



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

Appeal Number: EA/03517/2017

THE IMMIGRATION ACTS

Heard at Manchester

**Decision & Reasons
Promulgated**

On 25 August 2017

On 13 September 2017

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

**MS IWONA DEPTKA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Not represented at the hearing

For the Respondent: Ms J Isherwood, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant was neither in attendance nor represented at the hearing before the Upper Tribunal. The Tribunal's file contains a copy of a notice sent on 9 August 2017 to both the appellant and her legal representatives at the address provided for such service. This notice identifies the date, place and time of the hearing.

2. Attempts were made by the clerk to the Tribunal, on the day of the hearing, to contact the appellant and her legal representatives. The representatives indicated that they were not instructed for the purposes of the instant hearing. Contact was not made with the appellant.
3. In all the circumstances of the case and absent any explanation for the failure of the appellant to attend, I concluded that it was in the interests of justice to proceed with the hearing of this appeal in the appellant's absence.

First-tier Tribunal's Decision

4. The appellant is a national of Poland, born 22 October 1985. She appealed to the First-tier Tribunal against a decision made by the respondent on 8 March 2017 to remove her from the United Kingdom in accordance with Section 10 of the Immigration and Asylum Act 1999. The immigration decision itself incorporates the following text:

"A decision has now been taken to remove you from the United Kingdom in accordance with Section 10 of the Immigration and Asylum Act 1999 (which applies by virtue of Regulations 23(6)(a)/23(6)(c) pursuant to Regulation 26(3) and 32(2) of the EEA Regulations)."

5. A notice accompanying the removal decision headed "*Notice to a person liable to removal the Immigration (European Economic Area) Regulations 2016*" contains three tick boxes, each of which specify a different legislative provision and reason for the decision being made under Section 10 of the 1999 Act. The first of the tick boxes relates to regulation 23(6) (a) of the 2016 EEA Regulations - this is not ticked. Neither is the third box ticked. The second of the boxes is ticked, and reads as follows:

"By virtue of Regulation 23(6)(c) and 32(2) a person in respect of whom removal directions may be given in accordance with Section 10 of the Immigration and Asylum Act 1999 as: a person whose removal is justified on the grounds of misuse of a right to reside in accordance with Regulation 26(3) of the Immigration (European Economic Area) Regulations 2016."

6. The aforementioned rubric is followed by a box headed "*Specific Statement of Reasons*". The contents of the box specify that the appellant was engaged in conduct which "*appears intended to circumvent the requirement to be a qualified person*", it further being asserted therein that the appellant has been rough sleeping which is "*deemed a misuse a right to reside*" in the United Kingdom.
7. The appeal in the First-tier Tribunal came before FtT Judge Bartlett and, in a decision of 9 June 2017, was dismissed. In a lengthy and comprehensive decision Judge Bartlett concluded that the Secretary of State had not demonstrated that the appellant fell foul of the requirements of regulation 23(6)(c) of the 2016 EEA Regulations in that it had not been demonstrated that she had misused a right to reside.

8. As indicated above the First-tier Tribunal, nevertheless, dismissed the appeal, doing so on the basis that the appellant fell foul of regulation 23(6) (a) because she had not demonstrated that she was a qualified person.
9. Permission to appeal was granted in the following terms by First-tier Tribunal Judge Gillespie:
 - “2. There is arguable merit to the ground proposed: namely, that the decision to remove having based solely upon a finding by the respondent that the appellant had committed a misuse of rights under Section 23(6)(c) of the Regulations, and the learned judge having found this ground of removal not to have been proven by the respondent, the learned judge erred in law in nevertheless dismissing the appeal on the grounds, not having been advanced by the respondent in deciding to remove, that the appellant had no right to remain under Section 23(6)(a) of the Regulations.”

Setting aside of the FtT's Decision

10. In the days leading up to the hearing before the Upper Tribunal the Secretary of State, by way of an email from Miss Isherwood dated 23 August 2017, sought to withdraw her case in accordance with rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008. It was recognised by the Secretary of State that the FtT had dismissed the appellant's appeal for reasons which had not formed any part of the Secretary of State's case.
11. At the hearing before the Upper Tribunal Miss Isherwood reiterated the aforementioned stance accepting that, as a consequence, the Upper Tribunal should set aside the decision of the First-tier Tribunal and thereafter remake the decision so as to allow the appellant's appeal. By way of explanation Miss Isherwood indicated that it is the respondent's position that it was procedurally unfair of the First-tier Tribunal find against the appellant on a point not taken by the Secretary of State. She further confirmed that the Secretary of State did not seek to pursue the regulation 23(6)(a) point before the Upper Tribunal upon re-making of the decision under appeal, although cautioned that such point may, if still appropriate, be taken against the appellant in the future.
12. Given this concession I need say no more than I concur with the Secretary of State's view. It was plainly procedurally unfair of the First-tier Tribunal to determine the appeal against the appellant on a basis not pursued by the Secretary of State, particularly in the absence of putting the appellant on notice that such a point was going to be taken. For that reason alone, the decision of the First-tier Tribunal must be set aside.

Re-making of Decision

13. The normal course in cases in which the First-tier Tribunal's decision has been set aside as a consequence of procedural unfairness is to remit the appeal back to the First-tier Tribunal. However, in this case the findings

made by the First-tier Tribunal in relation to the application of regulation 23(6)(b) i.e. misuse of rights, have not been the subject of challenge by the Secretary of State and the Secretary of State accepts that those findings must remain standing. Given the continuing position of the Secretary of State not to pursue the appeal on the basis of matters not originally in her mind when drawing up the decision under challenge, the most appropriate course, as Miss Isherwood submitted, is for the appellant's appeal to be allowed and I accordingly make that decision.

Notice of Decision

The decision of the First-tier Tribunal is set aside.

Upon remaking of the appeal by the Upper Tribunal, the appellant's appeal is allowed.

Signed:

A handwritten signature in black ink, appearing to read 'M. O'Connor', written over a light blue horizontal line.

Upper Tribunal Judge O'Connor