IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI 2022 006117
First-tier Tribunal No: EA/01054/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 2 May 2023

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

IBRAHIM KARAKAS
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: In person
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on 29 March 2023

DECISION AND REASONS

Introduction

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Suffield-Thompson promulgated on 31 August 2022.

2. However, for ease of reference hereafter the parties will be referred to as they were before the First-tier Tribunal.

3. Permission to appeal was granted by First-tier Tribunal Judge Athwal on 24 November 2022.

Anonymity

4. No anonymity direction was made previously, and there is no reason for one now.

Factual Background

5. The appellant, who is now aged seventy, entered the United Kingdom clandestinely and applied for asylum during May 2004. That claim failed as did the appellant's appeal against the refusal of asylum. He was removed from the United Kingdom on 8 December 2005. The appellant re-entered the United Kingdom during October 2008 and applied for asylum shortly thereafter. That claim was also refused during January 2009 and his appeal was dismissed in November 2009. The appellant then applied for leave to remain as the spouse of a settled person and was refused with no right of appeal. Thereafter the appellant lodged a series of further submissions between 2013 and 2020, none of which led to an appealable decision.

6. On 26 February 2020, the appellant applied for a derivative residence card under the Immigration (European Economic Area) Regulation 2016, as the primary carer of his British citizen wife. That application was refused on 16 December 2021 because it was considered that he had not provided sufficient evidence to show that he was the primary carer of his wife.

The decision of the First-tier Tribunal

7. At the hearing before the First-tier Tribunal, the appellant attended, in person. The Secretary of State was not represented. The First-tier Tribunal judge accepted that the appellant met the requirements of the 2016 Regulations and that he was his wife's main carer and that she would be unable to remain in the United Kingdom if he had to leave the country.

The grounds of appeal

8. The first of the two grounds contended that the judge had an inadequate grasp of statute and case law in the following respects.

> The Judge sets out at paragraph 21 that were three issues to be decided and states, remarkably, that "It is accepted by the Respondent that the Appellant has a derivative right to reside as he is married to a British citizen." This in no way reflects the law or the position adopted by the Secretary of State. In fact the Judge's three issues are just one – that the appellant claimed to be the primary carer of a British citizen who would have to leave the EEA (now realistically the UK) should the appellant be unable to remain. The Secretary of State raised in the refusal questions as to whether in fact the appellant was a primary carer given that this was not in the medical evidence and also questioned whether the wife would be compelled to leave. The Supreme Court case of Patel was cited but is not mentioned by the Judge, who appears simply to have taken the hostile view that of course a spouse of 43 years would be primary carer and not an adult daughter. This is indicative of the Judge having had no proper regard to the law, the full extent of the evidence or of the binding legal precedents on the issue. There is simply no adequate consideration of the appeal.

9. The second ground was that the judge had regard to irrelevant matters.

> Judge Suffield-Thompson expresses the view at paragraph 27 that the appellant's case "should have been dealt with and his stay permanently regularised many years ago". This conclusion has no regard to the fact that Mr Karakas's position had been subject to due process throughout but more

> to the point it was entirely irrelevant to the matter to be decided in the appeal, which was whether a claim to a regulation 16(5) derivative right to reside existed at the date of decision. The case had been previously been put purely on the basis of the qualified rights provided by Article 8 of the ECHR and the judge's (flawed) view on the applicability of a regulation 16(5) right had never previously been asserted or considered in the previous "many years". It is also irrelevant to raise questions as to why the daughter's circumstances would make it difficult for her to provide assistance and to deplore the Respondent's suggestion that this might be a factor.

10. Permission to appeal was granted, with the judge granting permission making the following remarks.

> The first ground raises an arguable error of law. The Respondent was not represented, so quite properly the Judge summarised the Respondent's reasons for refusal. At paragraph 20 he stated that the Appellant had to prove that he had a derivative right to reside. At paragraph 21 the Judge stated that that it was accepted by the Respondent that the Appellant had a derivative right to reside as he is married to a British citizen. This was not the position adopted by the Respondent, as paragraph 20 demonstrates.

11. No Rule 24 response was filed.

The hearing

12. The appellant attended the hearing along with his wife and son-in-law. A Turkish interpreter was provided by the Upper Tribunal, to enable the appellant to take part in the hearing.

13. At the outset, Mr Tufan confirmed that the respondent maintained the position set out in the grounds. In addition, Mr Tufan made the following submissions.

14. Regarding the first ground, the judge was under an obligation to consider the rationale in *Patel* [2019] UKSC 59 and the failure to do so was clearly an error of law. As the appellant's case involved adult relatives, this case fell within *Patel*. The judge also wrongly recorded the Secretary of State's case at [21] by saying that the Home Office accepted that the appellant had a right of residence on derivative basis and thus the judge did not consider the concerns raised in the decision letter, applying *Malaba* [2006] EWCA Civ 820. As for the second ground, Mr Tufan had nothing to add to the grounds as drafted.

15. Mr Tufan also attempted, impermissibly, to introduce a new ground of appeal, without application, referring to *BL (Jamaica)* [2016] EWCA Civ 357, a deportation case involving an article 8 ECHR dimension. I did not give him permission to pursue this ground.

16. At the end of the hearing, I announced that there was no material error of law in the decision of the First-tier Tribunal and that the decision was upheld.

Decision on error of law

17. In the first ground, it is rightly stated that at [21], the judge records that it was '*accepted by the Respondent that the Appellant has a derivative right to reside*

as he is married to a British citizen.' This was not the Secretary of State's position as set out in the decision letter. As indicated above, the respondent's concerns related to an absence of sufficient evidence that the British citizen was unable to meet their daily care needs or that those needs could not be met through an alternative source. While the judge evidently erred in making this comment, it was not a material error as the judge went on to assess the issues of concern to the respondent. Indeed at [13-15] the judge correctly sets out the relevant Regulations and at [17] records that this appeal does not concern an Article 8 claim. At [20], the judge sets out the issues to be determined in the following way.

> (a) Proof that he has a derivative right to reside (b) Sufficient evidence that he is the primary carer of the British citizen (c) That the British citizen would be unable to continue to reside in the UK if the Appellant were to leave the UK

18. Lastly, also at [21] the judge confirms that the contested issues are '*whether (the appellant) is the Sponsor's primary carer and if she would be unable to continue to live in the UK without him*.'

19. Thereafter, the judge considers the evidence provided as to the sponsor's medical diagnoses and resolves the issues which are rightly identified at paragraphs [20-21]. The objectionable comment can only have been in made in error however, it is not an error that had any effect on the issues which were considered by the judge and as such it was not material.

20. The grounds argue that the Secretary of State questioned whether the appellant was his wife's primary carer as this was not shown in the medical evidence. Yet, at [28], the judge notes that there is reference in a medical report before the Tribunal, to the appellant assisting her with her everyday life and also the view of the doctor that this was in her best interests. The grounds state that the judge did not apply *Patel* in finding that the appellant was the sponsor's primary carer. I find that this complaint is not made out for the following reasons. While the judge did not cite *Patel* it is obvious from even a cursory reading of the decision that the judge applied the conclusions in that case.

21. At [22] of Patel, the following is said in relation to the position of an adult Union Citizen

> 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.

22. The evidence before the judge led to the finding that the sponsor would be compelled to leave the EU if the appellant was removed. That the sponsor would feel compelled to leave the United Kingdom if her husband did was also clearly stated in the representations that accompanied the appellant's application for a derivative residence card. Given the extensive evidence provided to the Tribunal of the sponsor's psychiatric diagnoses, her many physical health issues which are summarised at [23-24] as well as the findings that the appellant was his wife's main carer [24-26 & 29], and that the appellant and his wife have been married

for over 40 years, the judge's conclusion that the appellant met the requirements of the Regulations was entirely open to her.

23. In the second ground it was suggested that the circumstances of the appellant's daughter were irrelevant, and the judge was wrong to 'deplore' the respondent's suggestion that she could be a carer for the sponsor. The judge was fully cognisant of the need to consider whether the sponsor could receive care from another source. This the judge did at [24-26] of the decision, specifically considering whether the appellant's daughter could provide the care required. In view of the sponsor's complex psychiatric needs, her physical health as well as her language and cultural needs, combined with the daughter's inability to provide care the reasons provided for finding that there was no prospect of care from any alternative source and that the Regulations were met wholly adequate.

24. In the second ground it is rightly argued that the Tribunal ought not to have criticised the respondent. At [30], the judge states that 'it is of real concern that this matter has gone on for so long…when he should have been granted leave at the outset.' The grounds are correct to suggest that this comment oversimplifies the appellant's immigration history. Nonetheless, there is no indication that this comment had any bearing on the outcome of the appeal, coming as it did at the end of the decision and after the judge had assessed the case in accordance with the law. It follows, that I find there to be no material error of law in this regard.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal is upheld.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 March 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email