



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00465/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 29 November 2018**

**Decision & Reasons
Promulgated
On 12 December 2018**

Before

**THE HONOURABLE LORD MATTHEWS
SITTING AS AN UPPER TRIBUNAL JUDGE
UPPER TRIBUNAL JUDGE KING TD**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EFREN [M]

Claimant/Respondent

Representation:

For the Appellant: Mr I Jarvis, Home Office Presenting Officer

For the Respondent: Ms H Gore, Counsel instructed by McKenzie Beute & Pope
Immigration

DECISION AND REASONS

1. This is an appeal by the Secretary of State, whom we shall call “the appellant”, although he was the respondent in an appeal by Efren [M], an Italian citizen, whose appeal was allowed by the First-tier Tribunal on 10 September 2018 following a hearing on 11 July 2018.
2. On the face of it the appeal was against a decision of the Secretary of State refusing to revoke a deportation, or exclusion, order which was

made on 6 March 2017. It is contended on his behalf that in fact the appeal was against the making of the order itself and not against the refusal to revoke it.

3. The claimant is said to have been deported to Italy and that he waived certain rights and signed certain documents, into which we need not go in detail, but as a matter of fact, no findings of fact were made about that by the First-tier Tribunal and we are not in a position to make any finding on that whatsoever.
4. One thing which is clear is that the decision of the First-tier Tribunal can best be described as something of a hybrid document. Reference is made to the original decision of the Secretary of State. Reference is made to the Immigration (European Economic Area) Regulations 2016 and in particular to Regulation 34 of those Regulations. 34(1) provides that an exclusion order remains in force unless it is revoked by the Secretary of State under this Regulation. Regulation 34(3) says that a person, who is subject to deportation or an exclusion order, may only apply to the Secretary of State to have it revoked on the basis that there has been a material change in their circumstances that justify the making of the order.

5. The Judge of the First-tier Tribunal found at paragraph 71 that:-

"I therefore find that the deportation order should now be revoked in view that there has been a material change in the circumstances that justify the making of the order, namely that the order should never have been made."

This is, it seems to us, confusing the criteria for appealing against the making of an order and the criteria for revoking it. Where an order is to be revoked a material change in circumstances has to be identified in terms of the Regulations. It will not do simply to say that the order should never have been made in the first place; that is not a relevant material change of circumstances; it is not a change of circumstances at all, except that a different legal interpretation has been placed on circumstances which already prevailed at the time of the making of the order.

6. However, a finding that the order should never have been made was perfectly appropriate in an appeal against the making of that order, which is why we say that this decision is something of a hybrid.
7. A number of difficulties in relation to the process of serving the original order were referred to by Counsel, but no finding of fact is made about that, as we have indicated. We are not in a position to make any finding of fact ourselves, no evidence having been laid before us.
8. There is an issue as to whether the claimant was appropriately apprised of his rights to appeal. We cannot deal with that in this application, but we note that representations were made in June 2017, resulting in a decision of 26 July 2017 to refuse to revoke the order. The representations were treated by the Secretary of State as an application to revoke. It is

contended before us that in fact it was an appeal, albeit apparently out of time, against the making of the order in the first place. We note that the decision which is appealed, according to the form IAFT7, is that of 26 July, namely the refusal to revoke.

9. On any view, what has happened here is that the Judge appears to have confused two separate appeals in the process. She has not dealt with a number of the issues of fact which may or may not assist in determining the appeal, namely precisely what happened when or if the documentation was served on the claimant. Both the Home Office Presenting Officer and Counsel agree that the decision is deficient in a number of respects, such as to amount to a material error of law. We are satisfied that the whole proceedings have gone off the rails at a very early stage (if they were ever on the rails) and the matter will be remitted to the First-tier Tribunal before a different judge for a complete rehearing. The parties will need to be clear as to the nature of the appeal that is being presented.

DECISION: The appeal by the Secretary of State succeeds in the Upper Tribunal. The decision of the First-Tier Tribunal is set aside to be remade in the First tier Tribunal de Novo and upon an agreed basis.

10. No anonymity direction is made.



For LORD MATTHEWS
Sitting as an Upper Tribunal Judge
(Immigration and Asylum Chamber)

Date: 7th Dec 2018