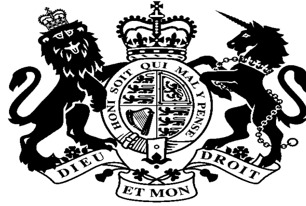

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05202/2018

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre **Decision & Reasons Promulgated**
On: 17th June 2019 **On: 30th July 2019**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHSIN BASHIR
(NO ANONYMITY DIRECTION MADE)

Respondent

For the Appellant: **Mr Bates, Senior Home Office Presenting Officer**
For the Respondent: **Ms Mensah of Counsel instructed by Gill Law Chambers**

DECISION AND REASONS

1. The Respondent is a national of Pakistan born on the 1st February 1986. On the 2nd October 2018 the First-tier Tribunal (Judge Shergill) allowed his appeal under the Immigration (European Economic Area) Regulations 2016 ('the EEA Regs'). The First-tier Tribunal accepted that the Respondent Mr Bashir is the full time-carer for his British father and accordingly that he has established a *Zambrano* derivative right of residence under Reg 9.

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2. The Secretary of State now has permission to appeal against that decision. The Secretary of State's complaint is that the First-tier Tribunal erred in two material respects:

   i) In failing to apply the principles in Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* [2002] UKIAT 00702. The First-tier Tribunal (Judge Malik) had earlier determined as a matter of fact that Mr Bashire's father would not leave the United Kingdom with his son, and this First-tier Tribunal was bound to treat that finding as its starting point.

   ii) In failing to apply the guidance in Ayinde and Thinjom (Carers – Reg 15A- Zambrano) [2015] UKUT 00650 was a determination, in particular in failing to consider whether alternative care arrangements were available to Mr Bashire's father

Discussion and Findings

Ground (i)

3. The First-tier Tribunal recognised that there had been a previous determination on the same facts at its paragraph 4. At paragraph 6 it specifically recognises the legal implication of that matter:

> "The 2016 decision relates to a hearing on 19/9/16 and there was a repetition of some material/arguments relied on in this application. I am mindful that *Deevaseelan* applies. The material was now somewhat dated and probably was obtained in order to secure the appellant's release from detention"

4. The Tribunal then goes on to consider whether there was anything different in the material before it. At paragraph 7 it notes that in 2015 the DWP had stated that Mr Bashire's father required someone to look over him at night, and found itself satisfied that this remained the case today. The same DWP assessment had stated in terms that Mr Bashire is his father's sole carer. It then says this:

> "…The issue in 2016 was dependent and a lack of proper medical evidence including a psychiatric report.
>
> The appellant now relies on a psychiatric report dated 10/11/16 (ie after the last hearing) and I am satisfied that this is sufficiently probative new evidence to move away from the starting point in the last decision…"

5. Ms Mensah strongly contends that these self-directions demonstrated a) that the Tribunal understood that <u>Devaseelan</u> applied here and b) that it applied the principles therein. I agree. In her 2016 decision Judge Malik had noted [at her §20] that there was no psychiatrist's report before her and that she clearly considered that to be an omission. That was an omission that had been rectified before Judge Shergill, and the determination simply reflected that. What is less clear is how that assisted Mr Bashire. This brings me to the second ground.

Ground (ii)

6. The Secretary of State's real issue with this determination is that the First-tier Tribunal has failed, in making its findings, to apply the guidance in <u>Ayinde and Thinjom</u>. In this reported decision the Upper Tribunal (Judge Jordan) had found that the only question for judges considering Zambrano applications was whether *as a matter of fact* the British citizen *would* leave the territory of the EU as a consequence of the third-country national being required to leave.

7. There can be no doubt that Judge Shergill did make such a finding:

> "The impact on the father is highly likely to lead to him wishing to reunite with his son as the only family member he has. That would mean he would be compelled to leave the territory of the EEA; and on balance I conclude that is likely to occur".

8. Judge Jordan had however not stopped there. His guidance has gone on to specify what factors decision makers must take into account in reaching that final conclusion of fact (emphasis added:

> 57. **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.
>
> 58. Secondly, **if the claim is based on the British citizen being forced to leave the Union, the likelihood of this occurring has to be assessed by reference to the benefits the Union citizen is receiving in the UK and will be entitled to receive were the appellant to leave. Hence, if the British citizen is in receipt of free healthcare, subsidised accommodation (or an allowance to assist in the payment of rent) and state benefits, pensions and fringe benefits in the form of concessions available to the elderly, 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. In reality if these benefits are not available in the country to which he claims he will be forced to travel by reason of the refusal of a grant of a derivative residence card to his carer, the likelihood of his doing so is likely to be remote. Hence the Tribunal will also have to compare the conditions that a British citizen will meet on being forced to settle elsewhere when assessing whether he is being forced to leave the United Kingdom. The greater the disparity, the less likely it will be that the British citizen will in fact leave the United Kingdom. **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**.

59. Thirdly, whilst these appeals were put on the basis that the British citizen has a right to human dignity which is inviolable and must be respected and protected, (the violation of which acts as the spur to his claim to be at risk of a forced departure from the United Kingdom), some care must be taken before reaching such a conclusion. 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 healthcare workers.

60. This leads us back to the words of reg. 15(4A) (iii) that the British citizen must be *unable to reside in* the United Kingdom if the appellant were to leave. These words can readily be applied in both appeals: Mrs Animashaun and Mr Stevens are *able* to reside in the United Kingdom".

9. I am unable to discern from the decision of Judge Shergill that any of these material questions of fact were considered. Mr Bashire's father has lived in the United Kingdom since 1971. He has put down roots through long residence and employment in this country. He relies on his state pension and associated benefits, and is evidently heavily dependent upon the services of the NHS. Those were material matters of fact which should have been weighed in the balance when the Tribunal was deciding whether as a matter of fact this

gentleman would elect to return to Pakistan with his son. It was an error of law to omit them from the reasoning process.

Disposal

10. The material facts identified by the Secretary of State's ground (ii) are not determinative. Notwithstanding that Mr Bashire's father receives a great deal of support and comfort from living in the United Kingdom, his country of nationality, it is still entirely possible that he would as a matter of fact leave it all behind to stay with his son. In her submissions Ms Mensah took me to various points in the evidence, in particular the report of Consultant Psychiatrist Dr Haroon Moosa, capable of indicating that his emotional dependency is such that he would in fact elect to do so. That report requires careful evaluation, in line with the totality of the evidence and the factors highlighted by Ayinde and Thinjom's case. I therefore find that in light of the extensive findings of fact required, that the most suitable disposal would be that this matter is re-heard in the First-tier Tribunal.

Decisions

11. The determination of the First-tier Tribunal is flawed for material error of law and it is set aside.

12. The decision in the appeal is to be re-determined in the First-tier Tribunal.

13. There is no order for anonymity.

Upper Tribunal Judge Bruce
8th July 2019