Upper Tribunal
(Immigration and Asylum Chamber)

Anwar (rule 17(1): withdrawal of appeal) [2019] UKUT 125 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 December 2018	
	……

Before

THE HON. MR JUSTICE LANE, PRESIDENT
MR C. M. G. OCKELTON, VICE PRESIDENT
MR M. A. CLEMENTS, PRESIDENT,
FIRST TIER TRIBUNAL, IMMIGRATION AND ASYLUM CHAMBER

Between

WASEEM ANWAR

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: No appearance or representation
For the respondent: Mr P. Deller, Senior Home Office Presenting Officer

(1) *Under rule 17(1) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, the decision whether to withdraw an appeal is for the appellant;*

(2) *That decision does not require judicial approval, in order for it to be effective;*

(3) *If an issue arises as to whether a withdrawal was, in fact, the appellant's decision (ie whether it was valid), it is for a judge of the First-tier Tribunal to decide it; as to which, the reasons for withdrawal may assist;*

(4) *If an issue arises as to whether or not an appellant's notice of withdrawal was legally valid, the Tribunal should exercise its case management powers so as to decide the matter. This will normally involve holding a hearing. The judge's task will be to decide on the issue of validity. If the judge's decision is a substantive decision, as opposed to a "procedural, ancillary or preliminary decision" within the meaning of article 3(n) of the Appeals (Excluded Decisions) Order 2009, the decision will be appealable to the Upper Tribunal;*

(5) *The decision of Upper Tribunal in TPN (FtT appeals – withdrawal) Vietnam [2017] UKUT 295 (IAC) not followed. The decision in AP (Withdrawals – nullity assessment) Pakistan [2007] UKAIT 22 followed.*

DECISION AND REASONS

A. Introduction

1. How can an appellant withdraw an appeal that is before the Immigration and Asylum Chamber of the First-tier Tribunal? What is the role of the Tribunal in this process? These two questions arise for determination in the present case.

2. The appellant is a citizen of Pakistan, born in 1990. He appealed under the Immigration (EEA) Regulations 2006 against the decision of the respondent, on 10 November 2015, to refuse to issue the appellant with a residence card as confirmation of a right to reside in the United Kingdom as the extended family member of a person (his brother in-law) present and exercising Treaty rights in this country.

3. On 26 September 2016, the appellant's representatives, Britain Solicitors, wrote to the First-tier Tribunal as follows:-

> "We are instructed by the client that he wants to withdraw his appeal which is pending with the First-tier Tribunal with appeal number EA/00270/2016, as he wants to leave the UK voluntarily. Please update your system and issue IS.52 (Notice of Withdrawal) accordingly.
>
> Your co-operation in this matter will be highly appreciated."

4. On 28 September 2016, the First-tier Tribunal issued a written notification recording the withdrawal.

5. On 5 October 2016, Britain Solicitors sent to the First-tier Tribunal "an application to reinstate appeal". In it, they said:-

> "On 26 Sep 2016 we are instructed by the client that he wants to withdraw his appeal as he is leaving the UK voluntarily, further we requested to the Tribunal this withdraw this EA/00270/2016 appeal.
>
> On 03 Oct 2016, we received Notice of Withdrawal "*the Appellant has withdrawn the appeal by notice*" dated 28 Sep 2016.
>
> On 05 Oct 2016, we are instructed by the client that he wants to proceed further with his appeal in the UK. Previously he had emergency in back home (sic) that's why he

wants to leave this country urgently and now everything is fine and wants to continue his appeal before the FTT (IAC).

In the circumstances, we respectfully request the Tribunal to **reinstate** his appeal and confirm us in writing. We really apologise for any inconvenience in this matter.

Your cooperation in this matter will be highly appreciated (original emphasis)".

6. On 19 March 2018, First-tier Tribunal Judge Burnett considered the matter. He did so without a hearing, as the appellant had confirmed that he wanted the appeal to be decided in that manner.

7. In a careful decision, which included an analysis of the case law we shall address in due course, Judge Burnett found that there was "no evidence that the request for the withdrawal of the appeal was not properly made by Britain Solicitors" (paragraph 17). The judge concluded that the appeal had been withdrawn on 26 September 2016 and that he accordingly had no jurisdiction to consider the merits of the appeal. He therefore dismissed the appeal for want of jurisdiction.

8. In his grounds of appeal to the First-tier Tribunal, seeking permission to appeal to the Upper Tribunal, the appellant submitted that since the Notice of Withdrawal of 26 September 2016, was not a judicial decision, bearing a judicial signature, the Notice of Withdrawal was invalid. The appellant relied for this proposition upon the decision of the Upper Tribunal (Hon. Mr Justice McCloskey, President) in TPN (FtT appeals - withdrawal) Vietnam [2017] UKUT 295 (IAC).

9. Permission to appeal to the Upper Tribunal against Judge Burnett's decision was granted by the First-tier Tribunal. A notice of hearing was sent to the appellant, c/o Britain Solicitors, pursuant to their email of 4 June 2018 to the Upper Tribunal, in which they had said:- "Kindly direct all future correspondence to us".

10. On 29 October 2018, the respondent informed the Upper Tribunal that the appellant had been removed to Pakistan on 1 August 2018 and that the respondent was not aware of his current address.

11. At the hearing on 7 December 2018, there was no appearance by the appellant or any representative of the appellant. The appellant had been notified of the hearing, at the correspondence address given by his representatives. In all the circumstances, the Upper Tribunal decided that it was appropriate to proceed in the absence of the appellant.

12. We observe that on 22 December 2018, Briton Solicitors (which appears to be the same entity as Britain Solicitors) wrote to the Upper Tribunal to say that, according to their file, the appellant's address was one in London E13, which had been recorded several years earlier. This communication, however, made no reference to the reason why the appellant had not been represented at the hearing on 7 December. Nor did it engage with whether the appellant had been removed from the United Kingdom.

B. Rule 17 of the FtTIAC Rules

13. Rule 17 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("the FtTIAC Rules") provides as follows:-

> "**Withdrawal**
>
> 17.—(1) A party may give notice of the withdrawal of their appeal—
>
> (a) by providing to the Tribunal a written notice of withdrawal of the appeal; or
>
> (b) orally at a hearing,
>
> and in either case must specify the reasons for that withdrawal.
>
> (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.
>
> (3) The Tribunal must notify each party in writing that a withdrawal has taken effect under this rule and that the proceedings are no longer regarded by the Tribunal as pending."

C. Procedure rules concerning withdrawal in other Chambers etc

14. The Procedure Rules of other Chambers of the First-tier Tribunal are in markedly different forms. For example, rule 17 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, so far as relevant, reads:-

> "(1) Subject to paragraph (2), a party may give notice of the withdrawal of its case, or any part of it –
>
> (a) … by sending or delivering to the Tribunal written notice of withdrawal; or
>
> (b) orally at a hearing.
>
> (2) In the circumstances as described in paragraph (3), a notice of withdrawal will not take effect unless the Tribunal consents to the withdrawal.
>
> (3) The circumstances referred to in paragraph (2) are where a party gives notice of withdrawal –
>
> (a) … in a criminal injuries compensation case;
>
> (b) in a social security and child support case where the Tribunal has directed that notice of withdrawal shall take effect only with the Tribunal's consent; or
>
> (c) at a hearing.
>
> (4) An application for a withdrawn case to be reinstated may be made by –
>
> (a) the party who withdrew the case;

(b) where an appeal in a social security and child support case has been withdrawn, a respondent.

(5) An application under paragraph (4) must be made in writing and be received by the Tribunal within 1 month after the earlier of –

(a) the date on which the applicant was sent notice under paragraph (6) that the withdrawal had taken effect; or

(b) if the applicant was present at the hearing when the case was withdrawn orally under paragraph (1)(b), the date of that hearing.

(6) The Tribunal must notify each party in writing that a withdrawal has taken effect under of this rule".

15. The relevant rule governing withdrawals in the General Regulatory Chamber of the First-tier Tribunal is very similar, save that the requirement for the Tribunal to give its consent is not confined to any particular category of appeal. So too is rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008, save that the consent of the Upper Tribunal is not needed in relation to withdrawal of an application for permission to appeal.

16. Rule 22 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 is somewhat different:-

22. Withdrawal

(1) Subject to paragraph (2), a party may give notice of the withdrawal of its case, or any part of it—

(a) orally at a hearing; or

(b) by sending or delivering to the Tribunal a written notice of withdrawal.

(2) A written notice of withdrawal must—

(a) be signed and dated;

(b) identify the case or part of the case which is withdrawn;

(c) state whether any part of the case, and if so what, remains to be determined;

(d) confirm that a copy of the notice of the withdrawal has been provided to all other parties and state the date on which this was done;

(e) include the written consent of any of the other parties who have consented to the withdrawal.

(3) Notice of withdrawal will not take effect unless the Tribunal consents to the withdrawal.

(4) The Tribunal may make such directions or impose such conditions on withdrawal as it considers appropriate.

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

(6) An application under paragraph (5) must be made in writing and be received by the Tribunal within 28 days after—

(a) the date of the hearing at which the case was withdrawn orally under paragraph (1)(a); or

(b) the date on which the Tribunal received the notice under paragraph (1)(b).

(7) The Tribunal must notify each party in writing of a withdrawal under this rule.

(8) Any party may, within 28 days after the date of receipt of notification by the Tribunal under paragraph (7), apply for a case, or part of a case, which has been withdrawn under this rule to be re-instated."

D. Other relevant provisions of the FtTIAC Rules

It is also necessary for us to set out various other provisions of the FtTIAC Rules, which are relevant to our decision:-

"Citation, commencement, application and interpretation

1.

…

(4) In these Rules:

…

"Tribunal" means the First-tier Tribunal;

…

Delegation to staff

3. – (1) Anything of a formal or administrative nature which is required or permitted to be done by the Tribunal under these Rules may be done by a member of the Tribunal's staff.

(2) Staff appointed by the Lord Chancellor, may, with the approval of the Senior President of the Tribunals, carry out functions of a judicial nature permitted or required to be done by the Tribunal.

…

Failure to comply with rules etc

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; or

…

Consideration of decision with or without a hearing

25. - (1) The Tribunal must hold a hearing before making a decision which disposes of proceedings except where—

(a) each party has consented to, or has not objected to, the matter being decided without a hearing;

…

(c) the appellant is outside the United Kingdom and does not have a representative who has an address for service in the United Kingdom;

…

Decisions and notice of decisions

29. - (1) The Tribunal may give a decision orally at a hearing.

(2) the Tribunal must provide to each party as soon as reasonably practicable after making a decision… which disposes of the proceedings—

(a) a notice of decision stating the Tribunal's decision; and

(b) notification of any right of appeal against the decision and the time within which, and the manner in which, such right of appeal may be exercised.

(3) Where the decision of the Tribunal relates to—

(a) an asylum claim or a humanitarian protection claim, the Tribunal must provide, with the notice of decision in paragraph (2)(a), written reasons for its decision;

(b) any other matter, the Tribunal may provide written reasons for its decision but, if it does not do so, must notify the parties of the right to apply for a written statement of reasons.

…

Application for permission to appeal to the Upper Tribunal

33.- (1) A party seeking permission to appeal to the Upper Tribunal must make a written application to the Tribunal for permission to appeal.

(2) … an application under paragraph (1) must be provided to the Tribunal so that it is received no later than 14 days after the date on which the party making the application was provided with written reasons for the decision.

…"

E. AP (Withdrawals – nullity assessment) Pakistan [2007] UKAIT 22

17. In AP (Withdrawals – nullity assessment) Pakistan [2007] UKAIT 22, the Asylum and Immigration Tribunal (Senior Immigration Judge Mackey and Immigration Judge Nicholson) was required to determine, as a preliminary issue, whether a valid withdrawal of an appeal had taken place in an asylum appeal. The relevant procedure rule at that time was rule 17 of the Asylum and Immigration Tribunal (Procedure) Rules 2005:-

"**Withdrawal of appeal**

17. - (1) An appellant may withdraw an appeal—

(a) orally, at a hearing; or

(b) at any time, by filing written notice with the Tribunal.

(2) An appeal shall be treated as withdrawn if the respondent notifies the Tribunal 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.

(3) If an appeal is withdrawn or treated as withdrawn, the Tribunal must serve on the parties a notice that the appeal has been recorded as having been withdrawn."

18. The AIT took note of what *McDonald's Immigration Law & Practice (6th Edition)* had to say about withdrawal and abandonment:-

"**Paragraph 18.104**:

"All appeals may be withdrawn or abandoned. What are the distinctions between withdrawal and abandonment, and what are the consequences? Withdrawal of an appeal implies a positive act, while abandonment suggests passive failure to prosecute the appeal, or an action incompatible with pursuing it whereby it is deemed abandoned by statute. In the case of a deemed withdrawal, which happens when the decision appealed against is withdrawn, the positive act is that of the respondent rather than the appellant, but the distinction between withdrawal and abandonment vanishes with the concept of "deemed abandonment" when the appellant is granted leave to enter or remain in the UK. Much of the case law deals with the issue of who decides whether an appeal has been withdrawn, how the decision is made, and whether a decision that an appeal has been withdrawn is itself challengeable. …If an appeal is withdrawn or treated as withdrawn, the Tribunal must serve on the parties a notice that the appeal has been recorded as having been withdrawn. Such a notice is not a "determination" within the meaning of the procedure Rules, or a decision on an appeal for the purposes of appeal or statutory review, and could be challenged only by judicial review. It is clear that whether an appeal has been

withdrawn is a matter for the Tribunal and the courts, not the Secretary of State. …Now that appeal notices go direct to the Tribunal, there is no reason for withdrawal of appeals to go through immigration authorities. When an appeal is validly withdrawn prior to the hearing, and the withdrawal accepted by the Tribunal, the appeal does not go into a state of suspended animation but ceases to exist, and any determination of the appeal (on the merits) is a nullity.

Paragraph 18.105

The main difficulty in practice has been whether the person withdrawing has the necessary instructions and authority to do so. The general rule that a retainer of a solicitor includes authority to compromise an action or withdraw unless contrary instructions are expressly given, does not appear to apply in immigration appeals, and a solicitor without instructions has been held to have no authority to withdraw an appeal. Where there is authority withdrawal will be effective. …The issue in all cases however is likely to be whether it is clear that the appellant intended to withdraw the appeal. If appellants have signed a letter of withdrawal, the burden is on them to show that they instructed their representative not to present it, or to withdraw it."

19. The AIT also looked at the position in other jurisdictions:-

"52. In an effort to ensure consistency with other areas of the law on the issue of withdrawal, (or abandonment as it is termed in the criminal jurisdiction) we have found helpful guidance in the criminal jurisdiction. In Reg v. Medway [1976] 2 WLR 528 the Court of Appeal (Lord Widgery CJ, Stephenson LJ, O'Connor, Lawson and Jupp JJ) in a decision delivered by Lawson J, held that the court had jurisdiction to grant leave to withdraw a notice of abandonment [withdrawal] of either an appeal, or application for leave to appeal, only where the court was satisfied that the notice of abandonment was a nullity, in the sense that the abandonment was not the result of a deliberate and informed decision; and that there was no inherent jurisdiction to grant leave to withdraw a notice of abandonment because of the existence of special circumstances.

53. Medway was a case where the applicant had a history of mental illness, and was convicted of arson offences and breach of a probation order. Contrary to advice of a medical officer he applied to the Full Court for leave to appeal. However, after receiving some advice [from] his solicitors, he abandoned the application. Later, after consulting different solicitors, he made an application to withdraw the notice of abandonment, on the ground that the single judge who heard the application had overlooked the power of the Court of Appeal to substitute an appropriate sentence, if relevant material became available after sentence had been imposed. The Court of Appeal dismissed the application finding the court had no jurisdiction to grant the application since the abandonment was the result of a deliberate decision. At 545 Lawson J stated:

> "The answer to the first question which we have to decide depends upon whether alongside the jurisdiction which undoubtedly, as authorities show, exists to give leave to withdraw an abandonment where it is shown that the circumstances are present which enable the court to say that that abandonment should be treated as a nullity, there coexists an inherent jurisdiction, in other special circumstances, enabling the court to give such leave. We are satisfied and hold that there is no such jurisdiction. In our judgment the kernel of what has been described as the "nullity test" is that the

> Court is satisfied that the abandonment was not the result of a deliberate and informed decision; in other words, that the mind of the applicant did not go with his act of abandonment. In the nature of things it is impossible to foresee when and how such a state of affairs may come about; therefore it would be quite wrong to make a list, under such headings as mistake, fraud, wrong advice, misapprehension and suchlike, which purports to be exhaustive of the types of case where this jurisdiction can be exercised. Such headings can only be regarded as guidelines, the presence of which may justify its existence.

54. The Criminal Procedure Rules 2005, (S.I. 2005, No 384, r 63.5) on the issue of withdrawal, (termed "abandonment" in those Rules), adopts the approach that was taken by in Medway, by the Court of Appeal when interpreting the Criminal Appeal Rules 1968 (S.I. 1968 No. 1262 – r10).

55. In the criminal jurisdiction the Magistrates' Courts Act 1980, s 111 , provides a right of appeal against a conviction, order, determination or other proceeding that is "wrong in law or is in excess of jurisdiction…" Rule 63.5 of the Criminal Procedure Rules 2005 provides for notice of Abandonment of an appeal stating:

> "63.5-(1) Without prejudice to the power of the Crown Court to give leave for an appeal to be abandoned, an appellant may abandon an appeal by giving notice in writing, in accordance with the following provisions of this rule, not later than the third day before the date fixed for hearing the appeal."

Archbold (2007) at para 2-176 comments:

> The Crown Court cannot entertain an appeal once it has been validly abandoned, unless the abandonment is a nullity by reason of mistake or fraudulent inducement … Nor can the Court reinstate abandoned appeals, unless it is satisfied that the notice of abandonment is a nullity."

56. The approach taken in Medway, and in the current Criminal Procedure Rules, has been adopted by SIAC, in open, but unpublished, decisions."

20. At paragraph 57, the AIT set out its conclusions:-

> 57. We are satisfied therefore, that the legal position in respect of withdrawals in this jurisdiction is as follows:
>
> (a) Rule 17(1) provides the basis upon which an appellant may withdraw an appeal.
>
> (b) Rule 17(2) provides how a respondent notifies the Tribunal an appeal shall be treated as withdrawn, and Rule 17(3) places an obligation on the Tribunal to serve the parties notice that the appeal has been recorded as having been withdrawn.
>
> (c) We consider the previous case law in the former IAT such as Adewole, El-Tuyeb reflect, but perhaps without the clarity desirable, the fundamental principle that if a notice of withdrawal has been given, either orally at a hearing, or by written notice prior to the hearing, the appeal then ceases to exist and is at an end.

(d) The clear guidelines on withdrawal/abandonment given in the criminal jurisdiction both by the Court of Appeal in Medway, and in the Archbold commentary on the Criminal Procedure Rules 2005, set out above, we consider should be adopted as the correct and consistent approach to be taken by this Tribunal.

(e) Accordingly when an application is made to challenge a notice of withdrawal as invalid the Tribunal will then proceed to hear the application. Based on all of the evidence placed before it, the Tribunal must be satisfied, on the balance of probabilities, that the withdrawal was not the result of a deliberate and informed decision; "in other words, that the mind of the applicant did not go with his act of abandonment [withdrawal]" before concluding that be purported withdrawal was in fact a nullity and the appeal is extant.

(f) Noting the comments of Lawson J in Medway (supra) and without being exhaustive of the reasons why a withdrawal could be found to lack validity, we consider that some guidelines can be given of the types of cases where this can arise, on the balance of probabilities. These are:

(i) The Appellant has had an almost immediate change of mind, which is promptly communicated to a representative, prior to the matter coming for hearing before the Tribunal (as in Adewole);

(ii) A letter or notice purporting to withdraw an appeal has been sent to the Respondent, rather than to the Tribunal itself – (NB. A notice of withdrawal should have no legal validity until the actual notice of appeal is communicated to the Tribunal, either in writing or at a hearing before the Tribunal);

(iii) A withdrawal has been communicated to the Tribunal by a representative without there being clear understanding, or meeting of the minds, between an Appellant and the representative;

(iv) A withdrawal has been communicated to the Tribunal by a representative on the instructions of a Sponsor, (who has completed section 5 of the appeal form), rather than on the actual instructions of the Appellant;

(v) A representative has communicated a withdrawal to the Tribunal in error, either through lack of due care, or simple mistake.

21. At paragraph 58, the AIT emphasised that there was no question of "re-instating" an appeal that had been validly withdrawn because once the withdrawal notice had been given to the Tribunal, the appeal was no longer pending before the Tribunal and that Tribunal had no further function. Accordingly:-

> "The only possible legal issue remaining is whether the purported withdrawal is in fact a valid one. If it is invalid, then the appeal remains extant and pending before the Tribunal. This point, of course, has important consequences relating to the ability to remove the Appellant and the continuation of any leave he or she may have by virtue of s.3C of the Immigration Act 1971"

22. Having heard evidence, the AIT concluded, that, in the case before it, the appellant had suffered from various failures in the translation of relevant documentation. The appellant did not intend to withdraw her appeal but merely to note that her solicitor was withdrawing his representation. The AIT, accordingly, found that there "was an invalid withdrawal which we find to have no effect in law and should be thus treated as a nullity" (paragraph 64).

F. TPN (FtT appeals – withdrawal) Vietnam [2017] UKUT 295 (IAC)

23. In the present case, Judge Burnett paid close attention to the AIT's decision in AP. However, he also had before him the decision of McCloskey J, President of the Immigration and Asylum Chamber of the Upper Tribunal, in TPN (FtT appeals – withdrawal) Vietnam [2017] UKUT 295 (IAC), a decision taken by reference to the current rules regarding withdrawal; namely, rule 17 of the FtTIAC Rules. As we have seen, the appellant relied upon TPN for his contention that, in the present case, the notice of withdrawal issued by the First-tier Tribunal was invalid and that, accordingly, Judge Burnett had been wrong in law to find he had no jurisdiction to determine the appeal on a substantive basis.

24. In TPN, counsel acting for the thirteen year old appellant who was appealing against the decision to refuse his international protection claim, withdrew the appeal at the appeal hearing before a First-tier Tribunal Judge. Counsel did not provide the judge with any reasons for the withdrawal but the judge nevertheless sanctioned the withdrawal.

25. Following the hearing, a member of the Tribunal's administrative staff issued form IA55, recording the withdrawal. By that time, however, the appellant's solicitors had informed the First-tier Tribunal that counsel had acted without instructions. In apparent response to this information, form IA55, as issued by the Tribunal, contained the statement: "counsel took the view to withdraw perfectly and legitimately, in these circumstances there is nothing for the Tribunal to do. Solicitors should take it up with counsel".

26. Having set out the relevant procedure rules, McCloskey J turned to the Presidential Guidance issued by the First-tier Tribunal on the subject of withdrawal:-

> "9. While the FtT Procedural Rules contain nothing further of significance, I would mention also in this context paragraph [15] of Presidential Guidance Note No. 1 of 2014 which, under the rubric of "Withdrawal by the Appellant", states:
>
> *"Where an appellant seeks to withdraw an appeal in terms of rule 17, provided the Tribunal is satisfied that the appellant is doing so freely and understands the consequences of the withdrawal, the Tribunal will be satisfied that the appeal is withdrawn. Where an appellant is legally represented and the request to withdraw is made by the representative, the Tribunal will assume that the representative has explained the consequences of the action to the appellant and that this is the intention of the appellant".*
>
> As I shall explain infra, I consider this statement to faithfully reflect the correct construction of Rule 17 and its discernible underlying intention".

27. The substantive parts of the decision in TPN were as follows:-

> "17. In order to determine the issues raised in this appeal it is necessary to construe certain provisions of the FtT procedural rules. No special principles fall to be applied in this exercise. Three overarching principles, each of them orthodox, are, in my estimation, engaged. First, it is necessary to ascertain the intention of the agency which made the Rules, namely the Tribunal Procedure Committee ("TPC"), a specialist body which draws on the expertise of, *inter alios*, judges hailing from various corners of the world of tribunals. Second, it will normally be appropriate to ascribe to the words of any rule their ordinary and natural meaning. Third, regard should be had to the full context, as I have highlighted in [10] above.
>
> 18. Rule 17 of the FtT Procedural Rules establishes two mechanisms for withdrawing an appeal, namely the provision of a written notice of withdrawal or oral withdrawal at a hearing. I consider that the rule makers clearly had two distinct scenarios in contemplation, namely withdrawal in advance of a hearing, in writing and withdrawal on the day of hearing. In both instances, the central stipulation in rule 17 is uncompromising. The reasons for the withdrawal "*must*" be specified. This is expressed as a mandatory requirement, subject to no exceptions.
>
> 19. This mandatory requirement points up and reflects some of the hallmarks of tribunal litigation. Proceedings in tribunals involve the determination of the respective legal rights and obligations of the citizen and the State. The administration of justice in tribunals has, by long established tradition and culture, been designed to provide swift, uncomplicated and inexpensive adjudication. Litigants sometimes have no legal advice or representation and, on occasion, have representatives who may not necessarily be appropriately skilled or experienced in the relevant field of law. Furthermore, tribunal litigation, particularly in the discrete field of immigration and asylum, does not lend itself to the consensual resolution mechanisms of mediation or other forms of conciliation. Finally, at the first tier level, the appellant is always the citizen.
>
> 20. I consider that the TPC would have been alert to the various features of Tribunal proceedings highlighted above in devising Rule 17. The Committee was, presumptively, operating in the real world of tribunal proceedings. In my judgement many of the factors highlighted explain why the TPC considered judicial oversight and decision necessary in the matter of withdrawing appeals. Furthermore the TPC, in my view, clearly had in contemplation the need for judicial evaluation of the question of whether the Secretary of State's withdrawal of the underlying decision should not operate to preclude judicial adjudication of for example an important issue of legal principle, statutory construction or practice and procedure. Fundamentally, I consider that rule 17 envisages and requires active and properly informed judicial involvement and decision making.
>
> 21. I develop this analysis as follows. The phrase "*the Tribunal*" is employed several times in the Rule 17 regime. Indeed – unsurprisingly – it appears repeatedly throughout the FtT Procedural Rules. It is undefined. In some contexts, "*the Tribunal*" denotes the administrative organisation of this judicialised entity. In others, it plainly denotes a judge of the Tribunal. Rule 17 provides a convenient illustration of this important distinction. The requirement to provide to the

Tribunal a written notice – enshrined in Rule 17(1)(a) – clearly entails the provision of the document required to the Tribunal's administration in the ordinary case. Similarly, the duty imposed on "*the Tribunal*" to provide the notification required by Rule 17(3) clearly envisages an act on the part of the Tribunal's administration. However, I consider that in all other material respects the words "*the Tribunal*" in Rule 17, denote a judge of the FtT.

22. I elaborate on the above analysis in my outline of what Rule 17 means and requires, most conveniently formulated in tabular form:

    i. An appeal can only be withdrawn by, or on behalf of, the appellant.

    ii. The requirement to provide the tribunal with the reasons in support of a proposed withdrawal clearly envisages that there will be judicial consideration.

    iii. If reasons are not provided, proper judicial consideration and oversight are not possible.

    iv. The combined effect of the notice provisions in Rule 17(i), the requirement of judicial oversight in Rule 17(ii) and the notice to be given in accordance with Rule 17(iii) is that the notice given by the appellant is the first step in the Rule 17 withdrawal process.

    v. The best guidance available to the FtT judge in performing this function is what is contained in the Presidential Guidance Note (*supra*): the judge must be satisfied that the appellant is withdrawing the appeal freely and understands the consequences of withdrawal. This will not be so if, for example, it lacks coherence or is based on a material misunderstanding or misconception.

    vi. In practice, enhanced judicial vigilance is likely to be required in cases where the appellant is unrepresented.

    vii. The reasons must be such as to persuade the FtT Judge that the course proposed is appropriate.

    viii. In determining whether withdrawal is appropriate, the Judge will take into account (inexhaustively) that Tribunal proceedings do not partake of the essential characteristics of private law *inter-partes* litigation, with the result that withdrawal requires, in effect, judicial adjudication.

    ix. Fundamentally, the FtT Judge must be satisfied that there is good reason for the withdrawal.

    x. There is no obligation on the FtT Judge to approve the proposed withdrawal. Quite the reverse: Rule 17 plainly contemplates that a proposal to withdraw may be refused.

xi. Fundamentally, where the withdrawal of an appeal is proposed, this takes the form of an application to the tribunal requiring a judicial decision.

23. The exercise of juxtaposing Rule 17(i) and (ii) is instructive. Their phraseology is not identical. However, I consider that, in substance, they are indistinguishable. In both cases notice must be given, the notice must incorporate reasons, judicial scrutiny is then applied and the appropriate outcome follows. Withdrawal of the appeal is neither automatic nor preordained. I consider that in both cases the main purpose of judicial scrutiny is to protect the appellant. It has the further purpose of enabling detection of any misuse of the process of the Tribunal. Each of these purposes furthers the public interest.

24. The above analysis is fortified by the free standing provision in Rule 17(2) which is directed to the scenario where the Secretary of State decides to withdraw the decision under appeal. A decision of this kind is not binding on the FtT. Rather, it too requires judicial oversight and decision. This will entail scrutinising the reasons given for the withdrawal of the underlying decision and the evaluation of whether there is "*good reason*" not to permit the withdrawal of the appeal.

25. Thus every withdrawal of an appeal under Rule 17 requires a judicial decision. I can finding nothing in either the language of the Rule or the ascertainable underlying intention pointing to any other persuasive analysis or construction. The next question which I address is whether Rule 29 of the FtT Procedural Rules applies to a judicial decision under Rule 17. Rule 29 requires that a formal notice of decision must be provided. Where (as in the present case) an asylum claim or humanitarian protection claim is involved, this notice must incorporate or annex "*written reasons for its decision*" – per Rule 29(3)(a). In all other cases, the FtT must either provide written reasons or notify the parties of their right to apply for same – per Rule 29(3)(b).

26. Notably, Rule 17 contains no reference to Rule 29, while Rule 29 contains no reference to Rule 17. The analysis that Rule 29 is directed to the substantive determination of appeals is readily made. In my judgment, the contemplation of the TPC was that Rule 17 would operate as a discrete, free standing regime. This analysis is fortified by the significant contrast between Rule 17(3) and Rule 29(3) and (6). Thus the question ultimately becomes: what does Rule 17(3) require? Given my conclusion that the "notification" mandated by Rule 17(3) must be the product of judicial consideration and decision, it is impossible to escape the further conclusion that the notice to be given under Rule 17(3) must be composed, signed and dated by the Judge concerned. Second, having regard to the common law principles rehearsed *in extenso* in MK (Duty to Give Reasons) Pakistan [2013] UKUT 641 (IAC) I consider that the judicially composed notice of decision under Rule 17(3) must contain an outline of why the decision has been made. The TPC, in my estimation, cannot have contemplated a bare, perfunctory, conclusionary pro-forma.

27. What, in principle, will this require of the Judge? Context being everything, one immediately contrasts a decision of this *genre* with the substantive determination of an appeal. The key to answering this rhetorical question lies mainly, in the requirement enshrined in Rule 17(1)(b) that the "*reasons*" for the proposed withdrawal be provided by the moving party. I consider that, in all cases, the notice required by Rule 17(3) should explain why the FtT has decided that the

reasons put forward are sufficient and satisfactory – or, as the case may be, are not. In the typical case nothing elaborate or unduly burdensome will be required of the Judge. Precisely the same analysis applies to a Notice of Decision under Rule 17(3) belonging to the Rule 17(2) scenario viz withdrawal by the Secretary of State of the underlying decision.

28. I apply my construction of Rule 17 to the factual matrix of this appeal in the following way. I do not accept that bare pro-forma notice to the Appellant and his legal representatives in the form which was sent in this case was compliant with either the letter or the spirit of the FtT Procedural Rules. The reason for that is that neither discloses any proper judicial consideration or any proper judicial act or judicial decision. Added to this the elementary requirement of a judicial signature has not been observed. The decision of the FtT is unsustainable in law on this ground alone. It suffers from the further, free standing infirmity that, in contravention of Rule 17, no reasons for the proposed withdrawal of the appeal were provided. It must be set aside in consequence.

29. The broader point of practice raised by this appeal is whether an appeal to the Upper Tribunal in this kind of context is appropriate. I am satisfied that it is. What occurred at first instance was in breach of the express and implied requirements of the Rules to the extent that the decision of the First-tier Tribunal is unsustainable in law. That per se renders it vulnerable to challenge on appeal to the Upper Tribunal.

…"

G. Discussion

28. The first thing to acknowledge is that the actual decision of the Upper Tribunal in TPN was manifestly correct. The First-tier Tribunal had been given information, shortly after the purported withdrawal of the appeal, which demonstrated that the supposed withdrawal made by Counsel at the hearing, was, in fact, invalid because it had been made entirely without instructions. The factual matrix was, in short, very like that discussed in paragraph 18.105 of the 6th Edition of *MacDonald*, as set out in the decision of AP. The First-tier Tribunal should have undertaken a judicial evaluation of whether the purported withdrawal was valid.

29. Given its author, the decision in TPN deserves great respect. We have, however, reluctantly but firmly concluded that TPN misconstrues rule 17 of the FtTIAC Rules. Our reasons are as follows.

30. In TPN, the President made reference to the Tribunal Procedure Committee which, pursuant to section 22 of the Tribunals, Courts and Enforcement Act 2007, makes procedure rules for the First-tier Tribunal and the Upper Tribunal. Schedule 5 to that Act contains further provision for such rules, including that they are to be made by statutory instrument.

31. The FtTIAC Rules are, accordingly, delegated legislation and, as such, subject to ordinary principles of statutory construction.

32. One such principle is that words in a statute or statutory instrument should be given their ordinary meaning. Applying that principle, rule 17(1) can readily be seen to do two things; namely –

(a) it enables an appellant to withdraw their appeal, either by written notice or orally at the hearing; and

(b) it requires the appellant to specify reasons for that withdrawal.

33. The requirement to give reasons does not have the effect of turning rule 17(1) into an application to the Tribunal to give its consent to the withdrawal. The requirement to "specify the reason for that withdrawal" makes it plain that the giving of reasons is not a precondition for withdrawal. The withdrawal has taken place but the Tribunal is entitled to be told why.

34. If withdrawal under rule 17 of the FtTIAC Rules had been intended by the drafter to be subject to consent, then it is inconceivable that the rule would not have said so in terms. As we have seen, such a requirement is contained in the procedure rules of other Chambers of the First-tier Tribunal and in the Upper Tribunal Rules.

35. We must, therefore, reluctantly disagree with those findings in paragraph 22 of the decision in TPN which suggest the contrary; in particular, (vii) which requires the reasons to be "such as to persuade the FTT judge that the course proposed is appropriate"; (ix) which requires the FTT judge to be satisfied "that there is good reason for the withdrawal"; (x) which holds that rule 17 "plainly contemplates the proposal to withdraw may be refused"; and (xi) which speaks of a "form of … application to the Tribunal requiring a judicial decision". None of these findings can be properly derived from rule 17. On the contrary, what TPN purports to do is create an entirely different rule, by means of judicial *fiat.*

36. We are fortified in our construction of rule 17(1) by the fact that the role of reasons in rule 17(2) is significantly different. There, the use of the word "if" makes the duty of the Tribunal to treat an appeal as withdrawn contingent upon the respondent doing two things; namely:-

a. notifying the tribunal when each of the party that the decision… has been withdrawn; and

b. specifying the reasons for withdrawal.

37. At paragraph 23 of TPN, the President regarded the juxtaposition of rule 17(1) and (2) as demonstrating that "in substance, they are indistinguishable" (original emphasis). We respectfully disagree. In our view, the juxtaposition of paragraphs (1) and (2) of rule 17 underscores the impermissibility of reading rule 17(1) in the way described in TPN.

38. Another principle of statutory interpretation is that recourse should not normally be had to background materials relating to the legislation in question unless the legislation is ambiguous or would lead to an absurd result, if read literally, Since, however, we are disagreeing with the decision in TPN, we set out in the Appendix to

our decision an extract from the published Reply of the Tribunal Procedure Committee to the Response to the Committee's Consultation Paper on the proposed new FtTIAC Rules (October 2014).

39. As can be seen from the extract, the Committee's discussion of the requirement to give reasons in rule 17 focused entirely on rule 17(2). There is, so far as we are aware, nothing in the Reply to support the construction of rule 17(1) contained in TPN.

40. The purpose of the requirement in rule 17(1) to specify reasons for an appellant's withdrawal is precisely that which was identified in the 6th edition of *MacDonald's Immigration Law & Practice* and which was elaborated by the AIT in AP. The requirement provides a mechanism whereby the Tribunal can see whether the withdrawal is a valid one. It relates to the Tribunal's function under rule 17(3) of notifying each party in writing that withdrawal has taken effect.

41. What happens if the notice of withdrawal is not accompanied by reasons? As with any failure to comply with a requirement of the FtTIAC Rules, the Tribunal has power under rule 6 to take such action as it considers just, which may include waiving the requirement or requiring the failure to be remedied. In practice, the Tribunal's administration can be expected to request reasons, where none have been provided.

42. The Tribunal's response to the reasons given – or the failure to give reasons – will depend upon the nature of the case, including what is known about the appellant. If, for example, the appellant is a child (as in TPN), the Tribunal is likely, through the mechanism of rule 6, to insist upon seeing reasons, before issuing a notification under rule 17(3).

43. In some cases, the Tribunal's administration may well arrange for the matter to be put before a judge or a person exercising delegated judicial functions under rule 3. However, the fact that a judge or such a person may be involved in the process at this point does not mean that any resulting rule 17(3) notification must therefore be regarded as a "full-blown" judicial decision. It remains merely a notification of something that has happened without the Tribunal's input. It is, in other words, "of a formal or administrative nature", within the meaning of rule 3(1).

44. The problems that arise if one concludes otherwise are, we consider, exposed by paragraphs 26-29 of TPN. If all rule 17(3) notifications are treated as reasoned judicial decisions, which dispose of proceedings in the First-tier Tribunal, then it is difficult to see why the requirements of rules 25 and 29 of the FtTIAC Rules should not apply to them. In paragraph 26 of TPN, the President nevertheless considered that "the contemplation of [the Tribunal Procedure Committee] was that rule 17 would operate as a discrete, freestanding regime". We agree. However, the interpretation adopted by TPN leaves it unclear on what principled basis rules 25 and 29 are to be disregarded.

45. Where the Tribunal considers that the reason given for withdrawal raises an issue as to whether the appellant's notice of withdrawal is, in fact, legally valid, in the sense

described by the AIT in AP; or where it is subsequently asserted that the notice of withdrawal was not validly given in that sense, then the Tribunal should exercise its case management powers under rule 4 so as to decide the matter. At this point, the matter lies unarguably in the purely judicial realm. The task for the judge is to pronounce on the issue of validity. This will normally involve holding a hearing, as occurred in AP. It may, however, involve dealing with the matter without a hearing, such as happened in the present case, where Judge Burnett was informed by the appellant's solicitors that they were content for the matter to be decided without a hearing. Judge Burnett was aware that rules 25 and 29 applied because he was engaged in a process that could result in a decision disposing of proceedings (as indeed it did).

46. So, in summary, our conclusions on rule 17(1) are as follows:

    (a) the decision whether to withdraw the appeal is for the appellant;

    (b) that decision does not require judicial approval, in order for it to be effective;

    (c) if an issue arises as to whether a withdrawal was, in fact, the appellant's decision (ie whether it was valid), it is for a judge of the First-tier Tribunal to decide it; as to which, the reasons for withdrawal may assist.

47. How the ensuing decision on the validity of withdrawal may be challenged will depend upon whether it falls to be categorised as an excluded decision for the purposes of section 11(5) of the 2007 Act. In the present case, Judge Burnett reached what can only properly be categorised as substantive decision, rather than a "procedural, ancillary or preliminary decision", within the meaning of article 3(n) of the Appeals (Excluded Decisions) Order 2009. Accordingly, his decision that he did not have jurisdiction in the appeal, which resulted from his conclusion that the appellant had validly withdrawn that appeal on 26 September 2016, was appealable to the Upper Tribunal.

48. We consider it plain that Judge Burnett's decision was correct. The appellant had validly withdrawn his appeal because he had decided to leave the United Kingdom. The fact that he later changed his mind could not affect the validity of that withdrawal. As the request from his solicitors disclosed, what the appellant was in fact attempting to do was to reinstate his appeal. But, as we have seen, that is not a course which is allowed under the FtTIAC Rules.

DECISION

49. The making of the decision by the First-tier Tribunal did not involve the making of an error on a point of law. The appeal, is accordingly, dismissed.

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber
4 March 2019

APPENDIX

EXTRACTS FROM THE REPLY OF THE TRIBUNAL PROCEDURE COMMITTEE TO THE RESPONSE TO THE COMMITTEE'S CONSULTATION PAPER ON THE PROPOSED NEW FtTIAC RULES (OCTOBER 2014)

(14) Should the Tribunal have the discretion to continue with an appeal, rather than treating it as withdrawn, when the decision to which it refers has been withdrawn?

63. Five respondents supported this proposal. These respondents argued that bare withdrawals of the underlying immigration decision were too common and had the effect of frustrating the tribunal process. They also suggested that, in some cases, withdrawal of the underlying decision by the Home Office was motivated by tactical reasons — such as addressing perceived inadequacies in the decision or gaining time
to seek new evidence. These circumstances, the respondents suggested, could be more appropriately addressed by applying for case management orders, such as adjournments.

64. The TPC agreed that withdrawal of the underlying decision should not be used to secure tactical advantage within the tribunal process and that the Rules should seek to prevent this.

65. The Home Office objected to the proposal. It argued that where the underlying decision had been withdrawn, there was no longer any matter for the tribunal to determine. It also raised concerns about the practicalities of assessing, in a large number of appeals where the underlying decision had been withdrawn, whether the appeal should nonetheless continue. Even if this could be done, it argued, the cost implications for both the Home Office and the Tribunal would be significant.

66. The TPC recognised that in the majority of cases where the underlying decision was withdrawn it would not be appropriate for the appeal to continue.

67. Finally, the Home Office argued that the concerns raised about improper withdrawals were unnecessary, since Home Office policy was only to withdraw the underlying decision where the intention was to grant the application. Where new points were to be raised Home Office policy was that: "A decision should not be withdrawn simply because better or stronger reasons for refusal could be given. If a Presenting Officer concludes that there were additional grounds for refusal, these should be discussed with an Appeals and Litigation Page 10 of 23 Directorate Senior Caseworker and — where it is agreed that it is appropriate to raise additional matters — the Presenting Officer should do so in writing to the Representative / Appellant and the Tribunal."

68. The TPC considered a number of possible approaches in the Rules. The approach set out in the consultation secured a discretion for the Tribunal, allowing it to continue to hear an appeal, notwithstanding the withdrawal of the underlying decision. Although this would help ensure withdrawals were not misused, it would also absorb considerable resources as regards both the Tribunal and litigants. In many cases, where the underlying decision had been withdrawn, the appellant would not wish to continue the case or it

would be inappropriate for them to do so. Identifying those cases where the option to withdraw the underlying decision was being used improperly would also be challenging; in many cases the misuse would not become apparent until after a new decision was made. This would make it impossible for a tribunal, at the
point of withdrawal, to distinguish those cases.

69. The TPC therefore also considered a formulation in which withdrawal of the underlying decision would end the appeal — but would also provide for an application to reinstate the appeal by the appellant. This would provide some security against improper withdrawal, but limit the resource implications to those cases where an application to reinstate was made. It would, however, mean that cases would initially be withdrawn, resulting in the loss of any listed hearing.

70. This possibility was raised by the TPC with the Home Office, who argued against it. The Home Office suggested that it might not be possible to remove an individual from the UK while the possibility of reinstatement existed. It also suggested that appellants might deliberately withdraw their appeal, with the intention to apply to reinstate it later, as a tactical measure to prolong their time in the UK. The Home Office also raised the possibility that many unnecessary applications to reinstate would be made by appellants either frustrated because a new decision had not yet been made by the Home Office or out of confusion over the appellant's immigration position.

71. The TPC did not consider that the possibility of reinstatement of an appeal would cause any significant issues with removal. Once an appeal had been withdrawn there would be no ongoing proceedings. The fact that there might, at some point in the future, be proceedings again did not alter that position. The TPC also concluded that there was no realistic possibility of litigants seeking to abuse any reinstatement process tactically. Any potential tactical advantage was hard to discern. Withdrawal would, in any event, run the very substantial risk that the tribunal would not agree to reinstate — especially if it appeared that the appeal had been withdrawn for tactical reasons.

72. But the TPC did agree that there was a real possibility of reinstatement applications using an excessive amount of resources, given that reinstatement would only be appropriate in a small number of cases. In light of the Home Office's clear statement of policy (see above), the TPC also concluded that the danger of tactically motivated withdrawals was reduced.

73. The TPC therefore concluded that it was unnecessary to provide a residual discretion to continue a case or a process for reinstatement. Instead, Rule 17(2) (as made) requires that notice of the withdrawal of an underlying decision be accompanied for the reasons for that withdrawal. The TPC anticipates that this will encourage compliance with the Home Office policy, and allow the TPC to monitor the nature of withdrawals. The TPC will keep this area of the rules under close review.