IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005231

First-tier Tribunal No:
[HU/50365/2021]
IA/06094/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 3 May 2023

Before

UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLAWUMOKE AWULAT BALOGUN
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr R McKee, instructed by the Immigration Law Practice

Heard at Field House on 2 March 2023

DECISION AND REASONS

1. To avoid confusion, we refer to the appellant as the Secretary of State, and to the respondent as the Claimant. On 10th August 2022, a Judge of the First-Tier Tribunal, Judge Loke ('the FtT') heard the Claimant's appeal against the Secretary of State's refusal of her application for leave to remain, based on the right to respect for her private life under Article 8 ECHR. The parties and the FtT had used the electronic filing system, "MyHMCTS", to upload documents and progress the case.

The FtT's decision

2. The Secretary of State was represented at the FtT hearing. The FtT gave a decision orally. She allowed the Claimant's appeal. Tribunal staff provided to the parties a notice of her decision, and a notification of their rights to appeal the FtT's decision, and the time within which, and manner in which to exercise that right. In her decision, the FtT stated at paragraph [4]:

> "Reasons were delivered orally in court. Parties have 28 days to request formal written reasons."

3. The FtT signed her decision and dated it 10th August 2022. Her decision contained a note, at the end:

> **"Reasons for the decision having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 28 days of the sending of this written record of the decision." [Original in bold]**

4. The Secretary of State did not request written reasons within 28 days, but made an out-of-time request on 13th September 2022. On 14th September 2022, the FtT refused the application, as it was six days out of time and the Secretary of State had provided no explanation for its lateness. The FtT directed that her refusal stood, unless within seven days of her direction, the Secretary of State provided adequate reasons as to why she was late in asking for written reasons.

5. On 23rd September 2022, the Secretary of State's representatives wrote to HMCTS administrative staff, saying that there had been confusion about what they described as a 'pilot,' relating to oral decisions. They referred to being confused about when the time limit for an application for permission to appeal began. HMCTS staff asked the Secretary of State's representatives to upload any application on to the 'MyHMCTS' system, as they had done with previous correspondence and documents.

The Secretary of State's application

6. In an application made on 26th September 2022, the Secretary of State asked for:

> "a copy of the written reasons of the decision and the right of appeal against these decisions is requested."

7. That was the extent of the application. It did not enclose a form "IAFT-4" (the form used for applications to the First-tier Tribunal for permission to appeal to the Upper Tribunal). It did not identify any alleged error of law in the FtT's decision.

8. On 26th September 2022, the FtT directed that the Secretary of State be granted an extension of time to "file a request for written reasons under Rule 29(4) until 4pm on 10th October 2022." The Secretary of State says that she never learnt of those directions. Mr McKee, for the Claimant, was prepared to accept that assertion. Although the reason is unclear, Mr Melvin suggested that it was possible that no one on behalf of the Secretary of State checked the MyHMCTS system again, or that the directions were not uploaded to the system, at the time. Whatever the reason, for the purposes of this appeal, we are prepared to accept that the Secretary of State was unaware, and so did not respond. The FtT did not provide a written statement of her reasons.

The grant of permission to appeal to this Tribunal

9. A Judge of the First-tier Tribunal, Judge Boyes, granted the Secretary of State permission to appeal, in a decision dated 5th November 2022. He stated:

> "This is a very unusual appeal in that I cannot see the written reasons/judgment and nor has the SSHD. It appears, from the correspondence attached to the permission application, that a 'no written reasons' policy/trial was implemented … The SSHD states that she was unaware of this. I will grant permission on the basis of the documents which appear accompanying the grounds as it appears to me that the UT will need to examine the policy, its implementation and the resultant fairness to both parties."

The parties' positions at the hearing before us

10. For the Secretary of State, Mr Melvin did not suggest that the FtT failed to give a fully reasoned decision orally at the hearing; or that she was not entitled to do so; or that the Tribunal staff failed to serve a notice of her decision, and notification of appeal rights. Rather, he took issue with the lack of general awareness of an unidentified policy or pilot, which meant that the Secretary of State does not now know why the Claimant had succeeded in her appeal, and consequently what form of leave to grant her. The FtT should also have extended time, once she became aware of the application for permission to appeal.

11. For the Claimant, Mr McKee was prepared to accept that something had gone amiss with the FtT's directions dated 26th September 2022 being received by the parties, and while he initially conceded during our discussion with the representatives that this might amount to a procedural unfairness in the FtT's decision, he withdrew that concession and without objection by Mr Melvin, we permitted him to do so. He said that our jurisdiction, when considering a statutory appeal based on the making of an error on a point of law, under sections 11 and 12 of the Tribunals, Courts and Enforcement Act 2007, related to the FtT's decision, or the making of it. Whatever had occurred post-decision, the FtT's decision had not involved the making of an error on a point of law.

The relevant law

12. We set out below the relevant rules from the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604) ('the Rules'):

> "29 Decisions and notice of decisions
>
> (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.
>
> 33 Application for permission to appeal to the Upper Tribunal
>
> (1) A party seeking permission to appeal to the Upper Tribunal must make a written application to the Tribunal for permission to appeal.

(2) Subject to paragraph (3), an application under paragraph (1) must be sent to the Tribunal so that it is received no later than 14 days after the date on which the party making the application was sent the written reasons for the decision.

(3) Where an appellant is outside the United Kingdom, an application to the Tribunal under paragraph (1) must be sent to the Tribunal so that it is received no later than 28 days after the date on which the party making the application was [sent the] written reasons for the decision.

(4) The time within which a party may apply for permission to appeal against an amended notice of decision runs from the date on which the party is sent the amended notice of decision.

(5) An application under paragraph (1) must—

(a) identify the decision of the Tribunal to which it relates;

(b) identify the alleged error or errors of law in the decision; and

(c) state the result the party making the application is seeking and include any application for an extension of time and the reasons why such an extension should be given.

(6) If a person makes an application under paragraph (1) when the Tribunal has not given a written statement of reasons for its decision —

(a) the Tribunal must, if no application for a written statement of reasons has been made, treat the application for permission as such an application; and

(b) may—

(i) direct under rule 36 that the application is not to be treated as an application for permission to appeal; or

(ii) determine the application for permission to appeal.

(7) If an application for a written statement of reasons has been, or is, refused because the application was received out of time, or the application for permission was received out of time, the Tribunal must only admit the application for permission if the Tribunal considers that it is in the interests of justice to do so."

13. Sections 11 and 12 of the 2007 Act include the following provisions:

"11. Right to appeal to Upper Tribunal

(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point

of law arising from a decision made by the First-tier Tribunal other than an excluded decision.

…

(5) For the purposes of subsection (1), an "excluded decision" is—

(d) a decision of the First-tier Tribunal under section 9—

…

(i) to review, or not to review, an earlier decision of the tribunal,

(ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal,

(iii) to set aside an earlier decision of the tribunal, or

(iv) to refer, or not to refer, a matter to the Upper Tribunal…"

12. Proceedings on appeal to Upper Tribunal

(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.

(2) The Upper Tribunal—

(a) may (but need not) set aside the decision of the First-tier Tribunal, and

(b) if it does, must either—

(i) remit the case to the First-tier Tribunal with directions for its reconsideration, or

(ii) re-make the decision."

Discussion

14. It is important that we are clear on what we are determining, and what we are not. Despite the grant of permission, our role is not to determine the lawfulness or otherwise of a 'pilot' or a 'policy'. We are considering a statutory appeal under sections 11 and 12 of the 2007 Act, not an application for judicial review. Even if we were considering an application for judicial review, the Secretary of State has produced no substantive evidence about such a pilot or policy, for example in the form of a witness statement from the Presenting Officer who appeared before the FtT. The Secretary of State has not even stated whether the Presenting Officer has,

or had, notes of the FtT's oral decision. Whether there was, or was not, a policy or pilot, distracts from the core, undisputed facts in this appeal. The only conceivable relevance would be whether, in this instance, the FtT erred on a point of law, which might be procedural, in the making of her decision.

15. First-tier Tribunal Judges in the Immigration and Asylum Chamber, in common with Judges in many other jurisdictions, may give decisions orally at a hearing (Rule 29(1)). Whether they do so is a matter for them, subject to any relevant Practice Guidance, Statements and Directions. We do not presume to encroach on such Guidance, etc. In all asylum and humanitarian protection appeals, Judges must give a written statement of their reasons, even if not requested (Rule 29(3)(a)). For other appeals, the Rules do not require Judges to provide written statements in every case. A Judge may decide on their own initiative to do so, but parties may also apply, in writing, for a written statement, within the time-limit, as extended, specified in Rule 29(5). In response, a Judge must, subject to withholding certain information, provide a written statement as soon as is reasonably practicable (Rule 29(6)).

16. The time limits for applying for a written statement (Rule 29(5)) and applying for permission to appeal (Rule 19(2)-(3)) are not the same. The consequence is that there may be cases where a party applying in time for permission to appeal (which for convenience, we refer to as a 'PTA') must do so, before receiving the written statement. Alternatively, they may not have applied for a written statement at all and the Rules do not require them to have done so, in order to apply for PTA. The Rules do not provide for an automatic extension of time for a PTA application, just because a written statement has not yet been provided.

17. However, a party who is legally represented can expect their legal representative to take a detailed note of a Judge's decision given orally. It is also open to a Judge to decide that it is not appropriate to give a decision orally, where a party is not legally represented and so may have difficulty in taking an adequate note.

18. The Rules also contain two important safeguards, to deal with the practical problem we have faced, which is how to decide whether an FtT made an error on a point of law in making a decision, where there is no written statement of its reasons.

19. First, while a party need not have applied for a written statement before applying for a PTA, where, in that case, no written statement has been provided, Rule 33(6) requires a Judge considering a PTA application to treat it as an application for a written statement, and they may decide not to treat it as a PTA application, or may determine the PTA application.

20. Second, Rule 33(7) limits the circumstances in which a PTA application may be admitted in two cases: where an application for a written statement has already been refused because it was received out of time;

and where a Judge now decides to refuse an out-of-time application for a written statement. In both cases, the PTA application must only be admitted if the Tribunal considers that it is in the interests of justice to do so. The effect of the combination of Rules 33(6)-(7) is that where a party applies for PTA, without applying for a written statement, a Judge must treat it as the latter, may decide to refuse the application because it was received out of time, and then must only admit the PTA application in the limited circumstances. At each stage, a Judge may decide to extend time for an application for a written statement, as they may do for complying with any rule (Rule 4(3)(a)).

Application for the Rules and the 2007 Act in this appeal

21. Applying the Rules to this case, Rule 33(6) was not applicable, as the Secretary of State had previously applied for a written statement. We must assume that Judge Boyes, when, granting permission, was aware of that, and had applied Rule 33(7), by nevertheless admitting the PTA application, because he regarded it as in the interests of justice to do so. We must also assume that Judge Boyes was aware of his powers, under Rule 4(3)(a), to extend time for the application for a written statement, but he did not exercise that discretion.

22. Following the grant of PTA, it remained open to the Presenting Officer, who appeared before the FtT, to have reviewed their notes of the FtT's decision given orally, (or if not available, to have stated that fact) and for the Secretary of State either to have applied for permission to amend the grounds, or at the very least, to have identified to us the alleged error of law in the making of the FtT's decision, as required by Rule 33(5)(b). Without criticism of Mr Melvin himself, the Secretary of State has done neither.

23. In reality, the Secretary of State's complaint relates to matters after the FtT made her decision. The logic of this is clear, when we consider the FtT's decision, and what the Secretary of State is seeking, which is a record of that decision. The FtT was entitled to give a decision orally (Rule 29(1)). A notice of her decision and the notification of the right of appeal, time and manner of that appeal were given (Rule 29(2)(a)-(b)). The subject matter of the appeal was not an asylum or humanitarian protection claim (Rule 29(3)(a)). The parties were advised of their right to apply for a written statement (Rule 29(3(b)). The Secretary of State did not apply, in time, for a written statement in-time, so that she did not comply with Rule 29(4)-(5). The FtT was not obliged under Rule 29(6) to provide a written statement. As can be seen, the FtT complied with every aspect of Rule 29 in the making of her decision.

24. The Secretary of State's challenge that there was a policy or pilot, as to which we do not have proper evidence, does not challenge the FtT's

compliance with Rule 29. Her complaint that a post-decision direction was not properly received, also has no relevance to the decision itself, which is the decision under challenge, as opposed to the post-decision direction.

25. The FtT did not err (and Mr Melvin made this point only in oral submissions) because she failed of her own initiative to extend time for the application for a written statement, when the Secretary of State applied for PTA. That second application was made on 26th September 2022, when the FtT also issued her further direction, even if it was not received. Even if the direction was not received, that mishap did not relate to the FtT's making of her decision of 10th August 2022, or her failure to provide written reasons following an in-time application. Moreover, it was open to Judge Boyes to have extended time for the application for a written statement, but he did not do so.

26. The point that the Secretary of State's challenge does not disclose an error by the FtT in the making of her decision is illustrated in another way. If we were to conclude that there were such an error, we would need to consider setting aside the FtT's decision, and if we did set aside the decision, we would need either to remake, or to remit the case with directions (Section 12(2) of the 2007 Act). For reasons we have already explained, there is no legal basis of setting aside the FtT's decision, under challenge. If we did not set aside that decision, then there is also no legal basis for remaking the decision ourselves, or remitting the case back to the FtT. Sections 11 and 12 of the 2007 Act are not the legal route for the redress which the Secretary of State seeks, which is to have a record of the FtT's reasons. This is in the context that the Secretary of State has not even confirmed that she does not have a record of those reasons, in the form of the Presenting Officer's notes.

Notice of Decision

The Secretary of State appeal discloses no error on a point of law in the making of the FtT's decision.

The Secretary of State's appeal is dismissed.

J Keith

Judge J Keith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

29th March 2023