

Point Abandoned or Appeal Withdrawn?

by Ryan Clement.
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There are times in court when it becomes apparent that a point being pursued becomes unarguable – either for factual or legal reasons – and has to be abandoned.

Such factual or legal reasons can come about in a number of ways, be it in consequence of a concession made on the evidence or through a straightforward change of evidence. Either way, a

representative would either no longer pursue the now defunct point and leave to the judge to decide the obvious or, under clear and unambiguous instructions from the client, withdraw the corresponding ground of appeal. In this article I shall examine part of the recent Upper Tier (Immigration and Asylum Chamber) decision in *Nav Raj Ghale v Secretary of State for the Home Department IA/34711/2009* that deals with the consequences of abandoning a point without necessarily withdrawing the corresponding ground.

In *Ghale* the appellant was a citizen of Nepal. He appealed unsuccessfully a decision of the respondent's refusing to vary his leave to remain in the United Kingdom; the respondent was not satisfied that he had met the requirements of paragraph 317 of HC 395 – in particular, that he was, "financially wholly or mainly dependent", on his son.

Appeal before First Tier

At the start of the hearing, the JJ considered the papers with the appellant's then representative and decided that the figures showed that the appellant's income exceeded his expenditure. According to the JJ's note the appellant's representative, "conceded that Rule does not assist appellant and relies on Art 8 alone".

When the appellant received the determination dismissing the appeal he was very concerned to find the point had not been argued. It had never been his intention to abandon the claim under the rules.

At paragraph 2 of his determination, the immigration judge recorded: "During the course of the hearing, [the appellant's representative] informed me that 'the Appellant was no longer pursuing his appeal on the basis of the relevant rule, namely paragraph [...] 317 of rules [...]'. The basis for such concession was that the evidence in fact showed that the Appellant was neither wholly nor mainly dependent on his son in the UK. Having regard to the evidence in this case, including the certificate of the Appellant's income at page 5 of the Appellant's bundle, I find that the concession was properly made." In consequence, the judge then went on to consider the case solely on the grounds of the appellant's human rights, which, like I said earlier, he dismissed in any case.

Appeal before Upper Tier

The grounds before the Upper Tier were settled on the basis that the appellant's then representative withdrew the grounds alleging that the appellant met the requirements of the Immigration Rules and that the JJ erred by accepting the appellant's representative's decision without confirming it with the appellant. The Senior Immigration Judge ("SIJ") stated that he was surprised that anyone would find anything wrong with the judge's approach if the appeal had in fact been withdrawn but counsel for the appellant was able to refer him to two relevant cases. The first was a decision of the House of Lords in *R v Diggines ex parte Rahimani & Others* [1986] Imm AR 195. The leading speech was given by Lord Scarman. Here, the HL found that on the particular facts of the case an advisory service had made a mistake and this had led to a misunderstanding. Nevertheless Lord Scarman did say that the immigration judge, "should have required an unambiguous declaration from the Service either that their instructions have been withdrawn or that they have no instructions". The SIJ was also referred to the decision of *Nachhar Singh v SSHD* [1991] Imm AR 195, a decision of the Immigration Appeal Tribunal chaired by its VP Professor D.C. Jackson. There the Tribunal decided that solicitors who were without instructions could not withdraw an appeal.

Error of law

The SIJ expressed the view that he was not sure that either of these decisions would have helped the appellant very much if he had had to decide if the ground relating to the appeal under the rules had been withdrawn properly. However, he was satisfied that it had not been withdrawn. The word "withdrawn" does not appear in the determination and there was no reason to think that it was formally withdrawn. It was quite clear to the SIJ that the appellant's representative simply abandoned a point that he did not think could succeed. It was still incumbent upon the JJ to do something with the appeal in front of him and on the particular facts of the case. He should have decided if the decision that was the subject of the appeal was in fact in accordance with the rules and he did not. Given the way the case was presented before him the SIJ had considerable sympathy with him for making this error, but it was an error and it has to be corrected.

Conclusion

This is a decision worth taking particular note of because many times, by way of 'house keeping', an advocate would be asked out the outset of a hearing about the issues in question that, depending on the approach of the presiding immigration judge, may entail points being pursued on appeal or not. However, according to *Ghale*, it is clear that, on the latter, an immigration judge ought not to treat a point not pursued by an appellant's representative as indicative of the appellant's withdrawal of the corresponding element of the appeal without further enquiry establishing that it is the appellant's desire to have the relevant in fact withdrawn.

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