UT Neutral Citation Number: [2024] UKUT 00028 (IAC)

Maleci (Non-admission of late evidence)

UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Heard at Field House

THE IMMIGRATION ACTS

Heard on 23 June 2023
Promulgated on 29 January 2024

Before

THE HON. MR JUSTICE DOVE, PRESIDENT
MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE BLUM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

COL MALECI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Presenting Officer
For the Respondent: Mr C Timpson, counsel

(1) The First-tier Tribunal is empowered to issue directions regulating the filing and service of evidence in proceedings which provide sanctions in the event of non-compliance that lead to the exclusion of evidence if the Tribunal considers this to be 'just'. Parties must appreciate that if they fail to comply with directions, they run the risk that the Tribunal will refuse to consider evidence that is not provided in accordance with those directions.

(2) What is 'just' will depend on the particular circumstances of each case but will be informed by the principles set out in SSHD v SS (Congo) and Others [2015] EWCA Civ 387.

DECISION AND REASONS

1. The respondent entered the United Kingdom in 1997 claiming to be from Kosovo. He gave his date of birth as 21 May 1978. He was recognised as a refugee and granted Indefinite Leave to Remain (ILR) on 28 June 1999. In an application for naturalisation made in 2004 the respondent confirmed his date of birth and his place of birth as Kosovo. He was naturalised as a British citizen on 16 February 2005.

2. The appellant does not accept the respondent is from Kosovo or that he is the age claimed. On 26 October 2021 the appellant gave notice under s.40(5) of the British Nationality Act 1981 (the 1981 Act) of her decision to make an order depriving the respondent of his citizenship status as she was satisfied it had been obtained by fraud, false representation, or concealment of a material fact (pursuant to s.40(3) of the 1981 Act).

3. The decision was supported by an undated letter issued by the British Embassy, Tirana (the Embassy letter). The Embassy letter asserted that checks conducted in accordance with a Memorandum of Understanding between the UK and Albania found that no national was registered on the National Civil Register of Kosovo with the details provided by the respondent (his name and date and place of birth). The checks did however reveal that someone with the same name, but whose date of birth was '21 May 1973', was included on the Albanian National Civil Register. The Embassy letter also contained a photograph from an Albanian government database that matched a photograph of the respondent held on Home Office records.

4. Pursuant to s.40A of the 1981 Act the respondent appealed the decision of 26 October 2021 to the First-tier Tribunal.

Directions issued by the First-tier Tribunal

5. On 7 February 2022, following a request for disclosure by the respondent's legal representative, a First-tier Tribunal caseworker directed the appellant to 'submit' several documents upon which the assertions in the Embassy letter were said to be based. These documents were to be

provided by 21 February 2022. They included, inter-alia, correspondence between the British Embassy and the relevant departments in the Albanian government and the Kosovan government, the official Albanian Family Certificate in respect of a person with the same name as the respondent and documentary evidence of the results produced following the checks that had been made. These directions stated that if the appellant was unable to comply she had to provide the First-tier Tribunal with reasons and/or make an application for more time. The appellant did not challenge these directions.

6. An extension of time application was made on 21 February 2022 as the appellant needed further time to "collate multiple documents which are not available electronically." Despite time being extended by a further 2 weeks, the appellant failed to provide the documents by 7 March 2022. No explanation was provided for this failure and no further application was made to extend time.

7. Further directions in the same terms were issued by Assistant Resident Judge Frantzis on 14 April 2022. The directions commenced:

> Direction 1. By 5 PM 21 April 2022, the [Appellant] must submit the following documents:-
> …

8. The directions concluded with a sanction for failure to comply:

> 2. In failing to do so, the [Appellant] will not be permitted to relying on these documents or any assertions made in relation to these documents.

9. The appellant did not challenge these directions. The appellant failed to comply with these directions. No explanation was offered for the failure. No application to extend time was made.

10. On 4 June 2022 a Legal Officer issued the following direction:

> The [Appellant] has failed to comply with directions dated 14 April 2022.
>
> In accordance with the directions of Judge Frantzis, the [Appellant] will not be permitted to rely on the documents or any assertions made in relation to those documents which have not been submitted.
>
> The [Respondent's] Legal Representative must now submit the Skeleton Argument and [Respondent's] bundle within 14 days.

11. The appellant did not challenge this direction or apply for this direction to be amended or set aside.

12. In a witness statement dated 27 May 2022 the respondent noted the appellant's failure to comply with the First-tier Tribunal's directions to provide the evidence supporting the British Embassy letter.

13. On 25 August 2022 the appellant uploaded onto CCD (the First-tier Tribunal's case management system) several documents that had been the subject of the earlier directions. The uploading of the documentation was not accompanied by an explanation for their lateness, or by any application to extend time to facilitate their admission, or by an application seeking relief from the sanction applied in the decision of 4 June 2022.

14. On 21 September 2022 the First-tier Tribunal listed the substantive hearing before Judge of the First-tier Tribunal Jepson (the judge).

The decision of the First-tier Tribunal

15. At the substantive hearing on 5 December 2022 the respondent was represented by Mr Timpson, and the appellant by Mr Royle, Presenting Officer. The judge was invited to make a preliminary decision as to whether the appellant could rely upon the late evidence produced on 25 August 2022. The judge considered the parties competing submissions, including the appellant's submission that although the documentary evidence was late it had been available to the respondent since August 2022, and that the documentary evidence had not taken the respondent by surprise as it was specifically requested by him. The appellant also submitted that the purpose of the earlier directions was to ensure that the evidence was before the Tribunal, and this had been achieved.

16. The judge decided as follows:

> 23.) I ruled that the evidence set out in direction seven be excluded. Judge Frantzis had made a clear direction. That set out the consequences if the direction were not met. After the first extension, no attempt was made by the Respondent to ask for more time or set out any difficulty encountered. There was ample opportunity to do so. Although it is right that directions of the Tribunal are frequently not met, they are not optional. The parties have a duty to keep the Tribunal apprised as to problems. The Respondent failed to fulfil that. Nor was this a 'near miss' situation. The evidence was four months late.
>
> 24.) My other concern was that, in effect, the Respondent was asking me to go behind or even overrule the directions of another judge of the First-Tier Tribunal. That would, in my judgment, be entirely inappropriate. No suggestion been made that the direction given was unlawful. The Respondent did not seek to challenge it. There was, in my view, no new information before the Tribunal which might have allowed the direction to be reconsidered in some way."

17. Following the preliminary decision the Presenting Officer, in the judge's words, "… sought to withdraw the decision via rule 17 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014". This was with a view to remaking the decision incorporating the evidence that the judge excluded. The judge was "urged" by Mr Timpson to refuse the application on the basis that no good reason existed to allow the withdrawal.

18. The judge decided to refuse to allow the appellant to withdraw. The judge reasoned as follows:

> "29.) Allowing withdrawal would in my judgment simply reward failure. All of the factors considered when deciding to exclude the late evidence were also taken into account here. The reality was, were withdrawal permitted the [Appellant] would re-issue the decision in the same terms as before. However, she would then no doubt serve the evidence I have excluded here. Arguably, nothing could then prevent reliance upon it. Without commenting on the strength or otherwise of any human rights argument the [Respondent] might have, the potential consequences for him would be significant. rely on evidence the Tribunal had excluded [*sic*].
>
> 30.) That evidence was of central importance to the case. The consequence of failing to serve it as directed had been made clear. To borrow language used in another jurisdiction, allowing withdrawal would in my judgment be an abuse of process. In reaching this decision, I bore in mind ZEI –
>
> > "Consideration of an application by the appellant will include examination of the reason behind the SSHD's decision but not exclusively; the Tribunal is also required to look at the impact on the appellant."
> >
> > "In the present case, as we have recorded above, Mr Deller was evidently persuaded by reasons (b) and (c). Reason (b) is not a good one, but there is no doubt that reason (c) applies. A new decision has been made but because of the date of the new decision, the appeal rights are substantially less. The appellant is thus prejudiced by the withdrawal. The fact that the withdrawal was for a reason that is extremely difficult to justify cannot, for the reasons given above, itself be a good reason, but it helps to show that the effect of the withdrawal is indeed prejudicial rather than merely unfortunate. We identify the fact that the new decision carries reduced rights of appeal as a good reason for allowing the appeal against the old decision (and thus governed by the old appeals provisions) to proceed."
>
> Although the above reflects a situation somewhat different to that here, the end result in my view of allowing withdrawal would be the same – considerable prejudice to the Appellant."

19. Following the judge's decision the Presenting Officer, "… opted not to cross-examine the [Respondent] or make a closing speech of any significance."

20. Under the heading "Discussion and conclusions", the judge stated:

> "35.) Although it is acknowledged by Mr. Timson the burden of proof remains on the [Respondent] in this appeal, there lies a burden on the [Appellant] to demonstrate the condition precedent been met [*sic*]. In court, Mr. Royle frankly accepted without the excluded evidence there was very little he might rely on.

> 36.) I agree. If one takes the late evidence away, the "British embassy letter" contains nothing more than unsubstantiated allegations. That leaves only the evidence uploaded alongside the Home Office review on 29th July, 2022. Without the excluded evidence to provide a foundation, the supplemental information about people applying for visit visas becomes essentially meaningless.
>
> 37.) The condition precedent cannot therefore be met. There is no real evidence, absent that excluded, to show the [Respondent] used fraud, made a false representation or concealed a material fact in seeking naturalised status. Any findings made by the Respondent are, given my judgment in relation to the late evidence, not supported.
>
> 38.) That finding means I need not proceed to consider the second part of the test set out in Ciceri – relating to human rights issues and whether deprivation would constitute a disproportionate breach thereof."

21. The judge "granted" the appeal.

Grounds of appeal

22. The appellant advanced three grounds of appeal.

23. The first ground asserted that, in excluding the evidence filed and served on 25 August 2022, the judge misdirected himself in law in a manner that amounted to procedural unfairness. The judge erroneously considered himself bound by the earlier directions, failed to appreciate that he could depart from those earlier directions, and failed to invoke or apply the overriding objective in the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. It was submitted that the judge failed to explain how the principles of fairness and justice was served by the exclusion of evidence in respect of which the respondent had been aware for four months, and that in concluding that there was "no new information before the Tribunal which might have allowed the direction to be reconsidered in some way" the judge failed to have regard to the substance of the new evidence which had not been before Judge Frantzis. The appellant contended that Judge Frantzis' direction of 14 April 2022 was in any event unlawful as the First-tier Tribunal had no jurisdiction to interfere with the appellant's decision under appeal. It was argued that the effect of the direction was to "effectively edit" the key reasoning in the appellant's underlying decision, which was contrary to the Supreme Court's decision in Begum v SSHD [2021] UKSC 7.

24. The second ground contends, in reliance on ZEI and others (Decision withdrawn – First-tier Tribunal Rule 17 – considerations) [2017] UKUT 292 (IAC); [2017] Imm AR 1355, that the judge misdirected himself in his approach to the appellant's indication that she was withdrawing her underlying decision. The appellant did not need the permission of the First-tier Tribunal to withdraw her decision as that Tribunal "must" treat the decision as withdrawn in the absence of a "good reason". Even if a "good reason" is articulated and the First-tier Tribunal retained jurisdiction by not

treating the decision as withdrawn, this did not change the fact that the decision had been withdrawn. The retained jurisdiction over the appeal would be against a former decision that was no longer operative against the individual to whom it was addressed. The First-tier Tribunal therefore had no power to prevent the appellant from withdrawing her decision.

25. The third ground contends that the judge misdirected himself in determining that the condition precedent of dishonesty in s.40 (3) of the 1981 Act had not been met, and/or by providing no or inadequate reasons as to why the appellant had acted unlawfully in relying on the assertions within the Embassy letter given that it expressly confirmed the source of those assertions.

26. The Upper Tribunal granted permission on all grounds.

27. At the 'error of law' hearing the Upper Tribunal panel considered a rule 24 response dated 29 March 2023 provided by the respondent, and the submissions of Mr Clarke and Mr Timson. We reserved our decision.

Discussion

Ground 1: Procedural rigour

28. The first ground of appeal raises issues concerning procedural rigour in the context of directions issued by the Tribunal that include, as a sanction for non-compliance, the non-admittance of late evidence.

29. The concept of procedural rigour must be considered in the context of the overriding objective of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (the Procedure Rules). The overriding objective of the Procedure Rules is to enable the Tribunal to deal with cases fairly and justly (rule 2). This includes dealing with cases in ways which are proportionate to their importance, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal. It also includes ensuring, so far as practicable, that the parties are able to participate fully in the proceedings, the avoidance of unnecessary formality and the seeking of flexibility in the proceedings, and the avoidance of delay, so far as compatible with proper consideration of the issues. Under rule 2(3) the Tribunal must seek to give effect to the overriding objective when it exercises any power under the Procedure Rules or interprets any rule or practice direction. Rule 2(4) states that parties must help the Tribunal to further the overriding objective and co-operate with the Tribunal generally.

30. The ability of the First-tier Tribunal to issue directions stems from the case management powers in rule 4. This states, in relevant part:

> 4.— (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
> …

31. Rule 4(3) gives particular examples of directions that can be given in relation to the conduct or disposal of proceedings. These include the extension or shortening of time for complying with any direction (rule 4(3)(a)). Although there is no express example relating to the exclusion of evidence following non-compliance with a time limit contained in a direction, rule 4(3) is written in non-exhaustive terms (the examples are given "without restricting the general powers" in 4(1) and 4(2)).

32. Rule 5 sets out the procedure for applying for and giving directions. Rule 5(1) states that the Tribunal may give a direction on the application of one or more of the parties or on its own initiative. Unless there is a good reason not to do so, rule 5(4) requires the Tribunal to send written notice of any direction to every party and any other person affected by the direction. Rule 5(5) states:

> If a party or any other person sent a notice of the direction under paragraph (4) wishes to challenge the direction which the Tribunal has given, they may do so by applying for another direction which amends, suspends or sets aside the first direction.

33. Rule 6 is concerned with failure to comply with any requirement of the rules, a practice direction or a direction.

> 6.— (1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction, does not of itself render void the proceedings or any step taken in the proceedings.
>
> (2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include—
>
> (a) waiving the requirement;
>
> (b) requiring the failure to be remedied;
>
> (c) exercising its power under paragraph 3

34. Rule 6(3) enables the Tribunal to request the Upper Tribunal to exercise its power under section 25 (supplementary powers of Upper Tribunal) of the Tribunals, Courts and Enforcement Act 2007 in relation to any failure by a person to comply with a requirement imposed by the Tribunal relating to a closed list of scenarios. These are not relevant to the issues in this appeal.

35. Rule 6(2)(a) to (c) contains examples of the action that the Tribunal 'may' take. Rule 6(2) does not restrict the action that the Tribunal may take, as long as the Tribunal considers that action to be 'just'. We take the reference to the word 'just' in rule 6(2) to encompass fairness as well, by reference to the overriding objective in rule 2. What is just and fair will depend on the particular circumstances of a case.

36. The Practice Statement No 1 of 2022 ('PS') is dated 13 May 2022. The PS contains model directions (at annexes A to C) which are applicable depending on the manner in which the appeal is lodged. Each of the annexes contains a section dealing with 'late material'. Although the word 'material' is not defined we take it to be synonymous with 'evidence'. These sections state that any material provided to the First-tier Tribunal outside the relevant time limits may not be relied upon without permission from the First-tier Tribunal. Where any material is provided after 5 working days prior to the hearing, including on the day of the hearing, the judge must deal with the admissibility of that material at the hearing as a preliminary matter.

37. The effect of the PS is that where the model directions are applied, even in the absence of a specific direction that includes a sanction leading to the potential exclusion of evidence, if the evidence is provided outside of the time limits it may not be relied on without obtaining the permission of the Tribunal.

38. The need to ensure procedural rigour in the context of public law proceedings has been stressed by the higher courts (R (Spahiu) v Secretary of State for the Home Department [2018] EWCA Civ 2604; [2019] Imm AR 524; R (Dolan) v Secretary of State for Health and Social Care [2020] EWCA Civ 1605).

39. In R (AB) Chief Constable of Hampshire Constabulary [2019] EWHC 3461 (Admin) the Divisional Court held (per Dame Victoria Sharp P, [108]):

> The conduct of litigation in accordance with the rules is integral to the overriding objective set out in the first part of the CPR and to the wider public interest in the fair and efficient disposal of claims. Public law cases do not fall into an exceptional category in any of these respects. If the rules are not adhered to there are real consequences for the administration of justice.

40. In R (Talpada) v Secretary of State for the Home Department [2018] EWCA Civ 841, Singh LJ stated [67]:

> I turn finally to the question of procedural rigour in public law litigation. In my view, it cannot be emphasised enough that public law litigation must be conducted with an appropriate degree of procedural rigour. I recognise that public law litigation cannot necessarily be regarded in the same way as ordinary civil litigation between private parties. This is because it is not only the private interests of the parties which are involved. There is clearly an important public interest which must not be overlooked or undermined. In particular procedure must not become the master of substance where, for

> example, an abuse of power needs to be corrected by the court. However, both fairness and the orderly management of litigation require that there must be an appropriate degree of formality and predictability in the conduct of public law litigation as in other forms of civil litigation.

41. Having deprecated the habit of "evolving" grounds of appeal in proceedings Singh LJ then stated [69]:

> These unfortunate trends must be resisted and should be discouraged by the courts, using whatever powers they have to impose procedural rigour in public law proceedings. Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them. Otherwise there is a risk that there will be unfairness, not only to the other party to the case, but potentially to the wider public interest, which is an important facet of public law litigation.

42. The Upper Tribunal has also considered the requirements of procedural rigour. The headnote in Shabir Ahmed and others (sanctions for non – compliance) [2016] UKUT 00562 (IAC) reads:

> *Persistent and egregious non-compliance with Upper Tribunal orders, directions and rules will attract appropriate sanctions.*

43. The need for general procedural rigour, including compliance with directions, has received comment in the decision of TC (PS compliance - "issues based" reasoning) Zimbabwe [2023] UKUT 00164 (IAC); [2023] Imm AR 1427. Headnote 5 reads:

> *The need for procedural rigour at every stage of the proceedings applies with equal force when permission to appeal to the UT is sought and in the UT, including a focus on the principal important controversial issues in the appeal and compliance with directions. The requisite clear, coherent and concise 'issues-based' approach continues when a judge considers whether to grant permission to appeal. This means that the judge should consider whether a point relied upon within the grounds of appeal was raised for consideration as an issue in the appeal.*

44. When considering whether to grant relief from sanctions, or the appropriate action consequent to a failure to comply with procedural requirements such as those contained in the PS, or the appropriate action following a failure to comply with a specific direction sanctioning the exclusion of evidence in the event of non-compliance, we consider that paragraphs 93, 94 and 95 of the Court of Appeal's judgment in SSHD v SS (Congo) and Others [2015] EWCA Civ 387; [2015] Imm AR 1036 are relevant. The test is the familiar tripartite one laid down by the Court of Appeal in Mitchell v NGN [2013] EWCA Civ 1537; [2014] 1 WLR 795 and Denton v TH White Ltd [2014] EWCA Civ 906; [2014] 1 WLR 3926 (see also SA (Non-compliance with rule 21(4)) Bangladesh [2022] UKUT 00132 (IAC); [2022] Imm AR 1049).

93. It is common ground that the governing principles are those laid down in *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, in which this court held that applications for extension of time for filing a notice of appeal should be approached in the same way as applications for relief from sanction under CPR rule 3.9 and in particular that the principles to be derived from *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR 795 and *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926 apply to them. According to the *Denton* restatement of the *Mitchell* guidance, in particular at paras. [24]-[38] of the judgment of the Master of the Rolls and Vos LJ in *Denton*, a judge should address an application for relief from sanction in three stages, as follows:

i) The first stage is to identify and assess the seriousness or significance of the failure to comply with the rules. The focus should be on whether the breach has been serious or significant. If a judge concludes that a breach is not serious or significant, then relief will usually be granted and it will usually be unnecessary to spend much time on the second or third stages; but if the judge decides that the breach is serious or significant, then the second and third stages assume greater importance.

ii) The second stage is to consider why the failure occurred, that is to say whether there is a good reason for it. It was stated in *Mitchell* (at para. [41]) that if there is a good reason for the default, the court will be likely to decide that relief should be granted. The important point made in *Denton* was that if there is a serious or significant breach and *no* good reason for the breach, this does not mean that the application for relief will automatically fail. It is necessary in every case to move to the third stage.

iii) The third stage is to evaluate all the circumstances of the case, so as to enable the court to deal justly with the application. The two factors specifically mentioned in CPR rule 3.9 are of particular importance and should be given particular weight. They are (a) the need for litigation to be conducted efficiently and at proportionate cost, and (b) the need to enforce compliance with rules, practice directions and court orders. As stated in para. [35] of the judgment in *Denton*:

> "Thus, the court must, in considering all the circumstances of the case so as to enable it to deal with the application justly, give particular weight to these two important factors. In doing so, it will take account of the seriousness and significance of the breach (which has been assessed at the first stage) and any explanation (which has been considered at the second stage). The more serious or significant the breach the less likely it is that relief will be granted unless there is good reason for it …."

94. The court in *Hysaj* added some points of particular relevance to the present context. At para. [41] of his judgment, Moore-Bick LJ (with whom the other members of the court agreed) said that it would be quite wrong to construct a special regime for applications for extensions of time in public law cases, but he accepted that "the importance of the issues to the public at large is a factor that the court can properly take into account when it comes at stage three of the decision-making process to evaluate all the circumstances of the case". At para. [42] he rejected the contention that the

court could construct a special rule for public authorities, which "have a responsibility to adhere to the rules just as much as any other litigants". He added that the nature of the proceedings and the identification of the responsibility for delay are factors which it may be appropriate to take into account at the third stage.

95. Another point concerned the merits of the substantive appeal, as to which Moore-Bick LJ said this at para. [46]:

> "If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them ....."

45. The assessment of whether the 'action' that can be taken by the Tribunal under rule 6(2) is 'just' will encapsulate the principles set out above in SS (Congo).

46. In assessing whether to grant relief from a sanction imposed by way of earlier directions SSGA (Disposal without considering merits; R25) Iraq [2023] UKUT 00012 (IAC); [2023] Imm AR 380 is relevant. Headnote 2 reads:

> *Every judge seized of an appeal must reach his or her own decision on the case and must exercise for himself or herself any available discretion. Judges who give directions must be careful to ensure that the wording of their directions does not and cannot be perceived to direct how another judge should dispose of the appeal or exercise any available discretion. If a judge tasked with deciding an appeal is faced with any direction that may be so perceived, the judge must make it clear in the decision that he/she has considered the matter for himself/herself.*

47. Having regard to the Procedure Rules, and in particular rules 2, 4, 5 and 6, and to the authorities cited above in respect of procedural rigour and relief from sanctions, we are satisfied that the First-tier Tribunal is empowered to issue directions regulating the filing and service of evidence in proceedings which provide sanctions in the event of non- compliance that lead to the exclusion of evidence if the Tribunal considers this to be 'just'. This is necessary to ensure that proceedings are conducted in accordance with the overriding objective. Non-compliance with directions imposing specified time limits may impact on judicial and administrative resources, on the ability of the other party to participate fully in the proceedings, and could delay the administration of justice. It is also disrespectful of the judicial process and the rule of law. Parties must appreciate that if they fail to comply with directions they run the risk that

the Tribunal will refuse to consider evidence that is not provided in accordance with those directions. What is 'just' will depend on the particular circumstances of each case but will be informed by the principles set out in SS (Congo).

Applying the principles of procedural rigour to the present appeal

48. The second paragraph of the Assistant Resident Judge's direction of 14 April 2022 contained a clearly defined sanction in the event of non-compliance. Although it would have been preferable if the directions was not phrased in mandatory terms, we do not consider that a future judge hearing the appeal would consider themselves bound to apply the sanction. We find, for reasons given below, that the judge who did hear the appeal did not consider himself bound to apply the sanction. The appellant had already been given an extension of time to provide the documents that were the subject of the directions issued on 7 February 2022. There had been no challenge to the earlier directions, and no further application to extend time, and the sanction did not prevent the appellant from relying on the Embassy letter itself. If the appellant considered that she was unable to comply with the directions it was open to her to make appropriate submissions in a timely manner. Nor is there any merit in the appellant's submission that the effect of the disclosure direction was to "effectively edit" the key reasoning of the appellant's deprivation decision as the direction sought the production of evidence that was already in existence when the deprivation decision was made and which had been relied on by the appellant in reaching that very decision. Although the Assistant Resident Judge did not expressly state that she considered the proposed sanction to be just, there is no reason to believe that she did not have rule 6 of the Procedure Rules in mind when the direction was formulated.

49. The Legal Officer's sanction decision of 4 June 2022 flowed from the appellant's failure to comply with the Assistant Resident Judge's decision. In the absence of any challenge to the earlier direction or any application to extend time, or any reason for the failure, we are satisfied that the sanction decision was just and lawful.

50. In refusing to grant relief from the sanction by admitting the documents the judge was demonstrably aware of the history of the proceedings, the appellant's failure to challenge the directions of 14 April 2022 or seek an extension of time, and the absence of any reason for the non-compliance. The appellant was aware of what would happen if she failed to comply with the sanction direction as the sanction was clearly prescribed. There is nothing to indicate that the judge failed to take into account all relevant circumstances or that his reasoning was inadequate. The judge was aware of and took into account both the importance of the documents to the appellant's case and the fact that the documents had eventually been made available. The judge noted the circumstances of the breach of the directions issued by the Tribunal and considered that the breach was serious. We again note the absence of any reason for the failure to comply

with the directions issued on 14 April 2022. The judge weighed the relevance of the documents against the seriousness of the breach and the consequences for the appellant and reached a conclusion that was within the range of reasonable conclusions open to him. While another judge may have reached a different conclusion, we cannot say that the judge's decision was one he was not entitled to make for the reasons given.

51. Having holistically considered the judges' reasoning at [23] and [24] we are not persuaded that the judge considered himself bound to follow the decision of 4 June 2022, or that he was unaware of or failed to exercise his own judgement. The judge demonstrably took into account the relevant circumstances and reached his own view as to whether he should provide relief from the sanction. The judge weighed the relevant considerations and reached a conclusion that was rationally open to him. Although there was no express reference to the overriding objective in the Procedure Rules or to the requirement in rule 6 that the judge considered his action to be just, we are satisfied that the judge would have had these in mind in reaching his decision.

Ground 2: withdrawal of the underling decision under appeal

52. It is apparent from the extract of the judge's decision set out at [18] above that the judge believed the Presenting Officer was making an application to withdraw the appellant's decision pursuant to rule 17 of the Procedure Rules. The heading for this section of the judge's decision was "The second Issue in Court – The Withdrawal Application." The judge purported to refuse the withdrawal application. The judge reasoned that allowing the withdrawal would "simply reward failure", that the "potential consequences" for the respondent "would be significant", that allowing the appellant to withdraw would be "an abuse of process", and that there would be "considerable prejudice to the [respondent]".

53. The Presenting Officer was relying upon rule 17(2) of the Procedure Rules. This states:

> (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.

54. The Presenting Officer provided a reason for the withdrawal of the underlying decision. According to the judge's decision the withdrawal was made "… with a view to re-making the decision so as to incorporate the evidence now available."

55. In ZEI and others (Decision withdrawn - FtT Rule 17 – considerations) Palestine [2017] UKUT 00292 (IAC) the Upper Tribunal considered and gave guidance in respect of rule 17(2). The headnote of ZEI reads:

Rule 17 clearly envisages that in general the appeal is to be treated as withdrawn. It 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. The appellant needs the opportunity to advance a case why he considers an appeal should not be treated as withdrawn, and the SSHD needs the opportunity to respond. The Tribunal has no power to require the Secretary of State to give (or even to have) a good reason for her decision.

The list below cannot and should not be regarded as a comprehensive account of all reasons that might be urged on judges, but we trust that as well as giving guidance on the arguments discussed the reasoning may be adapted to other cases.

(i) The following are not likely to be considered good reasons:

- The parties wish the appeal to proceed.
- The applicant is legally aided and if he has to appeal against a new decision, he will not (or will probably not) be legally aided because the legal aid regime has changed.
- The withdrawal is for reasons the judge considers inappropriate is very unlikely to be a good reason to proceed. An example is that of a Presenting Officer who seeks adjournment of a hearing and when that is refused, withdraws the decision.
- The witnesses are ready to be heard and can only with difficulty or expense be gathered again.

(ii) The following are likely to be capable of being a good reason.

- The appeal regime has changed since the first decision, so that if a new decision is made in the same sense, the rights of appeal will be reduced.
- Undue delay by the respondent.
- The appeal turns on a pure point of law that the judge thinks that even after argument is certainly or almost certainly to be decided in the appellant's favour.
- If there has already been a considerable delay in a decision the appellant is entitled to expect, the fact that children are affected.

56. Under rule 17(2) the First-tier Tribunal has a partial discretion whether to treat the appeal as withdrawn. This is distinct from the appellant's decision to withdraw the underlying decision that gave rise to the appeal. The appellant's grounds of appeal essentially contend that the judge conflated the issue of the withdrawal of the underlying decision, which is a matter exclusively for the appellant, with the limited circumstances in which an appeal can continue (upon the establishment of a 'good reason') even when the underlying decision is withdrawn.

57. The respondent contends that the judge did not prevent the appellant from withdrawing her underlying decision and instead gave reasons why the appeal should continue despite the withdrawal of the underlying decision. This, with respect, is not consistent with the language actually used by the judge. At [29] the judge expressly referred to the

consequences of “allowing withdrawal”. This suggests that the judge thought he had power to refuse to allow the appellant to withdraw her decision, which he was purporting to exercise. In the same paragraph the judge considered the consequences “were withdrawal permitted.” At [30] the judge considers that “allowing withdrawal” would amount to an abuse of process. The judge concludes the same paragraph by expressing his view that “allowing withdrawal” would cause considerable prejudice to the respondent. We are satisfied that the judge erroneously believed that he was empowered to permit or refuse the appellant to withdraw her underlying decision, and that he failed to consider whether there was good reason to allow the appeal to continue despite the fact that the underlying decision has been withdrawn.

58. We are satisfied that the judge’s legal error requires the decision to be set aside pursuant to s.12 of the Tribunals, Courts and Enforcement Act 2007.

59. Pursuant to s.12(4)(a) & (b) of the Tribunals, Courts and Enforcement Act 2007 the Upper Tribunal can, when remaking a decision of the First-tier Tribunal which has been set aside, make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and it may make such findings of fact as it considers appropriate. We have considered with care the arguments advanced on behalf of the respondent, both before the First-tier Tribunal and at the Upper Tribunal hearing, that there is a good reason to allow the appeal to proceed despite the underlying decision having been withdrawn. We note in particular the argument that treating the appeal as withdrawn would allow the appellant to side-step her failure to comply with directions by simply issuing a new decision that incorporates the excluded documentary evidence. We also note the view of the First-tier Tribunal judge that this would amount to an abuse of process, and the judge’s conclusion that this would cause “considerable prejudice to the [respondent]”.

60. We note in general that an appeal is to be regarded as withdrawn unless a good reason has been identified. We are guided by the headnote in ZEI which contains examples of what are not likely to be considered good reasons. This includes the withdrawal being for reasons the judge considers ‘inappropriate’, the example given relating to a Presenting Officer who seeks an adjournment who, when refused, withdraws the decision. We consider the decision of the Presenting Officer before the First-tier Tribunal to withdraw the decision to enable a new decision to be made that incorporates previously excluded evidence to be similar in nature to the example given in ZEI. The excluded evidence is clearly relevant to any consideration of the lawfulness of the appellant’s deprivation decision. Nor is there any apparent prejudice to the respondent. Unlike the appellant in ZEI, there will be no change in the respondent’s appeal rights. He will still be able to appeal any new decision to deprive him of his citizenship status. We are satisfied there is a good reason to treat the appeal as withdrawn.

The third ground

61. Given that we are satisfied that the judge's error contains a material error of law, and that it must be set aside, it is not necessary to determine whether the third ground of appeal is made out.

Notice of Decision

The making of the First-tier Tribunal's decision involved the making of an error on a point of law requiring it to be set aside.

The appeal is treated as withdrawn.

D. Blum

Judge of the Upper Tribunal
Immigration and Asylum Chamber

15 November 2023