IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003348
UI-2022-003349
UI-2022-003350
First-tier Tribunal No:
EA/03849/2021
EA/03975/2021
EA/03996/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 16 May 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ARHAM RANA
HOORAIN RANA
DAWOOD RANA
(NO ANONYMITY ORDER MADE)

Appellant

and

AN ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Sundhoe, the Sponsor.
For the Respondent: Mr Tann, a Senior Home Office Presenting Officer.

Heard at Manchester Civil Justice Centre on 17 April 2023

DECISION AND REASONS

1. The above appellants, all minor citizens of Pakistan, applied for a Family Permit under Appendix EU of the Immigration Rules on the basis of being a family member of a relevant EEA citizen. The applications were refused as an Entry Clearance Officer (ECO) was not satisfied that they had established their relationship with the EEA family member, namely Mr Sundhoe, the Sponsor.
2. The date of the relevant decisions, issued individually to each of the appellants who are related as siblings, was 5 January 2022. They therefore had, by virtue of rule 19 (2) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 28 days in which to lodge their appeals. That limitation period expired on 2 February 2022, yet the appeals were not received until 25 March 2022.

3. The matter was referred to a tribunal caseworker to consider as a preliminary issue the question of the timeliness of the appeal and the explanation for the delay. In a decision dated 10 June 2022 issued by Legal Officer it was stated that the reasons given for the delay when considering the interests of justice did not require an extension of time for lodging the appeals.
4. The appellants requested a review of the decision of the Legal Officer which came before First-tier Tribunal Judge Gray at Hatton Cross on 20 June 2022. Having reviewed the chronology and the appellant's explanation for why the appeal was late Judge Gray found the interests of justice did not require an extension of time for lodging the appeal.
5. The appellants then sought permission to appeal the decision of Judge Gray to refuse to extend time. That application came before First-tier Tribunal Judge Curtis on 19 July 2022.
6. The first issue for Judge Curtis to consider was whether there was a right of appeal against the decision of Judge Gray or whether it was an excluded decision.
7. The full terms of the grant of permission to appeal, dated 19 July 2022, are as follows:

> 1. The application is in time.
>
> Jurisdiction
>
> 2. The appellants seek permission to appeal against a decision of the Judge to refuse to extend the time within which they should have sent to the Tribunal their notices of appeal against the Respondent's refusal to issue them with family permits under Appendix EU (Family Permit). Rule 19(3B) of the Tribunal Procedure (First-tier Tribunal) (Immigration & Asylum Chamber) Rules 2014 ("the 2014 Rules") provides that the appellants should have lodged their notices not later than 28 days after they had received the notices of the decisions.
> 3. By virtue of s.11(1) of the Tribunals, Courts and Enforcement Act 2007 a person has "a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision". What amounts to an "excluded decision" is set out in the Appeals (Excluded Decisions) Order 2009 ("the 2009 Order") and article 3(m), therein, confirms that "any procedural, ancillary or preliminary decision made in relation to an appeal against a decision under section 40A of the British Nationality Act 1981 ("the 1981 Act"), section 82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act) or regulation 26 of the Immigration (EEA) Regulations 2006" ("the 2006 Regulations").
> 4. Para. 1 of schedule 7 of the Immigration (EEA) Regulations 2016 ("the 2016 Regulations") confirms that, for the above purposes (and elsewhere), regulation 36 of those regulations corresponds with regulation 26 of the 2006 Regulations.
> 5. With reference to para. 23 of the Joint Presidential Guidance 2019 No.1: Permission to appeal to the UTIAC, a decision that the original appeal is out of time and time is not to be extended is a type of preliminary or procedural decision captured by art. 3(m) of the 2009 Order.
> 6. However, the appellants' applications were for a family permit under Appendix EU (Family Permit) and their right of appeal against the Respondent's refusals derives from regulation 5(a) of the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2020 ("the 2020 Regulations").
> 7. Regulation 5(a) of the 2020 Regulations is not within the group of statutory provisions set out in article 3(m) of the 2009 Order despite it being an appeal-right deriving provision in the same way that s.82 of the 2002 Act, s.40A of the 1981 Act and reg. 26 of the 2006 Regulations/reg.36 of the 2016 Regulations are.

8. I have taken into account the case in NA (Excluded decision; identifying judge) Afghanistan [2010] UKUT 444 (IAC) in which the Upper Tribunal confirmed that there was no right of appeal to the Upper Tribunal against a decision by the First-tier Tribunal not to extend time for sending a notice of appeal to it because that was a "preliminary decision made in relation to an appeal" within article 3(m) of the 2009 Order. It was therefore an "excluded decision" for the purposes of s.11 of the 2007 Act.
9. However, in that case the appellant had sent to the Tribunal, albeit out of time, an appeal against the Secretary of State for the Home Department's refusal to grant him asylum. That appellant's right of appeal, then, was under s.82 of the 2002 Act which is explicitly captured by article 3(m) of the 2009 Order. It seems to me that NA is not authority for the proposition that all "procedural, ancillary or preliminary decisions made in relation to an appeal" are excluded decisions where the appeal-rights-granting legislation is not contained within the exhaustive list in article 3(m). If parliament had intended, or desired, that to be the position it would not have explicitly, and exhaustively, referred therein to the rights of appeal in s.40A of the 1981 Act, s.82 of the 2002 Act or regulation 26 of the 2006 Regulations (now to be read as regulation 36 of the 2016 Regulations).
10. Ultimately, it seems to me that NA can be distinguished because that concerned a right of appeal under a piece of primary legislation captured by article 3(m) of the 2009 Order whereas the current appeal does not.
11. For completeness, I recognise that reg. 11 of the 2020 Regulations makes provision, in schedule 2, for the application of the 2002 Act to appeals to the Tribunal. Schedule 2 provides that a number of prescribed sections of the 2002 Act "apply in connection with an appeal to the Tribunal under these Regulations as they apply in connection with an appeal under section 82(1) of that Act". The effect of schedule 2 is not to bring the right of appeal in s.82 within the ambit of an appeal under the 2020 Regulations.
12. I also recognise that rule 20(4) of the 2014 Rules mandates that the Tribunal must decide whether to extend the time for appealing as a preliminary issue but I form the view that that is not sufficient authority for shoehorning all "preliminary issues", as per rule 20(4), into the definition of "excluded decision" in the 2009 Order when the latter is drafted in such a way as to limit such decisions to those relating to appeals brought under three specific pieces of legislation and which does not include, for instance, regulation 5 of the 2020 Regulations.
13. On my reading of article 3(m) of the 2009 Order, the list of statutory provisions is exhaustive and, whilst this might well represent a lacuna in the drafting of any subsequent amendments to the 2009 Order, a procedural or preliminary decision relating to an appeal against a decision to refuse to issue a family permit under Appendix EU (Family Permit) is not an "excluded decision" for the purpose of s.11(1) of the 2007 Act.
14. In conclusion, as I have noted, any party has a right of appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision (s.11(1) & (2) of the 2007 Act). The Judge's decision to refuse to extend time for sending a notice of appeal, against a decision in respect of which the right of appeal derives from regulation 5 of the 2020 Regulations, to the Tribunal is not an excluded decision, as defined in the 2009 Order. If a decision is not excluded, it must logically follow that it is a decision which is included, and which attracts a right of appeal. Accordingly, it is my view that the Judge's decision is one which attracts a right of appeal to the Upper Tribunal and I do have jurisdiction to consider the substantive merits of it.

Merits

15. The essential thrust of the grounds of appeal is that whilst the appellants were informed on 27 January 2021 that the decisions of 5 January 2021 were ready for

collection, their father was unable to travel to Lahore to collect the passports (and, hence, the decision letters) until 19 March 2021 because of Covid-19 restrictions.

16. None of the three decision letters indicate the date on which they were sent to the applicants nor as to how they were sent. The boxes for that information in each of the letters are blank. The IAFT-6's all indicate that the appellants "received" the decision letters on 19 March 2021.
17. The Judge refers to rule 19(3) of the 2014 Rules and that the date of the decision letters was 5 January 2021 and notes that the appellants "had twenty-eight days in which to lodge an appeal" [2]. Whilst of no consequence to the period of time provided by the 2014 Rules, it seems to me that the Judge's reference to rule 19(3) was erroneous because these were appeals under the 2020 Regulations and it therefore rule 19(3B) which provides the period in which such an appeal must be sent to the Tribunal (and, furthermore, rule 19(3A) disapplies rule 19(3) in such an appeal). The Judge does not clarify from when the twenty-eight day period commences although it is arguable, given that the sole reference to a date in para. 2 is to the date of the decision letters, that the Judge understood that the twenty-eight period commenced on 5 January 2021. That conclusion is supported by the reference in para. 3 to the asserted fact that "the appeals should have been lodged no later than 2 February 2021".
18. However, rule 19(3B)(b) actually provides, in the appellants' case, that a notice of appeal to the First-tier Tribunal must be received "not later than 28 days after they receive the notice of the decision" (my emphasis). It is true that the Judge does proceed to consider an alternative scenario with reference to the Respondents' email of 27 January 2021 which informed the appellants that their passports, and implicitly, their decision letters, could be collected. The Judge had sight of those emails which simply read that "processed application…is ready for collection from the [sic] during working hours". There was no explicit reference to an "instruction", as the Judge describes, in that email for the appellants to collect their passports.
19. The Judge considers the effect of the emails of 27 January 2021 in para. 5 by noting that "if this was the first notification received by the Appellants of the Respondent's decision, I accept that the time for lodging the appeals could be extended to 24 February 2021" (original emphasis). However, it seems to me arguable that that does not engage with the precise wording of rule 19(3B)(b) which requires consideration of when the appellants received the notice of the decision. It is arguable that an email confirming that an application had been processed and could be collected, but which did not have the "notice of decision" attached, could not properly amount to the start point for the 28-day window.
20. Whilst the Judge did consider the suggestion that the decisions had been collected on 19 March 2021 she concluded that no evidence had been adduced to show that this was so. It is arguable that this amounts to a proposition that an appellant must automatically adduce evidence to demonstrate on what date the relevant decision letter was received. It is arguable that, if the Judge was going to reject the asserted position in the IAFT-6 as to the date the decision notice had been received and when there was no application within for an extension of time, the appellants ought to have been notified that the Tribunal intended to treat the notices of appeal as having been received out of time and allowed them to adduce evidence to support the asserted position that they were in time. This, after all, would be consistent with rule 20(2) & (3) of the 2014 Rules which state that:

> (2) If, upon receipt of a notice of appeal, the notice appears to the Tribunal to have been provided outside the time limit but does not include an application for an extension of time, the Tribunal must (unless it extends time of its own initiative) notify the person in writing that it proposes to treat the notice of appeal as being out of time. (3) Where the Tribunal gives notification under paragraph (2), the person may by written notice to the Tribunal contend that— (a) the notice of appeal was given in time; or (b) time for providing the notice of appeal should

be extended, and, if so, that person may provide the Tribunal with written evidence in support of that contention.

21. It seems to me arguable that the Judge fell into error in two ways. Firstly, in materially misdirecting herself on the law in relation to the start date of the 28-day period for sending a notice of appeal to the Tribunal and on the concept of "receiving" the notice of the decision for the purposes of rule 19(3B)(b) of the 2014 Rules (as distinct from the concept of being "sent" it for the purposes of rule 19(3B)(a) when an appellant is within the UK). Secondly, the Judge's failure to notify the appellants that she proposed to treat the notices of appeal as being out of time (when those notices did not contain an application to extend time), which is a mandatory requirement by virtue of rule 20(2) of the 2014 Rules, arguably resulted in procedural unfairness to the appellants.
22. Permission to appeal to the Upper Tribunal is therefore granted.

8. In a Rule 24 response dated 26 August 2022 the ECO's representative writes:

2. The respondent does not oppose the appellant's application for permission to appeal and invites the Tribunal to set aside the 'Decision on a Preliminary Issue-Timeliness' of FTTJ Grey to permit re-hearing in the FTT. The SSHD asks this R24 be treated as a combined response for the linked appeals of EA/03849/2021, EA/03975/2021 & EA/03996/2021.
3. The SSHD notes the Grant of Permission of FTTJ Curtis [6-14] and accepts there does appear to be a 'lacuna' (either by omission or design) to the extent that a Citizens Rights Appeal decision to refuse to extend time is not an 'Excluded Decision Order' and thus has a right of appeal under s.11 Tribunal, Courts Enforcement Act 2007.
4. The SSHD also concedes, as per the Grant of Permission [20], that in failing to notify the Appellants under Procedure Rules [2014] 20(2) & 20(3) that the FTTJ materially erred via 'procedural unfairness'.
5. The SSHD observes that regrettably the Appellants appeals were not linked to those of their parents (Appeal Ref: EA/06519/2021 & EA/06522/2021) heard on the papers by FTTJ Ficklin despite this apparently having been the intention and FTTJ Ficklin being aware of these minor Appellants purported appeals (see Para 3 of FTTJ Ficklin's decision of 28.3.2022- attached).
6. The Appellants'' parents' appeals being dismissed on the basis of the shared EEA Sponsor's exercising of treaty rights not being satisfactorily established (see Para 22/23 of FTTJ Ficklin's decision). It follows, as per Ocampo v Secretary of State for the Home Department [2006] EWCA Civ 1276 and Secretary of State for the Home Department v Patel [2022] EWCA Civ 36), that Devaseelan will apply to these Appellants appeals due to the shared factual matrix.
7. These Appellants were minor children claiming dependency via their own parents on an EEA national step-grandfather who it was claimed was exercising treaty rights and supporting their family.
8. As was considered in the refusal to extend time decision [7] the appeals of the parents were heard on the papers (2.3.2022) and dismissed (28.3.2022) and PTA to FTT refused (8.6.2022). Home Office records confirm there was no renewal PTA application to the UT and the parents, therefore, became ARE on 7.7.2022.
9. In reality these Appellants have been afforded a 'second bite of the cherry' to adduce further evidence that arguably could and should have been provided at the time of their parents appeals.
10. In light of the above concessions the SSHD invites the Tribunal to consider setting aside the disputed decision of FTTJ Grey under Procedure Rule 43(2)(d). If so permitted by R43(4)(b) and/or R43(5)?

Discussion and analysis

9. In accordance with the grant of permission to appeal and the ECO's Rule 24 response, I accept that the appellants have a right of appeal against the decision on timeliness taken by Judge Gray and set that decision aside for the reasons stated.
10. The appeal, procedurally, therefore reverts back to the consideration of the application for permission to appeal the decision of the ECO who refused the applications on the basis there was no evidence to suggest that the sponsor, Mr Sundhoe, was the appellants' mother's father or stepfather.
11. Sitting as a judge of the First-tier Tribunal I extend time in which the challenge to the decisions of the ECO may be filed and grant permission to appeal.
12. There was, arguably, with the applications made by the appellants sufficient evidence to establish the relationship as grandchildren with Mr Sundhoe. In addition, in the appeal of the appellant's mother and stepfather, considered by First-tier Tribunal Judge Ficklin and specifically referred to in the Rule 24 response above, it was specifically found at [21] that the relationship between Faisal Rana and Ishrat Rana is as claimed, namely that the mother of the children is the daughter of Mr Sundhoe.
13. As the only basis on which the applications were refused was on the basis that they had not proved they were the grandchildren under the age of 21 of Mr Sundhoe, which has now been established in a judicial finding that has not been challenged in the other appeal, it is appropriate to proceed, having granting permission, to make a decision to allow all the appeals.

Notice of Decision

14. I therefore make the following orders:

    a. I set aside the decision of First-tier Tribunal Judge Gray.
    b. I grant permission to appeal to all the appellants.
    c. I allow the appeals of all the appellants under the EUSS in light of the unchallenged decision of First-tier Tribunal Judge Ficklin in a related appeal that the appellants' mother is related to Mr Sundhoe as claimed and that the appellants are therefore the grandchildren under 21 of their EEA national sponsor.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 April 2023