Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/28144/2010

THE IMMIGRATION ACTS

Heard at Field House, London **Determination Promulgated**
On 22 July 2013 **On 18 September 2013**

Before

Upper Tribunal Judge Latter
Deputy Upper Tribunal Judge McCarthy

Between

OSMAN MAHDI MOHAMMED

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Collins, Counsel instructed by Montague Solicitor, London
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION ON WHETHER TO ADMIT AN APPLICATION FOR PERMISSION TO APPEAL

1. The appellant was born on 2 April 1972 and is a Somali national. He arrived in the United Kingdom on 14 May 2009. On 21 June 2010, the respondent made a decision that it was conducive to the public good to deport him to Somalia. The appellant appealed against that immigration decision but his appeal was dismissed in a determination promulgated on 4 January 2011. On 4 June 2013 he applied for permission to appeal to the Upper Tribunal.

© CROWN COPYRIGHT 2013

2. From this brief summary it will be evident that the application for permission to appeal was well outside the five-day period prescribed in rule 24(2) of the 2005 Procedure Rules. In our calculation, the application was in fact made more than 880 calendar days after the prescribed period ended.

3. On 17 June 2013, the First-tier Tribunal issued a decision stating that permission to appeal to the Upper Tribunal had been granted. That decision was in the following terms.

   1. The appellant, who comes from Somalia, seeks permission to appeal the decision of a panel of the Tribunal (Judge G A Black and Ms P L Ravenscroft) to appeal the decision to dismiss his appeal against the proposed making of a deportation order. This determination was promulgated on 4 January 2011 and the current application is grossly out of time.

   2. The appellant had appeared at earlier hearings but did not appear and was not represented at the hearing before the panel. He had previously been represented by a firm no longer practising. Notice of hearing was sent to him at the address last notified to the Tribunal. One of the grounds of appeal was based on asylum.

   3. In his application for permission, made through new representatives, it is said that notice of hearing was sent to the appellant's old address, that the panel should have sought to clarify his current address, and were in error in proceeding without doing so. Following an application made under the Freedom of Information Act it is said that the respondent was aware at the time of the hearing both of the appellant's correct address and of his new representatives but that information was not disclosed. The grounds go on to allege that the panel's findings were inadequate.

   4. On the face of the documents now produced it does appear that the respondent may have been aware of the new address and representatives at the time of the hearing but no further enquiry in that regard was made. In these circumstances, particularly as there was an asylum element to the claim, which was decided in the absence of the appellant, it may be appropriate to grant permission.

   5. However it is for the appellant to establish the facts as to the reasons for late submission of the application and that further, avoidable, delay has not occurred. In the circumstances, in accordance with the guidance in <u>Boktor and Wanis (late application for permission) Egypt</u> [2011] UKUT 00442 (IAC) permission is granted conditional on whether, after proper enquiry, special circumstances are established which would render it unjust not to extent time.

   As the fifth paragraph makes clear, permission to appeal had not in fact been granted. Instead, the Designated Judge had decided that permission to appeal would be granted if the appellant could establish that any delay in seeking permission had been unavoidable.

4. We observe that there has been no argument that the determination was not promulgated in accordance the Asylum and Immigration Tribunal (Procedure) Rules 2005. We are aware that rule 56 provides the following:

   56 **Address for service**

(1) Every party, and any person representing a party, must notify the Tribunal in writing of a postal address at which documents may be served on him and of any changes to that address.

(2) Until a party or representative notifies the Tribunal of a change of address, any document served on him at the most recent address which he has notified to the Tribunal shall be deemed to have been properly served on him.

(3) If the respondent knows that the appellant has changed the address referred to in paragraph (1), he must notify the Tribunal in writing of that fact and, if he is aware of it, the new address.

It is accepted that neither the appellant, nor his representatives nor the respondent notified the Tribunal of the appellant's change of address prior to the promulgation of the determination. As such, the determination was promulgated in accordance with rule 22 of the 2005 Procedure Rules.

5. We return to the issue described in the last paragraph of the decision on the application for permission to appeal. Although we are in full agreement that the question of timeliness is one that must be resolved before the substance of any appeal can be entertained, we are of the view that there is no power for a judge of the First-tier Tribunal to make a conditional grant of permission to appeal and to that extent the decision is defective. Our reasons are as follow.

6. It is necessary to recall the provisions of rule 24(4) of the 2005 Procedure Rules.

"24 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.

…

(4) If a person makes an application under paragraph (1) later than the time required by paragraph (2) –

(a) The Tribunal may extend the time for appealing if satisfied that by reason of special circumstances it would be unjust not to do so; and

(b) Unless the Tribunal extends time under sub-paragraph (a), the Tribunal must not admit the application.

Because the two parts of rule 24(4) are conjunctive, if the First-tier Tribunal does not make a decision to extend time, then the application cannot be admitted. This means that until a decision on whether to extend time has been made by a judge of the First-tier Tribunal, the application for permission to appeal cannot proceed to the Upper Tribunal. The implication is that a judge seized of such an application is required to reach a decision on the timeliness if raised in the application or identified from the papers.

7. The Designated Judge who dealt with the application referred to the reported case of Boktor and Wanis. The summary of that decision reads:

> Where permission to appeal to the Upper Tribunal has been granted, but in circumstances where the application is out of time, an explanation is provided, but that explanation is not considered by the judge granting permission, in the light of AK (Tribunal appeal - out of time) Bulgaria [2004] UKIAT 00201 (starred) and the clear wording of rule 24(4) of the Asylum and Immigration (Procedure) Rules 2005, the grant of permission to appeal is conditional, and the question of whether there are special circumstances making it unjust not to extend time has to be considered.

We draw attention to the first clause; the situation described is one where permission to appeal to the Upper Tribunal has been granted by the First-tier Tribunal but there has been no decision on whether the time for the application should be extended. The summary, like the decision, describes what might happen should the First-tier Tribunal fail to decide the timeliness issue.

8. In our view, this decision cannot be regarded as authority for the First-tier Tribunal to avoid making a decision on timeliness because it relates only to situations where the First-tier Tribunal has failed to do all that is required of it. The ability to correct an omission cannot be a reason to encourage a judge of the First-tier Tribunal not to do what is required of them. In support of this approach, we refer to the reported decision, Samir (FtT Permission to appeal: time) [2013] UKUT 3 (IAC). As its summary confirms, it is for the First-tier Tribunal to decide whether time should be extended.

> In a case where, following Boktor and Wanis (late application for permission) Egypt [2011] UKUT 00442 (IAC), a grant of permission has to be regarded as conditional upon a decision whether time should be extended, the latter decision is part of the original decision on the application. If the application was to the First-tier Tribunal, the decision as to time is therefore made by the First-tier Tribunal, and if the application is not admitted there is the possibility of renewal to the Upper Tribunal.

9. It is on the basis of this approach that we decided, after a significant amount of deliberation and with the consent of the parties, to resolve the fact that in this appeal the issue of timeliness remained outstanding before the First-tier Tribunal, by reconstituting ourselves as a panel of that Tribunal.

10. Our attention was drawn to two reported decisions of the Upper Tribunal. The earlier one is Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC). The relevant section refers to situations where the First-tier Tribunal has refused to admit an application for permission to appeal because it was made outside the prescribed period and describes how a subsequent application to the Upper Tribunal might proceed. The later decision is Wang and Chin (extension of time for appealing) [2013] UKUT 343 (IAC), which sets out what a First-tier Tribunal judge must do when faced with an application for permission to appeal that is out of time.

11. The former decision suggests that the Upper Tribunal can list an application for permission to appeal for an oral hearing. This only applies to applications for permission to appeal made direct to the Upper Tribunal; there is no equivalent provision in the Asylum and Immigration Tribunal (Procedure) Rules 2005 which govern proceedings in the First-tier Tribunal

(Immigration and Asylum Chamber). As the Upper Tribunal indicates in Wang and Chin, a First-tier Tribunal Judge must consider the application on the papers. It is only where the First-tier Tribunal has failed to complete its task, as here, that the Upper Tribunal will have to reconstitute itself to address the issue of timeliness since the appeal to the Upper Tribunal cannot be admitted – irrespective of any merits in the application – unless discretion is exercised by the First-tier Tribunal.

12. Although we have to consider the issue as a panel of the First-tier Tribunal, Ogundimu contains observations relevant to the consideration of timeliness in either Immigration and Asylum Chamber. We highlight two paragraphs of that decision:

> 16. Factors relevant to the exercise of discretion to extend time under rule 5(3)(a) of the 2008 Rules will include, but are not limited to: (i) the length of any delay, (ii) the reasons for the delay, (iii) the merits of the appeal and (iv) the degree of prejudice to the respondent if the application is granted. The merits of the appeal cannot be decisive (see the reasons given in Boktor and Wanis [2011] UKUT 442).
>
> 20. There must always be a reason shown why time limits have not been complied with and the longer the period of non-compliance the more powerful those reasons should be. Whilst each case must be determined on its own facts, given the strict time limits in immigration appeals generally and the reason behind those time limits, the expectation is that it will be an exceptional case where permission to be appeal should be granted where there has been a significant delay in filing an application; by significant delay we would certainly include any period more than 28 days out of time.

Although the reference in paragraph 16 of Ogundimu is to the Tribunal Procedure (Upper Tribunal) Rules 2008, the same approach is appropriate where the issue of timeliness arises under the Procedure Rules of the First-tier Tribunal because of the similarity of the rules in both chambers.

13. We have already indicated that the application for permission to appeal was 881 days after the prescribed period for the application expired. In light of the guidance provided in the reported decisions, we must identify what reasons are given for the whole of that delay.

14. The grounds of application contain the following explanation:

> This application is out of time and the Tribunal is respectfully requested to extend time due to the unfortunate circumstances beyond the control of the appellant and his present representatives which has led to this delayed application. We submit that there are special circumstances in this case which should be considered to extend time to appeal.
>
> There is an unfortunate background to this matter and what will be apparent is that none of it is in any way due to the Appellant. The errors will be identified as they arise in the Immigration Judges' (sic) determination.
>
> A brief chronology of the circumstances that has led to the instant application is as follows:

The chronology contains various dates. We are concerned with the period between the date the determination was promulgated (4 January 2011)

and the date of application for permission to appeal (4 June 2013). The information contained in the chronology relevant to this period is:

17. Irving & Co wrongly pursue an asylum application.

18. Appellant instructs current firm – 20.07.2012

19. Solicitors seek disclosure from Home Office

These entries do not add to the general explanation for the delay given in the earlier paragraphs of the grounds of application.

15. Attached to the application were papers disclosed by the Home Office in response to the appellant's subject access request. Those papers confirm that they were prepared on 28 January 2013. Mr Collins provided a letter dated 14 February 2013 from the Home Office to Montague Solicitors (endorsed that it was received on 20 February 2013). It is clearly the covering letter that accompanied the report. It refers to the subject access report having been made on 31 July 2012.

16. Within the report are some relevant dates and information.

    a. On 10 June 2011, the Home Office recorded that it had received a letter from Irving & Co, Solicitors, enclosing a letter of authority and a request for an update on the appellant's situation. It is not clear whether the Home Office replied in writing, but there is a record of a telephone conversation with the same solicitors on 8 June 2012 during which the Home Office confirmed that the appellant was "appeal rights exhausted".

    b. A letter from Irving & Co to the Home Office dated 20 May 2011 indicates that they understood that the appellant was awaiting a fresh decision on his asylum application. It would appear that this is the letter to which reference is made in the 10 June 2011 entry.

    c. The appellant instructed Irving & Co on or before 20 October 2010 since that is the date he signed a letter of authority. The papers from the Home Office also contain a letter dated 17 November 2010 from those solicitors confirming their instructions.

    d. The appellant's constituency MP contacted the Home Office for information about the appellant's status. The request was made on 5 December 2011 but no reply was sent until 1 June 2012. The papers suggest that a full account of the appellant's immigration and appeal history was provided in the response.

17. The most that can be drawn from these points is that it would appear that the appellant had not informed Irving & Co that he had a pending appeal and that the firm did not find out for the best part of one-and-a-half years.

18. Mr Collins suggested that it was likely that the solicitors had encountered some difficulty in obtaining papers from the appellant's previous solicitors, who had closed down overnight because of factors unrelated to immigration work. This had resulted in delays in obtaining the previous file. In addition, that file was no doubt confusing because the Home Office

had made and withdrawn one immigration decision and it was not clear that a second decision had been made or served.

19. Mr Collins indicated that his instructing firm, Montague Solicitors, had found it difficult to follow the papers, which confirmed this confusion. He also advised us that Irving & Co had told the appellant that they would not assist him once they had clarified he had no pending application. It was at that juncture that the appellant sought alternative legal advice and instructed Montague Solicitors. This is supported by the fact that the Home Office letter of 14 February 2013 refers to their application for a subject access request on 31 July 2012.

20. We asked why Montague Solicitors had not submitted the application for permission to appeal soon after they received the Home Office letter of 14 February 2013. Mr Collins again suggested that there was confusion and it was only because one of the senior solicitors at Montague Solicitors knew one of the solicitors who had dealt with the appellant's case at Sheikh & Co Solicitors (the firm that had closed overnight), that they could clarify the situation. Mr Collins informed us that his instructing solicitors were able to instruct that other solicitor to prepare the grounds of application.

21. This is all the evidence we had regarding the delay in bringing the application for permission to appeal. We are not satisfied that there is any reasonable explanation for the delay for the following reasons.

22. There is no explanation why the appellant did not inform Irving & Co or Montague Solicitors that he had an appeal. There can be no dispute that he received the second immigration decision since he appealed against it. The explanation given about why he failed to attend the appeal hearings is that he changed address but, as indicated in the chronology in his grounds of application, he remained in contact with Sheikh & Co Solicitors as it was them who informed the Home Office of his change of address. That firm knew all about the appellant's appeal.

23. There is no explanation why Irving & Co were not more diligent in pursuing clarification of the appellant's status with the Home Office. Although we accept that if they were without accurate instructions they would not have been aware of the urgency of the situation, we do not understand how an experienced firm of immigration solicitors would be unable to make sense of papers relating to an appeal against a decision to make a deportation order. It is plausible that the firm did not obtain the papers from Sheikh & Co immediately but Mr Collins did not suggest they never had the earlier papers.

24. Therefore, although there may be a period soon after Irving & Co were instructed that is explained by the failure of the appellant giving clear instructions and that firm not having the papers from Sheikh & Co, we cannot accept the explanation covers the whole 18 month period indicated.

25. We accept that it appears that Irving & Co decided that they could not assist the appellant once they knew his position because there is no further correspondence from that firm and the appellant gave instructions

soon after to Montague Solicitors. This may explain a short period of delay between June and July 2012.

26. Similarly, we can understand that if the appellant's instructions were not clear and they did not have the earlier papers, then Montague Solicitors would not have realised the need to make an application in June or July 2012. But we cannot accept that once they had received the file of papers they did not realise what action they needed to take. The suggestion that they needed clarification from the Home Office and had to await the outcome of the subject access request is a distraction since the file of papers would have contained the relevant information.

27. Even if that were not the case, we are clear that Montague Solicitors were aware of the appellant's circumstances by 20 February 2013. The explanation that the further delay was the result of another experienced firm of immigration solicitors being confused is not plausible, particularly as there was a connection between that firm and the firm that originally helped the appellant in his appeal.

28. We recognise that the fact that the delay in this case is extraordinarily long and the fact that a large part of that delay is without reasonable explanation are factors that weigh against us extending time. However, we also realise that we have to consider the merits of the appeal and the potential impact on the respondent should we extend time before reaching a decision.

29. We are satisfied that there are merits in the application as identified in the decision of the Designated Judge. It is arguable that the respondent could have advised the Tribunal of the appellant's change of address and that that information may have affected how the panel dealt with the appellant's appeal. But we also recognise, as indicated in Boktor and Wanis and approved of in Ogundimu, the fact that there may be an arguable error on a point of law is not a trump card.

30. We are aware that it is open to the appellant to make a fresh claim for asylum. It will be for the respondent to decide whether to admit such an application and there is of course power for any refusal to be reviewed judicially. Even though the appellant is seeking to challenge a decision to make a deportation order, he cannot be prevented from seeking to rely on the provisions of international protection.

31. We are also satisfied that the impact on the respondent would be significant if we extended time. This is because during the period of delay there have been significant changes relating to Somalia, including the delivery of a new country guideline case (AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC)). In addition, the passage of time will require substantial further evidence from the appellant about his life in the United Kingdom in relation to an assessment of his private and family life rights, if any. In effect, the respondent would be at a disadvantage in any appeal that proceeded because relevant issues would have to be considered on the hoof.

32. For the sake of clarity, we must explain that this is not to be taken in any way that the First-tier Tribunal is not able to act as the primary decision maker in asylum or immigration appeals. There is a long line of authority that confirms that possibility. However, even in light of those authorities, it is recognised that the overriding objective applies and there will be situations where it would not be fair to one or other party for the Tribunal to proceed because of changes that have occurred between an immigration decision being made and an appeal being heard. Such an appeal can be adjourned. However, we are not dealing with such an appeal and we are not considering an adjournment; we are considering whether time should be extended.

33. We are not aware of any other factors that we need to consider in this case. Having considered all the issues identified we are of the view that the appellant's circumstances are not ones that lead us to extend time and we refuse to do so. In consequence of this decision, the application is not admitted and the appeal to the Upper Tribunal cannot proceed.

34. Of course, this is a decision of the First-tier Tribunal and a further application for permission to appeal can be made to the Upper Tribunal. The parties should recall that in deciding such an application, the Upper Tribunal will have to apply rule 21(7) of the 2008 Procedure Rules and no doubt will have regard to our findings above.

Decision

Time for applying to the First-tier Tribunal (Immigration and Asylum Chamber) for permission to appeal is not extended.

The application is not admitted.

Signed Date

Deputy Judge of the Upper Tribunal
Sitting as a Judge of the First-tier Tribunal