



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/08687/2016

THE IMMIGRATION ACTS

Heard at Field House

On 24 January 2018

Prepared on 24 January 2018

**Decision & Reasons
Promulgated
On 26 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

**JOAO ANTONIO DE ARAUJO VALE E AZEVEDO
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Jones, counsel instructed by GSG Law

For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Portugal, date of birth 17 May 1957, appealed against the decision of the Secretary of State, dated 20 June 2016, to refuse admission in accordance with Regulation 19 of the 2006

Immigration (European Economic Area) Regulations (the 2006 Regulations).

2. The appeal was entered by application on behalf of the Appellant dated 27 July 2016.

3. As a fact was the appeal made out of time. An application for an extension of time to appeal came before First-tier Tribunal Judge Walters (the judge) on 22 February 2017. Representations were made on behalf of the Appellant in respect of the out of time application. The Home Office made representations and sought to address it simply on the issue that it was an out of time appeal. The grounds of appeal, as I have seen, do not include any human rights claim and that may well be because the general understanding was that to pursue a human rights claim required a separate application. In any event, if it was raised as Ms Jones tells me, it came at a later stage through either her grounds or skeleton argument in submissions made. Either way, the merits of the appeal and indeed Article 8 issues were not pursued before the judge. The issues were simply whether or not the appeal was out of time, the reasons for it being so and should time be extended. The matter appears to have been somewhat protracted by reason of difficulties in assessing the threat or potential threat of criminal proceedings against the Appellant in Portugal: Also by the fact that the Secretary of State had been asked to reconsider the decision: On 20 July 2017 the Secretary of State refused to readdress the issue and gave reasons therefor.

4. The Judge refused to extend time and dismissed the appeal as being out of time: No other issues were therefore pursued. The position is that permission to appeal the judge's refusal was given by First-tier Tribunal Judge Shimmin and no issue was taken as to whether or not there were any rights of appeal against the adverse preliminary decision made by the judge.

5. On 1 November 2017 permission to appeal was given and the matter therefore proceeded until today: When, for the first time, the issue was raised of whether there was any jurisdiction to entertain an appeal at all and, secondly, whether or not the decision to refuse to extend time was an “excluded decision” in relation to a procedural ancillary or preliminary decision under Regulation 26 of the 2006 Regulations.
6. Having considered the grounds, it seemed to me that on behalf of the Appellant an out of country appeal had been made which was provided for under the Rules and, as far as I can tell, no jurisdictional point was taken at any stage about that issue. On the basis that there therefore was a jurisdiction to hear an out of country appeal pursuant to Regulation 19 and 27 of the 2006 Regulations.
7. However, the matter does not stop there because the consequences of Section 4 of the Amendments to the Appeals (Excluded Decisions) Order 2009 by the Tribunals, Courts and Enforcement Act 2007 (Miscellaneous Provisions) Order 2010 it is clear that the decision of the First-tier Tribunal is an excluded decision. If that was in dispute it seemed to me that the case of *NA V Secretary of State for the Home Department* (excluded decision: identifying judge) *Afghanistan* [2010] UKUT 444 showed why a decision not to extend time by the First-tier Tribunal is not justiciable by the Upper Tribunal. The analysis of *NA* came to be further considered through the issues raised in the case of *Adjo and Anwar* [2010] EWCA Civ 1275 [19-23] which dealt with the issue of whether or not a court may, notwithstanding the provisions of the Rules, proceed in the absence of objection from the parties to deal with issues which otherwise would not fall to be considered.
8. The court in *Adjo* considered the subtle distinction that sometimes exists between circumstances where an issue of jurisdiction is, or is not taken. If it is taken on jurisdictional grounds early enough, then notwithstanding a

Tribunal proceeds to carry on and determine it, it may well be there still remained no jurisdiction to do so.

9. In certain circumstances if the point is not taken, and that discretion or decision is exercised, then there is jurisdiction. I do not have to resolve that interesting question because, quite simply, under the provisions of an excluded decision, the matter never went any further before the Judge than simply the issue of the extension of time and the merits of any claim have never been considered. In the circumstances I agree with the submissions made on behalf of the Respondent that there was no right of appeal to the Upper Tribunal against the decision of the judge.
10. It also seemed to me that as a matter of approach no greater jurisdiction was given simply by the grant of leave and nor has the Secretary of State waived the point in relation to jurisdiction so as to clearly have accepted that the Upper Tribunal should proceed on to hear this matter further on its merits. For these reasons, putting aside as I do because I make no decisions on it the alleged unfairness and unreasonableness of the Secretary of State's decisions to exclude or maintain exclusion, it seemed to me that there was no right of appeal and therefore that is the end of the matter. The appeal is dismissed.
11. For the avoidance of doubt, whilst Ms Jones has invited me to address the wider issues namely of the extent to which it appears that after the event an Immigration Officer wrote a note, signed and dated 28 August 2016, was simply after the event addressing the considerations under paragraph 19 in the context of Regulation 21(5) of the 2006 Regulations. The issue is somewhat difficult to deal with because on one hand the officer writing the note expressed himself entirely in this respect in the past tense indicating that he 'was' therefore satisfied or that he also considered or was satisfied further on various matters: Which all suggest a past consideration of the issue even if the note did not contain the analysis that Ms Jones complains of. It could be she was right in saying that the entirety of the document is

written after the event looking back, in the light of the complaint made by the Appellant's representative in connection with the decision and whether it was properly given to exclude the Appellant. I cannot resolve that matter. I have not heard evidence and the argument has not been developed further but, if it is so, that might have been grist for the mill for a proper challenge by way of judicial review which seemed to me to have been the alternative and available remedy to challenge the decision to refuse to extend time.

12. For these reasons therefore I do not find that there is any actual or apparent prejudice or disadvantage by the outcome of this matter and nor does it seem to me it infringed the rights under Articles 31 and 33 of the 2004 Directive in relation to the Directive 2004/38/Entry Clearance Officer (Citizens Freedom Movement) Directive.

12. In these circumstances as I have indicated the Original Tribunal's decision stands.

NOTICE OF DECISION

13. The appeal is dismissed.

14. No anonymity direction is made.

Signed

Date 28 February 2018

Deputy Upper Tribunal Judge Davey

P.S. I regret the delay in promulgation which was due to the case file being miss-located.