Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14316/2019

THE IMMIGRATION ACTS

Heard at Field House (Remotely)
On: 26 May 2021

Decision & Reasons Promulgated
On 16 June 2021

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

MRS SARASWATHY VENKATAKRISHNAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Z Raza, counsel instructed by Marks & Marks Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge O'Garro, promulgated on 3 February 2020. Permission to appeal was granted by the Vice President of the Upper Tribunal on 8 February 2021.

Anonymity

2. No direction has been made previously, and there is no obvious reason for one now and no such application was made.

Background

3. The appellant, now aged 76, entered the United Kingdom as a visitor on several occasions between 2005 and 2015. She last entered on 2 May 2015. Prior to her leave to enter expiring, the appellant sought leave to remain in the UK on human rights grounds. That application was refused on 14 February 2016 and certified as clearly unfounded. Further submissions were refused on 9 August 2017 and 18 December 2017.

4. On 26 October 2018, the appellant made a human rights application on private life grounds. That application was refused on 12 August 2019 and is the decision which is subject to this appeal. The Secretary of State refused the appellant's human rights claim because it was not accepted that the appellant's age and medical conditions amounted to very significant obstacles to her reintegration in India. It was noted that she had resided in India until the age of 70, that her late husband had left her land and property and that India had a health-care system which the appellant had previously used. It was not accepted that the appellant's circumstances merited an exception being made in her case.

The decision of the First-tier Tribunal

5. At the hearing before the First-tier Tribunal, the appellant's adult daughter gave evidence. There was also new medical evidence before the judge of the appellant having episodes of memory impairment. The judge accepted that the appellant's physical condition had deteriorated since she last entered the UK and that she would need personal care in India but did not accept that there were very significant obstacles to her reintegration. The judge found that there were close relatives and neighbours who could assist the appellant and that the appellant's daughter had the financial means to pay for assistance.

The grounds of appeal

6. The grounds of appeal to the Upper Tribunal argued that the First-tier Tribunal conflated the previous and current legal tests under paragraph 276ADE(1) (vi); that the findings as to the appellant's family ties were not properly reasoned and did not address the written and oral evidence of the sponsor as to why family support in India was not available. It was also argued that the Tribunal's conclusions as to the reasons for the appellant's dependency on her daughter were against the weight of the evidence; that the judge erred in attaching little weight to family life under 117B (4) and failed to take into consideration that the sponsor's British son was studying in the United Kingdom.

7. Permission to appeal was refused by Upper Tribunal Judge Sheridan on 13 August 2020 on the basis that the grounds of appeal were unarguable.

8. The appellant was granted permission to apply for judicial review of the decision of Judge Sheridan on 17 November 2020 by Mr Justice Mostyn. That decision included the following observation:

> *[8] "I have concluded that the claimant should have been granted permission to appeal because the judgment of the primary judge is so confused as to the relevant legal test being applied that the claimant could not be said to have understood with sufficient clarity why she had lost."*
>
> *[10] "The judgment of the primary judge is completely confused as to which test was being applied... in paragraph 19 the citation of the authority in Bossadi strongly suggests that the old test was being applied. In paragraphs 20-21 it appears that the new test is being applied; yet in paragraph 22 it is tolerably clear that the old one is in play."*
>
> *[12] In my opinion it was arguable that the judgment was flawed beyond repair..."*

9. The decision of the Upper Tribunal to refuse permission to appeal was quashed by order of Master Gidden dated 23 November 2020. Following which the Vice President granted permission to appeal, without observations.

10. The respondent's Rule 24 response indicated that the appeal was opposed.

The hearing

11. Mr Raza's submissions relied heavily on the observations of Mr Justice Mostyn. He argued that there was no need for the First-tier Tribunal to refer to the previous iteration of paragraph 276ADE(1)(vi). While the issue of ties was relevant it was not the focus of the current test of very significant obstacles. Mr Raza submitted that owing to the judge's focus on the appellant's ties, there was a failure to consider material matters including the extent of assistance provided by the sponsor and the lack of family support available in India. Furthermore, the judge had entered into the realm of speculation in finding that the appellant's siblings and neighbours could assist her when there was no evidence to this effect before the First-tier Tribunal.

12. Mr Avery argued that there was not, in reality, much different between the original test which was based on an assessment of ties and the very significant obstacles test. He accepted that the current test was broader, applying *Kamara* [2016] EWCA Civ 813, in that a broad evaluative assessment was required. It was accepted on behalf of the appellant that the judge addressed the new test and took that into account. While the focus was too much on the old test the judge understood the context of the appellant's case in that she noted that the appellant's physical

condition had deteriorated and that she will require care in India. The observations the judge made at [29] regarding the support available to the appellant were open to her. Mr Avery submitted that the judge made no material error of law.

13. In response, Mr Raza argued that there was a significant difference between the previous and current tests. There had been no need for the judge to refer to *Bossadi (paragraph 286ADE; suitability, ties)* [2015] UKUT 42 (IAC) which refers to the "no ties" test. While the issue of ties was relevant, it was a single aspect of the current test. The reference to no ties was made on multiple occasions. While the judge referred to the current test, it added to the confusion.

14. Mr Raza submitted that the judge's findings were focused on the issue of ties such as family life in India and the prevalence of neighbours. The said findings being made without reasoning and contrary to the evidence in the sponsor's witness statement.

15. At the end of the hearing, I concluded that the judge made a material error of law in relation to her assessment of the very significant obstacles test, in that she repeatedly referred to and applied the previous "no ties" test. Furthermore, the judge's consideration of the appellant's ties and support available in India did not accord with the evidence before her and there was an absence of reasons for her findings that support was available. Accordingly, the decision of the First-tier Tribunal is set aside in its entirety.

16. Mr Raza sought remittal to the First-tier Tribunal because there would need to be further evidence adduced regarding the appellant's current circumstances and up to date evidence regarding her health conditions. Mr Avery did not oppose that outcome. There was also a further issue which was not adequately addressed by the First-tier Tribunal previously, that being the ability of the appellant to replicate the personal care which she is receiving from her daughter in the United Kingdom, in India. I accordingly remitted the matter for a de novo hearing at the First-tier Tribunal.

Decision on error of law

17. To reiterate what is said above, the First-tier Tribunal confused the correct approach to paragraph 276ADE(1)(vi) with a focus on the predecessor test of "no ties" and the findings made by the judge focused on the issue of ties rather than current test of very significant obstacles. While the judge referred to the correct test at [18] (although she wrongly identified the appellant as being a Pakistani national) and appropriately directed herself by reference to *Kamara* at [20], she erred in referring to *Bossadi* at [19] and focused on the appellant's ties at [22], [26] and [29]. As a result of that misdirection, the judge failed to consider material matters including the specific nature of the assistance provided to the appellant by her daughter; whether that care could be replicated in India;

that the appellant's elder brothers had their own health concerns and there had been a breakdown in communication between the appellant and her relatives in India. The judge further speculated that the appellant would have "good neighbours" without there being any evidence going to that issue.

18. While mindful of statement 7 of the Senior President's Practice Statements of 10 February 2010, it is the case that the appellant has yet to have an adequate consideration of her human rights appeal at the First-tier Tribunal and it would be unfair to deprive her of such consideration.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Hatton Cross, with a time estimate of 3 hours by any judge except First-tier Tribunal Judge O'Garro.

No anonymity direction is made.

Signed: Date: 27 May 2021

Upper Tribunal Judge Kamara