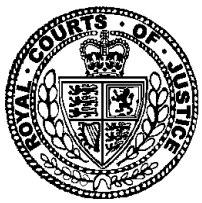

Neutral Citation Number: [2021] EWCA Civ 1754

Case No: C9/2020/1573

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL

(Immigration and Asylum Chamber)

UTJ BRUCE

EA/01773/2019

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 23 November 2021

Before:

LORD JUSTICE LEWISON

LORD JUSTICE BAKER

and

LADY JUSTICE SIMLER

- -

Between:

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Appella**

- and -

RM (PAKISTAN) **Respond**

- -

- -

Nicholas Chapman (instructed by **the Government Legal Department**) for the **Appellant**

Craig Holmes (instructed by **Latitude Law**) for the **Respondent**

Hearing dates: 27 October 2021

- -

Approved Judgment

Lady Justice Simler:

Introduction

1.

This appeal concerns a claim based on derivative rights to remain in the United Kingdom by RM, who is the adult brother and primary carer of A, an adult British citizen. The claim was made under Regulation 16(5)(c) of the Immigration (European Economic Area) Regulations 2016 (referred to below as “the Regulations”). The names of RM and A have been anonymised throughout the proceedings because of the confidential details of A’s medical history that have had to be discussed and anonymity continues for that reason in this judgment.

2.
RM, for whom Mr Craig Holmes appeared, is a national of Pakistan with no right to remain in the United Kingdom. He cares for A, who has a number of significant disabilities, on a more or less full-time basis. By a decision dated 1 April 2019, the Secretary of State for the Home Department (“the SSHD”) refused to grant RM’s application for a residence card based on his asserted derivative right to remain in the United Kingdom to care for his British citizen brother. She concluded that if there was no family member in the United Kingdom able to provide the necessary support to A at night, and if A was unable to afford the requisite night time care, the local authority would provide it, and A would not be compelled to leave the United Kingdom (and therefore, the European Union, or “EU”).

3.
The SSHD’s decision was challenged on appeal. The First-tier Tribunal (“the FTT”) dismissed the appeal, holding that while it was A’s preference that RM provide care for him, there were practical alternatives available and the evidence did not demonstrate that A required “constant care throughout the night”. RM challenged that decision on appeal on the basis that a number of the factual findings made by the FTT were not available on the evidence. The appeal was not resisted by the SSHD and by a decision promulgated on 4 February 2020, Upper Tribunal Judge Bruce (referred to below as “the judge”) allowed the appeal, remade the decision and held that A would leave the United Kingdom (and therefore the EU) if RM was required to do so, and in all the circumstances of this case a derivative right to reside had therefore been established by RM.

4.
The SSHD now appeals against the decision of the judge with permission granted by this court on 13 April 2021. There are five grounds of appeal but her primary arguments, advanced by Mr Nicholas Chapman on her behalf, are that the judge misapplied the legal test in reaching her decision and took account of an irrelevant consideration in doing so. The appeal is resisted by RM. Mr Holmes who contended that the judge made no error of law and reached a decision that was amply open to her on the evidence. I am grateful to both counsel for the clarity and concision of their submissions.

5.
At the conclusion of the hearing the court announced that the appeal would be allowed with reasons to follow; the decision of the judge would be set-aside; and the case would be remitted to the Upper Tribunal, with case management directions (including in relation to additional evidence if appropriate) left to the discretion of the Upper Tribunal. These are my reasons for agreeing that the appeal should be allowed with those consequences.

The factual background

6.
As already indicated, RM is a national of Pakistan, born in 1988. He is the primary carer of his brother A, who is a British citizen.

7.

A's significant and complex medical needs were summarised by the judge by reference to a series of reports and letters provided by treating clinicians (including letters from Mr S Patil, Consultant in spinal injuries and rehabilitation, Dr M Francis of Bingley Medical Practice, Dr Charlene Thwaites, and Professor R Skinner), and a social care and well-being assessment conducted by Bradford Social Services.

8.
The judge found that having been a healthy, able-bodied man, A's health began deteriorating in 2008 when he began experiencing back pain and sudden onset weakness in his legs. He was diagnosed with spinal stenosis, a prolapsed disc and lumbar disc degeneration. His condition worsened and in 2013 he was involved in a road traffic accident which left him incontinent. The combined effects of his spinal and other problems are that he is confined to a wheelchair with severe mobility problems. A suffers, intermittently and unpredictably, from incontinence and a numbness in his body which leaves him unable to move unaided. When that happens he needs help: "it is his brother who cleans him and manages his paralysis by moving his position and massaging the affected areas until sensation returns …". He also needs help with personal care in washing and dressing himself. A has also suffered neurological damage to one side of his brain, together with depression and anxiety. He takes a number of strong medications which affect his diet and cause significant side effects, including drowsiness.

9.
As a result of his complex needs, the judge found that A requires assistance with his "daily activities including preparing food, dressing, toileting and bathing. He has a significant stutter and has some difficulty communicating. He also reports significant fatigue as a side-effect of his medication". The unpredictable nature of his difficulties was noted both by his GP, Dr M Francis, and by Bradford Social Services. He is able to stand, but his legs can quickly become numb and "go" from under him. He has suffered a number of falls as a result and does not go out alone any longer.

10.
In relation to his night-time needs, the judge recorded the following:

"16. Bradford Social Services record that A needs to go to the toilet five or six times during the night, and that he suffers unpredictable episodes of numbness where his body becomes "locked". The report notes:

"[A] requested night care support and rang the access team last year to get support for night time carers but was told that our service is time specific and [A] is wanting to have someone there throughout the night in case he needs support and was advised to purchase this service privately. I reiterated this and [A] has said he understood but cannot afford to employ private care seven nights a week. [RM] has been providing this support in this remit since he has been in the UK."

11.
RM also provides support to A in managing his day-to-day affairs, including diary management, receiving correspondence and administrative affairs, and in discharging his duties and responsibilities as a local councillor in his neighbourhood in Yorkshire and as disability office for his constituency Labour Party, as the judge found. These roles give A a meaningful private life in the United Kingdom. In order to perform these community/political roles he is entirely dependent on his brother, who takes him to and from meetings and generally acts as his unpaid personal assistant. If RM was to return to Pakistan, A's evidence was that he would not be able to continue with this work: he could not afford to pay for a personal assistant/full-time carer to help in coping with these roles.

12.
In addition to his “severe mobility” and other physical health problems, the judge recorded that Dr Francis confirmed A’s evidence about his mental health issues and that his significant low mood had left him suicidal for a period. Evidence provided by Professor Skinner said that A was at risk of relapsing into a severe depression should he have to give up his current roles in local government and the Labour Party.

13.
Apart from RM, A’s family all live in Pakistan. His father is a retired civil servant and receives a pension. Whilst not wealthy, the family is comfortable. Both RM and A could be accommodated in the family home in Pakistan, where other family members could assist RM in caring for A.

14.
Bradford Social Services’ evidence was that a “relevant care package” would only be available during the day should RM depart. Their clear evidence as recorded by the judge was that the kind of night-time care A requires is simply not available in the person’s own home, and night-time provision is limited to “time specific” appointments. This was no good to A, because he cannot predict when he is going to need someone there during the night. As the judge put it, “the council would pay for a carer to come to the house between say 2am and 3am, but this is no good for A because he does not know when he might wet himself, or become unable to move.”

15.
There was evidence available to the judge indicating that A had made enquiries about the possibility of obtaining night-time care. 22 private care providers gave reasons why they were unable to assist him at all. A quote for a live-in care package was provided by Alchita Care Ltd at £1250.00 per week or a night-time carer rate of £18.50 per hour. Care Dynamics offered care at £16.24 per hour, with a higher rate for bank holidays. Care Mark quoted £17.00 per hour for experienced night care workers. A also found a care home specialising in the care of under 65s with spinal injury, quoting a basic weekly rate of £1088.00, with a top up of £15.00 per hour for accompanying A on trips out of the home. Similar quotes were provided by the Hales Group who could also provide a night carer at £17.00 per hour.

16.
A cannot afford to pay privately for this care. His income consists mostly of DWP benefits. Although the FTT suggested that he could look to his paternal uncle in Pakistan for financial support, the judge found there was no evidence that his uncle could or would be able to support him with payments of about £4500.00 per month for private night-time care. The judge found that A would “find himself in serious difficulty during the night. He would have to wait until carers arrived in the morning to clean him and help him move. … During the day he may receive in-home care but his ability to continue his involvement in public life – the essence of his private life – would be substantially reduced, dependent upon his ability to pay privately for carers to accompany him to meetings etc.” The judge recorded A’s evidence as to what he would do if RM returned to Pakistan, as being that he would have “no alternative but to leave the United Kingdom and return to Pakistan with his brother. He does not wish to remain in the United Kingdom if he is in effect confined to either a care home or his own.”

The relevant legislation

17.
Article 20 of the Treaty on the Functioning of the European Union (“the TFEU”) establishes Union citizenship and provides that “every person holding the nationality of a Member State” is a citizen of

the EU. By article 20(2)(a) TFEU citizens of the EU have, amongst other things, the fundamental right to move and reside freely within the territory of the member states.

18.
In Ruiz Zambrano v Office national de l'emploi (Case C-34/09)[2012] QB 265, [2011] 2 CMLR 46, the European Court of Justice ("the CJEU") found that article 20 TFEU precluded national measures which have the effect of depriving EU citizens (in that case, Belgian children of third country Colombian parents) of the genuine enjoyment of the substance of the fundamental rights conferred on them as EU citizens. That included a refusal to grant a right of residence (and a work permit) to the third country nationals with dependent minor children, because these measures would lead to a situation where the children who were EU citizens would be compelled to leave the EU to accompany their parents (see [42] to [44]).

19.
Prior to their revocation, the Regulations implemented those rights domestically (originally in the form of the 2006 Immigration (EEA) Regulations, SI 2006/1003) and provided for a derivative right to reside in the United Kingdom in certain prescribed circumstances. So far as material to this appeal, Regulation 16 of the Regulations provided:

"16. Derivative right of residence

(1) A person has a derivative right to reside during any period in which the person –

(a) is not an exempt person; and

(b) satisfies each of the criteria in one or more of paragraphs (2) to (6).

…

(5) The criteria in this paragraph are that –

(a) the person is the primary carer of a British citizen ("BC");

(b) BC is residing in the United Kingdom; and

(c) BC would be unable to reside in the United Kingdom or in another EEA State if the person left the United Kingdom for an indefinite period.

…

(8) A person is the "primary carer" of another person ("AP") if—

(a) the person is a direct relative or a legal guardian of AP; and

(b) either—

(i) the person has primary responsibility for AP's care; or

(ii) shares equally the responsibility for AP's care with one other person. …"

The Regulations provided for the Secretary of State to issue a person with a derivative residence card when that person provided proof that he or she had a derivative right of residence under Regulation 16(5).

20.

Here there was and is no dispute that RM is the primary carer for A, a British citizen, and that A resides in the United Kingdom. The only issue in dispute was and remains whether A would be unable to reside in the United Kingdom (and therefore in another EU state) if RM left the United Kingdom for an indefinite period.

21.
In KA and others v Belgium(Case C-82/16)[2018] 3 CMLR 28, the CJEU considered the circumstances in which a relationship of dependency, capable of justifying a derived right of residence under article 20 TFEU, might come into being. The Grand Chamber observed that there was a clear distinction to be drawn between relationships of dependency where the EU citizen is an adult and those where the citizen is a child, since as a general rule, an adult is capable of living an independent existence apart from the members of his or her family: see [65]. The Grand Chamber held at [76] that article 20 TFEU was therefore to be interpreted strictly in the case of adult dependents as follows:

“where the Union citizen is an adult, a relationship of dependency, capable of justifying the grant to the third country national concerned of a derived right of residence under art. 20 TFEU, is conceivable only in exceptional cases, where, in the light of all the relevant circumstances, any form of separation of the individual concerned from the member of his family on whom he is dependent is not possible; …”

22.
Following KA, the Supreme Court dealt with two unrelated derivative rights cases raising common issues in Patel v Secretary of State for the Home Department [2019] UKSC 59, [2020] 1 WLR 228. Patel concerned an adult third country national who cared for his parents, both British citizens and both ill. The FTT in that case accepted that they were dependent on him but held that because of the medical treatment available in this country to the father, they would not in fact return to India but would remain in the United Kingdom even if Mr Patel left. An appeal to the Upper Tribunal was dismissed and this court declined to interfere with the conclusions reached by the tribunals below because the evidence was too equivocal to amount to compulsion: if the parents did choose to follow their son to India that was “choice not compulsion”. The linked appeal, Shah, is less relevant to this appeal because in that appeal the third country national was the primary carer of his infant son, a British citizen. His wife was also a British citizen, but she worked full-time and supported the family. The FTT found that if Mr Shah returned to Pakistan, Mrs Shah would not remain in the United Kingdom, but would accompany her husband, and the child would have no option but to go there too. The Upper Tribunal dismissed the appeal, but this court allowed the further appeal.

23.
Lady Arden JSC (with whom all other members of the court agreed) explained that what lies at the heart of the Zambrano jurisprudence is 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: see [16] and [22]. She referred to the distinction confirmed in KA between cases concerning EU children and those concerning EU adults. It followed that the case of a child is quite separate from that of an adult, and 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.

24.
It was argued (among other cases by reference to Chavez-Vilchez v Raad van bestuur van de Sociale verzekeringsbank (Case C-133/15)[2018] QB 103, a decision relating to an EU child of separated

parents, so that different considerations applied) that the CJEU had refined or diminished the requirement to show compulsion to leave, and that enabled consideration to be given to the desirability of the family remaining together and to what a person would have to do to maintain family life. That argument was rejected at [27]. Lady Arden emphasised the difference between children and adults in this context, and continued:

“27. … An adult Union citizen does not have a right to have his family life taken into account if this would diminish the requirement to show compulsion to leave. It must be recalled that in KA the CJEU effectively reaffirmed the need to show compulsion even after making it clear that the decision in Chavez-Vilchez was good law. Accordingly, Chavez-Vilchez does not relax the level of compulsion required in the case of adults, and thus provides no assistance to Mr Patel, whose appeal must therefore fail.”

25.
The Supreme Court’s conclusion was different in Shah where, in answering the question whether the infant son would be compelled to leave by reason of his relationship of dependency with his father, the court was required to take account of the “best interests of the child” and the child’s “specific circumstances” (including the child’s age, physical and emotional development, the extent of his or her emotional ties and the risks which separation might entail for that child’s equilibrium). In that context, Lady Arden held:

“30. … The overarching question is whether the son would be compelled to leave by reason of his relationship of dependency with his father. In answering that question, the court is required to take account, “in the best interests of the child concerned, of all the specific circumstances …” The test of compulsion is thus a practical test to be applied to the actual facts and not to a theoretical set of facts. … on the FTT’s findings, the son would be compelled to leave with his father, who was his primary carer. That was sufficient compulsion for the purposes of the Zambrano test. There is an obvious difference between this situation of compulsion on the child and impermissible reliance on the right to respect for family life or on the desirability of keeping the family together as a ground for obtaining a derivative residence card. …”

26.
Finally, at [32] Lady Arden held:

“32. In those circumstances I consider that the Court of Appeal made an error of law when it treated as determinative what could happen to Mr and Mrs Shah’s son if the father left the United Kingdom, rather than what the FTT had found would happen in that event. In other words, it was not open in law to the Court of Appeal to hold that Mr Shah had no derivative right of residence because the mother could remain with the child in the United Kingdom even if the father was removed.”

27.
In MS (Malaysia) v Secretary of State for the Home Department [2019] EWCA Civ 580, a decision which predated the Supreme Court’s decision in Patel, this court made clear that the test for compulsion is an objective one. The evidence of the British citizen that he or she would feel compelled to leave if the third country national with whom a relationship of dependency exists left indefinitely, or that he or she would definitely leave in those circumstances, could not be conclusive of the issue of whether, on an objective basis, he or she would be compelled to leave. In that case, the British citizen required assistance with every part of her daily existence including her intimate care, 24 hours a day and as an orthodox Sikh, also had specialist needs that meant residential care would be inadequate. Among other arguments, the Secretary of State contended that the judge failed to factor into the

overall assessment, the availability of state medical and social care. Rejecting that argument on the facts of that case, Lord Justice Floyd held:

“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 dependence 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.”

Upper Tribunal Judge Bruce’s decision

28.
It was accepted by the SSHD and the judge concluded that the FTT made errors of law by failing to take relevant evidence into account, namely that Bradford Social Services would not provide A with a night-time carer and as to the prohibitive cost of private care; and by acting irrationally in rejecting the evidence of A’s GP as to the extent of his night-time needs. Having reached those conclusions, the judge went on to remake the decision.

29.
At paragraph 23 she held:

“I am satisfied that in respect of his physical care needs, A is dependent upon his brother, and that if that care was removed A would find himself in serious difficulty during the night. He would have to wait until carers arrived in the morning to clean him and help him to move. If he found himself unable to move in the night, he may have to call the emergency services as he has done in the past. During the day he may receive in-home care but his ability to continue his involvement in public life – the essence of his private life – would be substantially reduced, dependent upon his ability to pay privately for a carer to accompany him to meetings etc. Having heard his oral evidence I am wholly satisfied that A does not regard this as a feasible option for himself.”

30.
She continued at paragraph 24:

“This is not a case where the British national is heavily dependent upon the medical treatment he receives in the United Kingdom (cf. Ayinde and Thinjom (Carers – Reg.15A – Zambrano) [2015] UKUT 00560 (IAC)). In this case his care consists primarily of day-to-day assistance and personal attention provided by a close family member. I am wholly satisfied that as a matter of fact A would consider himself unable to remain in the United Kingdom in the absence of that care. Given the consequences that he would face should he ‘choose’ to remain, his conclusion is perfectly understandable. In Pakistan he will have the care of his brother, his sisters and parents, and will be able to live comfortably in the family home. In this country he will be confined to his home, and would have to give up most, if not all, of the work and community activism that he currently finds so important; he will have to face each night with trepidation, knowing that he may well end up soiled or in an ambulance. I am satisfied that the Appellant has demonstrated that he meets the criteria in Regulation 16(5)(c).”

31.

She then noted two things for the sake of completeness following from the Supreme Court judgment in Patel v Secretary of State for the Home Department. The first was the test set out in KA at [76], which she set out in full, and then added:

“26. … For the reasons I have set out above, I am satisfied that this is such an exceptional case. The objective reality underpinning A’s ‘choice’ is that should the care provided by his brother be removed, he would be far better off in Pakistan than he would be here, where he legitimately fears a deterioration in his mental health and physical neglect.”

32.
The second was at paragraph 27 as follows:

“27. Second, the Court underlined that the compulsion test in Regulation 16(5)(c) must be applied in a practical way. The term “unable” should not be interpreted to mean that it is physically impossible for the EEA national to remain in the country. It is a question of fact, of whether the individual concerned would in reality leave with his carer [at para 32]:

“In those circumstances I consider that the Court of Appeal made an error of law when it treated as determinative what could happen to Mr and Mrs Shah’s son if the father left the UK, rather than what the FTT had found would happen in that event. In other words, it was not open in law to the Court of Appeal to hold that Mr Shah had no derivative right of residence because the mother could remain with the child in the UK even if the father was removed”

[emphasis added]. Here, there obviously is an option for A to remain in the United Kingdom without his brother: no matter how lonely, physically challenging and restricted that life would be, he could do it. The fact remains that he would not.”

33.
Accordingly, the judge was satisfied that the criteria in Regulation 16(5)(c) were met and the appeal was allowed.

The appeal

34.
There are five grounds of appeal advanced by the SSHD as follows:

i)
In asking whether A “would” leave the United Kingdom (and therefore the EEA) if his brother did, the judge applied the wrong legal test.

ii)
The judge erred in failing to take into account as a relevant factor the enforceable legal duty on the local authority to meet A’s care and support needs.

iii)
The judge erred in taking into account as a relevant factor the potential effects of RM’s departure on A’s private life.

iv)
The judge’s conclusion that the case met the relevant legal criteria was not open to her on the evidence.

v)

The judge’s conclusion that the case met the relevant legal criteria was inadequately reasoned.

35.
Mr Chapman made the following submissions (in summary) on behalf of the SSHD in support of these grounds. The judge applied the wrong legal test for determining whether A would be compelled to leave. The question is not whether A would in reality leave the UK with RM, but whether he would in practice be compelled to leave with him because the lack of practical alternatives left him with no practical choice but to do so. That this was not merely an error of expression can be seen from the judge’s reference to Patel at paragraph 32 (in fact dealing with the Shah case) which is wholly inapposite: the issue there was whether an EU citizen child, lacking the power of self-determination, would in fact be compelled to leave the EU with his father, a third country national and his primary carer. That paragraph says nothing whatsoever about the test to be applied where the relevant relationship is between adults, and does nothing whatsoever to qualify the requirement to show that the EU citizen would be compelled to leave because “any form of separation … is not possible”. That A would (on the judge’s finding) in fact leave the UK is the sine qua non; but in focusing squarely on what A would in fact do, the judge failed properly to analyse whether that was truly because there was objectively no practical alternative. This error was not remedied elsewhere in the judgment: nowhere does the judge identify, articulate and address the relevant legal test, and read as a whole the judgment indicates that she did not have it in mind.

36.
Secondly, he submitted that the judge’s findings on whether the local authority would provide A with adequate care if RM left indefinitely are unclear. In particular, she failed to consider the fact that they have an enforceable legal duty to meet his care and support needs (see sections 9, 13 and 18 of the Care Act 2014 and Regulation 2 of the Care and Support (Eligibility Criteria) Regulations 2015). Subject to means testing, and depending on the circumstances, including A’s needs, this care might lawfully be provided either in A’s own home or in a care home setting. He submitted that it was care to which A would evidently be entitled, and A could, if necessary, take steps to ensure that the local authority provided it. The fourth ground is linked: Mr Chapman submitted that A’s physical needs, though debilitating, do not require the presence of his third country national brother in the United Kingdom. In RM’s absence, the local authority would be required to provide the care and support A needs. There was no evidence of any exceptional emotional or psychological dependency on RM. This is plainly not an exceptional case in which A would – objectively – be compelled to leave because, in the absence of any practical alternatives, he would be left with no practical choice but to do so. To the contrary, where an individual declines local authority support adequate to meet his care needs, or declines to enforce his legal right to that support, his departure is a matter of choice and not compulsion.

37.
Thirdly, at paragraphs 23 and 24, the judge attached significance to the fact that A’s private life, including his ability to participate in social, political and civic life, would be disrupted by his brother’s removal to Pakistan. This was not a factor that the judge was entitled to consider. The Supreme Court affirmed in Patel that it is legally impermissible to take these rights into account in determining whether there exists a relationship of dependency sufficient to compel departure from the United Kingdom. Finally, the conclusion of the judge that the case met the relevant legal criteria was in any event inadequately reasoned. No reasons were given for the conclusion that local authority overnight care outside A’s home, in a residential care setting, would not be provided, and it was unclear why such an offer of care could not be accepted by A.

38.
For RM Mr Holmes emphasised the correct self-direction in law given by the judge. Furthermore, the authorities establish that the question whether an EU national (or British citizen) is unable to remain and compelled to leave is a question of fact. In those circumstances, in relation to the factual conclusions reached by an experienced and specialist tribunal “it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right” and the appellate court should be reticent about disturbing them:Secretary of State for the Home Department v. AH (Sudan) & Ors[2007] UKHL 49 at [30].

39.
Secondly, the existence of an enforceable legal duty to provide care and support was raised for the first time on appeal without the SSHD seeking permission to argue this new point which was not addressed by any evidence. Mr Holmes submitted that it should not therefore be considered. In any event, the availability of alternative care is a relevant, but not necessarily a decisive factor and requires a fact-sensitive enquiry to be undertaken in deciding what weight to attribute to it in the wider context of the case. It is not a “trump” card. The focus of the assessment must be on the dependency with the relevant third country national, rather than solely on the question of whether care is available. Moreover, to the extent that the SSHD argued that A has another remedy in another forum to deal with any deficiencies in the care offered by the local authority (in other words, the option of judicial review), he submitted that this does not assist the SSHD’s appeal. On this footing, a fact sensitive assessment would necessarily require the tribunal to engage in some form of assessment of the likely merits of any such judicial review challenge before it could satisfy itself that the “legally enforceable duty” on the local authority provided a safeguard against the relevant EU citizen being unable to remain the territory or the EU. The better approach is for the tribunal to receive all relevant evidence on any care question and make appropriate findings of fact. Mr Holmes challenged the linked fourth ground as essentially reflecting mere disagreement with the judge’s conclusion. The judge received the evidence that the local authority would not provide overnight care for A and suggested he pay for it privately and was entitled to reach the conclusion that alternative care would not be provided. There was no error of law in that conclusion and the high threshold for demonstrating irrationality or perversity is simply not met.

40.
As to the third ground, Mr Holmes submitted that the discussion of private life by the judge has been mischaracterised. The judge did not engage in any assessment of the potential interference with A’s private life that may result from RM’s indefinite departure. Rather, she was bound by authority to consider all relevant factors that bear on the assessment of whether A is dependent on RM. This was confirmed in MS (Malaysia) and there is nothing in Patel which suggests that this was wrong. There is nothing in Patel that suggests that factors relevant to the sponsor’s private, personal or family life are out of bounds in the holistic factual assessment required. The judge was perfectly entitled to consider the serious impact that RM leaving the UK would have on his brother’s ability to live an independent life, have a social life, contribute to society and keep up his political and civic activities. These were all factors that bore on the question of practical compulsion. There was no error of law.

41.
Finally, in relation to ground 5, Mr Holmes submitted that the judge gave adequate reasons that made clear why the SSHD lost the appeal and no real deficiency has been identified.

Discussion and analysis

42.
The only issue to be determined in this case was the question under Regulation 16(5)(c) whether the "BC would be unable to reside in the United Kingdom or in another EEA state if the person left the United Kingdom for an indefinite period". The corollary of the relevant BC being "unable" to reside in the EU without the relevant third country national, is that the relevant BC is "compelled" to leave the EU territory. It follows that, in applying the test under the Regulations, a determination by the fact-finding tribunal that the relevant British citizen would be unable to remain without the third country national amounts in effect, to a finding that he or she would be compelled to leave.

43.
There is and can be no dispute that the judge set out the correct test to be applied by reference to Regulation 16(5)(c) and correctly identified the question she had to address at paragraph 12 of her decision. The real question in those circumstances is whether the judge correctly applied the test.

44.
The correct approach to the construction and application of the test is now well-established, and a matter of common ground in this case. In the light of KA and Patel the legal test for derivative status will be met in the case of an adult, only if the dependent British citizen would, in practice be compelled to leave the United Kingdom (and therefore the EU) if the third country family member were to leave indefinitely. Nothing short of compulsion to leave is enough. An adult person's choice to leave, based on an understandable preference to be cared for by the third country national family member, will not be sufficient unless an absence of practical alternatives leaves that person with no practical choice but to leave. This is a very demanding test. It is common ground that whether or not it is fulfilled is to be determined by an objective consideration inthe light of all the relevant circumstances, of whether any form of separation of the individual concerned from the member of his or her family on whom he or she is dependent is not practically possible. Put another way, the question to be answered is whether the relevant facts as a whole, viewed objectively, cross the threshold between "choice" to leave and "compulsion" to leave.

45.
That does not mean that the British citizen's subjective intentions are irrelevant. Plainly, if for whatever reason, the evidence demonstrates that the British citizen would not leave, perhaps because the medical treatment available in this country is better than that available in the third country, or because his or her career can only be pursued here, the test will not be met. In a case where the British citizen expresses a firm intention to leave, that is relevant and can properly be weighed as part of the global objective assessment. It certainly cannot be determinative.

46.
I also bear in mind that in dealing with the questions raised by this appeal, in particular whether the judge applied a legal test which she correctly identified to the facts, it is appropriate to apply due deference to the evaluation made by the specialist immigration tribunal: see for example, AH (Sudan) v Secretary of State for the Home Department[2007] UKHL 49; [2008] 1 AC 678 at [30].

47.
Applying that approach, I have come to the conclusion that, notwithstanding the correct legal self-direction she gave, the judge fell into material error when she came to apply the test in this case, because she failed to apply the need for compulsion and to take an objective approach to all the evidence.

48.

I have set out the relevant passages from the Upper Tribunal judgment above. The judge's conclusions, in particular at paragraph 24, that "as a matter of fact A would consider himself unable to remain in the United Kingdom" in RM's absence; and at paragraph 26 that the "objective reality underpinning A's 'choice' is that should the care provided by his brother be removed, he would be far better off in Pakistan than he would be here, where he legitimately fears a deterioration in his mental health and physical neglect" failed to engage with the need for compulsion, which had to be addressed globally, taking account of all objectively relevant circumstances. True it is, as Mr Holmes submitted, the judge referred to A's 'choice' reflecting her view that he felt he had no real choice about what to do. But A's conclusion that he would have to leave was a necessary condition of fulfilling the test. It could not be conclusive of the question whether A would be compelled to leave. Moreover, although the judge described A's conclusion that he would feel unable to stay as "perfectly understandable" at paragraph 24, and as reflecting the "objective reality" because of his "legitimate fears" at paragraph 26, that simply reflected her conclusion that those were rational subjective views and fears to hold. It appears to me that the judge wrongly substituted a subjective analysis for that required by the Regulations, which required actual compulsion, assessed objectively.

49.
The error at paragraph 24 was not remedied by the subsequent paragraphs, but rather was compounded by them. First, although at paragraph 26 the judge correctly set out the test derived from KA, she then failed to apply it. Instead, I agree with Mr Chapman that by comparing A's situation were he to return to Pakistan with his position were he to remain in the United Kingdom without his brother, the judge focussed wrongly on what A would reasonably do, rather than on whether, looked at objectively, all the circumstances meant that he would in fact be compelled to leave. The judge did not go on to conduct the necessary objective assessment, taking account of all the evidence, including such state funded care as could (or should) have been provided (in a residential or other setting) to determine whether there was objectively viewed, no practical alternative to A leaving.

50.
Secondly, at paragraph 27, the judge made a number of further errors. Having referred to the importance of establishing practical compulsion, she posed for herself the question "whether the individual concerned would in reality leave with his carer" drawing on Patel at [32]. That too was the wrong question: the question should have been whether the individual concerned would in reality be compelled to leave. The reference to Patel at [32] with emphasis placed by the judge on the words "would" and "could" was also misplaced. At [32] in Patel Lady Arden was addressing the case of Shah in the context of particular findings of fact made by the FTT in that case, which concerned a dependent infant child who lacked any personal choice as to whether to stay or leave. That paragraph had no relevance to this case, and could not simply be translated across to it. The judge's final conclusion at the end of paragraph 27 again reflects the error of her approach: she found that there was an option for A to stay (he could do it), but she concluded that he would not do it. The judge was entitled to find that A would leave; but the real question was whether that was a matter of choice or a matter of compulsion. That question was not answered or even addressed.

51.
In that regard this case is unlike MS (Malaysia), where the judge did not suspend further consideration of the appeal at the point where he accepted the British citizen's evidence that he would feel compelled to leave, but went on to explain why in the light of all the evidence the judge considered that he would inevitably be compelled to leave. Here, while UT Judge Bruce did not say expressly that she was treating A's evidence as conclusive, as opposed to giving it weight, that is

precisely what she did. There is nothing in her judgment to show that the judge moved from the finding about A's subjective intention, to conducting the necessary objective assessment, taking account of all the evidence, that would enable her to determine whether viewed objectively, there was no practical alternative to A leaving.

52.
It seems to me that there was a yet further error in the judge's approach. The judge wrongly took into account the effect of RM leaving on A's involvement in public life: see in particular her findings at paragraph 13 (iv) and (v) and paragraph 23 that A has a meaningful private life in the United Kingdom performing roles as a local councillor and as a disability officer for his constituency Labour Party, and would not be able to fulfil these roles without his brother, or at least, his involvement in such roles would be substantially reduced. At paragraph 24 in the comparison she drew between remaining in the United Kingdom and returning to Pakistan if RM left indefinitely, the judge described A as being "confined to his home" and said he "would have to give up most, if not all, of the work and community activism that he currently finds so important" if he remained in this country. A's private life rights are, of course, entitled to respect. However, as the Supreme Court made clear in Patel, it is not permissible for an adult British citizen's right to have his private or family life taken into account if this would diminish the requirement to show compulsion to leave. Here it seems to me that is what the judge did. Her focus on how much more fulfilling a private life A would be enabled to have and maintain if his brother stayed, led her to relax the requirement of compulsion and to stray into the territory of considering whether A would prefer for his brother to stay.

53.
Mr Holmes submitted that this mischaracterises the use to which the judge put this evidence, and that what the judge was really saying was that the effect on A would be so severe in light of his public role, over and above his physical needs, that A would be compelled to leave. I do not accept that this was the judge's reasoning, and Mr Holmes did not point to any passage in her reasons that reflected such a consideration. For A's public roles to have featured in the judge's analysis she would have had to conclude that these roles were so important to him, that without them his life would not be worthwhile, and that this contributed to his compulsion to leave. She did not make any express finding to this effect and it is not implicit in her reasoning. Indeed she found at paragraph 23 that giving up his involvement in public life was not "a feasible option for himself". There is a logical inconsistency in this: his strong desire to maintain this role tends to suggest that he would not leave the United Kingdom.

54.
The errors in the judge's application of the derivative residence test I have identified are material errors. I do not think it can be said that her ultimate conclusion would inevitably have been the same had she not made these errors. It might be the same; it might not. In those circumstances, the appeal must be allowed and I shall deal with the remaining challenges more shortly.

55.
In relation to the challenge to the approach taken to the evidence from Bradford Social Services (about the availability of local authority medical and social care, and the enforceable legal duty to provide adequate care to A) Mr Chapman submitted to this court, (though this submission was not made below) that the enforceable duty was a material and not a hypothetical factor: A can in fact enforce the duty owed to him through judicial review proceedings, and this should have been addressed since the availability of care was directly relevant to the assessment of whether or not there were practicable alternatives to leaving this country. Moreover, there was insufficient evidence

to justify any conclusion that might have been reached by the judge, that Bradford Social Services would be unable to provide appropriate care: the care assessment provided in 2019 (which specified that night-time care could not be provided) was an inadequate foundation for such a conclusion. There was no enquiry into whether residential care was a viable option and would be provided. Further, since the absence of other care options was critical to RM's case, the judge was wrong not to consider this important part of the evidence in greater detail.

56.
I do not think these are fair criticisms of the judgment. The availability of state-funded medical and/or social care may in many cases, make it hard for those who provide care for their elderly relatives to bring themselves within the Regulations. However, as this court observed in MS (Malaysia) at [42], 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. 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 British citizen on her adult carer." Accordingly, where relevant the availability of alternative care must be considered carefully and assessed realistically in terms of the established facts, both as to availability, appropriateness and adequacy of the care likely to be provided. This was done here. A report from Bradford Social Services was produced in evidence. It dealt with the availability of state medical and social care. A also provided evidence of the cost estimates of private care. If the SSHD wished to challenge any of that evidence (for example, by relying on evidence that Bradford Social Services would provide care elsewhere than in A's home) it seems to me that there was an evidential burden on the SSHD to produce such evidence. In the absence of any evidence from the SSHD contradicting what was said by Bradford Social Services in the care assessment put before the judge, the judge reached conclusions that were amply open to her on the evidence and not arguably perverse or in error of law.

57.
The reasons challenge adds nothing and falls away.

58.
For all these reasons, and recognising with considerable regret that the case will have to be remitted for a rehearing, putting the parties back to square one, I agreed that this appeal had to be allowed and the judge's decision set aside. It was common ground that the case should be remitted to the Upper Tribunal rather than the FTT, with a direction that it should be dealt with by a different judge.

Baker LJ:

59.
I agree.

Lewison LJ:

60.
I also agree.