Upper Tribunal
(Immigration and Asylum Chamber)

PAA (FtT: Oral decision – written reasons) Iraq [2019] UKUT 00013 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
9 November 2018	

Before

MR C M G OCKELTON, VICE PRESIDENT

Between

PAA

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Ms S. Alban, instructed by Fountain Solicitors.

For the Respondent: Mr C Howells, Senior Home Office Presenting Officer.

1. In accordance with rule 29(1) the First-tier Tribunal may give a decision orally at a hearing.

2. If it does so, that is the decision on the appeal, and the effect of Patel v SSHD [2015] EWCA Civ 1175 is that there is no power to revise or revoke the decision later. The requirement to give written reasons does not mean that reasons are required in order to perfect the decision.

3. If the written decision, when issued, is inconsistent with the oral decision, both decisions, being decisions of the Tribunal, stand until set aside by a court of competent jurisdiction; but neither party is entitled to enforce either decision until the matter has been sorted out on appeal.

4. In such a case, as in any other, time for appealing against the decision given at the hearing runs, under rule 33 (2) and (3), from the date of provision of the written reasons, however inappropriate the reasons may appear to be, subject to any successful application for extension of time.

DETERMINATION AND REASONS

1.

The appellant claims to be a national of Iraq aged about 16. He appeals, with permission, against the decision of the First-tier Tribunal given in writing on 21 June 2018 after a hearing on 23 May 2018 dismissing his appeal against the decision of the respondent on 17 March 2018 refusing his claim to be a refugee or to be entitled to humanitarian protection. The appellant has leave as an unaccompanied asylum-seeking child.

2.
The First-tier Tribunal judge heard evidence from the appellant (who was accompanied by a social worker) and from his guardian. It is what happened at the end of the hearing and thereafter that has given rise to the appeal to this Tribunal.

3.
The grounds of appeal on behalf of the appellant raise substantive issues on the content of the decision but begin with a complaint that the reasoned decision issued in writing does not reflect an indication given at the end of the hearing that the appeal would be allowed. Ground 1 asserts that the appellant had a substantive legitimate expectation of a decision in his favour as the judge had said there would be one. I cannot see the slightest basis in law why that should be so. If what happened at the hearing constitutes a ground of appeal it must be on the basis of the rules of procedure of the First-tier Tribunal.

4.
At the hearing I invited submissions on those rules, asking in particular whether the position of the parties was that the judge was entitled to give a decision at the hearing and had done so, or was able to give a decision only in writing. Both Ms Alban and Mr Howells told me that they had not looked at the rules and did not know.

5.
That is extremely regrettable. It ought to go without saying that anybody proposing to make submissions in an appeal about the procedure adopted below should have done proper research on what the procedural strictures below actually were. It ought further to be clear that procedural rigour, which as has been emphasised in recent cases applies in public as in private law (see for example Talpada v SSHD [2018] EWCA Civ 841 at [67]-[69] per Singh LJ), depends on parties knowing and following the relevant procedure rules. A representative who conducts litigation or who comes into court without an adequate knowledge of the rules of procedure risks having a decision made against the party on procedural grounds, and may well open him or herself to a claim by the party for failure to provide a proper service, or a reference to the appropriate regulator, or both. In circumstances where the representative's practice is in essence restricted to one or two tribunals, it would appear that there is no excuse at all for lack of knowledge of the rules.

6.
The position is that procedure in the Immigration and Asylum Chamber of the First-tier Tribunal has since 20 October 2014, that is to say for the last four years, been governed by the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2604/2014). In all previous procedure rules governing first-instance appeals in immigration matters there has been a provision requiring a decision to be in writing, but r 29 of the 2014 Rules is 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."

7.
In material respects the rule is the same as r 40 of the Upper Tribunal Procedure Rules, which was considered by the Court of Appeal in Patel v SSHD [2015] EWCA Civ 1175. The crucial part of the decision of Sir Richard Aikens (with whom Lewison LJ agreed) is at [47]-54]: a decision given to the parties in open court under a procedural rule in these terms cannot, after it has been uttered, be revised or reversed, and the requirement of written notice does not mean that such notice is required in order to perfect it. If, however, the judge also gives a written notice in terms contrary to the oral decision, the written decision stands unless and until set aside by a court of competent jurisdiction.

8.
Although rather oddly neither Ms Alban's note nor the judge's note records what he said at the end of the hearing, there are contemporaneous notes by the appellant's foster parent, the social worker and the Home Office Presenting Officer in virtually identical terms. On the basis of them I find as a fact that the judge said that although he had some reservations the appeal would be allowed and that the Secretary of State would have 14 days to appeal against the decision. There is no suggestion that he indicated that those words were not intended to be his decision on the appeal. In my judgement it is clear as a matter of law that he gave his decision orally allowing the appeal. He could not subsequently dismiss the appeal.

9.
His written decision purporting to dismiss the appeal therefore presumably ought to be set aside as having been made without jurisdiction, the judge having become functus by giving his oral decision allowing the appeal. The written decision seems to be the subject of the appeal to this Tribunal. I say

“seems to be” because as the decision was that given orally it may be regarded as not absolutely clear that the written decision is a “decision” within the meaning of s 11(1) of the Tribunals Courts and Enforcement Act 2007 carrying a right of appeal to this Tribunal. But, first, it declares on its face that it is a decision of the First-tier Tribunal, and, secondly, it is clear from Patel at [54] that a second decision in these circumstances is a decision by the Tribunal. The appropriate route of challenge is therefore by appeal under s 11. If the decisions are inconsistent with one another, this produces a sort of standoff: neither party is entitled to enforce the decision it would rely on, until the matter has been sorted out on appeal. One can imagine potential difficulties if one party was not present at the hearing; but these will be capable of resolution from the Tribunal Clerk’s note of the outcome of the hearing if not from the notes of those who were at the hearing.

10.
That is not the end of the matter, because it is also necessary to consider the status and effect of the documents sent out by the First-tier Tribunal in apparent compliance with r 29(2) and (3)(a). That rule requires the sending out of a notice stating the Tribunal’s decision, notification of the rights of appeal, and written reasons for the decision. The Tribunal sent the written decision of the judge, incorporating his decision dismissing the appeal and his reasons for doing so, with a covering letter indicating that either party could apply within 14 days for permission to appeal on a point of law. It seems to me that in the ordinary case this is sufficient to comply with the rules. In the present case the written decision is challenged, but in this case as in any other, although the reasons for the decision may give the grounds for the challenge, they are not themselves dispositive and so do not form part of the challenge itself. In a successful appeal it is specifically the decision that is set aside.

11.
Time for appealing runs, in accordance with r 33(2) and (3), from the date on which the party making the application was provided with the reasons for the decision. In this case the reasons were reasons for dismissing the appeal rather than allowing it, but that is not a procedural problem. It was open to either party on receipt of the documents from the Tribunal to apply for permission to appeal. The appellant could have complained that the decision was not that given at the hearing (as he did); the respondent could have complained that the reasons were entirely inadequate for allowing an appeal and that if those were the judge’s reasons he should have dismissed it. Reasons given for a decision are often, or are often said to be, bad reasons: the onward appeal jurisdiction exists in order to answer such complaints. The mere fact that in the present case the reasons did not really support the decision at all does not mean that time did not run from their being provided. It follows that time for the Secretary of State to appeal against the decision has long expired. Mr Howells confirmed at the hearing before me that there has been no application by the Secretary of State, and he did not seek to make one out of time, or to show why time should be extended.

12.
In a sense that fact is an exemplification of the possibility of a decision against a party on procedural grounds arising from a representative’s ignorance of the rules. If the Secretary of State had appreciated (as he should have done) that the decision of the First-tier Tribunal was the decision given orally to allow the appeal, he might have sought permission to appeal against it, perhaps fortified by the content of the written reasons. But that is not what happened. In the circumstances of the present case that result is perhaps not too troubling. Even when purporting to dismiss the appeal the judge found that the appellant’s nationality to be as he claimed (which the respondent has challenged) and apparently did not doubt that the appellant is a minor. Those factors are not of course

by themselves enough to make his case, but they help to show that winning his appeal was not wildly unlikely.

13.
For the reasons I have given I set aside the decision of the Tribunal to dismiss the appeal, substituting a decision that because the decision of the Tribunal had already been given orally there was no power to give a further decision dismissing it. That action imposes upon me the duty under s 12(2) and under s 12(2)(ii) I remake the written decision by deciding that there is no jurisdiction to give a second decision inconsistent with the first. The decision of the First-tier Tribunal given at the hearing on 23 May 2018 allowing the appeal stands as the decision on the appeal.

C. M. G. OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 26 November 2018.