Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03476/2018

EA/03478/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13th February 2019	**On 18th February 2019**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

TEJALBEN GOSWAMI AND JINESHGIRI GOSWAMI
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Badar, Counsel instructed on behalf of the Appellants.
For the Respondent: Miss Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants with permission, appeal against the decision of the First-tier Tribunal (hereinafter referred to as the "FtTJ") who, in a determination promulgated on the 28th November 2018 dismissed their appeals against the decision of the Respondent to refuse the first Appellant's application for a residence card as confirmation of her right to reside in the United Kingdom as a primary carer of a British Citizen pursuant to Regulations 20

and 16(5) under the Immigration (European Economic Area) Regulations 2016 ("hereinafter referred to as the 2016 Regulations").

2. The Appellants are citizens of India and are husband and wife. On 15 November 2017 applications were made by the first and second Appellants for derivative residence cards as confirmation that they were the primary carers of a British citizen. The sponsor, who is a British citizen, is the mother of the first Appellant.

3. In a decision made on 1 May 2018 the Respondent refused that application. The application was considered under Regulation 20 and 16 (5) of the 2016 Regulations and was refused on the basis that the first Appellant had not provided adequate evidence to show that she was the primary carer of a British citizen. In particular it was stated that the Appellant had not provided adequate evidence to demonstrate that the British citizen's needs could not be met by the NHS/local authority or private care nor had she demonstrated that the sponsor was solely dependent upon her for her care. The decision letter acknowledged that the British citizen concerned suffered from a range of health problems but had not received a diagnosis of a specific disorder that required a full-time carer. Furthermore, the psychological assessment had been conducted privately rather than having been conducted by a consultant in charge of the British citizen's care. The decision letter considered that the Appellant had failed to provide evidence that only she could assume the role of carer and why. Thus, the Respondent considered that the Appellant had not demonstrated that the British citizen sponsor would be unable to reside in the UK or in another EEA state if the Appellant was required to leave for an indefinite period.

4. The second appellant is the son-in-law of the British citizen sponsor and is therefore not considered a "direct relative" or "legal guardian" and was told that he did not have a right of appeal at all (see paragraph 5 of the FtTJ decision). There is reference in the court papers at page 7 to the Tribunal having accepted an appeal in respect of the second appellant but that the application had been refused without a right of appeal under Regulation 36 and that this was to be determined as a preliminary issue. It is unclear to me whether that issue was in fact resolved.

5. The Appellants lodged grounds of appeal against that decision on 9 May 2018. It is recorded in the grounds that the Respondent had made an error by not issuing a right of appeal in respect of the second Appellant and it was asserted that he also had a right of appeal as he was a family member citing Regulation 7(1) (c) of the 2016 Regulations. It was the second Appellant's case that he was also a primary carer of his mother-in-law.

6. The appeal came before the First-tier Tribunal on 20 November 2018. In a decision promulgated on 28 November 2018 the appeals were dismissed. The judge did not hear any oral evidence, either from the two Appellants or from the sponsor, and referred to the issues before the Tribunal as

being “an argument on an extremely narrow legal principle, not really a factual dispute” (see paragraph 10). At paragraph 14, the judge also made reference to the decision of the Court of Appeal in Patel and observed that the “case rested solely on a point of law”. The judge then proceeded to consider the medical circumstances of the sponsor by reference to specific conditions and purportedly by reference to the medical evidence but also based, it appears, on the judge’s own understanding of the medical conditions described and what may or could be appropriate medication or further diagnosis. The judge concluded that the Appellants did not satisfy the Regulations and dismissed the appeals.

7. On 11 December 2018 grounds of appeal were lodged on behalf of the Appellants. There were three specific grounds relied upon; ground 1 asserted that the judge had made a material misdirection in law by failure to follow the Court of Appeal decision in Patel; ground 2 asserted that the judge failed to consider the importance of the appeal of Patel to the Supreme Court and a ground 3 it was asserted that the judge had made perverse/irrational medical findings which were outside his remit to make.

8. Permission to appeal the decision was granted on 28 December 2018.

9. At the hearing before the Upper Tribunal, it was common ground between the advocates that the decision of the First-tier Tribunal involved the making of an error on a point of law and that the correct course to adopt would be for the decision to be set aside in its entirety with none of the findings of fact preserved and for the decision to be remitted to the FtT for a fresh hearing.

10. It is therefore only necessary for me to set out why I agree with that course and to set out briefly my reasons. I am satisfied that grounds one and three are made out.

11. As Mr Badar submitted, the judge erred in law by failing to apply the Court of Appeal decision in Patel v The Secretary of State for the Home Department [2017] EWCA Civ 2028 (hereinafter referred to as “Patel”). In that decision the Court of Appeal was asked to address the question of derivative claims of residence in the United Kingdom by those without rights of residence based upon their care for British citizens who are their “direct relatives” whether children or adults in need of care. At paragraphs 81 – 82 of the decision, the court made reference to the test which remained the test of compulsion. As set out above, the judge did not hear any oral evidence from the parties or from the sponsor and observed that the case before him was “an argument on an extremely narrow legal principle, not really a factual dispute.” (See paragraph 10) at paragraph 14 the judge made reference to the decision in Patel stating, “it became apparent that the case rested solely on a point of law in the Patel case given by Irwin LJ”. Therefore, whilst the judge had made reference to the case, and also at paragraph 22) he did not consider the issue of compulsion or choice when reaching his overall conclusions. Miss Everett conceded that at no point in the determination was there any assessment

of this issue by reference to the evidence. Instead, the vast body of the decision comprises of a discussion of medication, appropriate alternatives (not in any evidence) and the position of alternative carers. Both parties agree that the judge failed to apply the correct legal test.

12. Furthermore, both advocates agree that the judge made findings of fact on evidence that was not before the First-tier Tribunal. The grounds set out and make reference to a number of examples within the determination whereby the judge appeared to use his own knowledge of medical conditions and appropriate medication to make findings of fact. For example, the judge makes reference to the various medical conditions that the Appellant has at paragraph 31. Thereafter he considers those conditions in the light of treatment or medication that could be provided which was not in any evidence before the Tribunal. At paragraph 32 he makes reference to medication to offset deficiencies that the Appellant may have, at paragraph 33 he makes reference to the general practitioner being invited to prescribe different ointment which could lead to a full long-term recovery and at paragraph 35 proffers suggestions as to how her mobility issues could be treated by the medical profession. There are similar examples of paragraphs 36 and 37 and at paragraph 48- 49 making reference to medication for pain. The statements made by the judge do not emanate from any evidence and appear to be medical advice as to what the correct treatment should be.

13. It is plain from reading the judge's determination that he has experience in medical based legal appeals (see his observation at paragraph 59) but however well-intentioned, the findings made from the actual evidence before the Tribunal is muddled up with his own medical opinion and thus it is difficult with any certainty to ascertain what findings were made on the actual evidence that was before the Tribunal. As both parties submit, it is difficult if not impossible to extrapolate findings from the decision that have not been influenced by the judges own medical views. As the grounds state, the appeal should be decided on the evidence and if there were other issues, at the very least they should have been raised with the parties to give them the opportunity to address them.

14. For those reasons, and as both parties agree, the decision of the FtT involves making an error on a point of law and should be set aside. It is further agreed that the nature of the error of law is such that none of the findings of fact can be preserved and new findings will have to be made in accordance with the evidence.

15. As to the remaking of the decision, ground 2 made reference to the failure of the Tribunal to stay the proceedings to await the decision of the Supreme Court in Patel.
The issue of staying proceedings was the subject of detailed consideration by the Court of Appeal in AB (Sudan) v Secretary of State for the Home Department [2013] EWCA Civ 921. The Court, firstly, contrasted a stay of proceedings with a stay of enforcement of a judicial decision or order. It emphasised that stay issue involve case management decisions. It added,

at [25]:

> "*Such decisions will rarely be challenged and even more rarely be reversed on appeal.*"

16. The Court added the following observations of specified relevance in immigration cases:

> *"28. Immigration law has a tendency to develop rapidly, indeed sometimes at bewildering speed. The constant flow of developments arises from the industry of legislators, rule-makers, judges and practitioners. Not only does the law in this area change fast. So also do the political, military, social and economic circumstances in the numerous countries from which asylum seekers or other migrants may come.*
>
> *29. Both the tribunals and the courts have to keep pace with these constant changes. When a new appellate decision is awaited it is not unusual for parties in pending similar cases to seek a stay of their proceedings.*
>
> *30. Sometimes it is obviously necessary to grant such a stay, because the anticipated appellate decision will have a critical impact upon the proceedings in hand. There is also, however, a need for realism. In the world of immigration it is a fact of life that the law which the judge applies is liable to change in the future, quite possibly in the near future. This cannot usually be a reason for staying proceedings. I started dealing with immigration cases some fourteen years ago. I cannot remember any occasion during that period when important decisions on one or more aspects of immigration law were not eagerly awaited from the appellate courts.*
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> *31. As Pill LJ observed in R (Bahta) v SSHD [2011] EWCA Civ 895 at [70], what the Court of Appeal says is the law, is the law, unless and until overruled by a superior court or by Parliament. Likewise country guidance decisions should generally be applied unless and until they are reversed or superseded.*
>
> *32 In my view the power to stay immigration cases pending a future appellate decision in other litigation is a power which must be exercised cautiously and only when, in the interests of justice, it is necessary to do so. It may be necessary to grant a stay if the impending appellate decision is likely to have a critical impact on the current litigation. If courts or tribunals exercise their power to stay cases too freely, the immigration system (which is already overloaded with work) will become even more clogged up."*

17. I indicated to the parties that in my judgment the judge was not in error in refusing to stay the proceedings. He did not expressly make reference to the decision of the Court of Appeal but did apply the principles from that

case. Given that the case is not to be heard until May (the judge heard the appeal in 2018) and there was no evidence before him as to when the Supreme Court would give their written decision. For the same reasons, I do not consider it appropriate to stay the proceedings at this stage. However, it is plain from hearing the submissions of Mr Badar that it is likely that oral evidence will be given by the parties concerned and that any medical evidence may also require updating and therefore I am satisfied that the appeal should be remitted to the First-tier Tribunal to make findings of fact on the evidence and apply the correct legal test.

18. I therefore direct that a case management review hearing should be listed before the First-tier Tribunal and any further arguments or submissions that relate to the issue of a stay of the proceedings pending the decision of the Supreme Court can be advanced at the case management review hearing, who will be in a better placed position to consider what course is appropriate at that time.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law; the decision is set aside and is remitted for a fresh hearing before the First-tier Tribunal on a date to be fixed and in accordance with the directions given above.

No anonymity direction is made.

Signed Date 14/02/2019

Upper Tribunal Judge Reeds