



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/10614/2018

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 2<sup>nd</sup> April 2019**

**Decision & Reasons  
Promulgated  
On 26 April 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE LEVER**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**FOZIYEH [P]  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms N Willocks-Briscoe

For the Respondent: Mr D Bazini of Counsel

**DECISION AND REASONS**

**Introduction**

1. The Appellant born on 3<sup>rd</sup> September 1965 is a citizen of Iran. The Appellant was represented by Mr Bazini of Counsel. The Respondent was represented by Ms Willocks-Briscoe a Presenting Officer.

**Substantive Issues under Appeal**

2. The Appellant has said that she first entered the United Kingdom on 6<sup>th</sup> April 1996. She returned to Iran in 2002. On 23<sup>rd</sup> August 2011 she entered the UK as a visitor returning to Iran within the timeframe of that visa. On 15<sup>th</sup> September 2016 she entered the UK with leave to enter as a visitor valid until 4<sup>th</sup> February 2017. On 3<sup>rd</sup> February 2017 she applied for leave to remain in the UK on the basis of her family and private life.
3. The Respondent had refused that application on 25<sup>th</sup> April 2018.
4. The Appellant appealed that decision and her appeal was heard at Taylor House on 15<sup>th</sup> November 2018 before First-tier Tribunal Judge Beach. It was noted at the commencement of the hearing that the Appellant had left the UK but her Counsel submitted that the appeal should not be considered to have been withdrawn because it could not be said she had left voluntarily because of her mental health. The judge heard evidence from the Appellant's husband and son and then provided a decision at the conclusion of which he did not find the appeal to have been abandoned and allowed the appeal.
5. Application for permission to appeal was made by the Respondent and initially refused by First-tier Tribunal Judge Ford on 9<sup>th</sup> January 2019. Further permission to appeal was made by the Respondent and was granted by the Upper Tribunal on 4<sup>th</sup> March 2019 on the basis that it was arguable that the First-tier Tribunal had not properly addressed the question of whether a person could be said not to be taking voluntarily action when that person retains mental capacity. Directions were issued for the Upper Tribunal firstly to consider whether an error of law had been made in this case or not.

### **Submissions on Behalf of the Respondent**

6. I heard submissions from Ms Willocks-Briscoe in line with the Respondent's grounds of appeal that in summary stated that the evidence was not sufficient to show that the Appellant had acted involuntarily. I was referred to the case of **MM [2012]**. It was said that there was nothing in the medical evidence to show the Appellant did not have mental capacity to form an intent and the evidence showed that she had an intent to leave. There was no evidence to show that she had been forced to leave the country. Accordingly it was submitted that the appeal should be treated as abandoned. In those circumstances it was not relevant to look beyond that point.
7. On behalf of the Appellant Mr Bazini submitted that the case of **MM** was not the most relevant or up-to-date case and referred me to the case of **SR [2015]**. It was submitted that it was not necessary to show incapacity to demonstrate a lack of intent.
8. At the conclusion of the submissions I reserved my decision to consider those submissions and the evidence. I now provide that decision with my reasons.

## **Decision and Reasons**

9. This case turns on the issue of whether it can be said the Appellant left the UK voluntarily and therefore her appeal must be treated as abandoned by virtue of Section 92(8) of the 2002 Act, or her leaving the UK was, as a result of her mental health, involuntarily and therefore her appeal should not be treated as abandoned.
10. In submissions I was referred to the case of **MM [2012] EWCA Civ 827** and **SR [2015] EWCA Civ 1375** and **JG [2019] UKUT 00072**. Neither party referred me to or were aware of any case law on the issue of an appeal being abandoned with reference to the issue of mental capacity.
11. One construction of an Appellant having left the UK in terms of the abandonment of an appeal could focus solely on the question of where the Appellant was physically located. If an Appellant had physically left the UK and was abroad then that could be said to be the only relevant or determinative factor and could no doubt be answered swiftly and with ease.
12. In **MM [2012]** the court had looked at a few earlier cases concerning the question of “leave”. Paragraph 24 of **MM [2012]** in my view, makes clear, that there is a further part to the concept of “leave” other than simple physical absence from the UK. The court at paragraph 24 said

“I am not able to agree that a person who travels out on a short holiday and returns on the following day has not thereby left the UK within the meaning of Statute. Such a person has left the UK as a physical act. I would exclude the exceptional case of someone who did not leave of his own volition but for example was kidnapped because the word leave implies a volitional act”.
13. At paragraph 30 the court said

“I agree with Chadwick LJ’s suggestion that the purpose of the provision appears to be that the Tribunal should be required to treat an appeal or application for permission to appeal as abandoned upon the applicant ‘leaving’ the UK without any further enquiries into the facts of the particular case and that includes without further enquiry into the intentions of the departing person to return”.
14. At paragraph 32 the court said “for these reasons in my view the word ‘leave’ bears a purely physical meaning the question being whether the Appellant has by his voluntary act physically left the UK whether for a short or a long term”.
15. In summary **MM** found that the concept of “leave” had only two relevant factors:
  - (a) was the Appellant physically out of the UK;
  - (b) was his leaving the UK voluntary.

16. **SR [2015]** convened specifically to decide the issue of “leave” and the effect of Section 92(8). Although the matter was not ultimately contested LJ Sales gave a ruling because he saw the potential importance of the point (paragraph 12). In his ruling he said:
- “Where an applicant brings an appeal from within the UK but leaves the UK before the appeal is finally determined defines the circumstances in which the appeal is to be treated as abandoned. In my view the word ‘leaves’ used in this context means voluntary leaves the UK. It does not cover a situation in which an applicant is removed against his will by the Secretary of State”.
17. It seems to me the context of “leave” as defined in **SR [2015]** is entirely in line with the definition provided in the earlier case of **MM [2012]**. Lord Justice Sales at paragraph 16 in **SR** provided his reasons for constructing “leave” in the way that he did. In summary his reasons appear to be as follows:
- (a) Leave has a strong connotation of an action being taken by an agent on a voluntary basis.
  - (b) The concept of voluntary is inferential and matching in the concepts of “brings an appeal” and “leaves the country”.
  - (c) It will breach the rule of law if the State (a party to the ongoing litigation) could defeat litigation by removing the opposing party.
  - (d) Previous cases involving predecessor legislation have referred to “leave” meaning by a person’s voluntary action.
18. There is therefore in my view no conflict in case law and a clear thread that runs through the case law that “leave” means not just a person being physically absent from the UK but having voluntarily left. Those cases referred to above have sought to emphasise the voluntary nature as an appropriate defence against the intervention of a third party to remove an Appellant. An example of a kidnapper was given in **MM** and more importantly in **SR** to prevent the removal of an individual by the Secretary of State who was themselves a party to the action.
19. I have not been referred to nor am I aware of any case where the absence of intervention by a third party would render the Appellant’s voluntary removal, involuntary, so to defeat the concept of “leave”.
20. It is theoretically possible to think of circumstances where an Appellant may be removed from the UK having for example being rendered unconscious, or drugged or even perhaps duped but all such theoretical circumstances seem to require the intervention or action of a third party.
21. It is again perhaps theoretically possible to envisage a case where although the Appellant leaves the UK without the intervention of a third party that Appellant’s mental capacity is so severely affected that it cannot be said they were capable of making such a decision voluntary (or perhaps indeed capable of making any coherent decision). There may be

theoretically such a potential case but the case before me is not such a case. The evidence in this case may well demonstrate the Appellant was suffering from depression and/or other mentally debilitating features but the evidence does not demonstrate she was incapable of making decisions or had not voluntarily taken the various steps necessary to leave the UK and return by aeroplane to Iran. There was further no reference to any subsequent evidence such as letter or email to demonstrate that she had had a change of mind recognising that her leaving the UK was no more than the temporary aberration. There was further no evidence provided as to her circumstances in Iran which may or may not have provided support for the concept that she was unable to be left alone or make her own decisions.

22. There are serious implications for the submissions raised by Mr Bazini. One can readily understand how a person may leave the UK involuntarily as a result of the actions of a third party, some specific examples having been given by the Court of Appeal. However to suggest that a person is incapable of voluntarily making a decision because of mental difficulties has potentially profound consequences. The logical conclusion of such assertion is that other people by necessity need to take decisions on behalf of that individual and that the actions and wishes of that individual can and perhaps should be disregarded because they cannot be deemed to think properly for themselves. The serious restrictions on such an individual's free will and action is obvious. It goes against some of the most basic rights of human being. Such draconian action should only be considered in extremis and only after the presentation of proper evidence.
23. As I have indicated above the evidence in the case before me does not approach that level. It consists of the observations of the Appellant's husband and the untested evidence of a psychologist.
24. It was a material error of law to find that that evidence was sufficiently robust and powerful to lead to the conclusion that the Appellant acted involuntarily when she took the various steps to leave the UK and return to Iran, her home country, and where she has returned to in the past.

### **Notice of Decision**

25. A material error of law was made by the judge in this case and I set aside the decision of the First-tier Tribunal. Given that the specific issue in this case is whether or not the Appellant voluntarily left the UK and therefore her appeal should be treated as abandoned or not, having concluded that for reasons given she did so leave voluntarily then it flows from that finding that there is no further extant appeal to be heard and no further jurisdiction to be exercised by the Tribunal.

No anonymity direction is made.

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