



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

Appeal Number: IA/11320/2013

THE IMMIGRATION ACTS

Heard at Field House

On 21 January 2014

Approved Ex Tempore Judgment

**Determination
promulgated**

on 30 January 2014

Before

**THE PRESIDENT, THE HON MR JUSTICE MCCLOSKEY
UPPER TRIBUNAL JUDGE O'CONNOR**

Between

HARRIS MAHMOOD TARAR

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

Respondent

Representation:

For the Appellant: Mr S Ahmed, instructed by 12 Bridge Solicitors

For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

[1] In this appeal a preliminary issue has arisen which requires determination by the Upper Tribunal. We can describe the issue in compact and straightforward terms. In the history of this appeal the Appellant was granted limited leave to enter the United Kingdom on 29 October 2009. That was for a period of three years. On the last day of this period, 29 October 2012, the Appellant's solicitors applied for variation of their client's leave to enter the United Kingdom. This generated a refusal

decision on behalf of the Secretary of State and accompanying removal directions, both dated 22 March 2013. There was in turn an appeal to the First-tier Tribunal.

- [2]** We have raised with both parties' representatives one of the most striking features of the determination of the First-tier Tribunal, namely the repeated unequivocal statements that at the hearing the Respondent's representative "withdrew" the decision of the Secretary of State under appeal. This is stated in three places. First of all, in paragraph 13, where we consider with care the context. The statement at paragraph 13 is located under the heading "Preliminary Issues", which included an unsuccessful Respondent's adjournment application. We paraphrase the following sentences thus. The basis of the adjournment was the pending decision in the case of **MM**. The judge recorded that the Home Office had sought a stay of appeals pending this decision and, furthermore, was not making decisions in cases where **MM** has a potential impact. The judge then commented that to grant an adjournment or a stay would be consistent with the Home Office approach. The application for an adjournment was contested. The judge refused the application in that context. Paragraph 13 of the determination states:

"The respondent's representative withdrew the decision".

- [3]** Under a later heading in the determination, namely "The Respondent's Case", in paragraph 17, the judge stated again:

"The decision was withdrawn".


The structure of the determination was one of considering the Appellant's submission, followed by assessing the evidence and proceeding to make findings of fact. In paragraph 34, the judge considered the issue bearing on Article 8 of the Human Rights Convention. As an integral part of the judge's reasoning in relation to the Article 8 issue, the judge repeated for a third time that the Respondent's decision had been withdrawn. The relevant passage repays careful reading. It consists of the following:

"Here the decision having been withdrawn the Appellant's removal is not imminent and it is on that basis as I find that there is not currently any interference with the couple's family or private life ...".

- [4]** We would observe that the Upper Tribunal is an appellate Tribunal. It exercises an appellate cum supervisory jurisdiction. We are in no doubt that the logically first question to be determined at this stage, permission to appeal having been granted, is whether, as a matter of law, the judge's purported consideration and determination of all the issues at first instance can be sustained. We conclude without hesitation that it is cannot. We have no reason to question the unambiguous repeated statements that the representative of the Secretary of State withdrew the decision of the Secretary of State under a challenge in the appeal and there is no contrary submission. We have been assisted by some candid

submissions by Mr Nath on behalf of the Secretary of State today. Mr Nath is unable to place anything before us which seriously calls into question this analysis. The repeated statements by the judge are consistent only with an unequivocal understanding on the part of all concerned, namely the Tribunal and the two representatives, that the Secretary of State's representative had withdrawn the Secretary of State's decision.

- [5]** The following consequences flow. The first is that everything the judge did thereafter was erroneous in law. The judge was no longer seized of the appeal. That is the effect of Rule 17 of the 2005 Rules. The FtT was *functus officio*. The second analysis which may be applied is a jurisdictional one. The judge, in our view, no longer had jurisdiction to entertain and determine the appeal. Thirdly and finally, bearing in mind that we are operating in the domain of public law, we conclude further that what we find to have been an unambiguous representation by the Secretary of State's representative, namely that the appeal was being withdrawn, engendered in the Appellant a substantive legitimate expectation that that would ensue. What happened thereafter, namely the continuation of the hearing and the preparation of a judgment considering, addressing and determining all of the issues had the effect of frustrating the legitimate expectation in play. There can be no conceivable public interest justification for that course. Thus illegality of this further species is demonstrated.
- [6]** It follows that the decision of the First-tier Tribunal cannot be sustained and must be set aside. The decision was to dismiss the appellant's appeal. The logical effect of our analysis and conclusions above is that the judge should have taken a particular course at first hearing. Having received what we have found to have been an unambiguous statement on behalf of the Secretary of State that the decision was being withdrawn, the judge ought to have made a simple, formal ruling under Rule 17 that the appeal was treated as withdrawn.
- [7]** We proceed to remake the decision in the way in which we consider the First-tier Tribunal ought to have made it. The appeal is treated as having been withdrawn before the First-tier Tribunal, under Rule 17. The consequence of this remade decision is that the Secretary of State will reconsider the original decision and make a fresh one.

Signed: 
The Honourable Mr Justice McCloskey,
President
Dated: 24 January 2014

