Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/12857/2010

THE IMMIGRATION ACTS

Heard at Newport On 31 July 2012	Determination Sent On 3 June 2013

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

S E-A

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Chelvin instructed by South West Law
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal is subject to an anonymity direction that no report or other publication of these proceedings or any part or parts of them shall name or directly or indirectly identify the claimant. Reference to the claimant may be by use of his initials but not by name. Failure by any person, body or institution whether corporate or incorporate (for the avoidance of doubt to include either party to this appeal) to comply with this direction may lead to a contempt of Court. This direction shall

2. The appellant appeals against a decision of the First-tier Tribunal (Judge Harmston) which, in a determination dated 25 October 2010, dismissed her appeal against the respondent's decision taken on 5 August 2010 to remove her by way of directions to Egypt under s.10 of the Immigration and Asylum Act 1999.

3. The appellant arrived in the United Kingdom in November 2007 as a visitor with her mother. Her brother and sister came to the UK on 4 January 2008. Initially, the appellant's mother claimed asylum on 13 November 2007 with the appellant as her dependant. That claim was refused on 24 November 2009 and a subsequent appeal dismissed on 22 January 2010. On 14 May 2010, the appellant made her own claim for asylum. The appellant claimed that she would be forced to marry if returned to Egypt; would be subject to female genital mutilation (FGM) on return and that she would be persecuted as a lesbian in Egypt.

4. The First-tier Tribunal dismissed her appeal on all grounds. Principally, the judge found that the appellant would not be at risk of persecution by being forced to undergo FGM and she would not be at risk on account of her sexual orientation, which the judge accepted, because the evidence did not establish that lesbian women who live openly in Egypt would be at risk of persecution and that, in any event, she would live discreetly in order not to embarrass or upset her mother or siblings.

5. Following the grant of permission to appeal to the Upper Tribunal made on 18 November 2010, the appeal initially came before me. In a decision dated 14 August 2012, I concluded that the judge had erred in law in reaching his findings that the appellant would not be at risk on return because of her sexual orientation or because she would be forced to undergo FGM. My full reasons are set out in that decision and it is unnecessary to repeat them here.

6. The appeal was adjourned for a resumed hearing which was listed before me on 20 May 2013.

7. At the outset of that hearing, Mr Hibbs, who represented the Secretary of State, sought permission to withdraw the Secretary of State's immigration decision made on 2 August 2010 pursuant to rule 17(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). Mr Chelvin, on behalf of the appellant, opposed the Secretary of State's application.

8. The relevant rule is, as I say, rule 17 which, so far as germane provides as follows:

> "(1) Subject to paragraph (2), a party may give notice of the withdrawal of its case, or any part of it –
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> (a) at any time before a hearing to consider the disposal of the appeal (or, if the Upper Tribunal disposes of the proceedings without a hearing, before that disposal), by sending or delivering to the Upper Tribunal a written notice of withdrawal; or
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> (b) orally at a hearing.

(2) Notice of withdrawal will not take effect unless the Upper Tribunal consents to the withdrawal except in relation to an application for permission to appeal.

(3) A party which has withdrawn its case may apply to the Upper Tribunal for the case to be reinstated."

9. As rule 17(2) makes plain, a party to the proceedings may only withdraw "its case" if the Upper Tribunal consents. Before me, there was much debate as to whether the withdrawal by the Secretary of State of the "immigration decision" amounted to a withdrawal of her "case" within rule 17. Reference was made to the Upper Tribunal's decision in EG and NG (UT rule 17: withdrawal; rule 24: scope) Ethiopia [2013] UKUT 00143 (IAC) which I drew to the representatives' attention.

10. EG and NG was a case in which the Secretary of State was appealing to the Upper Tribunal and wished to withdraw her appeal. The UT accepted that withdrawal by the appellant of her case (who was the Secretary of State in the Upper Tribunal) fell within rule 17 and, if permitted by the Upper Tribunal, resulted in there being no appeal "awaiting determination" such that the appeal was "finally determined" and no longer pending by virtue of s.104 of the Nationality, Immigration and Asylum Act 2002. I was referred to a number of paragraphs in the UT's decision including [25], [26] and [43].

11. The case was not, of course, concerned with whether the Secretary of State's withdrawal of the underlying "immigration decision" amounted to a withdrawal of her "case" for the purposes of rule 17.

12. For my part, I apprehend that this is not an easy or straightforward point to resolve. There are arguments going both ways. There is also the issue of what effect, having withdrawn the immigration decision (with consent if needed), that has on the proceedings in the Upper Tribunal. There is no equivalent in the Upper Tribunal Procedure Rules of rule 17 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230) to the effect that the withdrawal by the Secretary of State of the "immigration decision" amounts to a deemed withdrawal of the appeal. That, of course, says nothing about whether the permission of the Upper Tribunal is required. If withdrawal of an "immigration decision" does fall within rule 17, then it may be necessary to grapple with the argument that this amounts to a fetter on the Secretary of State's decision-making power (to make or withdraw such decisions) under the Immigration Acts. It may not be immediately obvious how the Upper Tribunal's procedural rules can lawfully fetter the exercise of that discretion. In this appeal, however, it is not necessary to consider these issues further. It was accepted by both representatives that the Secretary of State's application to withdraw the underlying immigration decision fell within rule 17 of the Upper Tribunal rules. Both Mr Hibbs and Mr Chelvin expressly accepted that to be the case. In those circumstances, I proceeded at the hearing, to consider whether I should consent to the withdrawal by the Secretary of State of her immigration decision made under s.10 of the Immigration and Asylum Act 1999.

13. Mr Hibbs indicated that the basis upon which he sought to withdraw the immigration decision was that the Secretary of State wished to reconsider the appellant's claim in the light of the background evidence concerning the risk to her on return to Egypt.

14. On behalf of the appellant, Mr Chelvin opposed that application. In the light of the overriding objectives set out in rule 2 of the Upper Tribunal Procedure Rules, Mr Chelvin submitted that it was not appropriate to consent to the withdrawal of the decision. He highlighted the chronology concerning the appellant's appeal.

15. First, he reminded me that there were detailed submissions made on behalf of the appellant as to the merits of her claim which were part of the appellant's documentation submitted to the Upper Tribunal at the initial hearing before me on 31 July 2012. He acknowledged that my decision had not been sent out by the Tribunal until 8 February 2013 but from that date, he submitted, the Secretary of State had been on notice that the appellant's claim was to be determined by the Upper Tribunal on the basis of the background material. Indeed, there was a 'for mention' hearing on 10 March 2013 to consider whether the case should be listed as a Country Guidance case but, in the event, it was not.

16. Secondly, Mr Chelvin indicated that the appellant's solicitors had contacted Mr Hibbs on 15 May 2013 - namely the week before the hearing - in relation to the future disposal of the appeal. At that point, Mr Hibbs had indicated that he had just received the file and that once he had reviewed it he would contact the appellant's representatives if the Secretary of State's position changed. Mr Chelvin submitted that the bundle of documents which Mr Hibbs sought to introduce in the Upper Tribunal was largely part of the case before the Upper Tribunal in July of last year. There were only three documents which were, in other words, new to the case. He submitted that the Secretary of State had had an abundance of time to consider the material and whether to change her decision in relation to the appellant's claim for asylum. He invited me to refuse consent to the Secretary of State's application applying the overriding objective of dealing with the case "fairly and justly".

17. At the hearing, I indicated that that I did not consent to the withdrawal of the immigration decision by the Secretary of State. In reaching that decision, I applied the overriding objective of dealing with the case "fairly and justly" in rule 2 of the Upper Tribunal Procedure Rules. In doing so, I took into account a number of relevant factors. The Secretary of State has had, at least, since 8 February 2013 notice that the merits of the appellant's asylum claim were to be decided in the Upper Tribunal. The bulk of the background evidence, upon which the outcome of this appeal turns, was available to the Secretary of State no later than the initial hearing of this appeal on 31 July 2012. The further evidence that has led Mr Hibbs to take the view that the Secretary of State should reconsider her decision is largely not new and has been available to the Secretary of State for some time. The written application on behalf of the Secretary of State under rule 17(1) is dated yesterday (namely Sunday 19 May 2013). I intend no discourtesy to Mr Hibbs, who in all probability did not have access to the file and time to consider the Secretary of State's position until

shortly before the hearing, but nevertheless that application is made late and the appellant and her representatives have fully prepared for a hearing before the Upper Tribunal. As I understand it, the appellant's representatives had no prior notice of the application. The appeal was listed for a full half-day's hearing in order to consider all the material relied upon.

18. Taking all these matters into account, and bearing in mind the overriding objective of dealing with the case "fairly and justly", I refused my consent to the Secretary of State's withdrawal of the underlying immigration decision.

19. Following my indication that was decision to the representatives, Mr Hibbs sought a short adjournment in order to make further enquires by telephone. Following that adjournment, Mr Hibbs indicated that the Secretary of State had reconsidered the appellant's claim for asylum and intended to grant the appellant asylum in due course. In the light of this, both Mr Hibbs and Mr Chelvin invited me to allow the appellant's appeal on the basis that the Secretary of State conceded that the appellant was entitled to asylum.

20. On the basis of that concession, the substance of which I have no reason to doubt, I allow the appellant's appeal on asylum grounds.

Decision

21. The First-tier Tribunal's decision to dismiss the appellant's appeal involved the making of an error of law. I set that decision aside.

22. I remake the decision allowing the appellant's appeal on asylum grounds.

Signed Andrew Grubb

A Grubb
Judge of the Upper Tribunal

23, May 2013