Upper Tribunal
(Immigration and Asylum Chamber)

Jan (Upper Tribunal: set-aside powers) [2016] UKUT 00336 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Promulgated on**
22 January 2016	
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Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE O'CONNOR

Between

FAWAD JAN

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Applicant: Ms Keelin McCarthy, instructed by Derby Immigration Aid Consultants
For the Respondent: Mr Steven Walker, Senior Home Office Presenting Officer.

The decision of the Court of Appeal in Patel [2015] EWCA Civ 1175 entails the view that the Upper Tribunal's powers to set aside its own decisions are limited to those in rules 43 and 45-6 of the Upper Tribunal Rules.

DETERMINATION OF APPLICATION

1. The applicant, a national of Pakistan, appealed to the First-tier Tribunal against the respondent's decision on 6 January 2015 to refuse to vary his leave and to give directions for his removal. He appealed to the First-tier Tribunal and after a hearing on 21 April 2015 Judge Mather gave her

determination on 1 May 2015 dismissing his appeal. He applied for permission to appeal against that decision: permission was refused by Judge Chohan in the First-tier Tribunal on 13 July 2015. He renewed his application for permission to the Upper Tribunal. Permission was refused by Upper Tribunal Judge McGeachy on 3 September 2015. The decision was sent to the applicant and his then solicitors, as well as to the respondent, on 9 September 2015, under cover of a letter reading, in part, as follows:

> "There is no further right of appeal in these circumstances. A decision by the Upper Tribunal refusing permission to appeal to itself is an "excluded decision" and therefore no appeal lies from such a decision to the Court of Appeal: Section 13(a)(c) Tribunals, Courts and Enforcement Act 2007."

2. The applicant then changed his representatives and by letter dated 16 October 2015 Derby Immigration Aid Consultants applied on his behalf for the decision of Judge McGeachy to be reviewed under s. 10 of the Tribunals, Courts and Enforcement Act 2007. The grounds supporting the letter refer to rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended), which we set out below. The grounds appear to be based on an assertion that, because Judge McGeachy had not referred specifically to part of the wording of Judge Mather's decision, there was a "serious procedural irregularity" in Judge McGeachy's decision; and that it would be in the interests of justice to review the decision. Thus, the application argued that the relevant requirements of the Rules were met. The application acknowledged that it was made outside the time limited by rule 43, but argued that it was in the interests of justice for time to be extended, for reasons given in the application. We extend time because it is in the interests of justice to consider the issues arising from the application.

3. The Tribunal had seen a number of similar applications and it was considered advisable to list one for full consideration with the assistance of submissions by the parties. Thus this application was listed before us. At the beginning of the hearing, Ms McCarthy indicated that she conceded, for reasons set out in her written submissions, the application could not succeed. As we indicated at the time, we agree that the application could not succeed. In these circumstances the case has provided an opportunity to reflect on the Tribunal's jurisdiction to set aside its own decisions, particularly in the light of the recent decision of the Court of Appeal in Manorama Patel and Others v SSHD [2015] EWCA Civ 1175 ("Patel").

The position before *Patel*

4. Before the decision of the Court of Appeal in Patel, it appeared that there were four possible sources of a power in the Upper Tribunal to set aside its own decisions.

5. *First*, r 43 of the UT Rules provides as follows:

> "(1) The Upper Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if –
>
> (a) the Upper Tribunal considers that it is in the interests of justice to do so; and
>
> (b) one or more of the conditions in paragraph (2) are satisfied.
>
> (2) The conditions are –
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
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> (b) a document relating to the proceedings was not sent to the Upper Tribunal at an appropriate time;
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> (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
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> (d) there has been some other procedural irregularity in the proceedings."

Paragraphs (3)-(5) limit the time during which an application under rule 43 may be made. The rule applies to the Upper Tribunal as a whole with the exception of the Lands Chamber; but there are separate provisions for the timing of an application in relation to an asylum case or an immigration case, as defined.

6. Rule 43 is made in the exercise of specific powers derived from s. 22 of the 2007 Act and set out in paragraph 15 of Schedule 5 to that Act. Paragraph 15(2) of the Schedule allows rules for the setting aside of a decision in proceedings before the First-tier Tribunal or the Upper Tribunal in the circumstances mentioned in sub-paragraphs (a)-(d) of rule 43(2). Paragraph 15(1) also permits a "slip rule". Paragraph 15(3) of the Schedule is of some interest:

> "Sub-paragraphs (1) and (2) shall not be taken to prejudice, or to be prejudiced by, any power to correct errors or set aside decisions that is exercisable apart from rules made by virtue of those sub-paragraphs.

7. The power under rule 43 is, as the rule itself makes clear, limited to cases where the decision to be set aside is one which "disposes of proceedings". As well as the setting-aside being in the interests of justice, one of the reasons in paragraph (2) has to be present. These are all what may be termed procedural reasons. A refusal of permission to appeal to the Upper Tribunal is a decision which disposes of proceedings; but rule 43 does not permit such a decision to be set aside on grounds which are wholly substantive. The challenge to such a decision on substantive grounds is therefore brought by judicial review, as the decision of the Supreme Court in R (Cart) v The Upper Tribunal [2011] UKSC 28 makes clear. There is no reference in rule 43, or in the enabling legislation, to the notion of an "excluded decision": if the decision is one which disposes of proceedings, it is potentially within the ambit of rule 43.

8. Although rule 43 contains provisions about the timing of an application for a decision to be set aside, no application is required. Thus, the Tribunal can exercise its jurisdiction under rule 43 on its own motion.

9. *Secondly*, the 2007 Act includes a power of review. So far as the Upper Tribunal is concerned, the principal provisions are in s. 10:

> "10. Review of decision of Upper Tribunal
>
> (1) The Upper Tribunal may review a decision made by it on a matter in a case, other than a decision that is an excluded decision for the purposes of section 13(1) (but see subsection (7)).
> (2) The Upper Tribunal's power under subsection (1) in relation to a decision is exercisable –
> (a) of its own initiative, or
> (b) on application by a person who for the purposes of section 13(2) has a right of appeal in respect of the decision.
> (3) Tribunal Procedure Rules may –
> (a) provide that the Upper Tribunal may not under subsection (1) review (whether of its own initiative or on application under subsection (2)(b)) a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules;
> (b) provide that the Upper Tribunal's power under subsection (1) to review a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules is exercisable only of the tribunal's own initiative;
> (c) provide that an application under subsection (2)(b) that is of a description specified for the purposes of this paragraph in Tribunal Procedure Rules may be made only on grounds specified for the purposes of this paragraph in Tribunal Procedure Rules;
> (d) provide, in relation to a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules, that the Upper Tribunal's power under subsection (1) to review the decision of its own initiative is exercisable only on grounds specified for the purposes of this paragraph in Tribunal Procedure Rules.
> (4) Where the Upper Tribunal has under subsection (1) reviewed a decision, the Upper Tribunal may in the light of the review do any of the following –
> (a) correct accidental errors in the decision or in a record of the decision;
> (b) amend reasons given for the decision;
> (c) set the decision aside.
> (5) Where under subsection (4)(c) the Upper Tribunal sets a decision aside, the Upper Tribunal must re-decide the matter concerned.
> (6) Where the Upper Tribunal is acting under subsection (5), it may make such findings of fact as it considers appropriate.
> (7) This section has effect as if a decision under subsection (4)(c) to set aside an earlier decision were not an excluded decision for the purposes of section 13(1), but the Upper Tribunal's only power in the light of a review under subsection (1) of a decision under subsection (4)(c) is the power under subsection (4)(a).
>
> (8) A decision of the Upper Tribunal may not be reviewed under subsection (1) more than once, and once the Upper Tribunal has decided that an earlier decision should not be reviewed under subsection (1) it may not then decide to review that earlier decision under that subsection.

(9) Where under this section a decision is set aside and the matter concerned is then re-decided, the decision set aside and the decision made in re-deciding the matter are for the purposes of subsection (8) to be taken to be different decisions."

10. As permitted by sub-s (3), the Upper Tribunal Rules provide, at r 45(1) and r 46(1) that review may be undertaken in the course of consideration of an application for permission to appeal from the Upper Tribunal to the appropriate Appeal Court (in England and Wales, the Court of Appeal), but not under any other circumstances. Further, a decision may be reviewed only on the grounds set out in r 45(1)(a) and (b), which are as follows:

> "(a) when making the decision the Upper Tribunal overlooked a legislative provision or binding authority which could have had a material effect on the decision; or
> (b) since the Upper Tribunal's decision, a court has made a decision which is binding on the Upper Tribunal and which, had it been made before the Upper Tribunal' decision, could have had a material effect on the decision."

Thus the apparent general power in s. 10 is firmly and severely restricted by rules made as permitted by rule 10(3)(a).

11. The right of appeal to the relevant Appeal Court lies, by s. 13(1) of the 2007 Act, "on any point of law arising from a decision made by the Upper Tribunal other than an excluded decision". Excluded decisions are set out in s. 13(8) and in subordinate legislation made under s. 13(8)(f). The definition includes, at s. 13(8)(c):

> "Any decision of the Upper Tribunal on an application under section 11(4)(b) (application for permission or leave to appeal)."

12. Thus, the combined effect of the 2007 Act and the Rules is that a decision of the Upper Tribunal other than an excluded decision carries a right of appeal to the Court of Appeal. If an application for permission to appeal to the Court of Appeal is made, the decision may be reviewed under s. 10. But if the decision is an excluded decision, it does not carry a right of appeal to the Court of Appeal, and, because of the provisions of s. 10(1), it cannot be reviewed either. Rules 45 and 46 exclude review in any other circumstances.

13. The *third* potential source of a power in the Upper Tribunal to set aside its own decisions is that apparently recognised by the Court of Appeal in Akewushola v SSHD [1999] Imm AR 594, and perhaps by the Privy Council in Hip Foong Hong v H. Neotia & Co. [1918] AC 888.

14. In Akewushola the Immigration Appeal Tribunal, a statutory tribunal created by the Immigration Act 1971, had before it an appeal against an adjudicator's decision. At the hearing the appellant's representatives were not present. The Tribunal, constituted by a Vice President, Mr O'Brien Quinn QC, and two lay members proceeded and, in the absence of submissions on behalf of the appellant, dismissed the appeal. Their decision was sent out in writing in the usual way. Some time afterwards,

Mr O'Brien Quinn became aware that there had been a properly supported application for an adjournment of the hearing. He considered that the adjournment ought to have been granted. On that basis he purported to rescind the determination of the Tribunal over which he had presided; and he directed a fresh hearing before a differently constituted Tribunal. At that hearing, chaired by the President, His Honour Judge Pearl, a preliminary issue was whether the appeal was properly before the Tribunal, given the determination by the earlier Tribunal. The question, in other words, was whether Mr O'Brien Quinn had had power to set aside the Tribunal's determination and direct a re-hearing. The second Tribunal examined the powers of a Chairman of the Immigration Appeal Tribunal acting alone, and concluded that, whether or not the Tribunal had any general power to set aside its own decisions, Mr O'Brien Quinn acting by himself did not have that power.

15. The appellant then appealed to the Court of Appeal. The Court considered both the substantive issues (that is to say, on appeal from the first determination) and the question whether the second Tribunal was right to consider that it had no jurisdiction. The judgment was given by Sedley LJ, with whom Peter Gibson and Laws LJJ agreed.

16. Sedley LJ's judgment decides the substantive issue against the appellant. On the procedural question, Sedley LJ noted that the powers of a Chairman acting alone were set out in its rules and did not include the setting aside of a decision of the Tribunal. He then went on to consider the wider issue of whether even a full Tribunal could rescind its own or another Tribunal's decision. There was no explicit power in the Rules, and he said that he could see a number of reasons why no such power should be inferred or implied. The first was that rule 38 of the Tribunal's Rules allowed "any irregularity" to be cured "before an appellate authority has reached its decision". That appeared to impose a time limit (at least) on the exercise of a power such as was under consideration.

17. But there was a more general difficulty. After citing a passage from the then current edition of Wade and Forsyth on A*dministrative Law*, and referred to the slip rule in the Rules of the Supreme Court and the decision in Hip Foong Hong v H. Neotia & Co., Sedley LJ said this at 600:

> "For my part I do not think that, slips apart, a statutory tribunal – in contrast to a superior court – ordinarily possesses any inherent power to rescind or review its own decisions. Except where the High Court's jurisdiction is unequivocally excluded by privative legislation, it is there that the power of correction resides.
>
> This is particularly so where, as is the case with the Immigration Appeals (Procedure) Rules 1984, repeated provision is made for the circumstances in which a Tribunal can decide for itself what steps to take. … Although there may be further powers which arise by necessary implication from those spelled out in the rules – for example, to make provision for interpreters – it is not feasible to deduce from them the interstitial existence of an internal power of rescission or review. If something has gone procedurally wrong which is capable of having

affected the outcome, it is to the High Court – if necessary on a consensual application – that recourse must be had."

18. That discussion appears to recognise, in the first sentence quoted above, that a Superior Court does have an inherent power to rescind or review its own decisions. That is, of course, not necessarily to say that the power is unrestrained. Hip Foong Hong v H. Neotia & Co. concerned the exercise of the jurisdiction where a judgment was said to have been obtained by fraud, but it, and many other decisions including that of the Court of Appeal in Taylor v Lawrence [2002] EWCA Civ 90 appear to recognise an inherent power to reopen a case even after an order has been perfected and reconsider the decision in the interests of justice.

19. By s. 3(5) of the 2007 Act, the Upper Tribunal is (unlike the Immigration Appeal Tribunal) a Superior Court of Record. It might therefore be supposed that the Upper Tribunal has the inherent powers of a Superior Court of Record, whatever they may be.

20. The *fourth* possible source of a power to set decisions aside is s. 25 of the 2007 Act, which is as follows:

> "Supplementary powers of the Upper Tribunal
> (1) In relation to the matters mentioned in subsection (2), the Upper Tribunal –
> (a) has, in England and Wales or in Northern Ireland, the same powers, rights, privileges and authority as the High Court, and
> (b) has, in Scotland, the same powers, rights, privileges and authority as the Court of Session.
> (2) The matters are –
> (a) the attendance and examination of witnesses,
> (b) the production and inspection of documents, and
> (c) all other matters incidental to the Upper Tribunal's functions.
> (3) Subsection (1) shall not be taken –
> (a) to limit any power to make Tribunal Procedure Rules;
> (b) to be limited by anything in Tribunal Procedure Rules other than an express limitation.
> (4) A power, right, privilege or authority conferred in a territory by subsection (1) is available for purposes of proceedings in the Upper Tribunal that take place outside that territory (as well as for purposes of proceedings in the tribunal that take place within that territory)."

It might well be thought that regulating its own procedure, including setting aside its own previous decisions in appropriate circumstances, are "matters incidental to the Upper Tribunal's functions". Section 25 provides that in such matters the Upper Tribunal has the powers of the High Court and any other powers that the High Court including, presumably, both its inherent powers and those conferred by legislation or rule.

21. Looking more generally, it is to be noted that the third and fourth possible sources are applicable to the Upper Tribunal as a whole. The first and second are applicable to those Chambers of the Upper Tribunal to which the Upper Tribunal Rules apply, that is to say all Chambers with the exception of the Lands Chamber. Both paragraph 15(3) of Schedule 5 to,

and s. 25(3) of the 2007 Act have provisions which counter the effect of any *expressio unius exclusio alterius* argument; but those provisions apply only to the first and fourth possible sources. There is no similar provision in s. 10(3); and clearly such an argument might have effect in relation to the inherent jurisdiction.

22. Finally, we remind ourselves that both the Upper Tribunal Rules (at r 42) and the Procedure Rules of the First-tier Tribunal include a slip rule, in terms similar to that in CPR 40.12. The Upper Tribunal has held that the First-tier Tribunal's slip rule is not available for the purpose of reversing a decision already communicated to the parties: Katsonga v SSHD [2016] UKUT 00228 (IAC).

Patel

23. In Patel there was a long procedural history. The two most recent steps prior to the hearing before the Upper Tribunal were that the Upper Tribunal had refused permission to appeal, and the High Court had, in judicial review proceedings, quashed that refusal. The application for permission thus awaited lawful determination by the Upper Tribunal, and a hearing was arranged in order to determine it and, if appropriate, any resulting appeal. The Tribunal considered the substantive grounds and decided to grant permission. It then commenced the hearing of the appeal and discovered what had not previously been made clear either to the Tribunal or to the judge who dealt with the judicial review, that the application which the Tribunal had originally refused was substantially out of time. It thereupon purported to rescind its decision granting leave, substituted a decision refusing leave, and declined to consider the substantive appeal. The applicant appealed to the Court of Appeal on the basis that the Tribunal had no power to rescind its grant of permission. We add, because as presently constituted we are authoritatively able to do so, that the Tribunal thought that it was exercising the inherent jurisdiction of a Superior Court of Record, the third possible source.

24. The judgment of the Court of Appeal was given by Sir Richard Aikens, with whom Lewison LJ agreed. The Court was faced with the difficulty that the Tribunal had clearly made two decisions. If the Tribunal had no jurisdiction to set aside its decision granting permission, the second decision, refusing permission, nevertheless had to be dealt with as it stood unless quashed by an appropriate Superior Court. We do not need to concern ourselves with that difficult question of procedure. What is important for present purposes is the Court's decision on the question whether the Tribunal indeed had the power it purported to exercise.

25. Sir Richard Aikens' treatment of that issue is perfectly clear. Section 10 of the 2007 Act permits review of a decision, but not if the decision is an excluded decision. There had in the present case been a decision; but, being a decision on an application for permission to appeal, it was an excluded decision. The Tribunal accordingly had no power to review its decision under s. 10 and accordingly no power to set aside the grant of permission.

26. In reaching his decision to that effect, Sir Richard Aikens rejected submissions made on behalf of the Secretary of State about the nature, timing and form of decisions of the Upper Tribunal. He noted that r 40(1) permits a decision to be given orally at a hearing, and that the UT Rules do not require a decision of this sort (as distinct from a decision refusing permission) to be given in writing. Thus, the decision given orally could not be regarded as merely provisional until it was reduced to writing. The learned judge also pointed out that, in the procedure of the Upper Tribunal, there is not the distinction between judgment and order that applies in the High Court. Any general or inherent power to vary a judgment before the order was drawn up and sealed therefore had no relevance to the Upper Tribunal. None of the points raised by the Secretary of State therefore deflected the learned judge from his conclusion that the decision granting permission could not be the subject of review and therefore once taken, albeit orally, it could not be rescinded.

27. Evidently the Court of Appeal thought it desirable to deal with the matter in those general terms. Reaching the view that it did, it did not need to point out that the decision could not have been the subject of review under s.10 in any event, because the Tribunal was not considering an application for permission to appeal to the Court of Appeal: see rr 45 and 46, and s. 10(3)(a), discussed above. The judgment is clearly binding on the Upper Tribunal in all its Chambers, and it is in our judgment of considerable importance as much for what it does not say as for what it does. The Court was concerned to discover whether the Upper Tribunal had power to set aside a decision that, in the Tribunal's view, had been reached in the absence of a full appreciation of the facts. In these circumstances the Court's concentration on the review power under s. 10 of the 2007 Act and the absence of any reference to either the inherent power of a Superior Court of Record or the powers given by s. 25 must constitute a decision that those powers either do not exist or, if they do, were wholly irrelevant to the issue before the Court. It appears to us, therefore, that Patel puts to an end any speculation based on the judgment of Sedley LJ in Akewushola and, further, decides that whatever powers are granted by s. 25 of the 2007 Act, they do not include any power to rescind that deserved examination in the circumstances of the facts of Patel. That is important. It appears to mean that the Tribunal (in all its Chambers) has no inherent power to set aside its decisions, and no power derived from the powers of the High Court; further, in the Chambers governed by the UT Rules, it has no power to set aside its decisions other than in the circumstances set out in rules 43 and 45-46 respectively. That means that the power to set aside a decision is limited to (i) setting aside a decision that terminates proceedings, on the ground of procedural error, and (ii) setting aside a decision by way of review, where an application for permission to appeal to the Court of Appeal is being considered and one of the two circumstances in rule 45(1) applies.

The present application

28. Having set out the circumstances in which the Upper Tribunal has jurisdiction to set aside decisions of the Upper Tribunal, we proceed to apply the law to the present application. It is immediately apparent that,

potentially, rule 43 applies, but rule 45 does not. Rule 43 applies, because the decision refusing permission was a decision disposing of the proceedings before the Tribunal; the review power does not apply, because the Tribunal was and is not considering an application for permission to appeal to the Court of Appeal. Further, that power could not be applicable, because the decision under consideration is an "excluded decision".

29. Ms McCarthy's concession that the application cannot succeed is based on her recognition that the decision under challenge is an "excluded decision". That characterisation is, however, only relevant in relation to the power of review; it has no application to the only power which could be applicable in the present case, which is that under rule 43. Rule 43 does not apply here, however, because none of the conditions in paragraph (2) of that rule is present. Evidently none of sub-paragraphs (a) (b) or (c) applies; and although the applicant sought to suggest that there was "a serious procedural irregularity", the truth is that there has been no procedural irregularity at all. The applicant's complaint is based solely on the substance of the decision. Further, bearing in mind the interests of both parties, the basis for suggesting that the interests of justice require the decision to be set aside is wholly elusive. Indeed, if the Tribunal had the wider powers now authoritatively excluded by Patel, the result would have been the same: there is no proper basis for exercising a set-aside power in the present proceedings.

Conclusion

30. Our conclusions are as follows.

    (1) Following the decision of the Court of Appeal in Patel, it appears that the Tribunal's powers to set aside its own decision are limited to those in rules 43 (set-aside) and 45-6 (review).

    (2) The power under rule 43 (but not the power under rules 45-6) is exercisable in relation to an "excluded decision", but only when the decision has been reached following a procedural irregularity.

    (3) In the present case there was no procedural irregularity and the application is therefore refused.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 29 June 2016