Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00623/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19th March 2018	**On 28th March 2018**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

The Secretary of State for the Home Department — Appellant

And

David Felkl — Respondent

(ANONYMITY ORDER NOT MADE)

Representation:
For the Appellant: No appearance.
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Secretary of State has been granted permission to appeal against a decision of Judge of the First-tier Tribunal Hawden-Beal who, following a hearing on 20 December 2017, allowed the appeal of Mr David Felkl (hereafter the "claimant"), a national of the Czech Republic, born on 25 March 1972, against a decision of the respondent of 16 October 2017 to make a deportation order under regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 (the "EEA Regulations"). The respondent had also certified the applicant's human rights claim under regulation 33 of the EEA Regulations.

2. The claimant's appeal did not include a challenge to the refusal of his human rights claim.

Procedural issue before me

3. There was no appearance by or on behalf of the claimant at the hearing before me at 10:00 hrs or by 11:00 hrs. Mr Duffy informed me that the claimant was "*voluntarily removed*" from the United Kingdom on 9 January 2018.

4. The reason why the removal was described as "*voluntary*" is that the claimant had signed a document entitled: "*Post-decision disclaimer in a deportation case*" (hereafter the "*Disclaimer*"). In this document, the claimant had ticked the option that states:

> "I am aware that I have an outstanding appeal against my deportation but I wish to withdraw this appeal and leave the United Kingdom as soon as possible. Ref: 27447582".

There was also a declaration by the claimant that stated that the document had been read to him in the Czech language and that it had been understood by him.

The document was signed by the claimant.

It was also signed on 23 December 2017 at 10:20 by a Mr. Muhammad Khan whose position was described on the document as "Home Office – AO". Mr Khan confirmed that the claimant had signed the form in his presence and that the form had been read to the claimant in his presence.

5. Mr Duffy informed me that the Home Office has not been notified by the claimant of his address in the Czech Republic. I noted that the Tribunal had not been notified of an address for the claimant in the Czech Republic.

6. The Notice of Hearing for the hearing on 19 March 2018 was sent on 22 February 2018. In relation to the claimant, it was sent to him at Morton Hall Immigration Reporting Centre ("IRC"), Swinderby, Lincoln LN6 9PT.

7. I considered whether the Notice of Hearing for the hearing before me had been duly served. Although I am aware that the claimant is no longer at the Morton Hall IRC because he has been removed from the United Kingdom, he has not notified the Tribunal (or the Home Office) of his address in the Czech Republic. I also noted that:

   (i) By a notice dated 30 October 2017 under ref: IA47, the First-tier Tribunal informed the claimant as follows:

   > "We have been informed that the Secretary of State has exercised statutory powers to certify your human rights claim with the effect that you can be removed from the United Kingdom before your appeal has been finally determined.
   >
   > If this is the case you will have to continue with your appeal after you have left the United Kingdom and as a result the address the Tribunal currently uses to correspond with you will need to be updated.

> If you wish to continue with your appeal you should provide the Tribunal with your new address within 28 days of removal from the UK. If you do not do so your appeal may be decided without a hearing on the basis of the papers currently before the Tribunal."

(ii) In addition, the claimant was notified by the First-tier Tribunal by virtue of directions issued by Designated Judge McCarthy on 5 December 2017 of his responsibility to provide the Tribunal with his new contact details within 7 days of his removal.

8. Given that the claimant had been informed in no uncertain terms that, if he is removed, the address for correspondence that the Tribunal holds will need to be updated and that, if he wished to continue with his appeal after his removal, he must provide the Tribunal with his new address within a certain time frame (which has now elapsed), I am satisfied that the Notice of Hearing dated 22 February 2018 has been duly served on the claimant because it was sent to him at the address most recently held on record for the claimant before his removal.

9. Given that the claimant has been removed and he has not made any contact with the Tribunal, there is no reason to think that he might attend a future hearing if the hearing on 19 March 2018 were to be adjourned.

10. In all of the circumstances and having regard to the overriding objective, I exercised my discretion and proceeded with the hearing in the absence of the claimant and any representation on his behalf.

The judge's decision

11. There was a procedural issue before Judge Hawden-Beal. There was no appearance by or on behalf of the claimant or the Secretary of State before the judge.

12. At para 1 of her decision, the judge said that the paperwork before her indicated that the Secretary of State intended to remove the claimant from the United Kingdom on 15 December 2017. She said that she had no information before her that indicated that the claimant's removal had not taken place.

13. At para 8, the judge noted that a further case management review hearing had been directed to be listed for the week of 18th December 2017 once it became known that the claimant was likely to be removed on 15 December 2017 (the judge's reference to 11th December at para 8 must be a mistake). At para 9, she said that neither the claimant nor the Home Office had notified the Tribunal by 18th December 2017 of the claimant's address in the Czech Republic or of how he could be contacted.

14. The judge therefore decided to exercise her discretion under Rule 25 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (the "FtT Rules") and decide the appeal. Rule 25 provides:

> "Consideration of decision with or without a hearing
>
> 25. - (1) The Tribunal must hold a hearing before making a decision which disposes of proceedings except where

(a) each party has consented to, or has not objected to, the matter being decided without a hearing;

(b) the appellant has not consented to the appeal being determined without a hearing but the Lord Chancellor has refused to issue a certificate of fee satisfaction for the fee payable for a hearing;

(c) the appellant is outside the United Kingdom and does not have a representative who has an address for service in the United Kingdom;

(d) it is impracticable to give the appellant notice of the hearing;

(e) a party has failed to comply with a provision of these Rules, a practice direction or a direction and the Tribunal is satisfied that in all the circumstances, including the extent of the failure and any reasons for it, it is appropriate to determine the appeal without a hearing;

(f) the appeal is one to which rule 16(2) or 18(2) applies; or

(g) subject to paragraph (2), the Tribunal considers that it can justly determine the matter without a hearing.

(2) Where paragraph (1)(g) applies, the Tribunal must not make the decision without a hearing without first giving the parties notice of its intention to do so, and an opportunity to make written representations as to whether there should be a hearing.

(3) …"

15. The judge did not identify the particular provision in rule 25 (1) that she considered applied in the instant case.

16. The Secretary of State was not given any opportunity to make representations as to whether there should be a hearing.

17. The judge proceeded to allow the claimant's appeal under the EEA Regulations.

The grounds and the limited grant of permission

18. There were two grounds, as follows:

(i) Ground 1 was that the claimant had withdrawn his appeal pursuant to the Disclaimer.

(ii) Ground 2 was that the judge erred in law in proceeding under rule 25 because rule 25 only applied if the claimant had in fact been removed. There was no evidence before the judge that the claimant had been removed. The judge stated that she had no information that the claimant had not been removed which (it was contended) was a misapplication of the burden of proof and amounted to a procedural impropriety. The claimant remained in the United Kingdom until 9 January 2018 when he was removed voluntarily on the basis of his disclaimer.

19. Judge of the First-tier Tribunal N J Bennett refused permission on ground 1 which he considered unarguable. He said that an appeal could only be withdrawn under rule 17 of the FtT Rules if the First-tier Tribunal receives a notice to that effect

whereas the First-tier Tribunal had not received any such notice until the Secretary of State lodged the Disclaimer with the application of permission.

20. Judge Bennett considered it arguable that the judge had erred by disposing of the appeal under rule 25 in circumstances where the claimant was still in the United Kingdom and therefore there had been no default in complying with the Tribunal's directions issued on 4 December 2017 or with rules 12(1) or (3) and there had been no impracticality in giving the claimant Notice of Hearing. Furthermore, he considered it arguable that the judge had not complied with rule 25(2).

Assessment

21. The Secretary of State did not renew the application for permission on ground 1. It was therefore not open to Mr Duffy to contend at the hearing before me (as he sought to do at the commencement of the hearing before me) that the claimant had withdrawn his appeal for the purpose of establishing that the judge had materially erred in law so that her decision should be set aside. If her decision falls to be set aside on ground 2, then all matters are before me. In that event, I would be entitled to take into account all evidence before me (including the Disclaimer) in re-making the decision on the claimant's appeal.

22. I am satisfied that the judge's decision to proceed under rule 25 gives rise to a procedural irregularity which amounts to an error of law. The procedural irregularity is that she applied rule 25 which was not applicable, for the following reasons:

(i) The judge speculated in assuming that the claimant had been removed. Even in cases where removal directions are set for a particular date, this does not mean that removal will actually take place on the date in question.

(ii) In any event, I am entitled to take into account the evidence that the claimant was in the United Kingdom as at 20 December 2017 as a fact that existed as at the date of the hearing before the judge and which was an incontrovertible fact. Evidence which post-dates the decision of a judge can be admitted to establish an error of law if it establishes an existing fact that is incontrovertible. I am satisfied that that is the case in the instant case.

(iii) The judge therefore erred in law in proceeding under rule 25 because none of the circumstances identified in rule 25(1) could apply given that the claimant was still in the United Kingdom and there had not been any breach of directions such that rule 25(1)(e) applied on any legitimate view. None of the other circumstances applied.

23. In the alternative, the procedural irregularity was that the judge’s failure to comply with rule 25(2) led to the Secretary of State not having had an opportunity to make representations as to whether there should be a hearing.

24. Given that the procedural irregularity has led to the Secretary of State not having had a hearing and that the judge allowed the appeal, I am satisfied that the decision of the judge involved an error on a point of law such that it falls to be set aside in its entirety.

25. I therefore proceed to re-make the decision on the claimant's appeal.

26. Mr Duffy submitted that the claimant had abandoned his appeal. Having considered this matter further since the hearing, I have concluded that the appeal cannot be treated as abandoned for the following reasons:

    (i) s.104(4A) of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") does not apply;

    (ii) s.92(8) of the 2002 Act does not apply;

    (iii) there is no other statutory provision which applies; and

    (iv) rule 17A of the UT Rules cannot confer power to treat an appeal as abandoned where such power is not conferred by a statutory provision.

27. I have considered whether the claimant has withdrawn his appeal.

28. As explained at para 21 above, given that I have set aside the decision of the judge and that I am proceeding to re-make the decision on the appeal, I am entitled to take into account the Disclaimer because all matters are now at large before me.

29. Although the Disclaimer is addressed to the Secretary of State, I take into account that the claimant must have intended the Secretary of State to communicate the Disclaimer to the Tribunal.

30. The claimant was removed on 9 January 2018. He was informed at least twice (see para 7 above) of his responsibility to inform the Tribunal of his address in the Czech Republic. He has not informed the Tribunal of his address in Czech Republic.

31. The directions dated 5 December 2017 also informed the claimant that he had submitted a document in the Czech language which the Tribunal could not consider because it was not in the English language. He was notified that if he wished the Tribunal to consider this document, he would have to provide a translation. Nothing was heard from the claimant subsequently.

32. The claimant has not made any contact with the Tribunal. He has not even provided an email address.

33. I have carefully considered all the material before me. I cannot see anything which suggests that the claimant has the remotest intention to pursue his appeal or that he has any interest at all in the outcome of his appeal.

34. The claimant has not notified the Tribunal that he has appointed or instructed anyone in the United Kingdom to represent him in his appeal.

35. In all of the circumstances, I have concluded that the claimant has withdrawn his appeal.

Decision on error of law issue

The decision of Judge of the First-tier Tribunal Hawden-Beal involved the making of an error on a point of law such that it falls to be set aside.

The decision is set aside in its entirety. The Upper Tribunal proceeded to re-make the decision on the appeal.

Decision on re-making of the decision on the claimant's appeal

For the reasons given above, the Upper Tribunal has concluded that the claimant has withdrawn his appeal.

Signed
Upper Tribunal Judge Gill

Date: 23 March 2018