

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA384/2019  
[2019] NZCA 607**

BETWEEN                      KRUTI PATEL  
   Applicant

AND                                IMMIGRATION AND PROTECTION  
   TRIBUNAL  
   First Respondent

   MINISTER OF IMMIGRATION  
   Second Respondent

**CA385/2019  
CA386/2019**

BETWEEN                      KRUTI PATEL  
   Applicant

AND                                MINISTER OF IMMIGRATION  
   Respondent

Hearing:                      25 November 2019

Court:                            French and Brown JJ

Counsel:                      A Schaaf for Applicant  
   I M G Clarke and M G A Madden for Second Respondent in  
   CA384/2019 and Respondent in CA385/2019 and CA386/2019  
   No appearance for the First Respondent in CA384/2019

Judgment:                      3 December 2019 at 10 am

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**JUDGMENT OF THE COURT**

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**The applications for leave to appeal in CA384/2019, CA385/2019 and CA386/2019 are declined.**

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## REASONS OF THE COURT

(Given by French J)

### Introduction

[1] Ms Patel seeks leave to bring three related appeals. The proposed appeals all arise from a deportation liability notice served on her by Immigration New Zealand in August 2016. The grounds of the notice were that she had concealed relevant information in an application for a resident visa.

[2] Ms Patel appealed the notice to the Immigration and Protection Tribunal. The Tribunal dismissed the appeal.<sup>1</sup> Ms Patel then sought and obtained leave to appeal to the High Court against the Tribunal decision on two questions of law.<sup>2</sup> She also obtained leave to bring judicial review proceedings in the High Court.<sup>3</sup> The substantive appeal and judicial review proceeding were heard in the High Court by Gordon J. Gordon J dismissed the appeal and declined the application for judicial review.<sup>4</sup> She also declined to allow Ms Patel to call further evidence.<sup>5</sup>

[3] Having unsuccessfully applied for leave from Gordon J to appeal her decisions to this Court,<sup>6</sup> Ms Patel now seeks leave from this Court. There are three separate applications for leave and they have been allocated separate file numbers. The application relating to the judicial review proceeding is CA384/2019. The leave application in relation to the appeal on the two questions of law is CA385/2019 and the application relating to the refusal to admit further evidence is CA386/2019.

### Background

[4] Ms Patel is an Indian citizen. In 2011 in New Zealand she married another Indian citizen Mr Patel. Ms Patel had lawfully entered New Zealand on a student

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<sup>1</sup> *Patel v Minister of Immigration* [2017] NZIPT 600365 [Tribunal Decision].

<sup>2</sup> *Patel v Minister of Immigration* [2018] NZHC 577 at [86] [Decision on leave to appeal to the High Court].

<sup>3</sup> At [87]

<sup>4</sup> *Patel v Minister of Immigration* [2018] NZHC 2616 [High Court Judgment].

<sup>5</sup> At [102]–[103].

<sup>6</sup> *Patel v Minister of Immigration* [2019] NZHC 1618.

permit three years earlier in 2008. After she married Mr Patel, Ms Patel applied for a work visa based on her marriage to Mr Patel. Mr Patel also filed an application for residency under the skilled migrant category. He included Ms Patel in his application as a secondary applicant.

[5] In 2011 and in 2012, Mr and Ms Patel were interviewed by Immigration New Zealand to determine whether their relationship was “genuine and stable”. During the interview process, Immigration New Zealand asked Ms Patel about an allegation they had received from a Mr Jingar at the time she had applied for her student permit. The allegation was that she had married Mr Jingar in India in 2007. Ms Patel denied she had married Mr Jingar and claimed the marriage documents he had supplied were fraudulent. She suggested he had been trying to blackmail her and her family.

[6] Immigration New Zealand was satisfied with her explanation and granted both Mr and Ms Patel resident visas on 11 September 2014. In October 2014, Mr and Ms Patel separated.

[7] In June 2015, Mr Jingar contacted Immigration New Zealand to repeat his allegation that he had married Ms Patel in 2007. He further claimed that Ms Patel had commenced divorce proceedings in India in 2009. Immigration New Zealand investigated Mr Jingar’s claims and found that the marriage certificate to Mr Jingar appeared to be valid. They also confirmed that Ms Patel had commenced divorce proceedings (based on cruelty) against Mr Jingar in 2009 and further that the divorce proceedings had been dismissed in 2011 for want of prosecution. 2011 was the year Ms Patel married Mr Patel.

[8] Immigration New Zealand subsequently served a deportation liability notice on Ms Patel in August 2016. The grounds of the notice were that she had concealed relevant information in relation to the application for a resident visa, namely that she was married at the time she came to New Zealand and had commenced divorce proceedings in India.

[9] On appeal, the Immigration and Protection Tribunal found that she had not disclosed the fact of her divorce proceeding and that by failing to disclose this information she had deprived Immigration New Zealand of a relevant line of inquiry.<sup>7</sup>

[10] The Tribunal also considered whether it should nevertheless allow the appeal on humanitarian grounds under s 207 of the Immigration Act 2009.

[11] Section 207 provides that the Tribunal must allow an appeal against liability for deportation on humanitarian grounds only if satisfied that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the applicant to be deported from New Zealand and that to allow the applicant to remain in New Zealand would not in all the circumstances be contrary to the public interest.

[12] The Tribunal considered Ms Patel's personal circumstances, including her health and the interests of a child born to her and Mr Patel, but found the circumstances did not, whether viewed individually or collectively, qualify as exceptional for the purposes of s 207.<sup>8</sup>

[13] As already mentioned, Ms Patel obtained leave to appeal to the High Court on two questions of law, those questions being:<sup>9</sup>

- (a) Did the Tribunal err by concluding Ms Patel had "concealed" relevant information?
- (b) Did the Tribunal err by failing to take into account whether Ms Patel intentionally concealed relevant information when assessing whether there were exceptional circumstances of a humanitarian nature under s 207 of the Act?

[14] The High Court answered both questions in the negative. As regards the second question, the Judge held that absence of fault is not relevant to

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<sup>7</sup> Tribunal Decision, above n 1, at [69].

<sup>8</sup> At [103].

<sup>9</sup> Decision on leave to appeal to the High Court, above n 2, at [86].

the determination of what constitutes exceptional circumstances of a humanitarian nature for the purposes of s 207.<sup>10</sup> The Judge relied on several High Court decisions which have held that humanitarian circumstances under s 207 are limited to circumstances that relate to the consequences or effects of deportation on the applicant and not the reasons for deportation.<sup>11</sup> Culpability only becomes potentially relevant when considering whether it is unjust or unduly harsh for the appellant to be deported, after exceptional humanitarian circumstances have already been established.<sup>12</sup>

[15] The question on which leave had been granted in the judicial review proceeding was whether Ms Patel's previous counsel erred by failing to adduce evidence relating to the validity of the marriage at the Tribunal hearing.<sup>13</sup> Gordon J held the evidence which it was said trial counsel should have filed would not have affected the outcome and she therefore answered the question "no".<sup>14</sup>

[16] As also already mentioned, Gordon J was asked to consider an application to adduce further evidence. The proposed further evidence consisted of evidence regarding the invalidity of the marriage certificate and affidavit evidence from Ms Patel's mother about efforts made to track down the lawyer who had allegedly advised Ms Patel to file for divorce against Mr Jingar and not to apply for the marriage to be declared null and void. The Judge declined to admit the evidence because in her assessment it was not relevant.<sup>15</sup>

## **Analysis**

[17] In order to obtain leave to appeal to this Court, Ms Patel must satisfy us that the proposed appeals raise some question capable of bona fide and serious argument involving some interest of sufficient importance to outweigh the cost and delay of a further appeal.<sup>16</sup>

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<sup>10</sup> High Court Judgment, above n 4, at [89]–[91].

<sup>11</sup> At [79]–[87].

<sup>12</sup> At [88]–[89].

<sup>13</sup> At [106].

<sup>14</sup> At [116]–[119].

<sup>15</sup> At [92]–[103].

<sup>16</sup> Immigration Act 2009, ss 246 and 249B.

[18] There is an element of repetition in some of the proposed questions and we therefore do not propose to set them out verbatim. The issues they raise can be conveniently summarised as follows:

- (a) Should Ms Patel's culpability including her allegedly being the victim of marriage fraud have been considered in her humanitarian appeal under s 207?
- (b) Did she conceal relevant information when she failed to disclose the divorce proceedings to Immigration New Zealand?
- (c) The relevance and materiality of the further evidence she wished to call including whether the failure of her legal representative to call it amounted to a breach of procedural fairness.

[19] In support of the leave application, counsel Ms Schaaf submitted that the validity of the marriage was central to the whole case. The relevance or otherwise of the divorce proceedings turned on it. That was because the only possible relevance of the divorce proceedings was that on the face of it, the fact Ms Patel had issued divorce proceedings made her denial of the marriage less credible. If however the marriage was not in fact valid, then the divorce proceedings "fell away". They were not relevant, and therefore Ms Patel could not have concealed relevant information by failing to disclose them. It also followed that the further evidence should have been admitted, bearing as it did on the critical question of the validity of the marriage. It followed too that at the Tribunal hearing there had been procedural unfairness due to the failure of Ms Patel's legal representative to call such evidence.

[20] We do not accept these arguments meet the threshold for granting leave. They are entirely case-specific but more importantly are not in our view seriously arguable.

[21] The provisions of the Immigration Act make it clear that an applicant will be treated as having concealed relevant information if they know the information exists, the information is objectively relevant, meaning it may affect the decision of

the Immigration Officer, and the applicant does not disclose it.<sup>17</sup> Full and accurate information is required.

[22] Ms Patel's inclusion in Mr Patel's application for a resident visa was dependent on whether the two of them were in a genuine and stable relationship. The filing of divorce proceedings predicated the existence of a marriage to someone else was self-evidently relevant to that question. And it was relevant regardless of whether or not there was also evidence suggesting the marriage was fraudulently registered. As Ms Clarke for the Minister of Immigration submitted, the relative weighting of these matters and Ms Patel's explanations for them was for Immigration New Zealand. An applicant is not entitled to select what information they disclose or withhold based on their own subjective assessment of relevance. Having failed to disclose it at the time, it would not have assisted Ms Patel at the Tribunal hearing to come forward with new information in an attempt to retrospectively justify her non-disclosure. And it cannot assist her to attempt to adduce it now.

[23] Similarly, the established duty of full disclosure and candour means it is not tenable for Ms Patel to attempt to argue, as she seeks to do in this Court, that she would only have been required to disclose the divorce proceedings if the immigration officials had asked her about them.

[24] As regards the interpretation of s 207 and the relevance of culpability, Ms Schaaf submitted that the approach taken by Gordon J in this case is inconsistent with the later decision of Gendall J in *Minister of Immigration v Q*.<sup>18</sup> In that case, the applicant had become liable for deportation because of false evidence which she knew nothing about. Gendall J held, with reference to the dicta in the Supreme Court decision of *Guo v Minister of Immigration*,<sup>19</sup> that being without fault could qualify as an exceptional circumstance under s 207.<sup>20</sup>

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<sup>17</sup> Sections 58 and 158.

<sup>18</sup> *Minister of Immigration v Q* [2018] NZHC 3173, [2019] NZAR 117.

<sup>19</sup> *Guo v Minister of Immigration* [2015] NZSC 132, [2016] 1 NZLR 248.

<sup>20</sup> *Minister of Immigration v Q*, above n 18, at [36]–[44]. An appeal against Gendall J's decision is to be heard in this Court in 2020.

[25] Ms Schaaf argued that the conflicting High Court decisions meant this was an issue of general importance.

[26] However, in our view, the issue of absence of fault does not arise on the facts of this case. On Ms Patel's own version of events, before she was interviewed by Immigration New Zealand, she knew of the fraudulently registered marriage and she knew of the divorce proceedings. Ms Patel was not without fault. Recognising this, Ms Schaaf argued for a spectrum of fault but there is no basis for that in either *Guo* or *Q*. It is not a tenable argument.

### **Outcome**

[27] The applications for leave to appeal in CA384/2019, CA385/2019 and CA386/2019 are declined.

[28] Ms Patel is legally aided and we therefore make no award of costs.

Solicitors:

Ferguson Tuilotolava, Manukau for Applicant

Crown Law Office, Wellington for Second Respondent in CA384/2019 and Respondent in CA385/2019 and CA386/2019