



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/01590/2020

**THE IMMIGRATION ACTS**

Heard at Field House  
by Skype for Business  
On 26 April 2021

Decision & Reasons Promulgated

On 30<sup>th</sup> April 2021

Before

**UPPER TRIBUNAL JUDGE GLEESON**

Between

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

Appellant

and

**BAKIR HASSANALLY  
[NO ANONYMITY ORDER]**

Respondent

Representation:

For the appellant: Mr Peter Deller, a Senior Home Office Presenting Officer

For the respondent: Ms Sanoz Saifollahi, Counsel instructed by M & K Solicitors

**DECISION AND REASONS**

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against her decision on 30 January 2020 to refuse him a derivative residence card pursuant to regulations 16 and 20 of the Immigration (European Economic Area) Regulations 2016.
2. The claimant is a citizen of Sri Lanka. His claim is based on his responsibilities as the carer of his elderly father, who is a British citizen of Sri Lankan origin, born in 1949 and currently 71 years old.

3. It is accepted on the claimant's behalf that the First-tier Tribunal and the Upper Tribunal are seised only of issues under the EEA Regulations. There has been no section 120 notice and Article 8 ECHR is not the subject of the present appeal.

## **Background**

4. The claimant has an unappealing immigration history. He came to the United Kingdom in March 2003, aged 21, on a visit visa which expired in September 2003. He has had no permission to be in the United Kingdom since then.
5. The claimant's account is that his father's health began to deteriorate about 12 years after his arrival. The claimant helped his father, and on 13 April 2017, London Borough of Brent registered him as his father's full-time unpaid carer.
6. The claimant took no steps to regularise his position until 21 November 2018, when he applied for a derivative residence card, which was refused. He had an in-country right of appeal which he exercised, against that decision. The decision of First-tier Judge Manuell is the *Devaseelan* starting point for the next appeal. The claimant was appeal rights exhausted in August 2019.
7. On 2 December 2019, the claimant made a second derivative residence card application, with more information. The respondent refused again, and the claimant appealed to the First-tier Tribunal.

## **First-tier Tribunal decision**

8. By a decision sent to the parties on 21 December 2020, First-tier Judge Stedman allowed the claimant's appeal. He did so after conducting a fact-specific exercise, for the following reasons:

"26. Bringing all of these elements together and undertaking a fact-specific exercise, I find that there can be very little room for doubt that the [claimant's] father is provided with a very significant amount of physical and mental health [care] by the [claimant] and that the level of care which would be provided by social services is unable to provide a sufficient level of care, in physical and emotional terms, and in terms of safety and the prevention of harm. And by some margin. There is, in addition for the reasons I have given, a significant level of emotional dependency that could not be replaced or substituted by outside social health resources.

27. In forming my conclusion on the balance of the evidence, I have placed weight on the letter from the [claimant's] father's GP dated 22 September 2020, and also the report of Mr Chapman, which I found to be expressed in clear and cogent terms. I have relied on the [claimant's] statements and evidence regarding the declining state of his father's mental health state and memory and I have considered the prevailing conditions as a result of Covid. ...

28. In my judgment there is a real risk of the [claimant's] father, who is clearly vulnerable, suffering a serious decline of his mental and physical health without the presence of the [claimant]. I have to look at the practical implications of the removal of the [claimant] and what that would mean in real terms. I find that if the [claimant] was removed from the

United Kingdom, that his father would be compelled to leave also because he would not be capable of residing here independently or access the high level of input that he requires. It is my perspective that the conclusion of Judge Manuell that the issues in this appeal merely concern a 'question of personal preferences' is not justified on the evidence."

9. The facts underlying that assessment are to be found at [17]-[25] of the decision, and include confusion, significant cognitive decline, eyesight and hearing problems, and a number of long-standing conditions. On 29 May 2019, Brent Council made a disabled facilities grant for adaptations to the father's home.
10. A letter from Dr Zahira Bachelani, the family general medical practitioner, was to the effect that the claimant was his father's full time carer and Brent Social Services would not be able to provide adequate care if he were removed. Mr David Chapman, an independent social worker, observed that the claimant's father was very confused and unable to respond to him, and that his mental capacity was deteriorating, and that the input required from the claimant had 'increased enormously recently due to the deteriorating health of his father'. A letter from Talking Therapy in August 2018 referred to memory problems and suggested a referral to memory services. The claimant has made contact with support services for people with dementia.
11. An email from Zaid Izhan, ASC Duty Social Worker at Brent Council, sets out his assessment:

"To summarise my assessment, [Mr] Hassanally lives in a two-bedroom ground floor private rented property with shared kitchen, toilet/bathroom. His son lives with him and provides care.

He has glaucoma, hearing aids, numbness on calf, weak knee and back pain, hypertension [and] diabetes. He was confused previously, resulting in wandering, however since a medication change he has been more stable. [Mr] Hassanally requires support with all his daily living tasks, which [the claimant] is currently supporting with.

[Mr] Hassanally requires support with accessing the community, attending GP appointments, etc. I have informed son of befriending services and suggested he contact the hospital department or GP regarding transport to appointments. I have also suggested taxi vouchers and Dial-a-Ride.

*If [the claimant] was unable to provide the relevant support, social services could support with commissioning carers two/three times a day for 30 minutes each at around £15 an hour. This is to support with personal care, dressing, prompt medication and meals. [Mr] Hassanally would be required to purchase support with shopping, laundry and cleaning, using his benefits."*

12. The First-tier Judge found the claimant to be an honest and credible witness as to his father's care needs, memory issues and cognitive decline. He allowed the appeal.
13. The Secretary of State appealed to the Upper Tribunal.

## Permission to appeal

14. Permission to appeal was granted by First-tier Judge Martin on the basis that the First-tier Judge had arguably erred in focusing on the level of care given by the claimant to his father, as opposed to what Brent Social Services could provide, rather than whether the father would be compelled to leave the United Kingdom if his son were removed; and also, that the judge had failed to have regard to the decision of the Supreme Court in *Patel v Secretary of State for the Home Department* [2019] UKSC 59, in which the facts were considered to be very similar.

## Rule 24 Reply

15. The claimant's Counsel settled a Rule 24 Reply, identifying four issues in the Secretary of State's grounds of appeal:
  - (1) That the First-tier Judge had focused on whether the level of care given to the claimant's father would be inferior, rather than whether his father would be compelled to leave the United Kingdom if the claimant were to leave indefinitely;
  - (2) That the First-tier Judge had failed to have regard to *Patel*, and to the high threshold it set;
  - (3) That the First-tier Judge failed to justify his departure from the decision of First-tier Judge Manuell, and failed properly to focus on that decision as the *Devaseelan* starting point; and
  - (4) That the First-tier Judge failed to consider whether the facts of the appeal were amenable to an application for leave to remain on Article 8 ECHR grounds, removing the compulsion on the claimant and his father to leave the United Kingdom.
16. That is the basis on which this appeal came before the Upper Tribunal.

## Upper Tribunal hearing

17. The appeal was heard today by Skype for Business, on the basis of oral and written submissions. The claimant and his father were present on the call. Neither party objected to a remote hearing and I am satisfied that it was appropriate to hear the Secretary of State's appeal in this way. There were no technical difficulties.
18. Mr Deller adopted the concise analysis of the Secretary of State's grounds above and made focused oral submissions which were of great assistance to the Upper Tribunal. He accepted that there was new evidence which provided a potential justification for departing from First-tier Judge Manuell's earlier decision, when much less information had been available. He was not inclined to press the *Devaseelan* point for that reason.
19. As regards Article 8 ECHR, given that the First-tier Tribunal was expressly not seised of that issue, and there was no section 120 notice, Mr Deller accepted that failure to consider Article 8 ECHR could not constitute an error of law or fact by the First-tier Judge.

20. That left the first two grounds, which can be considered together. The First-tier Judge had not overlooked *Patel*: Mr Deller argued that a precis of the *Patel* test was to erase the claimant from the equation and see what would happen by way of Social Services care if he were not there. The European Union *Zambrano* right was a last resort, requiring something close to impossibility of the father remaining without his son, in order for the claimant to succeed.
21. For the claimant, Ms Saifolahi relied on the opinion of Lady Arden, with whom Lady Hale, Lord Carnwath, Lord Briggs and Lord Sales agreed, at [4]-[5] and [17]-[18] of *Patel*. The facts were different in *Patel*: the father in that case required dialysis and there was no certainty that he would be able to access it in India if he returned there with his father. The father in *Patel* also still had a living spouse, the appellant's mother, and the Supreme Court found that he would be provided with a social services care package and appropriate medical treatment if his son were to leave. At [17]-[22], Lady Arden explained the test and Ms Saifolahi contended that the claimant could properly be found to fall within the narrow test she outlined.

### Analysis

22. This is a fact-specific decision and the First-tier Judge in this appeal heard oral evidence from the claimant, which he found to be honest and credible, and also had a significant amount of new written evidence as to the deterioration in the claimant's father's health since Judge Manuell's decision in 2019. The judge did not err in departing from Judge Manuell's analysis for that reason: as already stated, Mr Deller sensibly did not press the point.
23. The First-tier Judge gave himself a proper self-direction on the *Patel* test at [14], citing [22] in Lady Arden's opinion:

"22. What lies at the heart of the *Zambrano* jurisprudence is the requirement that the Union citizen would be compelled to leave Union territory if the TCN, with whom the Union citizen has a relationship of dependency, is removed. As the CJEU held in *O v Maahanmuuttovirasto (Joined Cases C-356/11 and C-357/11)* [2013] Fam 203, it is the role of the national court to determine whether the removal of the TCN carer would actually cause the Union citizen to leave the Union. In this case, the FTT found against Mr Patel and concluded that his father would not accompany him to India. That means that, unless *Chavez-Vilchez* adopts a different approach to compulsion, Mr Patel's appeal must fail. There is no question of his being able to establish any interference with his Convention right to respect for his private and family life as he has failed already in that regard."

24. I remind myself of the narrow circumstances in which it is appropriate to interfere with a finding of fact by a First-tier Judge who has heard the parties give oral evidence: see *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296 and *R (Iran) & Others v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [90] in the judgment of Lord Justice Brooke, with whom Lord Justice Chadwick and Lord Justice Maurice Kay agreed.

25. The question then is whether it can properly be said that the First-tier Judge focused on whether the level of care given to the claimant's father would be inferior, rather than whether his father would be compelled to leave the United Kingdom if the claimant were to leave indefinitely. I am not satisfied that such is a proper characterisation of this carefully reasoned decision. The materials before the First-tier Judge were more than sufficient to show that if the claimant were removed, his father would be obliged to go with him.
26. The evidence from Brent Social Services was to the effect that only very limited support could be provided if the claimant were not there, and that the father, who lives on benefits, would have to organise most things from his very limited financial resources. The father has sight and hearing difficulties, and confusion. He has a number of other ailments and, probably, dementia.
27. Based on the facts found in his decision, the First-tier Judge was unarguably entitled to conclude that in practice, if the claimant were removed, his father would have to accompany him. On that basis, it was open to him to allow the appeal for the reasons he gave in his decision.
28. I therefore uphold the decision of the First-tier Judge and dismiss the Secretary of State's appeal.

## DECISION

29. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law I do not set aside the decision but order that it shall stand.

Signed *Judith AJC Gleeson*  
Upper Tribunal Judge Gleeson

Date: 26 April 2021