



Upper Tribunal
(Immigration and Asylum Chamber)
U/07372/2015

Appeal Number: H

THE IMMIGRATION ACTS

At Field House

Direction sent:
On 31 October 2017

Before:

UPPER TRIBUNAL JUDGE HANBURY

Between:

[F B]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

NOTICE OF WITHDRAWAL
(Pursuant to rule 17 Tribunal Procedure (Upper Tribunal) Rules 2008)

1. On 3 May 2017, the Appellant applied for permission to appeal to the Upper Tribunal against a decision of First-tier Tribunal Judge Phillips. By his decision, promulgated on 5th April 2017, Judge Phillips dismissed the appellant's appeal against the Respondent's decision of 17th August 2015 refusing her application for leave to enter as a child for settlement to join her father, who had ILR, and her mother, who had discretionary leave under Article 8 of the ECHR valid until 1 June 2017. Permission to appeal to the Upper Tribunal was given by First-tier Tribunal Judge Robertson on 31st May 2017.

2. Following a hearing before the Upper Tribunal on 18 July 2017 sitting at Field House, on 7 August 2017 I found a material error of law in the decision of the First-tier Tribunal (FTT). In particular, I found that the decision of the FTT had mistakenly referred to paragraph 297 of the Immigration Rules rather than the correct rule which was paragraph 301 of those Rules. Both parties agreed that that was the case, although the appellant's representatives have urged me to decide the case under Article 8. I directed the parties to make written representations as to the respondent's suggested solution to the error, which was to withdraw the original decision and make a fresh decision under the correct rule (paragraph 301 of the Immigration Rules).
3. By a letter dated 25 August 2017, the Respondent wrote to the Tribunal indicating that the Respondent wished to inform the Tribunal of her intention to withdraw the decision of the ECO dated 14 August 2015 refusing to issue the appellant entry clearance to the UK. Mr C Avery, a Home Office presenting officer, who had appeared at the hearing on 18 July 2017, had already undertaken to the Tribunal that the respondent would make a fresh decision under the correct rule in the event that the appeal was withdrawn. He undertook on behalf of the respondent that to consider any fresh documentation submitted in support of the application and would, of course, consider the appellant's protected private or family life under the provisions of Article 8.
4. This was followed by a letter dated 14 September 2017 written by the appellant's representatives to the Respondent (copied to the Tribunal) in which it was suggested that "the fact that there is another applicable Immigration Rule in the form of paragraph 301 of the Immigration Rules... signifies that there was no identified need in a democratic society to interfere with family life, and it would be disproportionate to do so, as the immigration rules which are supposed to reflect the public interest public interest are met". The representatives went on to suggest that there is no need to withdraw the decision and there is no need for a fresh decision to be made - the Tribunal has jurisdiction to re-make a decision under article 8 of the ECHR.
5. A further direction was sent out on 16 October 2017 by which I directed the Appellant "to make representations as to why the appeal should not be treated as withdrawn. The Tribunal notes that the appellant may raise any arguments under the European Convention on Human Rights in response to any fresh immigration decision the respondent shall make". In response to the above direction, the Appellant's representatives submitted by fax dated 23 October 2017: "We interpret the letter dated 25 August 2017 from the Secretary... As an indication of an intention to withdraw the substantive decision rather than an actual withdraw, and therefore giving us the opportunity to respond on behalf the appellant in accordance with

the terms of the Upper Tribunal's directions of 7 August 2017. The Appellant's position continues to be that the merits of the case insofar as the article 8 element of the decision are concerned is a matter for the Tribunal to determine for the reasons stated in our previous correspondence, and in the grounds in support of the application for permission to appeal the determination of First-tier Tribunal Judge Phillips."

6. Paragraph 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides that a party may withdraw its case before the Upper Tribunal only with the consent of the Tribunal. If the Tribunal does so consent this would amount to a final disposal of the appeal before the Upper Tribunal.
7. In light of the clear indication by the Respondent on 25th of August 2017 that she withdrew her decision on behalf of the Entry Clearance Officer dated 14 August 2014, there is no substantive decision before the Upper Tribunal against which the appellant can appeal. It appears to the Tribunal to be unfair to the respondent to make a decision under Article 8 before the matter has been properly considered by her in the context of the correct Immigration Rule – i.e. paragraph 301 of those Rules. When that Rule is fully considered, the appellant will be given every opportunity to make representations including under Article 8 of the ECHR. The appellant will have a fresh right of appeal to the First-tier Tribunal against that decision should it go against her.
8. In reaching that conclusion, I have had regard to the case of **S M (withdrawal of immigration decision: effect)** and note that since that decision the Immigration Act 2014 has come into force. Therefore, some of the provisions under discussion by the Upper Tribunal in that case are no longer relevant. However, I also have regard to the more recent case of **Z E I and others (decision withdrawn)** and **LB (Jamaica) v Secretary of State for the Home Department [2011] EWCA Civ 1420**. In the light of those authorities, and the discussion of them in Mac Donald's Immigration Law, it is clear that it is for the appellant's representatives to give a good reason why, notwithstanding the respondent's withdrawal of her substantive decision, the appeal should be treated as continuing. I have not identified any good reason here for that given the respondent's undertaking to consider all relevant matters which will include the application of Article 8 to the facts of the case in the light of any fresh representations made. I find the absence of any "good reason" to allow this appeal to continue in the light of the circumstances summarised above. The suggestion in the fax dated 23 October 2017 that there had not been an "actual withdrawal" seems opaque. I accept that there would be a discretion to treat the appeal as ongoing and make a decision, but and consider it to be inappropriate to do so in the circumstances. In addition, the

appellant may well be in a more favourable position if her application under paragraph 301 of the Immigration Rules is decided affirmatively. It is of note that the appellant has a less onerous test to surmount if she is to succeed under that paragraph.

9. I therefore direct that the present appeal be treated as withdrawn, as is the respondent's decision to refuse entry clearance under paragraph 297 of the Immigration Rules. This amounts to final disposal of the Appellant's appeal to this Tribunal.
10. The avoidance of doubt, there is no anonymity direction in this case and no fee award.

Upper Tribunal Judge Hanbury
October 2017

Date: 30th