISION AND REASONS

Introduction

1. The appellant is referred to in this decision as the Secretary of State, and the respondent as Mrs Bibi.
2. The Secretary of State appeals against a decision of Judge of the First-tier Tribunal Ford ('the Judge'), sent to the parties on 9 April 2023, allowing Mrs Bibi's appeal against a decision not to issue her with a derivative residence card as the primary carer of her husband, a British citizen. Mrs

Bibi asserts that she enjoys a 'Zambrano' right to reside in this country: Case C-34/09 *Ruiz Zambrano v Office national de l'emploi* [2012] QB 265, [2011] 2 CMLR 46. This right was, at the relevant time, implemented by regulation 16 of the Immigration (European Economic Area) Regulations 2016.

Anonymity

3. The Judge issued an anonymity order. No explanation was provided as to why this order was issued. Mr Youssefian informed us that an order had not been sought by Mrs Bibi.
4. We are mindful of Guidance Note No 2 2022 concerned with the issuing of an anonymity order and we observe that the starting point for consideration of such order in this Chamber of the Upper Tribunal, as in all courts and Tribunals, is open justice. The principle of open justice is fundamental to the common law. The rationale for this is to protect the rights of the parties and also to maintain public confidence in the administration of justice. Revelation of the identity of the parties is an important part of open justice: *re: Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697.
5. Even in cases involving exploration of intimate details of an appellant's private and family life, including medical conditions, the full force of the open justice principle should not readily be denigrated from: *Zeromska-Smith v. United Lincolnshire Hospitals NHS Trust* [2019] EWHC 552 (QB).
6. We observe that Mr Youssefian sought for the status quo to remain in respect of the order, but he accepted there had been no assertion before the Judge that any personal circumstances arose in this matter to displace the principle of open justice. We are satisfied that the private life rights of Mrs Bibi, and members of her family, do not outweigh the public interest in open justice and so there is no requirement that she enjoy anonymity.
7. We therefore set aside the anonymity order of the Judge.

Brief Facts

8. Mrs Bibi is a national of Pakistan and aged 70. She is married to a British citizen who is aged 76. They were married in Pakistan in 1969 and have four surviving children.
9. Her husband, Mr Muhammad Rasheed, claimed asylum in the United Kingdom in 2000. The application was refused by the Secretary of State but he subsequently secured ILR in 2009 and was naturalised in 2013.
10. Mrs Bibi's husband suffers from several medical conditions, primarily related to his advancing years.
11. Mrs Bibi entered the United Kingdom as a visitor on 4 February 2012, with leave to enter until 22 June 2012. On 21 June 2012 she submitted a

human rights (article 8) application which was refused by the Secretary of State on 8 February 2013. Mrs Bibi appealed against this decision and her appeal was dismissed by a decision of Judge of the First-tier Tribunal Lobo dated 19 November 2013. Having considered the evidence presented to him, Judge Lobo concluded that Mrs Bibi had lied to an Entry Clearance Officer, an Immigration Officer when arriving in this country, and to the Tribunal. Judge Lobo further found that her husband had lied to the Tribunal. Reasons were given for these conclusions. The appeal was dismissed on the ground that Mrs Bibi's removal from the United Kingdom would not disproportionately breach her article 8 rights.

12. Mrs Bibi applied for a derivative residence card on 6 August 2020. The Secretary of State refused the application by a decision dated 26 October 2020 observing, *inter alia*:

'Among your submissions in support of this application you have submitted your sponsor's DWP Pension Credit calculations dated 11 April 2016 and 20 November 2017 that record your sponsor has declared that he is single. You have also submitted council benefit letters based on Pension Credit calculation indicating single person council benefits. This is despite the fact that you have lived as a married couple since you entered the United Kingdom on 04 February 2012.

...

Your application is refused for the following reason(s):

- You have not provided sufficient evidence to show you are the primary carer of Muhammad Rasheed for the following reason(s):
 - you have provided insufficient evidence that the British citizen is unable to meet their own daily care needs.
 - you have provided insufficient evidence that the care needs of the British citizen cannot be met through an alternative source such as another relative, the NHS or a local authority

...

Furthermore, in order to qualify for a derivative residence card under the *Zambrano* ruling you are also required to demonstrate that the British citizen you are claiming to care for would be unable to continue to reside in the United Kingdom if you were required to leave.

No evidence has been provided which would demonstrate that he could not call upon the services of outside agencies including Social Services, if required. It is common ground that the local authority is under a statutory obligation to provide sufficient adult care to those who are eligible.'

The First-tier Tribunal Decision

13. The matter came before the Judge at a remote hearing. Two of Mrs Bibi's children gave evidence. The Judge considered Mrs Bibi's husband to be an unimpressive witness; dissembling and avoiding questions.

14. The Judge was critical of what she considered to be deliberate efforts not to seek and secure appropriate evidence that would aid in considering the appeal before her:

'14. In his evidence the appellant's husband was asked whether he had looked into the availability of NHS care, local authority care and/or private care to meet his needs. He told me that he was unable to get alternative care for his needs because he had asked his doctor about 24-hour care and was told that he would not be entitled to it. I find that he knew perfectly well that this was not the appropriate question to ask of his doctor. He has had legal advice throughout. He and his legal advisers should have looked into the costs and availability of private care to meet his needs if the appellant was no longer available. He chose not to provide this evidence and, in my view, deliberately so.'

15. The Judge gave reasons for placing little weight upon the report of an independent social worker, Mr Musendo, which was relied upon by Mrs. Bibi:

'16. It was submitted by counsel for the Secretary of State, that I can attach little weight to the report of the Independent social worker because he was not independent, simply repeating what had been told to him by the appellant and his wife. This criticism is justified in that Mr Musendo apparently made no attempt to independently verify what he was being told and had little access to up-to-date independent medical evidence.'

16. Having read the report of Mr Musendo we agree with the Judge. The simple reciting of information provided and the uncritical acceptance of it significantly undermines the 'independence' of a social worker purporting to provide objective observations to this Tribunal. We consider that Mr Musendo made no attempt to independently verify what he was being informed by Mrs Bibi and her family. Additionally, he exhibited no concern as to his limited access to any relevant medical evidence.

17. The Judge gave several reasons for finding that Mrs Bibi is her husband's primary carer, which we recite in full, at [22]

- 'a. I accept that the appellant's husband suffers from various serious conditions including osteoarthritis, diabetes, hypertension, sight and hearing issues and mobility issues.
- b. The appellant's husband is receiving attendance allowance at the highest level which indicates a high level of need.
- c. While I accept that the appellant's husband is not entitled to 24-hour care, I consider this to be something of a red herring

- d. The Secretary of State in my view attached too little weight to the psychological, emotional and social impact on the appellant's husband of losing her care and her presence in his daily life.
- e. I accept that the appellant's husband would lose his carer's allowance if he relocated to Pakistan to be with his wife there and to continue her support for his daily needs. This would be a disincentive for him to leave the UK.
- f. While I find that the appellant's adult children sought to exaggerate the difficulty, they had in providing practical, emotional, psychological and social support for their father, I accept that he would have great difficulty emotionally and psychologically if they, or strangers, were to provide for his physical needs on a day-to-day basis
- g. The level of need of the appellant's husband has increased markedly over the last 8 years to such an extent that he now presents as a severely frail vulnerable elderly man. This is noted in his running records.
- h. I accept on the evidence, although it is finely balanced, that the appellant's husband would be emotionally and psychologically compelled to leave the UK to continue to enjoy the ongoing emotional and psychological support of his wife where she compelled to leave. While I accept that he would want to continue to receive medical treatment in the UK, he could travel back and forth to the UK to do so. He would not however be able to find the equivalent psychological, emotional and social support from alternative sources if the appellant were to leave the UK, although I do accept that he could access social services carers to provide for his basic physical, medical and nutritional needs.'

18. In allowing the appeal the Judge concluded:

'26. Although this case is finely balanced and the appellant and her husband are open to much criticism for their failure to be open and honest with the authorities, and with this Tribunal, ultimately, I except that the perception of the appellant and her husband is that they would be left with no practical choice but for the appellant to join his wife in Pakistan if she had to leave. I find that he would do so. At this point in time, given the heavy dependence of the appellant on his wife, particularly psychologically, socially and emotionally, I accept that the appellant's husband would feel compelled to leave with her if she were forced to leave the UK. This is not because the medical treatment he is receiving in the UK is better than anything he would receive in Pakistan. Rather it is because the psychological social and emotional support the appellant receives from his wife, and has received from her for over 10 years cannot now be provided by others, including the appellant's adult children.'

Grounds of Appeal

19. The Secretary of State's challenge is succinctly advanced by her grounds of appeal:
- '1. The Judge of the First-tier Tribunal has made a material error of law in the Determination. Although outwardly having regard to the relevant statute and case law in respect of the assertion of a *Ruiz Zambrano* right to reside based on an adult British citizen, Judge Ford has erred by applying the wrong test in practice and in having regard to irrelevant considerations and not properly weighing relevant considerations.
 2. One such criticism can be succinctly expressed by reference to paragraph 26. There is a difference between whether the appellant's husband would feel compelled to leave and whether he would be so compelled.
 3. In reaching this contentious conclusion Judge Ford has erred in not weight [*sic*] the available combined support of the couple's adult children and the social care system, instead looking only at whether either side could provide comparable carefully in line with what the appellant is providing.
 4. Furthermore, in what is expressed as a finely balanced case the Judge has had regard to the irrelevant matters of the loss of carer allowance if the couple returned to Pakistan together and has considered the possibility of Mrs Bibi applying from abroad to return without saying for what. There is no provision now for entry from abroad pursuant to a *Zambrano* right and any application based on family life or Article 8 could and should be made in the United Kingdom in order to rule out that possibility of such alternative basis of stay avoiding the compulsion to leave.'
20. Judge of the First-tier Tribunal Athwal reasoned in her grant of permission to appeal, dated 15 May 2023, that it is arguable the Judge erred in her consideration as to whether the combined support of the appellant's adult children and social care would be insufficient and compel the appellant to leave.

Discussion

21. Paragraph 1 of the grounds is overarching and relates to the particular challenges advanced subsequently in the document.
22. Turning to the contention that the Judge applied the wrong legal test, we observe that the *Zambrano* jurisprudence has at its heart the requirement that the EU citizen would be compelled to leave EU territory if the third country national with whom the EU citizen has a relationship of dependency is removed: *Patel v. Secretary of State for the Home Department* [2019] UKSC 59, [2020] 1 WLR 228, at [16] and [22]. In the case of an adult, it will only be in exceptional circumstances that a third

country national will have a derivative right of residence by reference to a relationship of dependency with an adult EU citizen.

23. The test of compulsion is an objective one: *MS (Malaysia) v. Secretary of State for the Home Department* [2019] EWCA Civ 580, [2019] INLR. 438. This requires 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. This in our judgment the approach which the Judge adopted.
24. We consider that the high point of the Secretary of State's appeal is paragraph 3 of the grounds, and it was upon this paragraph that Mr Basra concentrated.
25. We agree with Mr Youssefian that the target of the Secretary of State's grounds is misplaced. Rather than the Judge allowing the appeal on 'care' grounds, it is clear from the decision that the deep and meaningful dependency identified is limited to ongoing psychological, social and emotional support that Mr Rasheed receives from Mrs Bibi, and it is this which tipped the finely balanced assessment. The Judge expressly accepted at [22(h)] that Mr Rasheed could access social service carers to provide for his basic physical, medical and nutritional needs. Consequently, this is not a matter where the Judge considered that the husband's care needs could not be met in the United Kingdom. It is noteworthy that the Judge gave no reasons for this finding of fact, but as Mr Youssefian appropriately observed this was an adverse finding against Mrs Bibi. The Judge's conclusion as to dependency was firmly directed to Mr Rasheed's emotional and psychological dependency upon his wife.
26. We note the judgment of Lord Justice Floyd in *MS (Malaysia)*, at [42]:
 - '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.'
27. The question the Judge was required to ask was whether Mr. Rasheed would in practice be compelled to leave this country with Mrs Bibi, because the lack of practical alternatives in respect of his emotional and psychological dependency upon his wife left him with no practical choice but to do so. The Judge found the question to be answered in the positive, after a careful, fact-sensitive assessment. There is no challenge to the

finding that the couple's children could not satisfy the emotional and psychological needs of their father. Whilst other judges may not have reached the same conclusion, on the facts as found, the conclusion that Mrs Bibi's husband would be compelled to accompany her to Pakistan is rational and so lawful.

28. As to paragraph 4 of the grounds, Mr Youssefian accepted by means of his helpful skeleton argument that at [22] the Judge considered factors that were irrelevant, such as Mrs Bibi's ability to apply from abroad to join her husband in the United Kingdom. We also consider that other irrelevant factors were considered by the Judge, including the potential loss of carer's allowance to her husband. However, we conclude these matters to have been peripheral at best when the Judge answered the question required of her, and so these errors were not material to the Zambrano assessment.
29. In the circumstances, we dismiss the Secretary of State's appeal.

Notice of Decision

30. The decision of the First-tier Tribunal sent to the parties on 9 April 2023 does not contain a material error of law, and so the Secretary of State's appeal is dismissed.
31. The anonymity order issued by the First-tier Tribunal on 9 April 2023 is set aside.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

17 July 2023