



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10924/2019

THE IMMIGRATION ACTS

Heard at Field House
On 16 December 2020

Decision & Reasons Promulgated
On 21 December 2020

Before

UPPER TRIBUNAL JUDGE CANAVAN
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MARY ANN LORONO PALACIO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the appellant: Ms S Cunha, Senior Home Office Presenting Officer

For the respondent: Mr R Tester, sponsor

DECISION AND REASONS

Introduction

1. This is an appeal by the Entry Clearance Officer against the decision of First-tier Tribunal Judge J Bartlett (“the judge”), promulgated on 16 April 2020, in which she allowed Ms Palacio’s appeal against the refusal of a human rights claim made by way of an application for entry clearance as the partner of a person present and settled in the United Kingdom.

The decision of the First-tier Tribunal

2. The appeal against the refusal of human rights claim was heard on 6 March 2020 with Mr Tester appearing on behalf of Ms Palacio and the Entry Clearance Officer being represented by counsel.
3. At the end of the hearing the judge proceeded to give an extempore judgment. The single substantive paragraph of her decision reads as follows:

“1. For the reasons given at the oral hearing which took place on 6 March 2020 the appellant’s appeal is allowed on human rights grounds.”

4. The decision was sent out to the parties under cover of an IA60 notice which informed them of the right to make an application for permission to appeal to the Upper Tribunal within specified time limits.

The Entry Clearance Officer’s challenge

5. Whilst appearing under the rubric of a failure to provide reasons, the real thrust of the grounds of appeal is that the First-tier Tribunal acted with procedural unfairness by failing to notify the parties (in particular the losing party) of the right to apply for a written statement of reasons where none had been set out in the decision to allow Ms Palacio’s appeal.
6. Permission to appeal was refused by the First-tier Tribunal, but granted on renewal.

The legal context

7. Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (2014/2604) has received little, if any, judicial attention. It provides as follows:

“Decisions and notice of decisions

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

(2) Subject to rule 13(2) (withholding information likely to cause serious harm), the Tribunal must provide to each party as soon as reasonably practicable after making a decision (other than a decision under Part 4) 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.

(4) Unless the Tribunal has already provided a written statement of reasons, a party may make a written application to the Tribunal for such statement following a decision which disposes of the proceedings.

(5) An application under paragraph (4) must be received within 28 days of the date on which the Tribunal sent or otherwise provided to the party a notice of decision relating to the decision which disposes of the proceedings.

(6) If a party makes an application in accordance with paragraphs (4) and (5) the Tribunal must, subject to rule 13(2) (withholding a document or information likely to cause serious harm), send a written statement of reasons to each party as soon as reasonably practicable.”

8. It can be seen that rule 29(1) allows for extempore judgments to be given in an appeal. Where the First-tier Tribunal’s decision relates to an asylum or humanitarian protection claim, rule 29(3)(a) provides that written reasons “must” accompany the decision.
9. Rule 29(3)(b) provides that where the decision relates to “any other matter” (which must presumably include a human rights claim based on Article 8 ECHR), the provision of written reasons at the time the decision is promulgated is not mandated. However, if no such reasons are provided with the decision, the First-tier Tribunal “must” notify the parties of the right to apply for a written statement of those reasons. Such notification informs a party that they may make a written application under rule 29(4) within the 28-day time limit stipulated in rule 29(5).
10. The precise method by which the required notification is provided to the parties in compliance with rule 29(3)(b) is ultimately a matter for the First-tier Tribunal. As a matter of general good practice, we offer the following guidance.
11. The wording of rule 29(3)(b) does not expressly require notification to be in writing and it is therefore permissible that it be given orally at a hearing. Whilst this is so, it may, if unaccompanied by confirmation in writing and depending on the circumstances of any given case, prove inadequate in achieving the aim of ensuring accessibility to the procedural steps required to be undertaken by a party prior to making an application for permission to appeal. The facts of the present case do not in one sense provide the best example of this potential problem. It was the Entry Clearance Officer who was the losing party and had the primary interest in obtaining a written statement of reasons. She should have been aware of the requirements of the Rules and it may be thought that she ought to have contacted the First-tier

Tribunal immediately upon receiving its decision in order to highlight the absence of notification under rule 29(3)(b) instead of lodging an application for permission to appeal. We are bound to say that we find it somewhat troubling that the Entry Clearance Officer's skeleton argument places the author of the grounds of appeal within the category of persons in respect of whom it "cannot be fairly assumed" will know the Rules.

12. The greater risk of procedural unfairness arises in respect of unrepresented appellants. It is by no means implausible to conceive of a judge notifying the parties at a hearing of the right to apply for a written statement of reasons, but this not being fully comprehended by an appellant who may, for example, feel inhibited in seeking clarification at the time.
13. The better means of providing notification under rule 29(3)(b) is by committing it to writing within the decision of the First-tier Tribunal itself, or at least within the IA60 notice accompanying that decision when it is sent out to the parties. Ideally, notification would be included in both. It follows from what we have said, above, that the requisite notification should be in language that is both compliant with the rule and clear for non-lawyers to understand.

Decision on error of law

14. In the present case, the judge's decision related to a human rights claim based entirely on Article 8. She was therefore entitled to give an extempore judgment and was not obliged to provide written reasons with her decision.
15. On the information before us, we cannot be sufficiently confident that notification of the parties' right to apply for a written statement of reasons was given at the hearing itself. Mr Tester was unable to recall if this had occurred (in respect of which we attach no criticism whatsoever) and we were informed that counsel's note of the hearing made no reference to this issue.
16. We conclude that the failure to comply with the mandatory requirement to notify the parties of their right to make an application to the First-tier Tribunal for a written statement of reasons, pursuant to rule 29(3)(b) of the Rules, constitutes a procedural irregularity amounting to unfairness. The fact that this does not rise from a matter expressly stated in the judge's decision itself does not deprive the Entry Clearance Officer of the ability to mount the challenge, or of the Upper Tribunal to find an error of law. Section 11(1) of the Tribunals, Courts and Enforcement Act 2007 provides that the right of appeal is on "any point of law arising from a decision made by the First-tier Tribunal". Plainly, the failure to comply with rule 29(3)(b) of the Rules is an error on a point of law "arising" from the First-tier Tribunal's decision.

17. In all the circumstances, we deem it appropriate to exercise our power under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set the judge's decision aside.

Disposal

18. Initially, we had contemplated remitting this appeal to the First-tier Tribunal with a direction that it would then either be for that Tribunal to formally notify the parties of their right to make an application for a written statement of reasons, or for Judge Bartlett simply to provide such a statement.
19. However, having considered all relevant materials, Ms Cunha, rightly in our view, suggested that we should instead go on and remake the decision in this case. Indeed, she went further and conceded that Ms Palacio's appeal against the Entry Clearance Officer's refusal of her human rights claim should be allowed.
20. We entirely agree with that fair and appropriate concession. The grounds for refusing the human rights claim were twofold: first, it was said that the sponsor was still married and would not therefore be free to marry Ms Palacio if she came to the United Kingdom; second, it was not accepted that the couple's relationship was genuine.
21. In respect of Mr Tester's freedom to marry Ms Palacio were she to come to this country, we are satisfied that the decree absolute, dated 2 September 2019, was provided in advance of the First-tier Tribunal hearing and is in evidence before us. This addresses the first ground of refusal.
22. The question of whether the couple's relationship was genuine was in fact conceded by an Entry Clearance Manager in a review of the original refusal, dated 14 November 2019. Mr Tester informed us that neither he, counsel, or the judge had been provided with the Entry Clearance Officer's bundle (a problem that is, unfortunately, not rare enough) and it may well be that everyone was unaware of this important concession. In any event, it plainly deals with the second ground of refusal.
23. It follows that Ms Palacio meets all of the requirements of the relevant Immigration Rules and that in light of this her appeal does indeed fall to be allowed on Article 8 grounds.

Anonymity

24. There is no good reason to make an anonymity direction in this case and we do not do so.

Notice of Decision

25. **The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.**
26. **We set aside the decision of the First-tier Tribunal.**
27. **We re-make the decision by allowing Ms Palacio's appeal against the refusal of her human rights claim.**

Signed: *H Norton-Taylor*

Date: 16 December 2020

Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

As we have allowed the appeal and because a fee has been paid or is payable, we have considered making a fee award and have decided to make a whole fee award of £140.00.

Signed: *H Norton-Taylor*

Date: 16 December 2020

Upper Tribunal Judge Norton-Taylor