Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/19195/2011

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7th April 2014	**On 15th May 2014**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Applicant

and

MR Z R

Respondent/Claimant

Representation:

For the Applicant: Mr N Bramble, Home Office Presenting Officer
For the Respondent/Claimant: Mr I Palmer of Counsel, instructed by Camden Community Law Centre

DETERMINATION AND REASONS

1. The claimant is a citizen of Bangladesh born on 25th March 1968. On 3rd April 2011 he made an application for entry clearance for settlement with his wife in the United Kingdom. The application was refused on 21st June

2011 by reference to paragraphs 320(18) and 281(iv) of the Immigration Rules HC 395.

2. Paragraph 320(18) indicates that entry clearance should normally be refused

> "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 twelve 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 claimant had been convicted of the murder of two people in Bangladesh in 1990 and had been sentenced to life imprisonment. He had been released in 1997 due to a general amnesty for good behaviour. However the Entry Clearance Officer was of the opinion that his admission into the United Kingdom was not in the public interest.

4. As to paragraph 281(iv) it was not considered that there would be adequate maintenance for the parties without recourse to public funds. The Entry Clearance Officer considered that the claimant had not provided satisfactory evidence in respect of the accommodation that he proposed to occupy. The marriage had taken place on 25th March 1998 when the sponsor was fully aware of the claimant's personal circumstances. She was free to visit Bangladesh and to remain in contact with the appellant thereby.

5. The claimant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Blair-Gould on 18th January 2012.

6. The Judge upheld the decision of the ECO in relation to paragraph 320(18) but not that in relation to paragraph 281(iv).

7. The Judge however went on to consider Article 8 and allowed the appeal on that basis.

8. The Secretary of State for the Home Department sought to appeal against that decision potentially on the basis that the Judge failed to appreciate the importance of protecting the public interest by not allowing murderers to enter the United Kingdom. She argued that Article 8 was inadequately reasoned and in any event the findings were starkly at variance with the fact that the Judge upheld paragraph 320(18). It was submitted that there was a failure of logic on the part of the Judge.

9. Permission to appeal was granted by Judge Froom on 3rd May 2012.

10. The significant feature then, and indeed now before me, is the accepted position that the Secretary of State for the Home Office was substantially and significantly out of time in lodging the application for leave to appeal. The hearing took place on 18th January 2012 before the First-tier Tribunal Judge. The determination was promulgated on 1st February 2012 and it is accepted by all parties that the Secretary of State for the Home Department received notification of that decision on 1st February 2012. Nevertheless it was not until 25th April 2012 that the appeal was received.

11. The reasons provided in the grounds of appeal for the late submission was as follows:-

> "For reasons unknown to Specialist Appeals Team, the appellant's allowed determination was not received by the team. The first time the allowed determination came to light was when the Entry Clearance Assistant emailed the Specialist Appeals Team on 25th April 2012 (today) asking for an official copy of the determination, as the ECO was supplied with a copy by the appellant (email from the Entry Clearance Assistant is attached for your perusal).
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> In view of the seriousness of the offence committed by the appellant, the Entry Clearance Officer seeks an extension of time in this rather unique case, where public interest is paramount."

12. Judge Froom having considered that explanation granted the requested extension of time.

13. That extension of time was challenged by and on behalf of the claimant. The matter came for hearing before Upper Tribunal Judge Freeman on 1st October 2012. It was his ruling that the Tribunal had no jurisdiction to reconsider that grant of permission and in particular the time point itself. Those acting on behalf of the claimant sought to suggest that the explanation that had been offered to justify the extension of time was not the correct one and that Judge Froom had proceeded to grant that extension upon a false and mistaken basis. Judge Freeman indicated that, whatever may be the position, the Tribunal had no jurisdiction to interfere with that grant or with the extension. It was a matter that could only be resolved by judicial review.

14. Thus it was that the claimant through his solicitors instituted judicial review proceedings successfully as it transpired against the decision of Judge Froom of 3rd May 2012. There is within the bundle the judgment of Mr Justice Ouseley of 24th May 2013. The Judge upheld the decision of Judge Freeman that a challenge to a refusal of an extension of time was a decision excluded by the provision of the Tribunal Rules.

15. Mr Justice Ouseley in his judgment, particularly at paragraphs 13 and 14 thereof, noted that the Secretary of State had knowledge of the decision in time; took a decision that no appeal would be made; and there then

followed a chapter of accidents (which is not necessary further to set out) which meant that Judge Froom was not told what he needed to be told about when the determination was received and when a decision not to appeal had been made which had led to a misleading argument being presented to him. The Secretary of State also conceded that the Judge had got the period of delay wrong though that was less important when the reason for extension was a good one. It was also clear that the claimant and his advisors were not at all responsible for the mistake.

16. Thus it was with consent that the decision of Judge Froom on 3rd May 2012 was quashed. In effect therefore matters reverted to the situation that it was for the Secretary of State for the Home Department to make the application for permission to appeal to the First-tier Tribunal. That application was duly done.

17. The reasons for the delay between 1st February 2012 when the decision was notified and 25th April 2012 when the appeal was lodged were dealt with in this way in the grounds of appeal:-

> "The appeal in this case was allowed on 1st February 2012. An in time application for permission to appeal was not made by 9th February 2012 as due to resource constraints, the allowed appeal was not considered by the Specialist Appeals Team (SAT) by that time. A member of SAT looked at the determination on 14th February 2012, decided not to challenge the case because the time limit had passed, and on that basis he did not look at the determination in detail or consider the merits of the decision. The SAT official did not record his actions on the Home Office database and the ECO post was not notified of the decision. Admittedly these are serious failings by the Home Office for which we offer our sincere apologies.
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> The determination came to the attention of SAT again on 25th April 2012 when an Entry Clearance Assistant emailed SAT to ask for the official copy of the determination of the Tribunal. The email included the appellant's copy of the determination and a different SAT official considered the determination and, under the impression that the FtT determination had never been received by the Secretary of State and unaware of the earlier decision not to appeal it, lodged an out of time application for permission to appeal. The SAT official was of the view that the public interest in such a case constituted special reasons for extending the time limit."

18. It was submitted that there are special circumstances that would make it unjust for the time limit not to be extended. Reliance is placed upon **BO & Others (extension of time for appealing) Nigeria [2006]** in that there are sufficient reasons in the case to justify extending the time limit. The grounds go on

> "it is accepted that a member of SAT looked at the determination on 14th February and decided not to appeal. It is submitted that although the initial delay in identifying this issue is, at the very least, regrettable, the corrective action in making the first application outside the time limit was made promptly after SAT became aware of the significance of the case. This second application has also been made after the judicial review and was concluded."

It was further said that the consequences of the failure to grant permission to extend the time limit would be that a decision of questionable legality remained unchallenged and would allow a double murderer to enter the United Kingdom.

19. The permission to appeal upon that application was refused by Upper Tribunal Judge Taylor on 6th January 2014. It was noted that the application was 57 days out of time the findings of Judge Taylor were as follows:-

> "This application is self-evidently significantly out of time. The determination was considered by a member of the Specialist Appeals Tribunal Team and it was decided by a member of that team not to challenge the decision. It appears it was only when the Entry Clearance Officer brought the determination to the attention of another member of the team that a decision was made to challenge. This is therefore not a case where the respondent has, through resource issues, failed to look at the decision at all, but has considered it, made a decision and then changed her mind. This is not a proper basis upon which to grant permission to appeal out of time."

She went on to conclude that on the merits the decision was one which the Judge was entitled to reach and could not be upset on the basis of disagreement with the findings. Thus permission to appeal was refused.

20. It is in those circumstances that the matter comes before me seeking to renew that application for the Upper-tier Tribunal under the terms and conditions of Rule 21 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

21. Significantly Rule 21(7) applies in this case namely that:-

> "If the appellant makes an application to the Upper Tribunal for permission to appeal against the decision of another Tribunal, and that other Tribunal refused to admit the appellant's application for permission to appeal because the application for permission or for a written statement of reasons was not made in time –
>
> (a) the application to the Upper Tribunal for permission to appeal must include the reason why the application to the other Tribunal

for permission to appeal or for a written statement of reasons, as the case may be, was not made in time; and

(b) the Upper Tribunal must only admit the application if the Upper Tribunal considers that it is in the interests of justice for it to do so."

22. I turn therefore to consider the grounds that are submitted before me on the matter of the out of time aspect. Those grounds are identical to those submitted in the application considered by Upper Tribunal Judge Taylor.

23. Mr Bramble who represents the Secretary of State for the Home Department relies upon such grounds. He submits that there is considerable merit in the challenges that are made to the decision of Judge Blair-Gould in the determination. He submits that the findings of fact are contradictory because on the one hand the Judge upholds the decision made under Rule 320(11) and yet allows the appeal under Article 8 of the ECHR.

24. He draws my attention to paragraph 59 of the judgment of the First-tier Tribunal Judge who says as follows:-

> "In my opinion there are not such strong compassionate reasons as to show that the appellant's admission is justified in the face of the normal requirement to exclude those who have been convicted of an offence carrying only twelve months imprisonment. I therefore reject the appellant under paragraph 320(18) of the Immigration Rules."

25. Having not found there to be strong compassionate reasons, it is illogical ,submits Mr Bramble, for the Judge to conclude in considering Article 8 that the continuing exclusion from the United Kingdom is in the particular circumstances disproportionate to the requirement for the strict maintenance of the United Kingdom's immigration controls. If there were not sufficiently compassionate circumstances to prevent the operation of paragraph 320(18) he submits that there are not sufficient compassionate or compelling circumstances as to admit of Article 8. He contends, therefore, that there are very strong grounds which justify an appeal particularly in the light of the sensitivity of this case of admitting a double murderer into the United Kingdom.

26. Both parties have submitted a skeleton argument and that submitted on behalf of the Secretary of State for the Home Department reflects the reasons for the delay as set out in the grounds both before myself and before Judge Taylor.

27. Mr Palmer, who represents the appellant, submits in the strongest possible terms that grounds now relied upon for the extension of time are not accurately set out and indeed are in contradiction to the grounds that were presented before the High Court in the application for permission for

judicial review proceedings. Not only were the grounds as presented before Judge Froom accepted as being inaccurate he invites me to find that they are still inaccurate as presented before me and as relied upon by Mr Bramble.

28. Mr Palmer relies upon a skeleton argument upon the appellant's bundle of documents many of which were documents presented to the High Court in the judicial review proceedings.

29. He invites my attention firstly to pages 77 and 78 of that bundle which is a letter from TSol dated 30th November 2012 written to the Camden Community Law Centre that is the solicitors acting on behalf of the claimant.

The relevant passage reads as follows:-

> "I have taken instructions from my client and it would appear that the determination of the First-tier Tribunal had in fact been received by the Specialist Appeals Team on 12th February 2012 and an initial decision taken by a Senior Presenting Officer (SPO) not to appeal. Unfortunately, a record of this decision was not recorded on UKBA's case information database.
>
> Further, the determination does appear to have been sent to the entry clearance post in Dhaka on 14th February, although it is not clear why the Entry Clearance Officer (ECO) did not see a copy until it was provided to him by the claimant on 25th April.
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> On 25th April, a second SPO, having received a copy of the determination directly from the ECO and unaware of the decision of 12th February, proceeded to file grounds of appeal. As a consequence, it would unfortunately appear that the application for extension of time was unintentionally made on an erroneous basis.
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> In the light of this error my client accepts it would be sensible to agree to an order quashing the decision of the First-tier Tribunal dated 4th May 2012 granting permission to appeal to the Upper Tribunal."

30. There is as set out at pages 68 to 70 the first interested party's detailed grounds of defence as presented to the High Court in the course of the proceedings, the first interested party being the Secretary of State for the Home Department.

31. Paragraphs 9, 10 and 11 are relevant and set out as follows:-

> "FTTJ Blair-Gould's decision was sent to the Secretary of State, as agent for the second interested party, and received on or before 2nd February 2012. On 2nd February 2012, a Senior Presenting Officer,

who had access to the decision only and not the appeal file decided not to appeal FTTJ Blair-Gould's decision. On 14th February 2012, the Secretary of State forwarded FTTJ Blair-Gould's decision to the second interested party. It would appear that the second interested party never received the determination"

On 23rd February 2012, the claimant's solicitors telephoned the Tribunal Services and were informed that no appeal had been lodged by the second interested party. On 20th March 2012, the claimant's solicitors telephoned the Secretary of State's "Allowed Appeal Section" and were informed that the determination had been sent to the second interested party on 14th February 2012 (second interested party being the ECO).

On 23rd April 2012, the claimant's solicitors emailed the "Immigration Enquiries" at the British High Commission in Dhaka, asking why the claimant's entry clearance had not yet been granted in accordance with his allowed appeal. On 24th April 2012, the Immigration Enquiries section responded by informing the claimant's solicitors that it had not received a copy of the determination. It asked the claimant's solicitors to forward a copy. They did so on 25th April 2012. On the same day, the second interested party forwarded the determination to the Secretary of State's Specialist Appeals Team (SAT) and requested SAT to forward the official copy of the determination. A Senior Executive Officer at SAT, under the impression that the FTT determination had never been received by the Secretary of State and unaware of the earlier decision not to appeal it, lodged an appeal along with an application for extension of time on behalf of the second interested party.

The application for extension of time was in the following terms:-

> 'The appellant was convicted for double murders in Bangladesh in 1990 for which he received a life sentence. For reasons unknown to the Specialist Appeals Team, the appellant's allowed determination was not received by the team. The first time the allowed determination came to light was when the Entry Clearance Assistant emailed the Specialist Appeals Team on 25th April 2012 (today) asking for an official copy of the determination, as the ECO was supplied with a copy by the appellant (email from Entry Clearance Assistant is attached for your perusal). In view of the seriousness of the offence committed by the appellant, the Entry Clearance Officer seeks an extension of time in this rather unique case, where public interest is paramount.'

The Secretary of State has been unable to determine why the initial decision not to appeal the determination was made by the Senior Executive Officer on 25th April 2012."

32. It is to be noted that in the letter to the claimant's solicitors, to which reference has been made, at page 77 said firstly that the decision by the First-tier Tribunal was not received by the Specialist Appeals Team until 12th February but it was sent to the entry clearance post on 14th February.

33. In the detailed grounds of defence the date is 2nd February and that has been repeated on a number of occasions. The significance being of course that if it was received on 2nd February that was in time and would have enabled the SAT to have drafted and lodged the appropriate grounds of appeal had they so decided.

34. In the detailed grounds of defence that were filed and dated 11th February 2013 it was noted as indeed I have just noted in paragraph 12 the following:-

> "The Secretary of State has been unable to determine why the initial decision of 2nd February 2012 not to appeal the determination was not evident to the Senior Executive Officer on 25th April 2012."

35. A year on there has still been no explanation from that officer as to why a decision was made not to appeal the decision, particularly as it is maintained throughout that this was an important case involving public interest.

36. Of more concern, however, submits Mr Palmer is that the explanation, set out either in the letter to the solicitors dated 30th November 2012 or as set out in the detailed grounds of defence to the High Court is at complete variance with what is now said to be the grounds of appeal for extension. There is no mention of the fact that the determination was received by 2nd or 12th and considered by a Senior Presenting Officer at SAT. The explanation now advanced is that the determination was received on 14th February and because that it was out of time when received that such informed the decision not to appeal. Indeed it was only after the matter had come to the attention of the SAT team on 25th April 2012 that a copy of the determination was emailed to the ECO. There is the contention made in the detailed grounds of defence that it was sent on 14th February to the ECO with no explanation as to why the ECO did not get it.

37. The High Court had quashed the decision of Judge Froom precisely because misleading information had been given to him by the Secretary of State for the Home Department as to the circumstances giving rise to the delay. That has not prevented, says Mr Palmer, the fact that the Secretary of State for the Home Department now furnishes two further and conflicting explanations, one to the High Court and one to the Tribunal. He invites me to find that before exercising any powers under Rule 21 it is necessary to have a clear reason why the application was late and that having three different explanations presented on occasions, when truthful and accurate explanations were required, fundamentally undermines the credibility of the Secretary of State in giving an accurate account of those circumstances.

38. On one account there would seem to be two if not three occasions when the papers were considered by SAT and no decision made to appeal. It

has only when the claimant's solicitors themselves, in seeking a response from the Secretary of State for the Home Department, alerted that department to the determination.

39. I invited Mr Bramble to address me as to the apparent conflict and contradiction that is presented in the explanation provided to the High Court that the determination was received by a Senior Presenting Officer on 2nd February 2012 who had made a decision not to appeal the matter. I asked him how that could be reconciled with his own grounds of appeal that such a consideration took place on 14th February that there was a decision made at that time because the case was out of time not to proceed further.

40. Mr Bramble said that he had been unable to get any further clarification of the circumstances other than he presumes that his grounds give more detail to the event than otherwise.

41. For my part I find it difficult if not impossible to reconcile the various accounts that have been presented. Given the acceptance by the Secretary of State for the Home Department in the letter from TSol that an inaccurate account of the reasons for the delay had been given to Judge Froom, it falls very squarely upon the Secretary of State to provide an accurate and correct account of the circumstances thereafter.

42. It is to be hoped that the detailed grounds of defence, as drafted and presented to the High Court, were perhaps the most accurate reflection of what had transpired. Key to that is the paragraph 12 that the Secretary of State has been unable to determine why the initial decision of 2nd February 2012 not to appeal the determination was not evident to the Senior Executive Officer on 25th April 2012. Perhaps more of relevance would be to clarify with the Senior Presenting Officer who considered the matter on 2nd February as to why an appeal was not lodged. It seems to me that an explanation for not having the file is a poor explanation in reality. The determination of Judge Blair-Gould is of some length and sets out with clarity the issues and the concerns. Uppermost in the mind of the Secretary of State for the Home Department is the admission of a convicted murderer into the United Kingdom. That would have been perfectly apparent to the Senior Presenting Officer who looked at the determination on 2nd February.

43. As I say I find it impossible to reconcile the suggestion that it was looked at on 2nd February with the suggestion that it was first looked at on 14th February when out of time.

44. There has been ample opportunity to obtain various witness statements from the various parties concerned as to why this decision was made and that decision was not. It was perfectly apparent to all that were concerned with this case that central to the hearing before me would be the question of timeliness. This omission is compounded by the acceptance of the

Secretary of State for the Home Department for Mr Justice Ouseley that misleading an incorrect information had been provided to the Tribunal on a previous occasion.

45. It is noted in the determination that the three children were born on 28th December 1998, 12th April 2005 and 21st March 2008. As at the time of the application being made they were 12, 6 and 3 years old. It was the finding of the Judge which has not been challenged in any grounds of appeal that they are British citizens, that their best interests lie with being with their mother. Because of their British nationality it was the finding of the Judge at paragraph 71 that there was now no question of the claimant's wife and children living with the appellant in Bangladesh, notwithstanding that the claimant was economically self-sufficient and were established there with a house and business. The Judge finds that the best interests of the children and indeed of Ms Begum is for the claimant to live with them. Whilst the concerns as expressed of having a double murderer come to the United Kingdom, the Judge notes that he was released from prison in 1997 for good behaviour and finds that he is a genuinely reformed character repenting of his offences and remorseful of what he has done. He is regarded locally as a man of integrity and honesty. He runs a shop and established himself as a law abiding and worthwhile citizen. Mr Choudhury gave evidence concerning the perception of the claimant in his home area and that evidence was accepted by the Judge as being credible.

46. The Judge recognised that normally international criminals should be excluded from the United Kingdom but came to the conclusion that in the light of all the circumstances that the continued exclusion of him could no longer be justified. Reasons are given for that.

47. It is somewhat difficult I recognise to reconcile the findings at paragraph 54 that the public interest in the exclusion of the claimant outweighs the children's best interests the conclusion at paragraph 81 that that continued exclusion can no longer be justified.

48. Mr Palmer seeks to argue that different considerations arose in relation to a decision under the Immigration Rules than arises in Article 8 of the ECHR. The Tribunal in **MF** has set out the relationship as between Immigration Rules and Article 8. It is only if there is something particularly compelling outside the Rules that Article 8 would be engaged, hence the difficulty in reconciling paragraph 59 with 81.

49. In one sense the children were conceived in circumstances when it was clear that it would be unlikely that the claimant would be permitted to come to the United Kingdom but equally the decision by the parents should not be visited upon the children without good reason. It is the children that is a primary consideration but not necessarily the overriding consideration.

50. Equally the public interest is not served by an unrepentant murderer arriving in the United Kingdom but in this case the Judge, for good reasons, has found that the claimant is reformed and presents no threat to society indeed has contributed in a positive way to society.

51. In looking at the merits of the matter I pay regard to the grounds of appeal and the way in which they are drafted. It is said that the Judge failed to take into account the public interest. It is clear however the Judge has taken that into account. It is said that it would be difficult to see how the Tribunal can mitigate the public interest, in the absence of any material change in the claimant's circumstances since his original appeal was dismissed in 2003. That again is not an accurate statement of the findings of the Judge who made it clear why it was considered that there had been significant change over that period. Perhaps the most relevant ground is as set out as to why the Tribunal found it appropriate to allow the claimant's Article 8 claim when dismissed the claim under paragraph 320(18). That having been said, the Tribunal has recognised on previous occasions in respect of Rules barring entry clearance, that there may come a time where the interests of the individual outweigh the interests of the public particularly given the effusion of time and of the change in the individual.

52. In considering whether or not to admit the application in the interests of justice I have also to bear in mind that the interests of justice also lie in holding the Secretary of State for the Home Department responsible for the decisions that were made on her behalf. This is a case which has been considered seemingly on at least three occasions by Senior Presenting Officers or members of the Specialist Appeals Team. It is in the public interest, therefore, that public authorities to be accountable for their actions and to give proper reasons for their decisions. In this case a decision seemingly was taken not to proceed with an appeal, when to do so would have been in time. There was, in circumstances yet to be clarified, a change of heart months later by another representative seemingly ignorant of the decision of the first. If the decision of the First-tier Tribunal Judge had been sent to the ECO on 14th February as claimed it is surprising that it was not received and dealt with given the alleged importance that is now attached to it.

53. The claimant was led to have a legitimate expectation that he would be granted entry clearance, precisely because of the significant delay in the appeal process. Indeed it is significant that the matter only surfaced to the attention of those acting on behalf of the Secretary of State for the Home Department precisely because the claimant, through his representatives, asked why it was that he had not been granted leave which he had won upon appeal. It seems to me that it is also a matter of public interest that public authorities are consistent in their decision making and are efficient in their appeal processes. This is not a minor delay caused by administrative oversight but a lengthy delay following a positive decision not to appeal.

54. I am concerned that three different sets of explanation have been put forward to the Tribunal and to the High Court in this matter, particularly when the decision of Mr Justice Ouseley, made it clear that the Secretary of State for the Home Department accepted responsibility for misinformation to the Tribunal Judge.

55. I cannot reconcile the two accounts now presented. I find indeed that there is an inconsistency or inaccuracy in what is being presented to me. It would have been very easy for there to be clarification by way of statements or documents setting out precisely how and why a mistake was made. That at least would assist on public accountability and responsibility. That has not been done.

56. There seems to be an expectation that the public interest on the merits trumps everything else. It seems to me that that is not necessarily the case and is certainly not the case here.

57. Judge Taylor set out clearly in her refusal of permission why it was that she did so particularly in relation to the aspect of delay and of merit.

59. Given that I do not find acceptable the reason why the application made to the Tribunal was late it follows that I should only admit it if persuaded it is in the interest of justice to do so. Regrettably I am not persuaded for the reasons which I have indicated.

60. I find that the application is out of time without any clear explanation for being out of time. I do not find that it is in the interests of justice or fairness for any extension of time to be granted. Accordingly this application is refused and time is not extended.

Signed Date

Upper Tribunal Judge King TD