Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04549/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 August 2020	**On 22 September 2020**

Before

UPPER TRIBUNAL JUDGE PITT

Between

MR RAJA [K]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Hayes, Counsel, instructed by Deo Volente Solicitors LLP
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision issued on 20 November 2019 of First-tier Tribunal Judge Gurung-Thapa which refused Mr [K]'s appeal for a residence card under the provisions of Regulation 16(5) of the Immigration (European Economic Area) Regulations 2016 (the EEA Regulations) reflecting his derivative rights as a primary carer.

2. Mr [K] is a national of Pakistan, born on 19 October 1990.

3. The appellant entered the UK as a student on 8 September 2010 with leave until 23 October 2011 and was granted further periods of leave until 9 March 2016. On 29 December 2014 the appellant was informed that his leave to remain would be curtailed as of 3 March 2015.

4. Following the curtailment notice, on 2 March 2015 the appellant applied for an EEA residence card as the partner of an EEA national. That application was refused on 2 September 2015. The appellant appealed but on 20 December 2016 his appeal was refused and he became appeal rights exhausted on 11 August 2017. On 7 September 2017 he made a second application on the same basis which was refused on 16 April 2018.

5. On 14 September 2018 the appellant applied for a residence card reflecting his derivative rights as the primary carer of a British citizen. The respondent refused this application on 6 November 2018. The appellant appealed to the First-tier Tribunal and his appeal was heard by First-tier Tribunal Judge Powell who dismissed it in a decision issued on 7 February 2019.

6. The appellant made a further application on the same basis on 15 May 2019 but the respondent again refused his application, this time in a decision issued on 1 August 2019. The appellant appealed and his appeal was heard by First-tier Tribunal Judge Gurung-Thapa on 16 October 2019 at the Nottingham Justice Centre. The appellant was granted permission to appeal against that decision by the First-tier Tribunal on 1 April 2020. Thus the matter comes before me.

7. The core of the appellant's case is that his brother, [RAK] ([A]) who is a British citizen and who has been diagnosed with paranoid schizophrenia, has come to depend on the appellant only and particularly for his personal care and in managing his mental illness. The appellant and his family considered that if the appellant left the UK, his brother would be unable to access support from statutory services because of his particular attachment to the appellant and that his relapse would be so serious that his circumstances would mean that he would be compelled to leave the UK and join the appellant in Pakistan.

8. First-tier Tribunal Judge Gurung-Thapa set out the appellant's case in paragraphs 6 to 16 of her decision. She noted that the brother's NHS Consultant Psychiatrist, Dr Adekunte, identified in a letter dated 29 March 2019 , referring to the brother as "[R]" that "there is a possible risk of relapse in [R]'s mental health if his carer was to leave the UK, back to Pakistan". The letter confirmed the appellant's provision of support to [A] with his daily care needs.

9. The letter of 29 March 2019 also stated that the team would provide:

> "a supporting letter in view of [Raja K]'s carer's role for [R]. As discussed with him, there will be a balanced opinion on [R]'s needs and level of care required."

It may be that a further letter from Dr Adekunte dated 17 April 2019 was intended to fulfil that commitment. It identifies, again referring to the brother as "[R]", that:

> "[Raja K] has been integral to [R]'s care at home and the level of support he provides is well recognised by the CMHT. [Raja K]'s involvement had been helpful in stabilising his mental state. This will be further required as we progress with re-establishing his medication treatment. The CMHT is determined to continue to provide support for [Raja K] as [R]'s main carer even as he recovers from his illness."

10. The First-tier Tribunal was also provided with a report dated 7 October 2019 from an independent Consultant Psychiatrist, Dr Iankov. The First-tier Tribunal judge set out a summary of Dr Iankov's report in paragraphs 31 to 40 of the decision and does not indicate anywhere in the decision that she does not accept his opinion on the circumstances of the appellant and his brother. Dr Iankov sets out that he was provided with information by [A] and the appellant and concluded that appellant supported [A] in all aspects of daily living. Dr Iankov was shown a Carer's Assessment Form dated 21 November 2018 which also showed that the appellant was providing "a substantial amount of emotional, mental and practical support for his brother on a daily basis"; see paragraphs 3.50 to 3.54.

11. In paragraph 3.10, Dr Iankov records that that the brother told him that he:

> "… is unable to trust anyone but his brother and wouldn't do anything at all if his brother is not around."

The brother also told Dr Iankov that he was not involved with mental health services as he did not trust them after being sectioned twice and found it "better here with my brother"; paragraph 3.18. He also told Dr Iankov, set out in paragraph 3.29, that:

> "… he often thinks that if he doesn't have his brother around, he will feel unsafe and may become suicidal."

12. The report indicated in paragraph 3.15 that the appellant was managing [A]'s medication which the family were obtaining privately from Pakistan as [A] would not engage with mental health services in the UK. The family considered that "it is very unlikely" that the brother will attend for monitoring of the side effects of the medication.

13. Dr Iankov recorded in paragraph 3.32 that:

> "It was evident that the two brothers get on well. I was left with the impression that Mr [RAK] was dependent on his brother for support and reassurance."

14. Dr Iankov concluded in paragraph 4.2 that the appellant's brother "struggled to engage with mental health services, but it is unclear at this point whether he has been formally discharged from services." He was "satisfied that the appellant "is the main carer for his brother" (paragraph 4.8) and that [A] "trusts his brother and is dependent on him"; paragraph 4.10. Dr Iankov was "concerned that if Mr [RAK]'s mental state deteriorates, he will be very reluctant to seek help" (paragraph 4.12) and that the appellant was "providing good support" and could seek statutory support for his brother (paragraph 4.13). In paragraph 4.17, Dr Iankov identified a need for a care plan involving the appellant and statutory services.

15. Dr Iankov concluded:

> "4.19 In conclusion, Mr [RAK] provides a significant degree of support to his brother who suffers with paranoid schizophrenia. This degree of support is likely to lead to a better prognosis and it is always desirable to have a collaborative approach between carers and statutory mental health services.
>
> 4.20 If Mr Raja [K]is deported, it is likely that Mr [RAK]'s mental state will deteriorate significantly. In my opinion he will become more paranoid and is likely to become unable to maintain his compliance with medication. I will have concerns about his ability to continue living in his sister's house (considering the seriousness of his mental disorder and the need for daily support). It is therefore in Mr [RAK]'s best interests that he is supported by a dedicated carer from his own family (Mr Raja [K]), rather than relying on future supported placements being arranged and monitored by the local health services."

16. The First-tier Tribunal then went on to identify the assessment that had to be made:

> "… will the appellant's brother be unable to reside in the UK if the appellant as required to leave?"

This statement of the key issue in the appeal is in line with the guidance in case law on derivative rights of primary carers, including Patel v SSHD [2019] UKSC 59 and MS (Malaysia) v SSHD [2019] EWCA Civ 580. In my view, the judge makes the same uncontentious statement of the question that she had to answer in paragraph 50 of the decision. She sets out in paragraph 51, that in her view "[a] vital part of this assessment is of the provision that would be made by social services and the NHS". That is consistent with paragraph 42 of MS (Malaysia) which identifies statutory provision as a "relevant, but not always decisive factor".

17. Judge Gurung-Thapa went on, correctly, to take the findings of First-tier Tribunal Judge Powell, prepared only some nine months prior to the appeal before her, as the starting point. At paragraph 52 she refers to Judge Powell's findings at paragraph 30 of the earlier decision which identified an evidential gap where the provision available to the appellant's brother from the NHS and the local authority was not properly covered in the evidence provided. Judge Powell stated in paragraph 30 of her decision:

> "I do not have sufficient evidence about the services or the lack of services or the impact of services being provided to him on his wellbeing to conclude that he is likely to be unable to continue to live in the United Kingdom, if the appellant is removed. Whilst I accept that Fouzia Zamir is unable to provide the same or similar care to her brother, the absence of any analysis from the NHS or the local authority does not provide me with a basis to understand the interplay between statutory services and familial support, which may include the brother's other relatives in this country.".

18. Judge Gurung-Thapa identifies in paragraph 53 of her decision that, in her view, this evidential gap was again not met. She referred in paragraph 54 to the appellant having described private care services as able to assist his brother two or three hours

a day for two or three days a week. His evidence concerning support from statutory services in his absence was set out in paragraph 48:

> "In cross-examination the appellant was asked if he has asked the professionals how they will deal with his brother's trust issues and who will care for him. The appellant replied that this has never been asked."

Paragraph 49 also records evidence from the appellant on this issue:

> "I asked the appellant if he or his family have tried to obtain a more up-to-date evidence of the sort of care the authorities can provide. He replied when they had the last care assessment, they raised this issue and they said that they cannot provide 24/7 care. The private agencies cannot guarantee that it will be the same person to provide the care."

19. In paragraphs 54 and 55, the judge concludes that the appellant was on notice from the decision of Judge Powell that information about the care that could be offered by statutory services in his absence was important in order to assess whether his brother would be forced to leave the UK with him. She found that this undermined the appellant's credibility, finding in paragraph 55 that his failure to provide the evidence on what could be provided by statutory services was likely to be because he knew it would not support his case.

20. The First-tier Tribunal states in paragraph 56:

> "I find this is not a case of considering what level of care can reasonably be provided by the state, nor is it case of considering what level of care is acceptable to the brother or of benefit to the brother. The brother is known to the local authority and the mental health services and there is no documentary evidence before me to suggest that the brother has been formally discharged from the mental health services and that he has previously had a carer's assessment. I find that there is simply no evidence that the brother would not receive adequate care in the UK, if the appellant were to leave the UK."

The judge continues in paragraph 57:

> "Whilst I accept that the brother is emotionally dependent on the appellant, I find that there is no satisfactory evidence before me to suggest that the brother's emotional dependency on the appellant is such that the brother would be compelled to leave the UK even if the relevant agencies provided 24 hour care that addressed the brother's needs."

21. The grounds of appeal maintain that the judge failed to adequately assess "the character and quality of the dependency" of [A] on the appellant. The grounds sought to draw support from paragraph 42 of MS (Malaysia) v SSHD [2019] EWCA Civ 580:

> "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.

22. The grounds concede that it is self-evident that the state can provide care needed by the brother, but the question for the judge was whether "the quality and nature of the brother's dependency on the appellant is such that it would seriously impair the quality and standard of the brother's life such that he would be forced to leave the EU". The grounds argue that the judge erred in failing to properly engage with the test set out in Zambrano. The grounds maintain that the "IJ's concentration on the absence of evidence of state provision … is an 'irrelevant matter'".

23. It is convenient to indicate at this point that I refused to admit new grounds contained in paragraph 3 of Mr Hayes' skeleton argument dated 20 August 2020 concerning the burden of proof and discrimination. No formal application was made for those grounds to be admitted. No reason was given for the new grounds not being argued in the original grounds of appeal. I did not accept that they were so manifestly "obvious" or otherwise compelling that the grounds had to be varied to admit them. The appeal therefore proceeded on the basis of the grounds dated 27 November 2019 on which permission had been granted.

Findings

24. It is easy to have sympathy for [A] and his family, including the appellant, given the seriousness of [A]'s mental illness. As indicated by Dr Iankaov in paragraph 4.13 of his report the appellant clearly has "good intentions and is providing good support". Judge Gurung-Thapa accepted that the appellant is the primary carer for his brother and that his brother is dependent on him, needs care and that other family members would have difficulty in providing that care.

25. However, as set out above, the question that the judge had to answer here was whether the evidence before her showed that the appellant's brother would be compelled to leave the UK were the appellant to leave. The judge's concern was that without evidence of what would be provided to the brother from the state via the NHS and other statutory services, it was not possible for her to conclude that he would be compelled to leave the UK. She was astute to the potentially complicating factor of a symptom of the appellant's illness being a mistrust of anyone other than the appellant. She raised this with the appellant at the hearing; see paragraph 48, set out above.

26. In my view, the absence of evidence from the community team as to how they would address the medical and social care of the appellant's brother if the appellant was to leave was a legitimate concern here, just as it was for First-tier Tribunal Judge Powell. Certainly, there was an additional factor in the claim here that whatever statutory services did, [A] would not engage or be able to receive that support as he had become so dependent on the appellant. The difficulty Judge Gurung-Thapa found herself in was that she could not make an assessment of what the outcome

would be for [A] if the appellant left the UK without knowing how statutory services "will deal with his brother's trust issues". This does not mean that she treated the availability of statutory services as a "trump card" but that she could not make the assessment without more information. The judge was not obliged to accept the appellant's assertion that his brother would refuse to engage at all and have to go to Pakistan with him or conclude, without more, that statutory mental health services would be unable to address [A]'s trust issues to the extent that he would be obliged to leave the UK in order to be with the appellant.

27. Further, the letters from Dr Adekunte clearly anticipated that the community team would continue to offer care. Also, Dr Iankov's does not suggest, for example in paragraph 4.20 of his report, that his view is that [A] would disengage and deteriorate so seriously that he would be compelled to leave the UK. He envisages [A] relying on "future supported placements being arranged and monitored by the local health service" although he is clear that this not to be preferred to the current arrangement. Dr Iankov identified a need for a care plan involving the appellant and statutory services and clearly did not consider statutory provision to be an "irrelevant" issue as suggested in the grounds. That is so even though Dr Iankov was clearly aware of the importance of the appellant in [A]'s care and well-being.

28. It is my conclusion that Judge Gurung-Thapa's approach was lawful and did offend the ratio of MS (Malaysia). She considered the evidence on the nature of [A]'s dependency on the appellant and, notwithstanding that dependency being real and serious, was entitled to ask what alternative care would be available if the appellant left the UK, including how statutory services would deal with [A]'s lack of trust and difficulty in engaging. She found that latter part of the evidence lacking and that therefore she did not accept that it had been shown that [A] would be compelled to leave the UK. That conclusion was open to her on the evidence provided.

29. It is therefore my conclusion that the First-tier Tribunal Judge here did not err and that her decision should therefore stand.

Decision

30. The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed: *S Pitt* Date: 25 August 2020
Upper Tribunal Judge Pitt