



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/02075/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 15 May 2018

Determination Promulgated  
On 19 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

JAFAR [B]  
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr C Ikegwureuka (for Moorehouse Solicitors)  
For the Respondent: Mr S Kandola (Home Office Senior Presenting Officer)

**DECISION AND REASONS**

1. This is the appeal of Jafar [B], a citizen of Nigeria born 23 April 1973, against the decision of the First-tier tribunal of 11 October 2017 to dismiss his appeal on human rights grounds, itself brought against the decision to refuse his application on 29 April 2016.
2. His application was for indefinite leave to remain as the spouse of a person present and settled in the UK. He had had entered the spouse route before July 2012 (when Appendix FM was introduced). His application was refused because the Secretary

of State considered that false documents and information had been provided on the application, because the documents said to support his claim to have been in work for a company called Fresco were considered inadequate:

- (a) There was no confirmation of his earnings for October 2015 by way of receipts into his bank account;
  - (b) Enquiries of HMRC indicated that no tax and national insurance contributions were registered against the national insurance number given in the wage slips;
  - (c) The business address included an out of date postcode for the Cannon Street place of work, Fresco, and there was no indication of such a firm operating from that address: the only known address for such a firm was in Basildon, and a letter to Fresco was returned unopened;
  - (d) There was no records of tax or other payments by Fresco which was surprising for a firm apparently of sufficient size to require a Personnel Manager and a Project Manager;
  - (e) In any event his income was considered inadequate to match the state welfare payments that would be appropriate for a family of his size.
3. By the time of the appeal hearing on 28 September 2017, the Appellant had not complied with any of the standard directions, but the day before the hearing his representatives provided a letter stating that the appeal should be treated as withdrawn. The judge invited the Presenting Officer to make submissions on the case, drawing her attention to the decision of *TPN (FtT appeals – withdrawal) Vietnam* [2017] UKUT 295 (IAC).
  4. The First-tier tribunal considered that it was not appropriate “to agree to a withdrawal” because the grounds of appeal did not address the reasons for the immigration application’s refusal, there had been no engagement with the appeal process and the Appellant had had no regard to the objectives of the Procedure Rules or to the costs of the Home Office in defending the appeal. The withdrawal application had only been made in writing the day before the hearing without notice to the Respondent, and no detailed reasons had been given for the withdrawal; nor had any further application been identified which the Appellant might make.
  5. The First-tier tribunal considered the substance of the appeal, and, essentially for the reasons identified by the Respondent, dismissed the appeal. It noted the burden of proof lay on the Respondent and that dishonesty allegations were serious and to be determined via the civil standard of proof. The absence of any known link to Fresco at the address given on the employment contract, wrong postcode and return of the letter to Fresco, together constituted clear evidence that Fresco did not operate from the claimed address.
  6. Grounds of appeal argued that a “notice of request for adjournment” had been made giving reasons why the fresh application route was being taken: once notice of withdrawal was communicated the appeal was effectively and automatically

withdrawn, and thus the First-tier tribunal had lacked jurisdiction to determine the appeal.

7. The First-tier tribunal granted permission to appeal on 28 March 2018 on the basis that it was arguable that there was no discretion to hear an appeal once written notice of its withdrawal had been given; additionally arguably contradictory statements had been made as to the burden of proof.
8. The Home Office Response argues that on the authority of *TPN* there was a requirement for the First-tier Tribunal to apply the appropriate judicial scrutiny to the reasons given for an appeal's proposed withdrawal. A Reply from the Appellant maintained that the fact of withdrawal was wholly a matter that arose as between the Appellant and the Tribunal itself.

### Findings and reasons

9. The letter from the Appellant's representatives stated that their client had instructed them to contact the Tribunal and to request the withdrawal of his appeal: the reason for withdrawal was on account of him wishing to make a fresh application to the Home Office.

10. The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 state:

**"Withdrawal**

17. – (1) A party may give notice of the withdrawal of their appeal –

(a) by providing to the Tribunal a written notice of withdrawal of the appeal;  
or

(b) orally at a hearing, and in either case must specify the reasons for that withdrawal.

(2) The Tribunal must (save for good reason) treat an appeal as withdrawn if the respondent

notifies the Tribunal and each other party that the decision (or, where the appeal relates to more than one decision, all of the decisions) to which the appeal relates has been withdrawn and specifies the reasons for the withdrawal of the decision.

(3) The Tribunal must notify each party in writing that a withdrawal has taken effect under this rule and that the proceedings are no longer regarded by the Tribunal as pending."

11. Paragraph [15] of Presidential Guidance Note No. 1 of 2014 which, under the rubric of "Withdrawal by the Appellant", states:

"Where an Appellant seeks to withdraw an appeal in terms of rule 17, provided the Tribunal is satisfied that the Appellant is doing so freely and understands the consequences of the withdrawal, the Tribunal will be

satisfied that the appeal is withdrawn. Where an Appellant is legally represented and the request to withdraw is made by the representative, the Tribunal will assume that the representative has explained the consequences of the action to the Appellant and that this is the intention of the Appellant."

12. The headnote to *TN Vietnam* reads:

"(i) The public law character of appeals to the FtT is reflected in the regulatory requirement governing the withdrawal of appeals that any proposed withdrawal of an appeal must contain the reasons for the course mooted and must be judicially scrutinised, per rule 17 of the FtT Rules and rule 17 of the Upper Tribunal Rules.

(ii) Judicial evaluation of both the withdrawal of an appellant's appeal and the withdrawal of the Secretary of State's case or appeal is required."

13. The President went on to state, at §22:

"(v) The best guidance available to the FtT judge in performing this function is what is contained in the Presidential Guidance Note [as cited above]: the judge must be satisfied that the appellant is withdrawing the appeal freely and understands the consequences of withdrawal. This will not be so if, for example, it lacks coherence or is based on a material misunderstanding or misconception.

(vi) In practice, enhanced judicial vigilance is likely to be required in cases where the appellant is unrepresented.

(vii) The reasons must be such as to persuade the FtT Judge that the course proposed is appropriate.

(viii) In determining whether withdrawal is appropriate, the Judge will take into account (inexhaustively) that Tribunal proceedings do not partake of the essential characteristics of private law inter-partes litigation, with the result that withdrawal requires, in effect, judicial adjudication.

(ix) Fundamentally, the FtT Judge must be satisfied that there is good reason for the withdrawal."

14. It is clear from *TN Vietnam* that some degree of judicial scrutiny is to be applied to the withdrawal of an immigration appeal. The real contest between the parties is whether this simply requires a reasoned application to withdraw the appeal to be made, as the Appellant contends, or whether, as per Mr Kandola's submissions, the First-tier Tribunal had an additional duty to audit the reasons actually given as to whether they provide a good case for treating the appeal as withdrawn.

15. I accept, applying the interpretation provided in *TN Vietnam*, that the Tribunal must apply its own mind to whether the reasons given for a withdrawal are adequate. Thus far I prefer the submissions of Mr Kandola. The First-tier Tribunal is not simply to rubber stamp any reasoned application to withdraw an appeal.

16. However, it is equally clear that the reasons provided for withdrawing an appeal must be the subject of specific assessment. It is noteworthy that *TN Vietnam* concentrated on whether the Appellant's mind was truly directed to the implications of withdrawal of an appeal; it did not suggest that a decision to

withdraw an appeal based on legitimate legal advice should be frustrated without good reason. Here the Tribunal found that considerations extraneous to the reasons actually put forward required the appeal to be determined. I accept that compliance with case management directions is a relevant consideration. But it cannot be given overwhelming force.

17. Here the Appellant's advisors had imparted the information that the Appellant wished to make another application rather than pursue his appeal. That is not an unreasonable step to take. It might well recognise that, following (legally privileged) advice the present appeal was not viable. Treating such an appeal as withdrawn should preserve judicial resources more often than it expends them (given a judge might be better employed in determining a live appeal where both sides have put their best case rather than making a decision where one party has not done so, and where the matter might not trouble the appellate authority again if the future application is granted). One of the overriding objectives of the Rules is of course "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;".
18. Another overriding objective is to deal with cases "in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal". It seems to me that seeking to determine the issues when one party believed their attendance was not required was unlikely to finally resolve the issues in question and endangered the achievement of justice.
19. I accordingly consider that the First-tier Tribunal erred in law in failing to adjudicate upon the propriety of the reasons actually given for withdrawal, rather than concentrating simply on case management considerations.
20. I go on to remake the decision. It seems to me that the reason given for withdrawing the appeal was a perfectly proper one that was overall more likely to promote than frustrate the purposes of the Rules. There is no evidence to support an inference that the Appellant had not been properly advised of the pros and cons of withdrawing his appeal. The withdrawal application was scantily expressed but realistically one must have regard to the possibility that legal privilege lies behind the brevity.
21. I accordingly remake the decision on the appeal by finding that the appeal against the decision of the Secretary of State should be treated as withdrawn.
22. Nevertheless, the late application to withdraw the appeal was discourteous and unprofessional. A client's precise instructions should be sought sooner rather than later, and they should be advised of the dangers of failing to come to a firm decision on progressing their appeal in a timely fashion. No adequate explanation was given here for the late notification to the Tribunal. It was accordingly unsurprising that the Appellant and his advisors (and now the Upper Tribunal and the Home Office's specialist appeals unit) have been put to avoidable trouble and expense.

23. Doubtless all involved will appreciate the need to give more, rather than less, detail of the reasons motivating a withdrawal application, even if this amounts only to stating that part of the rationale is privileged.
24. The decision of the First-tier Tribunal of 11 October 2017, being legally flawed, should not be treated as relevant in any future decision making on the Appellant's immigration status.

Decision:

The appeal to the Upper Tribunal is allowed.

The appeal against the Home Office decision is accepted as having been lawfully withdrawn.

Signed:

Date: 20 May 2018

A handwritten signature in black ink, appearing to read 'M. A. Symes', with a long, sweeping underline that extends to the left and then curves back under the signature.

Deputy Upper Tribunal Judge Symes