Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33333/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 July 2017	**On 27 September 2017**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

CENK YAGMUR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Peterson, Counsel
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Turkey, has permission to challenge the decision of First-tier Tribunal (FtJ) Judge I Ross sent on 24 November 2016 (following a hearing on 27

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October 2016) dismissing his appeal against a decision made by the respondent on 7 October 2016 refusing to vary leave to remain.

2. The appellant's first ground takes issue with the fact that, having announced at the end of the hearing that he will allow the appeal, the FtT judge dismissed it. This was said to be contrary to the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 which govern procedure when the Tribunal gives a decision orally at a hearing, rules 29, 31 and 32. Rule 29 provides:

> "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.

3. The Procedure Rules do allow at rule 31 for correcting clerical mistakes, accidental slips or omissions but do not allow for the complete reversal of a decision.

> "**Clerical mistakes and accidental slips or omissions**
>
> 31. The Tribunal may at any time correct any clerical mistake or other accidental slip or omission in a decision, direction or any document produced by it, by –
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> (a) providing notification of the amended decision or direction, or a copy of the amended document, to all parties; and
>
> (b) making any necessary amendment to any information published in relation to the decision, direction or document."

4. The same Rules also provide for setting aside a decision which disposes of proceedings. This power is subject to a number of conditions which are set out at rule 32(2).

5. The grounds submit that as none of the conditions listed at r.32(2) exist in this case, the notice of decision should have reflected that given at the hearing.

6. In advance of the hearing the Upper Tribunal issued a notice confirming that the FtT judge's record of proceedings states that the judge "will allow the appeal".

7. I heard submissions from both parties on the correct interpretation of rules 29, 31 and 32. I readily concede that the matter of interpretation that arises in this case is not free of doubt, particularly bearing in mind [51] of Patel & Ors v SSHD (Rev 1) [2015] EWCA Civ 1175. The Rules at some points do appear to differentiate between 'decision' and 'reasons for a decision: see e.g. rule 29(3)(a). However, I am persuaded that Mr Wilding is right to say that the term 'decision' in rule 29(1) can only mean a decision accompanied by reasons and cannot simply mean a mere statement of outcome. That is essentially for two reasons. One is that by virtue of rule 29(2) the decision must be one that "disposes of the proceedings" and a decision without reasons cannot achieve that. The other (and my primary reason) is that the terms of r.29(3), which require "*written* reasons for its decision" (mandatory in an asylum claim or a humanitarian protection claim; optional on any other matter) presuppose, in my view, that some reasons have been given *orally*. In my view, r.29 does not address the situation, such as arose in the appellant's case, of a FtT judge merely announcing without giving reasons that he will allow a decision on appeal. If it did it would have the effect of preventing a judge from changing his or her mind, a possibility which cannot legitimately be removed by procedural rules (see cases cited at [49]-[50] of Patel), since the effective date of decision can only be when a tribunal has given reasons for that decision.

8. However, it does not follow from my rejection of the appellant's reliance on r.29 (and 32) that the appellant's first ground must fail. The first ground had an implied additional limb: procedural fairness. As Mr Wilding conceded, any decision made by

a tribunal must be subject to the rules of procedural fairness. As already observed, it is open to a judge who has announced at a hearing that he or she will allow or dismiss an appeal, to change his or her mind subsequently. However, what he must do, if he or she is minded to change the result, is explain to the parties why he or she has done this and afford them an opportunity to comment.

9. Mr Wilding accepts that there is a rule or principle of procedural fairness as I have just described but submits that on its own it will not establish a material error of law if it was incapable of affecting the outcome of the decision. I would agree but this does not help Mr Wilding's efforts to resist the first ground of appeal in this case because on the given evidence the appellant's case was not one that was bound to fail under the relevant Immigration Rules.

10. The relevant Immigration Rules in the appellant's case were those set out as long ago as 1972 in para 210 of HC 510 which so far as is relevant provides:

> "People admitted as visitors may apply for the consent of the Secretary of State to their establishing themselves here for the purpose of setting up in business, whether on their own account or as partners in a new or existing business. Any such application is to be considered on merits. Permission will depend on a number of factors, including evidence that the applicant will be devoting assets of his own to the business, proportional to his interest in it, that he will be able to bear his share of any liabilities his business may incur, and that his share of its profits will be sufficient to support him and any dependants. The applicant's part in the business must not amount to disguised employment, and it must be clear that he will not have to supplement his business activities by employment for which a work permit is required...".

This provision has been preserved by operation of the Ankara Agreement and guidance on how to apply it has been given, inter alia, by the Upper Tribunal in EK (Ankara Agreement – 1972 Rules – construction) Turkey [2016] UKUT 425 (IAC).

11. On the evidence before the FtT judge there was a live issue as to whether the appellant could meet the requirement "that the applicant will be devoting assets of his own to the business". It was the appellant's evidence that he met this requirement in that he had £2,000, an amount in excess of the £1,560.90 amount specified in his business plan. The appellant claimed that he had this amount of money (he produced the sum in cash at the hearing) and that it was an asset of his own although he accepted his girlfriend was the source of that money. For the judge the fact that he girlfriend had given the appellant the money was fatal to his claim that it was his own money. He states at paras 13 and 14 as follows:

> "13. I am satisfied that the appellant enthusiastically wishes to set up a computer repair business, as he did in Mexico. However, I have to look at the merits of his application including the factors set out paragraph 21 of HC 510, set out above. The business plan identifies the start-up costs will be £1,560.90. It is clear that the appellant himself, does not possess that

amount of money, otherwise there would have been no necessity to obtain that money from his girlfriend.

14. The appellant has to show, that he will be devoting his own assets to the business. Whilst there is the appellant's oral evidence and his girlfriend's letter, that she gave him £2,000, there is no formal deed of gift showing that this money is not repayable. Further, whilst appellant gave evidence that he could not open a bank account, there is no evidence of the absence of any overseas bank account, into which he could have transferred the £2,000 from his girlfriend. I find it incredible that the appellant, who has Mexican citizenship and was a businessman in Mexico, does not have any bank account."

12. Ms Peterson submits that the judge clearly erred in paragraph 14 in that the Rules do not require assets received by way of a gift to be evidenced by way of a formal deed of gift. I consider that submission to be arguable. Indeed, the judge's subsequent statement (that he took into account the failure of the appellant's girlfriend to attend the hearing which had the result that "the assertion that the money was an unconditional gift being totally untested or confirmed in oral evidence") appears to indicate that (contrary to what he stated at paragraph 13) it may have been possible for the appellant to establish the money was unconditionally his by non-formal means.

13. On the matter of the absence of the appellant's girlfriend (it is said the couple are no longer in a relationship), I am troubled by the fact that the judge gave no consideration to whether there was a satisfactory explanation for her absence. The appellant had stated (see paragraph 8) that "[s]he was unable to attend the hearing as she works as a Health Care Assistant in an acute stroke unit". It was incumbent on the judge to state why that explanation was not accepted or why the witness's evidence would not have been capable of affecting assessment of the appellant's assets. In contrast to some employments, required attendance at an acute stoke unit (if proven) could have severe consequences for people's lives.

14. It was suggested by Mr Wilding that even leaving to one side the issue of the £2,000, the appellant could not have succeeded anyway because the judge stated at paragraph 16 that:

> "16. Further, in the absence of any assets other than the start-up money, I find that the appellant has not shown that he could bear the burden of any liabilities which may be incurred by the business. It is unclear to me on what basis the anticipated profits have been calculated in the business plan, given that the nature of the business depends on one-off repairs, rather than repeat business."

15. However (i) it is not clear whether in paragraph 16 the judge has applied requirements that only become part of the Immigration Rules in versions subsequent to the 1972 one; (ii) as the judge himself correctly observed at paragraph 17, the

requirements of paragraph 21 "must not be applied too rigidly and that a failure to comply with one of the listed factors should not necessarily be fatal to the application"; (iii) hence, at the very least, the judge, having announced at the hearing that he will allow the appeal, was obliged to explain why he decided in his written decision that the appellant's inability to show he could "bear the burden of any liabilities" was in his view decisive; and (iv) as noted in the appellant's ground 2, the basis of the anticipated profit was not an issue raised in the refusal letter nor put to the appellant at the hearing and the business plan took account of ongoing maintenance.

16. In short, the appellant's case under paragraph 210 was not one which lacked a realistic prospect of success or was bound to fail.

17. In such circumstances, I have no hesitation in concluding that the judge's decision must be set aside for material error of law necessitating that there be a further hearing.

Direction

1. I direct that at the next hearing the appellant's (former) girlfriend is afforded a further opportunity to attend and give evidence. I further direct that she produces a letter from her employer confirming that on 27 October 2016 she was required to attend her employment at an acute stroke unit. If the (former) girlfriend considers that the new date fixed for hearing conflicts with her employment duties, she will be required (a) to submit a letter from her employers confirming this; and (b) to submit dates within the 28 days immediately following the date fixed for hearing when she would be able to attend to give evidence.

2. I consider that this case is to be remitted to the FtT to be heard by a judge other than Judge I Ross.

Notice of Decision

The decision of FtT Judge Ross is set aside for material error of law. The case is remitted to the FtT before a judge other than Judge Ross.

No anonymity direction is made.

Signed H H Storey Date: 26 September 2017

Dr H H Storey
Judge of the Upper Tribunal