Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00807/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th October 2017	**On 26th October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MR JAYKUMAR MUKESHCHANDRA NAYEE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Parkin, Counsel instructed by Eagles Solicitors
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of India, appealed to the First-tier Tribunal against a decision of the Secretary of State of 19th August 2015 to refuse his application for a Derivative

Residence Card as the primary carer of a British citizen under Regulation 15A of the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations). First-tier Tribunal Judge Hembrough dismissed the appeal in a decision promulgated on 26th September 2016. The appellant now appeals to this Tribunal with permission granted by Designated Judge Macdonald on 16th August 2017.

2. According to the papers the appellant claims to have entered the UK on 12th April 2011 with entry clearance as a Tier 4 (General) Student valid until 13th December 2012. On 12th December 2012 he applied for leave to remain on the basis of his private and family life but that application was refused on 4th April 2014. A further application on the same basis was refused on 16th June 2014. On 21st May 2015 he applied for a Derivative Residence Card claiming that he is the primary carer of his grandparents, Gomatiben Kantilal Nayee and Kantilal Mohanlal Nayee, both of whom are British citizens. As set out in the Reasons for Refusal letter the Secretary of State refused the application on two grounds of appeal. It was not accepted that the appellant was related to the British nationals as claimed. The respondent also did not accept that the appellant had established that he was the primary carer of the British nationals in accordance with Regulation 15A of the 2006 Regulations.

3. On the basis of DNA evidence submitted by the appellant, it was accepted by the Presenting Officer at the hearing in the First-tier Tribunal that the appellant was related to the British nationals as claimed. Therefore the only issue to be determined by the First-tier Tribunal Judge was whether the appellant met the requirements of Regulation 15A. The judge heard oral evidence from the appellant and from his grandparents and the judge concluded that the appellant had not demonstrated that he is the primary carer of either of his grandparents or that they are in want of care. The judge was not satisfied that either grandparent would be unable to reside in the UK or in another EEA state if the appellant were required to leave the UK.

4. The Grounds of Appeal take issue with a number of the judge's findings disputing the weight attached by the judge to various parts of the appellant's evidence. Permission to appeal was granted on the basis that it was arguable that the judge erred in law in failing to take account all factors.

The Law

5. The provisions of the 2006 Regulations, which were applicable at the time this application was made are as follows:-

> "**Derivative right of residence**
> **15A.** (1) A person ("P") who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.
> …
> (4A) P satisfies the criteria in this paragraph if—
> (a)P is the primary carer of a British citizen ("the relevant British citizen");
> (b) the relevant British citizen is residing in the United Kingdom; and

(c) the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave.

…

(7) P is to be regarded as a "primary carer" of another person if

(a)P is a direct relative or a legal guardian of that person; and

(b)P—

(i)is the person who has primary responsibility for that person's care; or

(ii) shares equally the responsibility for that person's care with one other person who is not an exempt person.

…"

Submissions

6. At the hearing in the Upper Tribunal Ms Isherwood informed the Tribunal that the Home Office records showed that the appellant had an asylum appeal listed for hearing at Hatton Cross before the First-tier Tribunal earlier in the week. Having taken instructions, Mr Parkin advised the Tribunal that the appellant had instructed him that he did have an asylum appeal scheduled to be heard earlier in the week but that he had withdrawn that appeal on the evening before it was due to be heard. He said that the appellant understands that the appeal did not go ahead. It appeared to me that the potential asylum appeal did not appear to infringe upon the error of law matter to be determined by me and, with the agreements of the parties, I concluded that the fact that the appellant appeared to have an asylum appeal before the First-tier Tribunal earlier in the week was not a barrier to the error of law hearing proceeding.

7. In the grounds as developed by Mr Parkin at the hearing it is asserted that the First-tier Tribunal Judge gave inadequate reasons for his findings. Mr Parkin's primary submission was that, whilst each of the errors relied upon may not have amounted to an error of law on their own, the cumulative effect of a number of errors amounted to an error of law.

8. Mr Parkin conteded that at the judge erred at paragraph 41 of the decision where he found that he was not satisfied that the appellant's grandparents have any significant care needs that are not being met or could not be met through the various agencies of the welfare state or the private sector. In Mr Parkin's submission the judge failed to refer here to the evidence from the appellant and his grandparents, in particular the evidence recorded at paragraph 19 that the appellant said his grandparents were unable to afford the cost of private care. He submitted that, whilst it might have been open for the judge to disbelieve this evidence, it was not open to him to ignore it. Mr Parkin submitted that the judge made an error in relation to the assessment of care needs at paragraph 42 of the decision in light of the evidence from the appellant as to the medical conditions of his grandfather and the care given by him [15-16]. He submitted that the Tribunal failed to make reference to the care provided by the appellant to his grandparents at paragraph 42. In his submission this pattern developed further at paragraph 43 where the judge said that the main area where the grandparents need assistance is in relation to interpretation. In his submission this was part of the oral evidence but not all of it. He submitted that, had the judge taken

account of all of the evidence at paragraph 16, he could have reached a different conclusion. He argued that the judge's conclusion at paragraph 43 that the grandparents' nephew who lives nearby would be able to assist goes against the evidence at paragraph 20 that the nephew sees the grandparents infrequently. Mr Parkin argued that in concluding that the grandparents could rely on the private sector the judge failed to take account of the evidence that the grandparents are impecunious.

9. Mr Parkin submitted that there was an inference to be drawn from the evidence before the judge, which painted a picture of almost complete dependency on the appellant, showing that the grandparents would be unable to reside in the UK or in another EEA state if the appellant was to leave. In his submission it was implicit that the grandparents would have to leave the UK or the EU if the appellant was removed. He contended that, if the judge had found that the appellant was a primary carer, he would have then had to consider whether the grandparents would have had to leave the UK if the appellant was removed.

10. Ms Isherwood submitted that the grounds amounted to a disagreement as to the weight the judge attached to the evidence and, in her submission, that was a matter for the judge. She submitted that the complaint that the judge did not consider the appellant's oral evidence that his grandfather suffered three falls since 2014 when he was walking alone was a matter of weight which was a matter for the judge. She submitted that the complaint in relation to the judge's finding that the grandparent's nephew could assist was also an issue of weight which was an issue for the judge.

11. Ms Isherwood pointed out that there was no medical evidence to support the assertion in the Grounds of Appeal that there is a possibility that the grandfather's current diagnosis of COPD may in fact be lung cancer. Ms Isherwood submitted that when the actual evidence before the judge is considered it is apparent that he did not ignore any evidence. She highlighted paragraph 22 where the appellant said that his grandfather was able to bathe independently and that he used a bath or shower seat but would sometimes need assistance. She also highlighted paragraph 23 where the appellant said that his grandmother cooks all the meals and was able to undertake housework and both grandparents could carry light shopping. She referred to paragraph 27 where the judge observed that care workers and aids were available through the NHS, social services and a variety of other providers to assist the grandfather and the appellant said that his grandmother did not like strangers in the house and that his grandparents had problems accessing services because they did not speak English. In her submission services are provided and it was open to the judge to take account of those.

12. Ms Isherwood highlighted the grandfather's evidence at paragraphs 31 and 32 where he said that he is able to walk unaided and that his wife had no health problems. She also highlighted in paragraphs 33, 34 and 35 where the grandfather said that he accepted that his wife was able to cook and undertake most of the housework, needing assistance when she was not feeling 100%. The judge noted at paragraph 41 that the appellant's desire to care for his grandparents was understandable, as is their

wish that such care should be delivered by a family member. In her submission the findings at paragraphs 41, 42, 43 and 44 were open to the judge in light of the evidence before him.

13. Ms Isherwood relied on the case of **Ayinde and Thinjom (Carers – Reg. 15A – Zambrano) [2015] UKUT 00560 (IAC).** She submitted that the evidence before the judge does not indicate that if the appellant were to be removed the grandparents would have to leave the UK or the European Union. She referred to paragraph 21 of the decision which sets out the appellant's evidence that if he was removed from the UK his grandparents would be reliant upon social services, but they would not "receive the same standard of care as he was able to provide". The appellant is recorded as saying that he had concerns that, if unsupervised, his grandfather might take the wrong medicine at the wrong time or accidentally overdose, as has happened in the past. He said that his grandmother was unable to assist him in managing his medicines because she is illiterate. Ms Isherwood referred to the appellant's witness statement and said that there was nothing in the statement to indicate that the grandparents would have to leave the UK. In her submission this has never been addressed by the appellant or grandparents in their evidence.

14. In response Mr Parkin submitted that it is accepted that weight is a matter for the judge. However, he submitted that it was for the judge to explain the basis on which he reached the conclusions he did. He argues that the judge must do more than assert that he preferred some evidence over the other. He must look at the evidence as a whole, not just particular factors. He submitted that a mere record of some evidence in cross-examination is not enough to show that the judge took it into account. He accepted that the evidence establishes that there are aspects of the grandparents' lives when they are relatively independent, but the point is that the grandfather sometimes does need care bathing and there is no evidence that the NHS can provide such services or that such services are available.

Discussion and Conclusions

15. It is worth referring back to the provisions of Regulation 15A in the context of this appeal. The burden was on the appellant to demonstrate that he is the primary carer for his grandparents and that they would be unable to reside in the UK or in another EEA state if the appellant was required to leave.

16. These provisions were considered in the case of **Ayinde and Thinjom** where the Tribunal's guidance is summarised in the head note 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."

60. The Tribunal gave the following analysis in the body of the decision:-

"42. The appellants argue that the genuine enjoyment of the substance of the rights of their British family members includes the right of those suffering the effects of increasing age, infirmity or illness should be protected against losing their home and losing the care provided by their family members. The submission runs dangerously close to arguing that those who are unable to benefit from carers from within their family are at risk of suffering a violation of their rights by being cared for by local authority carers or social workers or by the NHS or by being placed in a care-home. This is simply misconceived. The support provided by local authorities, care agencies, residential homes and hospitals has at its core the preservation of the dignity of those under their care. Care workers would justifiably feel aggrieved at the suggestion that their care falls below a standard that preserves the dignity of their patients. The fact that examples can be found of care falling below acceptable standards is not to the point. Whilst, in the course of argument, Mr Knafler disavowed any suggestion to the contrary, it is the inevitable consequence of his reliance upon the Charter. If he were not suggesting the two British citizens involved in these appeals would suffer a loss of their protected right to dignity if they were required to go into residential care, there would have been no point in relying on the Charter.

...

54. These situations are very different from the situation in *Zambrano*. Whilst a minor child can survive without his parents in that adoption, foster-care or a children's home may provide a proper and adequate level of care, such alternative care is only likely to be contemplated if there are serious reasons for breaking the relationship between a child and one or both of his parents. Serious wrong-doing on the part of both parents (or, more often, of one of the parents) may justify the separation. However, elderly adults can more readily survive without a family member to act as their carer if there are adequate support mechanisms in existence to provide them with alternative care to an appropriate standard. It is beyond the range of proportionate responses that a minor should be required to go into some form of alternative care (be it adoption, foster-care or residential care) in order to enjoy his EU rights were both his parents required to leave. The same consideration does not normally apply in relation to the infirm or elderly.

> 55. 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 *Ruiz Zambrano*, it was not the difference between the standard of care that the *Zambrano* parents provided to the children at home and the standard of care provided by child care agencies that prompted the Court of Justice to reach its decision. A comparison of alternative care arrangements was not being considered. It was not, therefore, the quality of life or care that was in issue but what would *happen* to the *Zambrano* children, that is, whether they would remain or leave. For the *Zambrano* children, the answer was obvious: the children would go with their parents. It was impossible to contemplate an outcome in which they would not be driven to leave. That is a far cry from the situation facing Mrs Animashaun and Mr Stevens, neither of whom will leave the United Kingdom.
>
> …
>
> 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".

17. As we are reminded in the case of **Ayinde and Thinjom** it must be demonstrated that the effect of the removal of the carer, the appellant in this case, would render the British citizens, the grandparents here, no longer able to reside in the UK or in another EEA state. They must establish as a fact that the British citizen will be forced to leave the territory of the union. Hence the test is in two main parts. The judge in this case engaged with the evidence around the issue as to whether the appellant is a primary carer for his grandparents. The judge set out all of the oral evidence of the appellant and of the grandparents. In the findings and reasons the judge focused on elements of the evidence which he considered relevant to resolution of the issues. The Grounds effectively take issue with the weight attached to the various pieces of evidence by the judge. In my view it is clear that the judge weighed all of the relevant evidence, addressing in particular the pieces of evidence relevant to the issue as to whether the appellant is the primary carer. The judge took full account, as he was entitled to, of the availability of care from the NHS or other sources. The judge took full account of the fact that there was no objective medical evidence to indicate that either grandparent was "unable to self-care or has any disability which restricts their daily living or mobility activities" [41]. The judge took account of the fact of the evidence that the grandmother is able to cook, undertake housework and shopping and has no significant medical issues. The judge took into account that the grandparents need assistance in relation to interpretation but that interpretation services are available throughout the NHS and social services. The judge also took account of the fact that the grandparents live in supported accommodation which provides for an alarm system to summon help in case of emergency. All of this evidence entitled the judge to reach the conclusion he did that the appellant had not demonstrated that he is the primary carer for either of his grandparents, or indeed that they are in want of care.

18. In any event, it is very clear that the evidence before the judge did not establish that the second part of 15A as contained in Regulation 15A(4A)(c) had been established. In fact the evidence points in the other direction. So at paragraph 21 the appellant was asked how his grandparents would manage if he was removed and he said that they would be reliant upon social services, albeit they believed that they would not receive the same standard of care as he was able to provide. At paragraph 27 the appellant is recorded as saying that his grandmother did not like strangers in the house and that his grandparents had problems accessing services because they did not speak English, but again he made no reference to them leaving the UK if he were removed. At paragraph 35 the appellant's grandfather was asked how he would manage if the appellant was removed and he said "It would be in the hands of the Gods". Again he made no reference to any belief that he would be forced to leave the UK or the EU if his grandson was removed.

19. In my view it is clear that there was no evidence before the judge which would have enabled him to reach an alternative finding to that at paragraph 47, that he was not satisfied that the grandparents would be unable to reside in the UK or another EEA state if the appellant were required to leave the UK.

20. In these circumstances I am satisfied that the judge reached findings open to him on the evidence and there is no material error of law in the decision.

Notice of Decision

There is no material error in the First-tier Tribunal Judge's decision.

The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed Date: 25th October 2017

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

The appeal has been dismissed and therefore there can be no fee award.

Signed Date: 25th October 2017

Deputy Upper Tribunal Judge Grimes