



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/01068/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 17th January 2018

**Decision & Reasons
Promulgated
On 8th February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

**PRISCA CHIDERA NNAJI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Siaw instructed by R Spio & Co Solicitors

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Nigeria, appealed to the First-tier Tribunal against decisions of the Secretary of State dated 12th January 2016 to revoke her residence card and to refuse an application for a residence card on the basis of her retained right of residence following her divorce from an EEA national. First-tier Tribunal Judge Khawar dismissed the appeal in a decision promulgated on 19th April 2017. The Appellant now appeals to this Tribunal with permission granted by First-tier Tribunal Judge Brunnen on 30th October 2017.
2. The issue in this appeal relates to the Appellant's application to withdraw the appeal and the judge's consideration of that application.

3. In the decision the judge noted that at the hearing on 10th April 2017 his attention was drawn to a letter dated 7th April 2017 faxed to the Tribunal by the Appellant's solicitors stating that they were instructed to withdraw the appeal stating "our client has indicated that she does not wish to proceed with the appeal due to personal reasons." The judge considered Rule 17 of the Tribunal Procedure (First tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 which states that a party may give notice of the withdrawal of their appeal in writing or orally at the hearing "and in either case must specify the reasons for that withdrawal". The judge indicated that the Presenting Officer objected to the withdrawal under Rule 17 on the basis that the claimed personal reasons do not satisfy the requirement that reasons should be specified.
4. The judge agreed with that saying
 10. ... To simply assert "personal reasons" does not in fact provide any or at all adequate reasons for withdrawal. Consequently I concluded that the purported notice of withdrawal is defective and this appeal remains a live issue.
 11. I came to the aforesaid conclusion especially in light of the fact that the Appellant has failed to file any documentary evidence to engage with this appeal and in view of the nature of the issues raised in the Respondent's refusal letter - to the effect that the Appellant and indeed her partner Mr Chukwuemeka Michael Chibuike-Nebo, both entered into marriages of convenience with Polish nationals but nevertheless remained living together.
 12. As evident from the above circumstances the Appellant has chosen not to attend this appeal and clearly has also chosen not to engage with matters raised in the Respondent's reason for refusal."
5. The judge went on to consider the appeal on the basis of the documentary evidence before him and concluded that the Respondent had provided sufficient evidence to establish reasonable suspicion that the Appellant's marriage to the Sponsor was a marriage of convenience. The judge found, in accordance with the authority of **Papajorgi (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC)**, that the burden of proof was upon the Appellant to establish the marriage was not one of convenience but had she had failed to do so. The judge dismissed the appeal under the Immigration (EEA) Regulations 2006.
6. In the Grounds of Appeal the Appellant contends the judge erred in determining the appeal when he clearly had notification that the appeal was withdrawn. It is contended that the Appellant provided reasons for withdrawing the appeal by informing the Tribunal it was due to personal reasons. It is contended that these reasons were adequate. It is further contended that the Appellant's representatives received a call from the Tribunal indicating that the notice of withdrawal had been received and confirming that the appeal would be withdrawn. It is therefore contended that it was perverse for the judge to decide the appeal in the absence of

the Appellant after having been notified of the reasons for withdrawing the appeal.

7. In granting permission to appeal First-tier Tribunal Judge Brunnen considered it arguable that the judge erred in refusing to treat the appeal as withdrawn under Rule 17. It was further considered that if the Appellant is able to establish that there was a telephone call to indicate that the appeal had been withdrawn then it was arguable that it was a procedural error amounting to an error of law to determine the appeal in the Appellant's absence.
8. At the hearing before me Mr Siaw submitted a photocopy of a telephone attendance sheet dated 10th April 2015 with the initials RSA indicating that there was a telephone call to the Tribunal to enquire about the fax sent on 7th April requesting withdrawal of the Appellant's appeal saying that the caller spoke to someone who said they would send a message to Taylor House to enquire if the request had been received. There is a further note of a telephone call from the Tribunal on 10th April 2017 "saying a fax had been received and the appeal would be withdrawn" and that has initials WMA. Mr Melvin did not accept this as sufficient evidence of a telephone call. In his submission, had such a telephone call taken place, there was no reason why the Tribunal would not have acted upon that and taken the case out of the list.

Error of law

9. I do not accept that the copy telephone attendance is sufficient evidence of a purported telephone call from the Tribunal advising that an appeal had been treated as withdrawn. It is not clear who is alleged to have made or received the two telephone calls referred to. No reason has been given as to why someone from the solicitor's office has not provided better evidence of this purported call. There is no evidence as to the timing of these calls. They could have been after the judge dealt with the case. I note that the judge said that there was a delay in the Home Office Presenting Officer's arrival and the case did not start till approximately 11:30 [7]. It is not at all clear when these telephone calls were made.
10. In any event Rule 17 is clear. The Rule was further considered in the case of **TPM (FTT appeals - withdrawal) Vietnam [2017] UKUT 00295 (IAC)** where the then president Mr Justice McCloskey made clear that judicial evaluation of both the withdrawal of an Appellant's appeal and the withdrawal of the Secretary of State's case for appeal is required. In a decision which refers to the Presidential Guidance Note and other professional Regulations the Tribunal notes at paragraph 18 "...the central stipulation in Rule 17 is uncompromising. The reasons for the withdrawal 'must' be specified. This is expressed as a mandatory requirement, subject to no exceptions". And at paragraph 20, "Fundamentally, I consider that Rule 17 envisages and requires active and properly informed judicial involvement and decision making".

11. At paragraph 22 the Upper Tribunal said that a requirement to provide the Tribunal with the reasons in support of a proposed withdrawal clearly envisages that there will be judicial consideration. It is noted that the judge must be satisfied that the Appellant is withdrawing the appeal freely and understands the consequences of withdrawal and this will not be so if, for example, it lacks coherence or is based on a material misunderstanding or misconception. It states at 22(vii) that the reasons must be such as to persuade the First-tier Tribunal Judge that the course proposed is appropriate. At 22 (viii) the tribunal says that in considering whether withdrawal is appropriate the judge will take into account, *inter alia*, 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. At 22 (ix) the Tribunal notes that fundamentally the First-tier Tribunal Judge must be satisfied that there is good reason for a withdrawal. At 22 (x) the Tribunal says that there is no obligation for the First-tier Tribunal Judge to approve the proposed withdrawal, in fact Rule 17 plainly contemplates that a proposal to withdraw may be refused.
12. In this case the First-tier Tribunal Judge considered the application to withdraw and gave reasons for finding that no good reason had been given for the application to withdraw and for refusing to treat the appeal as withdrawn. It has not been asserted that these reasons are perverse or irrational. The judge considered that the phrase 'personal reasons' was not a sufficient or adequate reason for withdrawal. This was a decision open to the judge on the evidence and in accordance with Rule 17.
13. Accordingly in this case I accept that the judge was required to consider the application for withdrawal and made a decision open to him on the basis of the evidence before him and on the basis of the application to withdraw. In my view the evidence submitted at the hearing before me by Mr Siaw was insufficient to corroborate the claim that the Appellant's solicitor's had been notified that the appeal had been treated as withdrawn and in any event any such assurance would have been inappropriate and clearly wrong in light of the contents of Rule 17.
14. Accordingly in my view the Grounds of Appeal have not been made out. The judge made no material error in refusing to accept the application to withdraw the appeal. The judge made no material error in proceeding to consider the appeal in these circumstances.

Notice of Decision

The decision of the First-tier Tribunal does not contain a material error of law.
The decision of the First-tier Tribunal shall stand.
No anonymity direction is made.

Signed
Deputy Upper Tribunal Judge Grimes

Dated: 5 February 2018

TO THE RESPONDENT
FEE AWARD

I maintain the fee order made by the First-tier Tribunal.

Signed
Deputy Upper Tribunal Judge Grimes

Date: 5th February 2018