IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-000173
UI-2022-000175

First-tier Tribunal Nos:
EA/00558/2021
EA/00561/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued
On the 30 January 2023

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ADRIATIK TANA
BAJAME TANA
(NO ANONYMITY ORDER MADE)

Respondents

Representation:
For the Appellant: Mr P Deller, Senior Home Office Presenting Officer
For the Respondents: Mr K Jegede, Solicitor from Ashton Ross Law Solicitors

Heard at Field House on 7 April 2022

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the appeal of the respondents, hereinafter "the claimants", against a decision of the Secretary of State refusing them EEA residence cards.

2. The claimants are married to each other and are nationals of Albania. They are also the parents of a woman who is not an EEA national but is married to an EEA national who is exercising treaty rights.

3. It is important to look at the Secretary of State's reasons for refusal to see why the application failed because these reasons have led to considerable tension between the parties.

4. The Secretary of State said:

> "You have not provided adequate evidence to show that you are the dependent direct family member of an EEA or Swiss national.
>
> You are not currently living with your EEA national sponsor Giorgo Balliou, and the bank statements you have provided only show evidence of money transfers from your Albanian daughter Donalda Tana and not your EEA national sponsor. There is no other evidence to show that you are reliant on your EEA national sponsor".

5. It is clear that the claimants understood this rejection to mean that the problem in their application was with the evidence showing payments made to them from their daughter rather than from her husband, the EEA national sponsor, and the case was prepared on this assumption.

6. It is also plain that when the appeal came before the First-tier Tribunal this was not the Secretary of State's understanding of the position at all.

7. The First-tier Tribunal Judge recorded at paragraph 5 that there was discussion between the parties and:

> "I decided as a preliminary issue that the sole reason for the decision under appeal stated in the 31 December 2020 decision notice is that the Respondent considered that the Appellants needed to show dependency on their EEA national sponsor Giorgo Balliou, rather than their Albanian daughter Donalda Tana."

8. The judge noted, correctly, that:

> "there was no indication in the reasons that the transfers [from the daughter's bank account] were not indicative of dependency *per se*."

9. In response to this ruling the Secretary of State asked for an adjournment in order to clarify the Secretary of State's position but that application was opposed, primarily on the basis of delay and on the claimants' case having been disclosed before the hearing in a skeleton argument. The judge decided to refuse the application.

10. The Secretary of State then applied for "permission to withdraw the decision". This is, at first blush, a slightly puzzling phrase but it appear to arise from a misreading of rule 17 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Rule 17 states:

> 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 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 as pending."

11. Rule 17(1) concerns the *withdrawal* of an appeal and is not normally (ever?) a matter for the Secretary of State as she does not bring appeals to the First-tier Tribunal. Rule 17(2) provides that when a decision is withdrawn by the Secretary of State (an appellant has no decision to withdraw) then, save for good reason, the Tribunal must *treat* an appeal as withdrawn when it is against a decision that has been withdrawn and reasons for withdrawal are given. The rule is not about the First-tier Tribunal permitting the withdrawal of a decision but about what the First-tier Tribunal must do when a decision has been withdrawn by the Secretary of State.

12. The First-tier Tribunal refused to treat the appeal as withdrawn.

13. The judge then considered the evidence and found that the money handed over to the claimant did come from pooled family resources and the fact that it was transferred from the non-EEA daughter's account rather than the EEA national son-in-law's account is irrelevant.

14. The judge allowed the appeals and the Secretary of State was given permission to appeal.

15. The first ground complains that the evidence did not support the conclusion that there was dependency rather than frequent transfers of money and the appeal should not have been allowed on that basis that it did. There was no oral evidence taken and the conclusion that there was dependency could not have been reached without some indication of what the claimants did with the money they received and how they could have managed without it, if indeed they could.

16. This ground rather begs the question. The judge had decided that that was not the point in issue and his decision was consistent with that finding.

17. The second ground claims that the Tribunal erred by "committing or permitting a procedural or other irregularity capable of making a difference to the outcome or the fairness of the proceedings". It said that the refusal letter was at least ambiguous and when the ambiguity became apparent there should have been an opportunity to correct the error or at least the ambiguity provided no basis whatsoever for refusing the application to withdraw the decision.

18. The grounds also rely on a decision of the Court of Appeal reported as **SI (India) v SSHD [2016] EWCA Civ 1255** and to **ZEI & Ors (Decision withdrawn -FtT Rule 17 – considerations) Palestine [2017] UKUT 00292 (IAC).**

19. The decision in **SI (India)** was given by Lady Justice Rafferty DBE sitting with the Senior President of Tribunals but paragraph 7 includes the (if I may say so) slightly unusual observation that:

> "this judgment neither establishes precedent nor requires other than the application to the particular facts of the legal framework. We thus do no more than identify our conclusion.

It is clearly intended to be of very, very limited value in approaching other cases. Nevertheless, I do note the entirely unsurprising encouragement to the Secretary of State to give clear reasons in her letters.

20. The decision in **ZEI & Ors (Decision withdrawn -FtT Rule 17 – considerations) Palestine [2017] UKUT 00292 (IAC)** is the decision of Mr C M G Ockelton, Vice

President sitting with Upper Tribunal Judge Dawson and clearly is intended to provide general guidance.

21. Although it was not expected in the appeal that I have to decide, the Tribunal pointed out at paragraph 10 in **ZEI & Ors** that when a decision is withdrawn it will often lead to a decision to grant leave. It follows that, far from being controversial, a claimant will often be pleased that the Secretary of State has withdrawn a decision. However, at risk of being trite, a decision that has been withdrawn will almost always have to be made again.

22. Rule 17(2) provides that when a decision is withdrawn, the appeal before the First-tier Tribunal must be treated as withdrawn "save for good reason". It was explained at paragraph 14 of **ZEI & Ors** that the appeal before the First-tier Tribunal:

> "will continue only if a good reason is identified for allowing it to proceed despite being an appeal against a decision that will not have effect in any event."

23. As the Secretary of State's grounds made plain, the judicial headnote in **ZEI & Ors** shows that judicial vexation because a decision was withdrawn after an application for an adjournment has been refused is *unlikely* to be a good reason to refuse to treat an appeal against a withdrawn decision as withdrawn. Very often a decision made after the Secretary of State has withdrawn the decision will be of limited value because the Secretary of State will not engage with the proceedings but, once a decision has been withdrawn, any decision by the First-tier Tribunal is relevant only because, as is explained at paragraph 19(e) **ZEI & Ors**:

> "the Secretary of State will, as she is bound to do, take account of any relevant judicial determination in making a new decision".

24. It is regrettable that the Decision and Reasons and the Grounds of Appeal are drawn as if permission were required to withdraw a decision. It is not. It is for the Secretary of State alone to decide if she wishes to withdraw a decision. Her decision on that point might attract judicial review but that is not a matter for the First-tier Tribunal.

25. I am satisfied the decision was withdrawn at the hearing because that is what the Secretary of State's representative said that she wanted to do and she is entitled to do it. I am satisfied too that the Secretary of State gave a reason, namely that the reasons for refusing the decision were ambiguous and needed to reconsidered.

26. The First-tier Tribunal should then have asked itself if there was good reason not to treat the appeal against that decision as withdrawn. As far as I can see it did not ask itself that question but rather asked itself if the Secretary of State was permitted to withdraw the decision. This was clearly an error.

27. I must now ask myself if the First-tier Tribunal erred in refusing to adjourn and if it erred in refusing to treat the appeal against the withdrawn decision as a withdrawn appeal.

28. I have listened carefully to Mr Jegede's arguments. I do understand his contention that the claimants have been wrongfooted by the ambiguity in the refusal letter and that they were anxious to avoid further delay. The letter is ambiguous but that means it could legitimately be understood in different ways. The Secretary of State had *not* decided that the only point in issue was if the support given to the appellants was from the EU national. The First-tier Tribunal cannot tell the Secretary of State what she has decided or treat an issue as agreed when it clearly was not agreed, if only because any decision of the kind made he could be expected to prompt the Secretary of State to withdraw the disputed decision and thus take the matter out of the First-tier

Tribunal's scope. A better reason is that Secretary of State is the primary decision maker.

29. The claimants cannot be criticised for failing to prepare a case that they did not know that that they had to answer but that was a very compelling reason to adjourn the hearing or, possibly, to take a rather generous view of thin evidence because the evidence would probably have been better if the claimants were on notice. The First-tier Tribunal's ruling on the preliminary issue was unlawful. Rather the First-tier Tribunal should have adjourned the appeal for the claimants to re-prepare their cases. I realise that great discretion must be given to a trial judge dealing with an application to adjourn but the overriding objective is to deal with cases fairly and justly and it hard to see how a case can be dealt with justly when there is a clear dispute between the parties about the scope of the decision and therefore the appeal.

30. I have been known to say that a party is entitled to assume that the points in issue were those identified in the refusal letter but this is not a question about what the parties are entitled to assume. It is about what happens when it becomes apparent that what the parties assumed was wrong. What should have happened is that the appeal should have been adjourned so that the parties could sort out their position and start again.

31. Immediately after the First-tier Tribunal refused the adjournment application the Secretary of State withdrew the decision. The First-tier Tribunal erred in not identifying a "good reason" to continue notwithstanding that the decision was withdrawn and so anything that it decided was no value and carries no weight in any further consideration of the case.

32. The weakness of the claimants' position is emphasised by the decision after the adjournment application had been refused to withdraw the decisions that were the subject of the appeal. It is for the Secretary of State to determine what is in issue. The First-tier Tribunal could not stop the Secretary of State withdrawing the decision and there was point continuing with the appeal. No good reason not to treat the appeal as withdrawn was advanced or found.

33. The First-tier Tribunal did err in law. Having refused to adjourn, it should have treated the appeal as withdrawn. I set aside its decision and I order the appeal be remitted to the First-tier Tribunal to be treated as withdrawn. As I find that is the only lawful disposal I have made a decision as First-tier Tribunal Judge treating the decision as withdrawn and that should be promulgated with or very soon after my decision as a judge of the Upper Tribunal that the First-tier Tribunal erred in law.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 January 2023