Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **OA 19195-11**

THE IMMIGRATION ACTS

At **Field House** signed: **15.10.2013**

on **01.10.2012** and **15.10.2013** sent out:16.10.2013

Before:

Upper Tribunal Judge
John FREEMAN

Between:

ZILAUR RAHMAN

appellant

and

Entry Clearance Officer, DACCA

respondent

Representation:
For the appellant: *Iain Palmer* (counsel instructed by Camden Community Law Centre)
For the respondent: Mr Sebastian Kandola (2012) and Mr Tom Wilding (2013)

RULING

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge John Blair-Gould), sitting at Taylor House on 18 January, to dismiss a husband's appeal by a citizen of Bangladesh. Permission to appeal was given the entry clearance officer on the basis of an apparent contradiction between what the judge had said in dealing with the position of the appellant's children with the sponsor. This had arisen first at paragraph 54, where the judge was dealing with the appeal under the Immigration Rules, on which a visa had been refused on the basis of paragraph 320 (18).

2. This provision raises a discretionary bar to the issue of a visa

> save where the Immigration Officer is satisfied that admission would be justified for strong compassionate reasons, conviction in any country including the United Kingdom of an offence which, if committed in the United Kingdom, is

> punishable with imprisonment for a term of 12 months or any greater punishment or, if committed outside the United Kingdom, would be so punishable if the conduct constituting the offence had occurred in the United Kingdom

3. The judge dismissed the appeal on this ground; but he allowed it, for reasons which included, at paragraph 72, what appeared to Judge Neil Froom, who granted the entry clearance officer permission to appeal, in the First-tier Tribunal, to have been a treatment of the position of the children inconsistent with what the judge had said at paragraph 54. Judge Froom also extended time to appeal, for reasons he gave.

4. I am not however concerned at present with the merits of this appeal, because Mr Palmer wished to challenge the grant of permission itself. Again I am not at present concerned with the merits of that challenge, because the first question which arises on it is as to my jurisdiction to deal with it.

5. It is enough for the moment to say that Judge Froom had evidently misunderstood (as I had myself till Mr Palmer drew it to my attention) the effect of r. 24 (3) of the Procedure Rules, as it has stood since before the date of the decision under appeal:

> Where an appellant is outside the UK, the time limit for that person sending or delivering an application under paragraph (1) is 28 days.

Under the definitions in r. 2,

> "appellant" means a person who has given a notice of appeal to the Tribunal against a relevant decision in accordance with these Rules
>
> "relevant decision" means a decision against which there is an exercisable right of appeal to the Tribunal

6. It follows that the time for appealing to the Upper Tribunal is set by the location of the person who gave notice of appeal to the First-tier Tribunal, to whom for clarity I shall refer as 'the appellant' throughout. However, only the appellant has the 28 days given by r. 24 (3), rather than the five provided by r. 24 (2). The entry clearance officer's application for permission to appeal Judge Blair-Gould's decision in this case was out of time on either reckoning; but, on Mr Palmer's calculation, by 52 days, rather than the 28 mentioned by Judge Froom.

7. This was not of course a point that affected the lawfulness, or the merits of Judge Blair-Gould's decision; so Mr Palmer recognized he needed to persuade me that I had jurisdiction to deal with it. Since the Procedure Rules provide no means of interlocutory challenge to a grant of permission, as for example they now do for a partial refusal, Mr Palmer had to persuade me that the Upper Tribunal was entitled to hear an appeal, in the first place not on the basis of Judge Froom's grant of permission, but against that grant itself.

8. Mr Palmer referred me to two relevant decisions of the Upper Tribunal. The first in time was *NA* (Excluded decision; identifying judge) Afghanistan [2010], written by Judge Andrew Grubb, sitting with Mr CMG Ockelton, vice-president. The judicial head-note explains the basis for it:

1. There is no right of appeal to the Upper Tribunal against a decision not to extend time under rule 10 of the First-tier Tribunal Procedure Rules when a notice of appeal has been given out of time. It is a "preliminary decision made in relation to an appeal" within Art 3(m) of the Appeals (Excluded Decisions) Order 2009 (as amended) and consequently is an "excluded decision" for the purposes of s.11 of the Tribunals, Courts and Enforcement Act 2007.

2. The parties are entitled to know the judge who makes a decision in an appeal. In the case of an appeal determined without a hearing that means that the determination or decision must identify the judge. The absence of the Duty Judge's name identifying the decision-maker of the decision not to extend time resulted in a fundamental breach of justice which vitiated the decision.

9. The first-tier decision under appeal in *NA* had been by a duty judge, who failed to give his name on the face of his decision, to refuse an extension of time for appealing an immigration decision to the First-tier Tribunal. However Mr Palmer conceded that the decision to grant permission to appeal in the present case is just as much a "preliminary decision made in relation to an appeal" as the decision to refuse an extension of time in *NA*; so *prima facie* it follows that it is an "excluded decision" for the purposes of the 2009 Order, and there is no right of appeal against it under the 2007 Act.

10. The first basis on which Mr Palmer asked me to review the grant of permission to appeal in the present case was that the Upper Tribunal in *NA* had nevertheless pronounced on the lawfulness of the decision to refuse an extension. That is true; but their reason for saying it was *not* lawful was that the first-tier judge had failed to identify himself. They went on to say, after exhaustive consideration of the statutory wording, that

> 22. … A decision such as the one in this case can only be challenged by way of judicial review.
>
> 23. In our judgment, there was no statutory basis upon which to grant permission to appeal to the Upper Tribunal in this case. The fact that it was granted cannot confer a jurisdiction upon the Upper Tribunal which it does not have. There is no valid appeal before the Upper Tribunal.

11. The Upper Tribunal went on to point out that, since there had been no lawful decision on the extension of time on the part of the First-tier Tribunal, that decision remained to be taken. The position is however quite different in the present case: Judge Froom granted permission to appeal under a (widely shared) misapprehension as to the relevant time for appealing; but not one which made an extension of time unnecessary. He could and did consider whether or not to grant one, and had jurisdiction to do so. Whether he was right or wrong in law to decide as he did is something I could only consider if there were a right of appeal to the Upper Tribunal against his decision itself, and there is nothing in *NA* to show that this is so.

12. The other authority relied on by Mr Palmer was *Boktor and Wanis* (late application for permission) Egypt [2011] UKUT 442 (IAC). This was a case where the judge who had granted permission in the First-tier Tribunal had simply not considered the need, or the application for an extension of

time; so there had been no decision on that point at all. However Mr Palmer was quite unable to refer me to any discussion in *Boktor* of the Upper Tribunal's jurisdiction to consider the time point itself, as Judge David Allen had done in that case: it seems that the jurisdiction point, as opposed to the merits or otherwise of the application for an extension of time, was simply not raised by the parties, and so was not dealt with by Judge Allen.

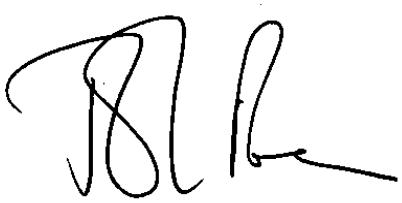
13. The most that Mr Palmer could say was that, as Judge Allen had assumed the necessary jurisdiction, so should I. The basis on which Judge Allen dealt with the situation before him, referring to the relevant authorities, was that a grant of permission, given without considering the need for an extension of time, was conditional only, and subject to reconsideration by the Upper Tribunal at the hearing.

14. The main difference from the present case is that in *Boktor* there had never been a decision on the time point at all; so neither the need for, nor the jurisdiction to consider an appeal to the Upper Tribunal against such a decision arose. It was possible for Judge Allen simply to do what had so far not been done, and needed to be done by the Upper Tribunal, and consider the application for an extension of time himself. He may well have considered this too obvious to need further explanation, other than by reference to the authorities on the effect of the need for an extension of time not being considered.

15. The other, more general point about *Boktor* is that nothing said in it could give me a jurisdiction to entertain an appeal against a decision to extend time, which the words of the 2007 Act and the 2009 Order do not, as is already quite clear from *NA*. It follows that in my view I do not have jurisdiction to consider any appeal by the appellant against Judge Froom's extension of time for the entry clearance officer to appeal Judge Blair-Gould's decision.

16. Mr Palmer asked me, if I came to that view, to stay the entry clearance officer's appeal so that he could challenge Judge Froom's decision on judicial review. Mr Kandola did not object to my doing that, so that is what I did. This resulted in a decision by Ouseley J in the Administrative Court ([2013] EWHC (Admin) 1622), quashing Judge Froom's decision (but upholding mine). The result of Ouseley J's decision is that the Home Office appeal to the Upper Tribunal is out of time, and there is no longer any valid appeal before me.

No valid appeal



(a judge of the Upper Tribunal)