Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/17315/2012
OA/17319/2012
OA/17322/2012

THE IMMIGRATION ACTS

Heard at : Field House
On : 1 November 2013

Determination Promulgated
On : 5 November 2013
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Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

ENTRY CLEARANCE OFFICER

Appellant

and

JINFENG CHI
YUQING CHEN
ZHIHONG CHEN

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms H Tung, instructed by Fletcherday

DECISION ON WHETHER TO ADMIT AN APPLICATION FOR PERMISSION TO APPEAL

1. This case came before me following a grant of permission on 19 August 2013 to the Entry Clearance Officer, to appeal the decision of the First-tier Tribunal allowing the appeals against the decision to refuse entry clearance to the United Kingdom.

2. The respondents (hereafter referred to as the claimants) are citizens of China, born on 24 July 1973, 15 August 1994 and 23 April 1996 respectively. They applied for entry clearance to settle in the United Kingdom as the spouse, step-daughter and son of the sponsor, Chen Tang, who had been granted indefinite leave to remain under the legacy programme. Their applications were refused on 22 August 2012 and on 29 May 2013 their appeals were heard in the First-tier Tribunal and allowed under the immigration rules.

3. The grounds of appeal, in providing reasons for the application for permission being late, refer to the Secretary of State having received the Tribunal's determination on 14 June 2013. On 7 August 2013 the Specialist Appeals Team, on behalf of the Entry Clearance Officer, made an application to the First-tier Tribunal for permission to appeal to the Upper Tribunal. A request was made for time to be extended, on the basis that the application ought to have been lodged by 19 June 2013. The request erroneously referred to rule 21 of the Tribunal Procedure (Upper Tribunal) Rules 2008, whereas the correct rule was rule 24 of the Asylum & Immigration Tribunal (Procedure) Rules 2005.

4. On 19 August 2013 First-tier Tribunal Judge Cruthers granted permission to appeal, without giving any consideration to the timelessness issue and without specifically extending time for appealing.

5. The appeals then came before me on 1 November 2013. Mr Tufan raised as a preliminary issue, the matter of the out-of-time application. No issue had ever been raised by the claimants' representatives in that regard and Mr Tufan raised it himself as a matter of fairness. He produced the decisions of the Upper Tribunal in the cases of Wang and Chin (extension of time for appealing) [2013] UKUT 343 and Samir (FtT Permission to appeal: time) [2013] UKUT 3 in that regard and, by way of a brief submission, relied on the explanation for the delay provided as in the application. Ms Tung accepted that it had never been alleged on behalf of the claimants that the ECO's application was out of time, but now that it had been raised she would be relying on the matter. I went on to hear from both parties on the error of law issue in order that I could consider both matters at a later stage, but on the basis of my findings below on the timeliness of the applications, that was, on reflection, not necessary.

6. With regard to the time limit for seeking permission to appeal, The Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 230/2005) state as follows:

> "24. (1) A party seeking permission to appeal to the Upper Tribunal must make a written application to the [First-tier] Tribunal for permission to appeal.
>
> (2) Subject to paragraph (3) [which does not apply in this case], an application under paragraph (1) must be sent or delivered to the Tribunal so that it is received no later than 5 days after the date on which the party making the application is deemed to have been served with written reasons for the decision.
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> …
>
> (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.

(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. "

7. Rule 25 requires a decision to be made on an application, and communicated to the parties in writing.

8. Both parties accepted that the application was made out of time. The reasons provided in the application admit to the delay as being some seven weeks and refer to the recipient of the determination as the Secretary of State. It could, perhaps, have been argued that different time limits applied, both as to receipt of the determination and the time limit for appealing, given that the respondent in the First-tier Tribunal was the Entry Clearance Office who was based in China, contrary to the circumstances identified in Samir where the applicant was clearly identified as the Secretary of State. However the case was not put on that basis and the grounds of appeal did not suggest that the time limits for out-of-country applications applied. Indeed the grounds refer to the determination having been sent to the Secretary of State and to the lodging of the application being the task of the Secretary of State, so suggesting an application made inside the UK. In any event Mr Tufan accepted that even if the 28 day time-limit were considered for out-of-country applications, the application would still have been made out of time. I therefore proceed on the basis that the application was made out of time.

9. Accordingly, pursuant to rule 24(4), the First-tier Tribunal was not permitted to admit the application unless and until a decision had been made to extend time. In the absence of such a decision, it was found in the cases of Boktor and Wanis (late application for permission) Egypt [2011] UKUT 00442, Samir and Mohammed (late application-First-tier Tribunal) Somalia [2013] UKUT 467, that the substance of the appeal could not be entertained and consideration had first to be given to the question of whether "by reason of special circumstances it would be unjust not to do so" [ie extend time].

10. In the case of Mohammed the Upper Tribunal, in circumstances similar to those in which I find myself, decided to reconstitute themselves as a panel of the First-tier Tribunal in order to resolve the timeliness issue. Accordingly, I do the same.

11. The explanation given for the delay, as stated in the permission application, was as follow:

> "Due to a backlog of determinations received in the Specialist Appeals Team in June there were insufficient resources available to give adequate scrutiny to every determination and due to an oversight permission to appeal was not sought in this decision. The Entry Clearance Manager in Guanghzhou has since contacted the Specialist Appeals Team in order to request that we consider making an out of time application.

> It is respectfully submitted that the grounds are arguable and that it would be improper for the Entry Clearance Officer not to present them simply because of an administrative error. While such errors are to be avoided, large bureaucracies will inevitably have some errors committed; in such cases it is hoped that any errors occur on points of little significance. Unfortunately this was not the case here. Failing to grant permission in this case would, it is submitted, impose a disproportionate unfairness on the Entry Clearance Officer."

12. Proceeding on the basis of the period of the delay admitted to on behalf of the Entry Clearance, namely some seven weeks, it seems to me that such a substantial delay cannot be justified in terms of inadequate resources or administrative oversight. The grounds provide no explanation as to when the Entry Clearance Manager received the decision, how quickly (s)he considered the determination and contacted the Specialist Appeals Team and how long it then took the Specialist Appeals Team to lodge the application. It is not clear whether the delay was only with the Specialist Appeals Team or whether there was also a delay on the part of the Entry Clearance Manager and, in the latter case, what the explanation was for that delay. Neither do the reasons offer any indication of whose initiative and responsibility it was to consider appealing a decision of the First-tier Tribunal and why the ECM could not have made the application him/herself.

13. Aside from the period of the delay, the explanation for the delay and the question of whether the explanation covered the entire period of the delay, I have also considered other relevant factors as referred to in the case of Boktor and Wanis, with reference to the principles in BO and Others (Extension of time for appealing) Nigeria [2006] UKAIT 00035. Such other relevant factors include the prejudice to the respondent, a matter raised on behalf of the Entry Clearance Officer in the permission application, in the reasons given for the delay. However I do not consider that there arises any significant prejudice to the ECO so as to justify such a substantial delay.

14. The claimants' applications were refused on the basis of multiple concerns, with respect to discrepancies arising as to the identity of the sponsor and the date and thus validity of the marriage, as well as accommodation and maintenance. By the time of the hearing before the First-tier Tribunal, however, the relationship between the parties had been accepted and the grounds of appeal made no challenge to the judge's finding that the marriage was genuine and subsisting. Any mismatch between the dates given for the marriage in the Gregorian and Chinese Lunar calendars, as raised in the grounds, was, in the light of the various other positive and unchallenged findings about the marriage, plainly not a material matter. The grounds relating to the judge's findings on accommodation was only a partial challenge and did not, in my view, have particular merit: the judge was entitled to make the findings that she did. The only real challenge to the decision was the judge's findings on maintenance and that was the only ground upon which Mr Tufan had submissions to make. In that respect, the sponsor had produced evidence of monthly salary payments of £300, above the equivalent level of income support, and even if the net amount of £250 was considered, there was evidence of savings held by the sponsor which were adequate to make up the shortfall in income of what appeared to be no more than £9 a week.

15. Accordingly I find that this is not a case in which it could be said that the grounds of appeal have a high prospect of success, or that the claimants would not have succeeded again had the decision in the appeals had to be re-made, nor that any substantial injustice

is suffered by allowing Judge Taylor's determination to stand. I am therefore not satisfied that there are special circumstances according to which it would be unjust not to extend time and I am not satisfied that it is in the interests of justice that time for the application for permission should now be extended. I therefore decline to admit the Entry Clearance Officer's application. It follows that, the appeals of the claimants having been allowed by the First-tier Tribunal, that decision stands. There is no appeal pending before the Upper Tribunal.

Signed Date

Upper Tribunal Judge Kebede