Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08413/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 September 2017	**On 06 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

N R
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Ms E Fitzsimmons of Counsel, instructed by Duncan Lewis & Co Solicitors (Harrow Office)

DECISION AND REASONS

1. The Secretary of State for the Home Department seeks to appeal against the decision of First-tier Tribunal Judge Mitchell promulgated on 16 March 2017 in which he allowed the appeal of NR on asylum and human rights grounds against a decision of the Secretary of State dated 26 July 2016 to refuse leave to remain.

2. For the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to NR as the Appellant and the Secretary of State as the Respondent.

3. The Appellant is a citizen of Afghanistan. He has been accorded the date of birth of 1 January 1989 in circumstances where he claimed not to know his true date of birth. Whilst I note that there was at one point a dispute in respect of his age this was resolved in the Appellant's favour by way of findings made in an earlier appeal by Judge Eban (appeal reference AS/05197/2005). I also observe from the papers that the Appellant has more recently indicated that he has adopted 12 July as his birthday, that being the date upon which he underwent a baptism as part of the process of a conversion to Christianity - an event that forms the core basis of the asylum claim now relied upon.

4. The Appellant claims to have entered the United Kingdom on 13 January 2005, and is recorded as having claimed asylum on that date. His application at that time was based on events that had happened in Afghanistan, arising from a business dispute between his father and another, which it was claimed had subsequently led to difficulties for the Appellant. The Appellant's initial application for asylum was refused on 17 February 2005 and his appeal was dismissed by Judge Eban in a decision promulgated on 1 June 2005.

5. Judge Eban, in addition to accepting the Appellant's account as to his age (paragraph 10), also accepted some aspects of his claimed history in Afghanistan. It was accepted that there had been a dispute between the Appellant's father and a business partner, that the Appellant's father had been abducted by the erstwhile partner and not seen again, and that the partner had with the assistance of the Taliban claimed the Appellant's father's land (paragraph 12). However, Judge Eban did not accept other aspects of the Appellant's account, in particular those aspects of his account whereby he claimed to have become a target of his father's former business partner. The claimed facts not accepted were the matters at the core of the Appellant's claim at that time, and his appeal was consequently dismissed.

6. The Appellant made further submissions to the Respondent in December 2009 which were refused without a right of appeal in July 2010. Yet further submissions were made in March 2012 and in turn those were refused without a right of appeal in December 2013. The Appellant then made a further submission in respect of asylum by way of an application dated 24 November 2015 in which in particular it was raised that he had converted to Christianity, the date for such conversion being given as 12 July 2015 (the date of his baptism).

7. The Appellant was interviewed in relation to this claim on 21 July 2016 and in due course, for reasons set out in a 'reasons for refusal' letter of 26 July 2016, his claim was rejected. It was, however, acknowledged that he had advanced matters constituting a fresh claim for asylum and a right of appeal was accorded to him. The Appellant appealed to the IAC.

8. It is to be noted that in the RFRL the Secretary of State acknowledged pursuant to country materials set out within the RFRL and the case of **NM (Christian Converts) Afghanistan CG [2009] UKAIT 00045**, that a genuine Christian convert would be in danger on return to Afghanistan. However, the Respondent did not accept that the Appellant was indeed a genuine Christian convert.

9. The Appellant's appeal was allowed by First-tier Tribunal Judge Mitchell for reasons set out in his Decision.

10. The Respondent sought to challenge the Decision of the First-tier Tribunal by way of Grounds of Appeal drafted in support of an application for permission to appeal. The focus of the challenge is essentially twofold: the Judge had failed to consider the Appellant's evidence in the round, and in particular had disregarded the adverse credibility assessment in the earlier appeal; secondly, the Judge had failed to make an independent assessment in respect of the supporting witnesses called by the Appellant but had, to quote from paragraph 5 of the Grounds, *"simply accepted the witnesses' views on the [Appellant's] conversion without assessing the adverse points made in the RFRL."*

11. Permission to appeal was purportedly granted by First-tier Tribunal Judge Parkes in a decision dated 26 July 2017.

12. The Appellant has filed a Rule 24 response dated 24 August 2017 drafted by Ms Fitzsimmons, who appears for him today. In the Rule 24 response a preliminary matter is raised in respect of the timeliness of the Secretary of State's application for permission to appeal.

13. The Secretary of State's application for permission to appeal acknowledges the Tribunal determination date to be 17 March 2017, but the application for permission is dated 17 July 2017, i.e. four months after the promulgation date. The delay is acknowledged in section B of the

application form (headed 'Time limit for making a First-tier application for permission to appeal'), and the drafter of the application writes this:

"The SSHD does not currently have information as to why it has taken this long for the judgement to be allocated to a drafter for review. The SSHD apologises for the out of time application but asks that time is extended on the basis that there is a very significant chance of success and the seriousness of the nature of the grounds of challenge."

14. In contrast to the appropriate identification of delay in lodging the application, Judge Parkes in granting permission to appeal simply states: *"The application is in time and is admitted."* Plainly, this observation was in error of fact: Ms Isherwood does not remotely seek to suggest otherwise.

15. The preliminary issue that is raised before me is to how this Tribunal should now proceed in light of that clear error of fact, and the consequent failure of Judge Parkes to extend the time limit for appealing.

16. In the Rule 24 response - relied upon by Ms Fitzsimmons and expanded upon in the course of her oral submissions - reference is made to case law. Ms Isherwood has also provided me with a case relevant to the consideration of 'out-of-time' applications for permission to appeal. In short, I have been provided with the cases of **AK and others (Tribunal Appeal - out of time) Bulgaria * [2004] UKIAT 00201**, **BO and Others (Extension of time for appealing) Nigeria [2006] UKAIT 00035** and **Boktor and Wanis (late application for permission) Egypt [2011] UKUT 00442 (IAC)**.

17. Ms Fitzsimmons essentially argues that the grant of permission of Judge Parkes should be considered to be contingent upon the resolution of the issue of timeliness, and the Tribunal today must consider the question of extending time. She invites the Tribunal to refuse to grant an extension of time with particular reference to some of the guidelines set out in the case of **AK**.

18. Ms Isherwood opposes this approach. She highlights that the current Procedure Rules, the regime that governs the Tribunal in respect of the grant of permission to appeal presently, are those in the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (in respect of applications considered, as here by Judge Parkes, by the First-tier Tribunal) and the Tribunal Procedure (Upper Tribunal) Rules 2008 (in respect of applications considered by the Upper Tribunal), and

emphasises that this is a different regime from the Rules that are referred to in the case law. Her primary position is that the Tribunal is in effect bound by the grant of permission, and should simply proceed with the appeal and undertake a consideration of the grounds in the usual way. If the grant of permission is to be challenged that should be by way of the process of judicial review, but otherwise, absent such a challenge, the Tribunal is now seized of a valid appeal against the Decision of the First-tier Tribunal.

19. In the alternative, if the Tribunal does have to turn its mind to the question of timeliness Ms Isherwood identifies that the decision of the First-tier Tribunal appears to have been posted to a Home Office Presenting Officers' Unit in Salford and not the Home Office Presenting Officers' Unit at Hatton Cross where the appeal was heard. She is unable to say in the limited amount of time that she has had to address her mind to these matters whether the address given in Salford is indeed the Presenting Officers' Unit's address. Beyond this, she does not have any knowledge of the circumstances in which the Decision made its way to the appropriate Specialist Appeals Team at the Home Office that deals with applications for permission to appeal: to this extent she is not really able to offer anything more by way of explanation than the original drafter. Otherwise Ms Isherwood essentially relies upon the merits of the grounds as a reason for extending time.

20. I do not accept that I am bound by the grant of permission to appeal if that was plainly made on the basis of an error. In my judgement to proceed without giving some further consideration to that error would be for the Tribunal to proceed on an *ultra vires* basis. The permission to appeal granted by Judge Parkes cannot be said to be a valid grant of permission to appeal if he has not turned his mind to the question of timeousness - and it is clear that he did not.

21. It seems to me that notwithstanding that there has been a change in the Procedure Rules there is nothing in those changes that substantially denies or negates the principles brought to play in consideration of exactly these sort of circumstances in earlier cases. In particular, with regard to the head note in the case of **Boktor** the following is to be noted:

> *"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."

22. In this context I consider rule 24 of the Asylum and Immigration Tribunal (Procedure) Rules 2005, which is helpfully set out at paragraph 8 of the decision in **Boktor**, is in substantial part in similar terms to rule 33 of the 2014 Procedure Rules. Both prescribe the form and manner in which an application for permission to appeal is to be made, including identifying the time limit. Rule 24(4)(a) defines the power to extend time for a late application "*if satisfied by reason of special circumstances it would be unjust not to do so*"; rule 24(4)(b) identifies that if time is not extended the Tribunal "*must not admit the application*". Whilst there are no directly analogous provisions to 24(4)(a) and (b) in rule 33 of the 2014 Rules, however the power to extend time is governed by the general case management powers set out under rule 4 – in particular rule 4(3)(a) – "*the Tribunal may… extend… the time for complying with any rule…*". There is no comparable test set out by reference to 'special circumstances', but the powers under rule 4 are to be understood and exercised with reference to the 'overriding objective' set out in rule 2(1) (see rule 2(3)) – i.e. fairly and justly. It seems to me if there has not been due compliance with that and the Judge granting permission to appeal has not identified any errors in that matter then the permission Judge's decision must now similarly be considered to be contingent.

23. There is a similar, but slightly different Procedure Rules regime in place compared with the case law. An applicant is still obliged to comply with certain formalities, including in respect of a time limit; the Tribunal has power to relax those formalities and to extend the time limit. Whilst there is no express provision comparable with rule 24(4)(b) – "*must not admit*" – the First-tier Tribunal's power to consider an application for permission to appeal (under rule 34) is contingent upon receipt of an application for permission to appeal – which of necessity must be taken to mean a valid application – i.e. one that complies with the prescribed requirements under rule 33 or has otherwise been deemed valid because of favourable consideration of the general case management powers to relax the requirements (including the requirement in respect of time).

24. The procedures for the Upper Tribunal considering an application for permission to appeal are also similar, but not identical: see Tribunal Procedure (Upper Tribunal) Rules 2008, in particular rules 21, 5(3)(a), and 2. (These Rules wold have been in force at the time of the consideration of the appeal in **Boktor**.)

25. In the circumstances it seems to me that the general principles - absent the specific reference to 'special circumstances' - continue to apply: I can

identify nothing in either the fact of the change of the Rules, or in the changed wording of the Rules, that warrants a departure from this approach. Accordingly guidance such as provided in the cases of **BO** and **AK** continues to be relevant. In particular, the head note of **BO** helpfully offers the following:

> *"If a notice of appeal is given out of time, the first task in deciding whether to extend time is to see whether there is an explanation (or a series of explanations) that cover the delay. If there is, it and all other relevant factors, such as the strength of the grounds, the consequences of the decision, the length of the delay and any relevant conduct by the Respondent are to be taken into account..."*

26. I accept Ms Fitzsimmons submission that I must address the question of the timeliness of the Secretary of State's application for permission to appeal, bearing in mind the guidance indicated above - but with the caveat that I am not applying a 'special circumstances' test but a 'fairly and justly' test.

27. Ms Fitzsimmons places particular reliance upon certain passages in the case of **AK and others**. She emphasises paragraphs 25-27, which are in these terms:

> *"25. We entirely reject the Secretary of State's submission that one day's lateness is to be regarded as de minimis. The time limits in appeals of this nature are very short. Under the 2000 Procedure Rules, the time limit in an asylum appeal is ten days after the Adjudicator's determination. A day's lateness extends the time by ten per cent. Ten per cent cannot be regarded as a minimal amount.*
>
> *26. The assertion that in **AK**'s case the delay was due to 'administrative error' adds virtually nothing to the case. Nobody supposed that the delay was deliberate. On the other hand, the Secretary of State does not advance any explanation or excuse for the 'error'.*
>
> *27. As [the Home Office Presenting Officer] pointed out, the fact that the Vice President thought that the grounds were arguable shows something of their strength, but, as we have indicated earlier, the strength of grounds cannot by itself be a reason for extending time. The assertion that there is no prejudice to the Claimant as a result of the delay is simply wrong. On the expiry of the time limit, the Claimant's position, as a person whose appeal had been allowed, became very much stronger. The Adjudicator's determination could now only be upset if time were*

extended. It clearly puts her at a disadvantage if the time limit is essentially to be ignored."

28. It seems to me that there is considerable weight in the arguments advanced by Ms Fitzsimmons that draw an analogy between the circumstances in the instant case and those under consideration in **AK**. The delay here, on a time limit of fourteen days, was 3.5 months. That is of course a much more serious delay than that which was being considered in **AK**.

29. The Secretary of State in the application for permission to appeal did not in truth offer any explanation for the delay, but simply acknowledged that it was unknown why there had been any delay and offered an apology. Ms Isherwood has offered a potential explanation that the decision may have been misdirected to the wrong Presenting Officers' Unit, but that in itself falls well short of offering an explanation for the very considerable period of delay thereafter, and she is not otherwise able to offer any further explanation. I acknowledge that Ms Isherwood is in some difficulties in gathering information in this regard, but it remains the case, it seems to me, that essentially no proper explanation has been offered for the delay notwithstanding the apology offered.

30. The view of the Upper Tribunal in **AK** was that the strength of grounds could not in itself be a reason for extending time – and ultimately that is what Ms Isherwood falls back on, by reference to the favourable view on arguability expressed by Judge Parkes. On a strict application of **AK**, this is not enough. In any event, for my own part - as will be seen in due course - ultimately I do not consider there to be much merit in the challenge the Secretary of State has raised.

31. Accordingly, in all the circumstances I have reached the conclusions: first, it is indeed for me to consider the question of extension of time; and second, extension of time is not to be granted. This means that permission to appeal is denied to the Secretary of State. That formally brings the appeal to a conclusion.

32. I mentioned in my consideration of the above issues that I had turned my mind to the merits of the appeal. Indeed, before making my decision I invited submissions on the substance of the challenge from the parties - and I am grateful for those submissions from each of the representatives. However, as I say, it seems to me that ultimately the Respondent's appeal lacks substantial merit and were I to have formed the view that time to appeal should be extended and proceeded on the basis of the contingent permission granted by Judge Parkes, I would ultimately have reached the

conclusion that the Secretary of State has failed to identify any material error of law such that the decision of First-tier Tribunal Judge Mitchell should be set aside.

33. In circumstances where I have reached a conclusion which refuses permission to appeal I do not propose to go into very great detail, but nonetheless make the following brief observations because they are at least in part relevant to the issue of 'merits' to which I had regard when considering the issue of extension of time.

34. It seems to me that the First-tier Tribunal Judge accurately identifies the issues in the appeal at paragraphs 4 and 12 of his Decision, and indeed at paragraph 4 acknowledges that the only argument being put forward by the Secretary of State was whether the Appellant was a genuine convert, it not being disputed that he was attending church in view of the number of witnesses who attended the hearing.

35. The Judge also correctly identified the concession on risk made by the Secretary of State pursuant to the case of **NM**, (see paragraph 13 of the Judge's decision).

36. The Judge had regard to the Appellant's immigration history and, in my judgment, it cannot be said that he in some way overlooked this in his overall consideration of the claim, see for example paragraph 12. Whilst it is correct that some aspects of the decision of Judge Eban rejected the Appellant's account, there are other aspects of the disputed account in respect of which Judge Eban found in the Appellant's favour. Judge Eban's decision was not an 'across the board' conclusion of a lack of credibility. It was a nuanced and careful assessment.

37. The Judge Mitchell also identifies and states the basis of the Secretary of State's refusal of the Appellant's case with reference to the RFRL (paragraph 14).

38. The Judge refers to the Appellant's oral testimony before him, and observes that the Appellant gave his evidence, whilst in a highly emotional manner, nonetheless a straightforward manner; although his answers were extremely lengthy he did not at any time contradict himself and his evidence had been consistent throughout (paragraph 11).

39. The Judge gave also gave consideration to the supporting testimonies of the Appellant's witnesses: see paragraphs 15-17. It was also noted that there were other witnesses in attendance that the Respondent's representative did not wish to hear from or challenge. The key witnesses for the Appellant were members of his church, in particular the Reverend David McClure and the Reverend Thomas Gillum. At paragraph 15, in setting out the evidence of the Reverend McClure the Judge observes that his evidence included the observation that the Appellant "*was not "swallowing wholesale" what was being said to him but was thinking about it and questioning it*". This is illustrative, it seems to me, of an element of critical thinking on the part of the Appellant with regard to his exploration of the Christian faith that the Judge so identified.

40. Reverend Gillum's testimony is stated to have included a description of *"how he treats with caution any asylum seeker who wishes to be baptised and uses the test of 'Belonging, Behaving, Believing'"* (paragraph 16).

41. The Judge observed that both these witnesses were "*impressive and highly credible*", and that they themselves "*were clearly satisfied that the Appellant was a genuine convert*" (paragraph 17). The Judge concluded that he considered this evidence to be *"highly persuasive that the Appellant is a genuine convert"* (paragraph 17). On that basis, and on the basis of the totality of the evidence before him – "*considering all the evidence that has been provided*" (paragraph 19) - the Judge expressed his satisfaction that the Appellant was a genuine convert from Islam to Christianity. In consequence of the concession made by the Respondent further to the case of **NM**, that was enough to allow the appeal.

42. I do not accept for a moment that there is any substance in the suggestion that the Judge essentially uncritically accepted the evidence of the witnesses. It seems to me that the grounds in this regard essentially confuse the notion of the independent evaluation and consequent acceptance of the evidence with the notion of adopting that evidence uncritically. For the reasons explained in the Decision, the Judge was entitled to place significant weight – indeed characterising it as highly persuasive – on what was essentially the opinion evidence of the two churchmen as to their views that the Appellant was genuine in his conversion.

43. As regards the challenges to the Judge's failure to consider the evidence 'in the round' it is to be acknowledged that the Judge does not make any express reference to the adverse credibility findings in the earlier appeal, albeit, as I say, he clearly had in mind the immigration history. It is to be noted that the Appellant's presentation of his conversion to Christianity was essentially a completely new case and accordingly any past

untruthfulness would not inevitably be a determinative, or even necessarily a strong signifier, as to the claimed new fact of his commitment to Christianity. That was primarily to be assessed by the evidence of that conversion - and that is essentially what the Judge did.

44. Criticism is also made that the Judge failed to have detailed consideration to the individual points and analysis set out in the RFRL as to why the Secretary of State considered that the Appellant had failed to demonstrate a credible knowledge of Christianity consistent with his professed interest in Christianity.

45. It seems to me that whilst there may have been gaps in the Appellant's knowledge he could not possibly be described as being ignorant of his faith: there are passages in the interview, for example at questions 92 and 95, where he relates certain parables from the Bible. He also refers to the four Gospels and he also refers to the disciples and the circumstances of Christ's baptism.

46. The evidence before the First-tier Tribunal was to the effect that the Appellant had attended a number of classes at his church. It cannot be said that he was therefore untutored in his new professed faith. So, it follows that if there were any gaps in his knowledge that must either have been a product of gaps in the tutoring, or a product of his failure to pick up and retain information from the tutoring. It seems to me such gaps are therefore not in themselves a very helpful indicator of whether he is genuine in his faith. To that extent the Respondent's reasoning in the RFRL is substantially undermined once it is accepted that the Appellant did indeed go through a process of preparation for baptism and has been a regular attender at church.

47. In any event I consider that the Judge was perfectly entitled to conclude that the evidence presented in respect of the opinions of the two reverends before him was persuasive evidence as to the genuineness of the Appellant's conversion, and to take that into account along with the Appellant's own consistency of his evidence in reaching a favourable conclusion on this key point. The Judge only needed to reach that conclusion on the lower standard applicable in asylum cases but indeed went on to say that he was so persuaded that he would have been satisfied even to the civil standard of a balance of probabilities (paragraph 18).

48. In all such circumstances, whilst it might have been better if the Judge had included some closer analysis of the reasoning in the RFRL, I am not persuaded that the Respondent has identified anything of particular merit

in the grounds of appeal such that the 'timeliness' point is to be disregarded; nor if permission to appeal were now to have been granted that would have persuaded me that the decision of the Judge should be set aside.

49. For the reasons indicated I refuse to extend time, and therefore permission to appeal is also refused.

Notice of Decision

50. The Secretary of State's application for permission to appeal was made out-of-time. I refuse to extend time. Permission to appeal is refused to the Secretary of State.

51. The Decision of the First-tier Tribunal stands: the Appellant's appeal remains allowed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed: Date: 27 September 2017

Deputy Upper Tribunal Judge I A Lewis