Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/13715/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 March 2018	**On 29 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

EMRUL HUSSAIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Aly, counsel.
For the Respondent: Ms A Everett, Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal dismissing his appeal against the respondent's decision of 8 November 2016 refusing him a derivative right of residence under reg. 15(4A) of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") as the primary carer of his wife.

Background

2. The appellant is a citizen of Bangladesh born on 10 March 1965. He has a poor immigration history. He says that he entered the UK on a false passport in 2001 and again in July 2008. On 22 June 2003 he was served with notice as an illegal entrant following which he claimed asylum. His application was refused, and his appeal was dismissed on 21 August 2003. In July 2004 he applied for indefinite leave to

remain which was refused. In April and June 2013, he made applications on human rights grounds but both were refused. On 8 January 2016 he applied for a derivative residence card which was refused on 8 March 2016 and on 11 May 2016 he made a further application which was again refused and is the subject of this appeal.

3. He claims to be the primary carer of his wife, a British citizen. They married in a civil ceremony on 2 July 2013 following a religious ceremony on 12 November 2012. The respondent refused the application on the basis that, although the appellant claimed to be the primary carer of his wife, it appeared that this was by choice as he had not provided any evidence that her condition was so severe that she needed a carer or that she was wholly dependent upon him. The respondent was not satisfied that adult social services could not provide her with any required care. The appellant had said that when was away at work for three days a week, his wife was cared for by other family members. There was no evidence that they would be unable to care for her should he be required to leave the UK and he had failed to demonstrate that his wife would be unable to reside in the UK if her carer were required to leave.

The Hearing before the First-Tier Tribunal

4. At the hearing the appellant produced documentary evidence including medical evidence, in a bundle indexed and paginated 1-53 and the judge heard oral evidence from the appellant, his wife and her son. He set out his findings at [24]-[35]. He identified a number of discrepancies in the evidence relating to whether the appellant was in employment that was paid or unpaid and how he travelled to his place of work [25]-[26]. The judge said at [27] that faced with these contradictions, he had to conclude that neither the appellant nor his wife were credible witnesses. It had also emerged in the course of cross-examination that until very recently his wife's son and daughter-in-law had been living in the same house as the appellant and his wife, but it was said that they had moved out about two months before the hearing. The judge did not accept that this was the case and found on balance that the family were still residing with the appellant and his wife [29]. He also noted that the appellant's wife had a daughter living in Luton with her family and that she was likely to be available to provide some assistance [30].

5. The judge was not satisfied that the medical evidence was sufficient to enable him to conclude that the appellant was acting as his wife's carer to anything like the extent claimed [31]. However, the appellant not only had to show that he was her primary carer but also that if he was required to leave the UK, she would be "unable to reside" in the UK. He referred to the Upper Tribunal decision in Ayinde and Thinjom (Carers – Reg. 15A - Zambrano) [2015] UKUT 560 where it was held that the carer had to establish as a fact that the person cared for would be forced to leave the UK. The judge was not satisfied that this had been shown. For these reasons the appeal was dismissed.

The Grounds and Submissions

6. In the grounds of appeal, it is argued that the judge failed to consider the evidence in the round and in particular the medical evidence from the GP and the diabetes specialist nurse and members of the family. Secondly, it is argued that the judge misinterpreted the term "primary carer" and the fact that the appellant's wife occasionally had assistance from others did not exclude the appellant from being the primary carer who did the vast majority of the work.

7. Permission to appeal was granted by the First-tier Tribunal, the judge identifying the following matters as arguable:

   (i) The judge had arguably approached and assessed the evidence contrary to EU principles of purposive construction but had weighed the evidence hypercritically on the issue of whether the appellant was shown to be the primary carer and whether his wife would be unable to reside in the UK if he were required to leave.

   (ii) Credibility had appeared to be the focus of the judge's concern. There appeared arguably to be an absence of regard to whether the appellant's wife was a vulnerable witness in accordance with the Tribunal Practice Direction of 2010 and, if so, this would have affected the approach to the assessment of her evidence including the various discrepancies identified and whether she would leave the UK if her husband had to go.

   (iii) The judge had referred to the relative lack of medical evidence but there were letters from the GP and a report from a diabetes specialist nurse and it was arguable that the GP's evidence was assessed hypercritically and the evidence from the nurse appeared to make no appearance in assessing whether the appellant was the primary carer of his wife.

   (iv) When assessing whether the appellant's wife would leave the leave the UK there was arguably an absence of real regard for the conjugal basis of the relationship which appeared to be unchallenged but rather there appeared to be an assumption that NHS care, the support of the children and other family ties in the UK would naturally fall into place and replace the emotional benefits of the close care provided by a husband for his wife.

   (v) The decision arguably disclosed an inadequacy of reasons concerning the totality of the material evidence.

8. In her submissions Ms Aly adopted the arguments identified in the grant of permission to appeal. She submitted that the judge had failed to take a global and purposive construction to the evidence, had relied too much on his findings on credibility and had not taken proper account of the medical evidence. The appellant's wife should have been treated as a vulnerable witness and her evidence should have been assessed in that context. Apart from a reference to her frailty, there was nothing to show that her evidence had been assessed in the light of her vulnerability. She submitted that the medical evidence had not been properly

analysed. There was sufficient evidence to show that the appellant was the primary carer. The judge had failed to take proper account when assessing whether his wife would leave the UK of the fact that they were husband and wife. In summary, the judge had failed to give adequate reasons, so she submitted, for his decision and had failed to analyse the evidence properly.

9. Ms Everett submitted that the grounds were misconceived as was the grant of permission to appeal. There was no substance in the submission that the judge had applied a wrong approach to the test for the grant of a derivative right of residence, which was a quite stringent test. It had to be shown firstly that the appellant was the primary carer and the concerns the judge expressed about the evidence on that issue were fully justified by the matters he had identified relating to the appellant's work and whether other family members had continued to live in their home and secondly, that his wife would be unable to reside in the UK if he had to leave. There was no reason to believe that the judge did not take full account of the extent of the family relationship when considering whether the appellant's wife would be unable to reside in the UK. He had taken proper account of the guidance in Ayinde and Thinjom and had reached a decision open to him on the evidence.

Assessment of the Issues

10. In order to qualify for a derivative residence card, the onus was on the appellant to show that he met the provisions of reg. 15(4A) of the 2016 Regulations, namely that he was the primary carer of a British citizen residing in the UK and that she would be unable to reside in the UK or in another EEA state if he were required to leave. These provisions were considered by the Upper Tribunal in Ayinde and Thinjom and in particular the requirement that it had to be shown that the person cared for would be unable to reside in the UK if her primary carer had to leave. The Tribunal's conclusions on this issue were set out in [51] and in the italicised headnote as follows:

> "(i) The deprivation of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizens identified in the decision in Zambrano [2011] EUECJ C-34/09 is limited to safeguarding a British citizen's EU rights as defined in Article 20.
>
> (ii) The provisions of reg. 15A of the Immigration (European Economic Area) Regulations 2006 as amended apply when the effect of removal of the carer of a British citizen renders the British citizen no longer able to reside in the United Kingdom or in another EEA state. This requires the carer to establish as a fact that the British citizen will be forced to leave the territory of the Union.
>
> (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."

11. I now turn to the submissions. I am not satisfied that it is shown that the judge applied an incorrect or unlawful approach to his assessment of the evidence by failing to follow EU principles of construction or that he weighed the evidence hypercritically. The fact that the judge was aware of the correct approach to the assessment of issues relating to EU law is clear from his reference in [32] to the fact that, although such provisions have to be interpreted broadly so as to give effect to the purpose of the Regulations, in this case to facilitate the free movement of nationals, the word "unable" to continue to reside in the UK in the Regulations was still a difficult one to demonstrate nor am I satisfied that when the decision is read as a whole can it be said that the judge weighed the evidence hypercritically.

12. It was for him to make findings of fact and to decide what inferences could properly be drawn from his findings of primary fact. When considering the evidence about the appellant's work, he was entitled to note that there was a contradiction between the evidence set out in his wife's statement that they were dependent on his earnings from his work and her oral evidence saying that she did not know whether his work was paid or unpaid. It was also for the judge to decide what inferences to draw from the evidence that the appellant worked 70 miles away from his home three days a week, the suggestion being that this was for two or three hours voluntary work. The judge was entitled to comment that whatever the true position about the distance, pay or hours worked, it was for the appellant to show what the position was and that there should have been no difficulty in providing such evidence, but none had been produced. The judge was also entitled to comment that it was only in the course of cross-examination that the issue arose about whether her son and daughter-in-law's family were still living in the same household as the appellant and his wife and that, if the family had moved out two months previously, he would have expected this to be set out in the witness statements and to be supported by some documentary evidence. I am satisfied that the judge's findings of fact were properly open to him.

13. It was argued that the appellant's wife should have been treated as a vulnerable witness and that her evidence should have been assessed accordingly. This issue does not appear to have been raised specifically at the hearing before the First-tier Tribunal but the appeal necessarily raised the issue of the issue of whether the appellant's wife was a vulnerable person as someone cared for primarily by her husband. The judge did comment that the appellant's wife appeared to be extremely frail and had to be helped to the witness chair [11] but he had to assess not simply the appearance but the reality of her medical condition and its consequences. When making that assessment he had to consider the evidence as a whole and in particular the contents and extent of the medical evidence.

14. This leads to the issue of whether the judge failed to take proper account of the medical evidence relating to the appellant's wife. The judge dealt with this at [31], commenting that the conditions diagnosed by her GP were unsurprising in a woman

of 70 and highlighting that in his letter of support, the GP had said that she was at high risk of heart disease, but this was not the same as suffering from heart disease. This was a comment open to the judge, as was his comment that there was no assessment of matters such as her mobility or her ability to carry out her day-to-day tasks for the purpose of obtaining benefits or carers allowance. There was a report from a diabetes specialist nurse which the judge was clearly aware of as he referred to it in [25] albeit in the context of recording that the appellant worked 70 miles away from home for three days a week and that other family members were required to provide support for his wife.

15. There is no reason to believe that the judge left that report or any other medical evidence out of account when assessing whether the appellant was his wife's primary carer. It was for him to decide what inferences to draw from the evidence in relation to the provision of care, particularly in the light of the evidence that the appellant worked away from home three days a week and that other family members provided support during this period. The judge was entitled to comment at [32] that it may well be that the appellant was her main supporter to the extent that she required care but how much care she required and how much he provided was difficult to ascertain as he did not accept that their evidence was credible. I am not satisfied that the judge erred in law in the way he approached the assessment of the evidence of the appellant's wife. It was for him to assess the extent to which she required care and the extent of her vulnerability, but the evidence taken as a whole failed to satisfy him to the required standard of the care she in fact required or that the appellant was her primary carer

16. It is then argued that the judge failed to take into account the conjugal basis of the relationship between husband and wife when considering whether it was shown that the appellant's wife would be unable to reside in the UK if he were required to leave. The conjugal relationship of husband and wife is relevant to that issue but is by no means determinative. As the Upper Tribunal pointed out in Ayinde and Thinjom at [54], whilst a minor child could survive without his parents in that adoption, foster care or a children's home may provide an adequate level of care, such alternative care was only likely to be contemplated if there were serious reasons for breaking the relationship between a child and one or both of the parents but elderly adults could more readily survive without a family member to act as their carer if there were adequate support mechanisms to provide them with alternative care to an appropriate standard. Whilst it was beyond the range of proportionate responses that a minor should go into some form of alternative care to enjoy his EU rights were both his parents required to leave, the same consideration did not normally apply to the infirm or the elderly.

17. At [56] the Tribunal said that the fact that children were in need of specific forms of protection was acknowledged by the UN Convention on the Rights of the Child and the immigration rules reinforced the special position of children, it being an exception to the public interest in favour of removal if it was established that removal would be "unduly harsh" for a qualifying child but no comparable system of regulation applied to the needs of the elderly, certainly in the context of recognising

the rights of family members to maintain family life together. The Tribunal held that this distinction informed a consideration of the Zambrano principle when applied to persons other than minor children.

18. The judge was not satisfied that it had been shown that the appellant's wife would have no choice but to leave the UK. It had not been a point made in their witness statements, although it was addressed in oral evidence, and in this context the judge was entitled to comment that it took two attempts for the appellant and his wife to agree that she would have to leave [34]. The judge found at [35] that from a purely medical point of view the withdrawal of the care and support provided by the appellant would not have a significant impact on his wife's treatment or day to day activities given the availability of other family members, the diabetes specialist nurse or other NHS support. He was not satisfied that the appellant's wife would in fact prefer to leave, let alone be unable to remain in the UK: she was British citizen, she would have to leave her children and grandchildren in the UK apart from the advantages of free medical care. This was a finding of fact properly open to the judge for the reasons he gave.

19. Finally, I am satisfied that with the decision is read as a whole, there is no inadequacy of reasons. The judge has explained why he was not satisfied that the appellant had shown either that he was the primary carer or that his removal would lead to a situation where his wife would be unable to reside in the UK.

20. Accordingly, I am not satisfied that the judge erred in law. He reached findings and conclusions properly open to him the evidence for the reasons he gave.

Decision

21. The First-tier Tribunal did not err in law and its decision stands. No anonymity order was made by the First-tier Tribunal.

Signed: H J E Latter Dated: 27 March 2018

Deputy Upper Tribunal Judge Latter