In the Upper Tribunal
(Immigration and Asylum Chamber)
Judicial Review

JR-2021-LON-000127

In the Matter of an Application for Judicial Review

THE KING

on the application of

K M (ALBANIA)

Applicant

And

FIRST-TIER TRIBUNAL

(IMMIGRATION AND ASYLUM CHAMBER)

Respondent

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Interested Party

ORDER

HAVING CONSIDERED all documents lodged and UPON HEARING Manjit Gill KC and Priya Solanki for the Applicant and William Irwin for the Interested Party

AND UPON the Respondent not appearing or being represented AND for the reasons given in the attached judgment

IT IS ORDERED that:

(1) The Applicant's claim for judicial review is refused.

(2) The Applicant will pay the Interested Party's costs of these proceedings, to be assessed if not agreed.

(3) The applicant has the benefit of cost protection under section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (the LASPO Act). Accordingly:

(i) No steps shall be taken to recover costs against her until there has been a determination of the amount (if any) which it is reasonable for her to pay, pursuant to section 26 of the LASPO Act, following an application by the respondent pursuant to regulation 16 of the Civil Legal Aid (Costs) Regulations 2013; and

(ii) There shall be detailed assessment of the applicant's publicly funded costs.

(4) Permission to appeal to the Court of Appeal is refused.

Signed: Judith A J C Gleeson Dated: **20 December 2022**
Upper Tribunal Judge Gleeson

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 21/12/2022

Solicitors:
Ref No.
Home Office Ref: ~

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Case No: JR-2021-LON-000127

Field House,
Breams Buildings London,
EC4A 1WR

13 December 2022

Before:

UPPER TRIBUNAL JUDGE GLEESON

- -

Between:

THE KING
on the application of

K M (ALBANIA)
[ANONYMITY ORDER MADE]

Applicant

- and –

THE FIRST-TIER TRIBUNAL (IAC)

Respondent

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Interested Party

- -

Mr Manjit Gill KC and Ms Priya Solanki
(instructed by Oliver and Hasani Solicitors), for the applicant

Mr William Irwin
(instructed by the Government Legal Department) for the Interested Party

Hearing date: 31 October 2022

- -

APPROVED JUDGMENT

- -

Judge Gleeson:

1. The applicant seeks judicial review of the First-tier Tribunal's decision on 13 October 2021 to grant an application by the Interested Party for permission to appeal out of time against the decision of the First-tier Tribunal on 27 June 2021 that the applicant was not excluded by Article 1F(b) of the Refugee Convention from seeking international protection in the UK. The applicant is a citizen of Albania.

2. The First-tier Tribunal has indicated that it will take no part in these proceedings and was not represented at the hearing.

3. **Anonymity order.** Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the applicant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the applicant, likely to lead members of the public to identify her or her children. Failure to comply with this order could amount to a contempt of court.

Background

4. The applicant is accepted to have suffered abuse and exploitation in a forced marriage in Albania, amounting to trafficking. She attempted suicide by overdose, asked her family to help, and asked her trafficker husband to let her go, to no avail.

5. She then plotted with her former boyfriend to plant explosives in her husband's car and home to enable her to flee. She was convicted of attempted murder, sentenced to 12 years' imprisonment, reduced on appeal to 4 years, and served 2 years and 8 months of that term.

6. The applicant self-confined on her release, but her husband found her. He beat her and threatened her and her unborn child.

7. In November 2015, the applicant fled Albania and sought protection and asylum in the UK. She is now a single mother with two minor children, the elder being almost 7 years old, and the younger, 4 ½ years old.

8. The applicant has post-natal depression, post-traumatic stress disorder, anxiety and depression. She takes medication and is receiving cognitive behavioural therapy (CBT) and eye movement desensitisation and reprocessing (EMDR) to assist with her various mental health difficulties. She receives support for her problems both within the community and from social services.

9. The Interested Party made a positive Reasonable Grounds decision on 30 June 2016 and a positive Conclusive Grounds decision on 26 February 2018 but at the date of the First-tier Tribunal hearing had not yet granted the applicant discretionary leave as a victim of trafficking or made a decision on her international protection claim.

10. Following a judicial review about the failure to grant her discretionary leave as a victim of trafficking, on 30 March 2022, the Interested Party agreed to grant leave consistent with her policy and with her obligations under the

Council of Europe Convention on Action against Trafficking in Human Beings [2012] (ECAT).

11. However, on 30 March 2022, what the Interested Party granted the applicant was 9 months' Restricted Leave. That decision is under challenge in separate judicial review proceedings on the basis that it is contrary to ECAT and is irrational and unlawful.

12. On 17 July 2020, the Interested Party refused the international protection claim. The applicant appealed to the First-tier Tribunal which considered the exclusion issue, rejecting it decisively, and allowed the appeal.

13. On 1 July 2021, the Interested Party sent an email to the First-tier Tribunal, purporting to appeal the decision. That was not acted upon by the First-tier Tribunal, as this was a Reform appeal on which the practice is that grounds of appeal are submitted electronically via MyHMCTS.

14. In August 2021, having received no indication that the Interested Party intended to appeal, the applicant's representatives chased the Interested Party for confirmation of the grant of refugee status. They wrote to GLD, and to the Home Office appeals team, the Presenting Officers' unit, the asylum administration team, and the determinations team.

15. On 28 September 2021, the Interested Party responded, saying that one of those emails had been forwarded to a colleague and that the writer had 'asked him to complete their part of the process as soon as possible'.

Permission to appeal application

16. The next day, 29 September 2021, the Interested Party submitted an out of time application for permission to appeal via MyHMCTS. It was over 2½ months out of time. The reasons given for the delay were brief:

> "It is respectfully submitted that an attempt to appeal the First-tier Tribunal decision was made in time on the 1/7/2021 but unfortunately the grounds of appeal were erroneously sent to the IAFT4 email address (please see attached screenshots of the sent email and notice of receipt). The reason for this mistake was due to the drafter of the grounds being unaware that this was [a] Reform case.
>
> Given that the original email containing the grounds of appeal was sent in time to the Tribunal and given that service was not refused, the Tribunal is respectfully invited to admit the [Interested Party's] grounds. "

17. As to substance, the Interested Party accepted that the applicant was a victim of trafficking who would be at Article 3 ECHR risk on return. However, she considered that before coming to the UK the applicant had committed a serious non-political crime (attempted murder) engaging Article 1F(b) and was excluded from international protection for that reason.

18. The Interested Party argued that there was no reason for the First-tier Judge to have gone behind the Albanian conviction. Neither national law

nor length of sentence was determinative in exclusion cases: indeed, no conviction was required and guilt need not be proved to the criminal standard: see *AH (Article 1F(b): 'serious') Algeria* [2013] UKUT 00038 (IAC) and *AH v Secretary of State for the Home Department* [2012] EWCA Civ 395 at [54].

19. The Judge had failed to consider the applicant's crime in the context of one of the two purposes of Article 1F(b). It was not necessary to consider that she was evading justice: this applicant had served her prison term, but there was a second reason identified, which excluded from protection individuals who had demonstrated by their conduct that they were not worthy of refugee protection.

20. The final ground related to the previous abuse of this applicant and does the Interested Party no credit. She had accepted that the applicant was a victim of trafficking and that the abuse had occurred: it is not a properly arguable ground of appeal to say that she could or should have fled at an earlier date 'so as to avoid her abuse'.

Applicant's objections letter

21. On 7 October 2021, the applicant's solicitors, Oliver and Hasani, submitted objections to the Interested Party's out of time application for permission to appeal. They relied on *Onowu, R (on the application of) v First-tier Tribunal (Immigration and Asylum Chamber) (extension of time for appealing: principles) (IJR)* [2016] UKUT 185 (IAC) (31 March 2016), in which the Upper Tribunal drew together the jurisprudence as to the principles for extension of time.

22. The Interested Party's delay of 2½ months on a 14-day timeline was serious and significant; the reason given, that a particular case worker did not recognise this to be a Reform case, was not one which the Interested Party could be permitted to advance, given that she should know the Rules 'far better than anyone else'.

23. In *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1663 at [42], the Court of Appeal had held that there was no merit in constructing a special rule for public authorities: the respondent had a responsibility to adhere to the Procedure Rules which were applicable to both parties equally.

24. The applicant also relied on a history of significant delay in dealing with the asylum claim and the trafficking claim; and of failure to comply with directions in the present appeal, including repeatedly failing to serve her bundle. All of that had resulted in a state of limbo lasting from 2015 to the present day.

25. The Interested Party had communicated the allowing of the appeal to the applicant on 3 August 2021, showing that she was well aware that the time for appealing had begun to run, but without mentioning the possibility that she was considering appealing out of time.

First-tier Tribunal decision to extend time

26. On 13 October 2021, the First-tier Tribunal granted an extension of time to appeal, having regard to the explanation that the 1 July 2021 application had been erroneously made by email due to the case worker being unaware that this was a Reform appeal.

27. The basis of the grant of permission followed the grounds of appeal closely:

> "(1) The application is late, however it is accepted that an attempt to lodge grounds of appeal was made in time on 1/7/2021. The application was erroneously sent to the Tribunal's email address, due to the drafter of the grounds being unaware that this was [a] Reform case. Given these circumstances, time has been extended.
>
> (2) The [Interested Party] considered the [applicant] should be excluded from the Refugee Convention as she had committed a serious non-political crime, pursuant to Article 1F, on account of her conviction for attempted murder in Albania. The grounds rely on *AH (Article 1F(b) – 'serious') Algeria* [2013] UKUT 00038 (IAC) in that the exclusion clause was intended to have two purposes; one of which was to exclude from protection those who have demonstrated by their conduct [that] they are not worthy of it. It is arguable that the Judge did not address this particular consideration within the context of the accepted crime.
>
> (3) Permission is granted on all the grounds."

28. That is the decision under challenge.

Grounds for review

29. In his skeleton argument for the Upper Tribunal hearing, Mr Gill KC helpfully summarised the applicant's grounds for judicial review as follows:

(1) The First-tier Tribunal had failed to apply the correct legal tests for granting an extension of time to appeal: see *Hysaj* with reference to the *Denton/Mitchell* line of cases, all summarised in *Onowu.*

(2) The First-tier Judge fell into error because the Interested Party, unfairly and in breach of her duty of candour and of fair presentation, put before the First-tier Tribunal incomplete information as to her delay, and failed to explain all relevant facts, to refer to the relevant legal tests, or to relate the facts relevant to the delay to those tests. The relevant facts concerned events occurring between 27 June 2021 and 29 September 2021 which further compounded the Interested Party's delay, making it inexcusable;

(3) The First-tier Judge failed to have regard to the representations made by the applicant's solicitors on 7 October 2021, objecting to the grant of an extension of time, and drawing attention to the events between 27 June 2021 and 29 September 2021, and the relevant legal tests; and in consequence

(4) The decision by the First-tier Judge that time should be extended was unfair and unreasonable.

30. In addition, responding to the Interested Party's detailed grounds of defence, Mr Gill KC argued that it was not open to the Interested Party to introduce in her detailed grounds an argument that despite not being

submitted through MyHMCTS, the 1 July 2021 application for permission to appeal was nevertheless in time.

31. The decision of the First-tier Tribunal was inadequately reasoned and should be quashed.

First-tier Tribunal procedure rules

32. The First-tier Tribunal rules on time are at paragraph 12 of the First-tier Tribunal (Immigration and Asylum Chamber) Rules 2014 (as amended):

> "**Sending, delivery and language of documents**
>
> 12 - (1) Any document to be provided to the Tribunal or any person under these Rules, a Practice Statement or a direction must be—
>
> (a) delivered, or sent by post, to an address;
>
> (b) sent via a document exchange to a document exchange number or address;
>
> (c) [...]
>
> (d) sent by e-mail to an e-mail address;
>
> (e) sent or delivered by any other method,
>
> identified for that purpose by the Tribunal or person to whom the document is directed."

33. Those Rules are supplemented by a Presidential Practice Statement issued in March 2020, following the introduction of the MyHMCTS portal:

> "(1) All appeals to the First-tier Tribunal must be started using the reform online procedure* (accessed through MyHMCTS**) unless it is not reasonably practicable to do so.
>
> (2) If an appellant seeks to argue that it is not reasonably practicable to start an appeal by using MyHMCTS, the appellant must at the same time, save where paragraph (3) applies, state why it is not reasonably practicable to do so. If the Tribunal agrees, the appellant may proceed without using MyHMCTS. Where paragraph 3(e) applies the appellant must provide to the Tribunal together with the Notice of Appeal, the reference number or numbers of any linked appeals.
>
> (3) Where an appeal is brought in any of the following circumstances, it shall be deemed not to be reasonably practicable to commence that appeal by using MyHMCTS:
>
> (a) under The Immigration (Citizens' Rights Appeals)(EU Exit Regulations 2020);
>
> (b) if the appellant is outside the United Kingdom;
>
> (c) if the appellant is in detention;
>
> (d) any appeal brought by a person without representation by a qualified person within the meaning of s.84 of the Immigration and Asylum Act 1999; or
>
> (e) if the appellant's appeal is linked to another appeal. (This applies where the appeal of one or more appellants is brought at the same time in circumstances in which those appeals raise common

issues);

(4) The Tribunal will consider the reasons provided in support of appeals started in accordance with paragraph [2] above and will give such directions as it thinks fit in accordance with the Rules."

34. There was a footnote to paragraph (1) of the Practice Statement:

> "*Note: Increased functionality of MyHMCTS has been brought forward to facilitate an increased number of appeals being brought by that method to enable remote engagement. However, some aspects of the system have not yet been completed, which explains why not all appeal types can be brought in this way. *Further there will be occasions when parties may still need to communicate with the Tribunal from time to time by email or other online means as directed*." [*Emphasis added*]

35. The model directions to represented appellants establish how the online procedure will work. At 4.6 they say this:

> "4.6 The Tribunal may not accept any material after the Decision and Reasons has been promulgated. *This direction does not apply to any application for permission to appeal to the Upper Tribunal*." [*Emphasis added*]

36. There is no other reference in the Practice Statement to applications for onward appeal to the Upper Tribunal, although in practice, they are lodged on MyHMCTS where the appeal has been managed in the Reform process.

Upper Tribunal hearing

37. I had the benefit of a substantial bundle of documents, pleadings and submissions, which are summarised in the recitals above. I have read and had regard to all the material before me, and in particular, the materials to which the parties drew my attention at the hearing.

38. I now summarise the oral submissions, so far as relevant to the issues in this application.

Applicant's submissions

39. At the hearing, Mr Gill KC argued that the First-tier Judge had failed adequately to address the threefold test for extension of time in *Onowu*. The case needed to be viewed against the significant previous delay by the Interested Party, which was the subject of various judicial review proceedings. The Interested Party had not given sufficient explanation of the circumstances in which the error was made and had given the applicant to understand that her refugee protection leave was still under consideration, just one day before the application for an extension of time to lodge grounds of appeal to the Upper Tribunal was made. On any view, that demonstrated a lack of candour.

40. Mr Gill KC submitted that it was not open to the Interested Party to rely on the 1 July 2021 application made by email. She had acknowledged in the 29 September 2021 application that it was out of time and could not now be heard to say that it was not. If it was the Interested Party's case that the Practice Statement was inconsistent with the First-tier Tribunal Procedure Rules, it would be necessary to seek to quash the Practice Statement.

41. It was not possible to sever the grant of permission from the extension of time: the effect of the Interested Party's argument about the validity of the 1 July 2022 application was that the grant of permission on the 29 September 2022 grant was entirely unsound and should be quashed. Mr Gill KC reminded the Tribunal of the decision of Mr Justice Fordham in *The Joint Council for the Welfare of Immigrants v The President of the Upper Tribunal (Immigration And Asylum Chamber)* [2020] EWHC 3103 (Admin) (20 November 2020) (the *JCWI* decision).

42. There was no material inconsistency between the First-tier Tribunal President's Practice Statement and the First-tier Tribunal Rules. Even if rule 12 of the First-tier Tribunal Rules was permissive rather than prescriptive, that was because there were different types of appeals. The failure to change the online forms did not, in context, assist the Interested Party: see *Mahad (previously referred to as AM) (Ethiopia) v Entry Clearance Officer* [2009] UKSC 16 (16 December 2009).

43. There were other judicial reviews arising out of the history of this application for international protection (indeed, orders and applications thereon were included in the bundles provided for the hearing) but the Upper Tribunal was seised only of the judicial review before it today.

44. The substantive decision of the First-tier Tribunal was excellent and any appeal from it should properly have been regarded as unarguable.

45. The decision to grant permission to appeal out of time should be quashed.

Interested Party's submissions

46. For the Interested Party, Mr Irwin relied on his skeleton argument. He accepted that it had been discourteous not to have used MyHMCTS, but asserted that this was a procedural failure and that the 1 July 2021 application for permission to appeal was substantively in time. That was a complete answer to the grounds for review. The application for an extension of time made on 29 September 2021 was otiose and not determinative of the permission application.

47. Mr Irwin accepted that under rule 2.2.4 of the First-tier Tribunal Rules, the parties, including the Interested Party, had a duty to cooperate with the Tribunal. He further accepted that the Practice Statement could not 'trump' the First-tier Tribunal Procedure Rules, which were a statutory instrument. They should be read together, and on that basis the Interested Party's 1 July 2021 application was not out of time. The options in paragraph 12(1) of the Rules were disjunctive, and any of the methods advanced could lawfully be used. A document filed otherwise than in accordance with sub-paragraph 12(1)(e) was not ineffective or a nullity.

48. Mr Irwin accepted that there was no direct authority on this point. The treatment of policy in the broadest sense was to be considered by applying the principles in *Mount Cook Land Ltd & Anor v Westminster City Council* [2003] EWCA Civ 1346 (14 October 2003). The Rules allowed for the First-tier Tribunal to specify means of service, but that would not render alternative filing ineffective as long as one of the Rule 12 methods was used.

49. The July 1 2021 grounds were identical to those in the September 29 2021 application, which should be treated as a 'belt and braces' application. The www.gov.uk website continued to state that email was an acceptable route for appealing. All of the guidance at the time indicated that multiple appeal routes were possible and email remained a permitted route.

50. As regards the Practice Statement, despite the imperative language, no sanction was specified, and read in its natural meaning the Practice Statement was aimed at appeals *to* the First-tier Tribunal, not *from* it to the Upper Tribunal, as was the case here. *Hysaj* was not relevant: no relief from sanction applied here.

51. If the threefold test should have been considered, the Tribunal should find that the Judge accelerated through tests (1) and (2) and focused on (3), but that the grant of permission was valid, both procedurally and substantively. Any Judge would have granted permission on those grounds, which were weighty.

52. As to the brevity of the grant, the Interested Party would rely on *MR (permission to appeal: Tribunal's approach)* [2015] UKUT 29 (IAC) (19 January 2015): the grant had been expressed in a concise and focused manner, as there required, but was not inadequately reasoned.

53. I reserved my judgment, which I now give. The parties' representatives have had an opportunity to see this judgment in draft in order to identify any errors or omissions, before it is handed down.

Discussion

54. Mr Gill KC has not disputed that the Interested Party emailed an application for permission to appeal on 1 July 2021, nor that (as Mr Irwin confirmed) the attached grounds of appeal were the same as those sent via MyHMCTS on 29 September 2021.

55. Mr Gill KC's argument for the applicant can succeed if and only if he can show that there was a mandatory requirement for the Interested Party to submit her grounds of appeal to the Upper Tribunal via MyHMCTS and that no other alternative method was permitted.

56. On the face of the First-tier Tribunal Procedure Rules at paragraph 12(1)(d), it was then and remains permissible to deliver a document by email[1]. The email is required to be sent to a destination 'identified for that purpose by the Tribunal or person to whom the document is directed'. It is not disputed that the 1 July 2021 email was sent to the email address still in use for non-Reform appeals to the Upper Tribunal.

57. I turn therefore to whether the March 2020 Practice Statement narrows the permissible options as Mr Gill KC contends. I am not satisfied, applying the natural language of the Practice Statement, that it does have that effect. The mandatory language in the Practice Statement at (1) refers expressly to appeals to the First-tier Tribunal being *started* on MyHMCTS, and makes

[1] The Procedure Rules have since been amended by the insertion of sub-paragraph 12(1)(da), which identifies an additional method of service, whereby the document is to be 'uploaded to the Tribunal's secure portal in a compatible file format'.

no reference to onward appeals to the Upper Tribunal. Further, that paragraph has a footnote saying that 'there will be occasions when parties may still need to communicate with the Tribunal from time to time by email or other online means as directed'.

58. I note that no sanction is provided for failure to begin proceedings on MyHMCTS. The Practice Statement does not say that an application sent by one of the other methods in paragraph 12(1) of the Procedure Rules would be invalid.

59. I note, further, the exception at 4.6 of the Practice Statement:

> "5.4 The [First-tier Tribunal] may not accept any material after the decision and Reasons has been promulgated. This direction does not apply to any application for permission to appeal to the Upper Tribunal."

60. Properly understood, that provision provides an exception which allows the First- tier Tribunal to accept grounds of appeal and accompanying documents relating to an application for permission to appeal to the Upper Tribunal. Presumably, though the Practice Statement does not say so, that exception relates principally to the MyHMCTS portal being used for such applications.

61. In conclusion, I am not satisfied that it was mandatory for the Interested Party to begin an appeal on MyHMCTS, though as Mr Irwin accepted, it was discourteous of her not to do so. It is unfortunate that the First-tier Tribunal failed to deal with the 1 July 2021 emailed application, which I find to have been in time. My primary conclusion is that no extension of time was required and that therefore, that part of the decision to grant permission to appeal to the Upper Tribunal after the 29 September 2021 application was made, is a nullity.

62. I must consider whether, as Mr Gill KC argues, the whole of the grant of permission should be struck down. I am not satisfied that there is any justification for so doing. Paragraphs (2) and (3) of the grant of permission were based on the consideration of those grounds and the asserted errors as to the format of the application for permission to appeal are immaterial to the First-tier Judge's consideration of those grounds.

63. The Judge granted permission on all grounds, for the following reasons:

> "(2) The [Interested Party] considered the [applicant] should be excluded from the Refugee Convention as she had committed a serious non-political crime, pursuant to Article 1F, on account of her conviction for attempted murder in Albania. The grounds rely on *AH (Article 1F(b) – 'serious') Algeria* [2013] UKUT 00038 [(IAC)] in that the exclusion clause was intended to have two purposes; one of which was to exclude from protection those who have demonstrated by their conduct [that] they are not worthy of it. It is arguable that the Judge did not address this particular consideration within the context of the accepted crime."

64. If I am wrong and the 1 July 2021 application was not valid, then I find that any public law error which the First-tier Judge made was not material. Both sets of grounds were identical. It is right that the decision on extension of time is brief and does not engage in detail with the threefold test

summarised by the Upper Tribunal in *Onowu.* The Judge could be expected to have considered the following three limbs of the test:

> **"**(1) the seriousness and significance of the Interested Party's failure to comply with the Rules;
>
> (2) why it occurred and whether there was a good reason for that failure; and
>
> (3) all the circumstances of the case, in particular the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with rules, practice directions and court orders. **"**

65. However, his failure to give reasons on (1) and (2) is not material to the outcome of his consideration of the application for permission to appeal. That the delay (if it was a delay) was serious is unarguable. The confused correspondence over the summer of 2021 gave it more significance than perhaps it merited. The Judge clearly thought the reason given was a good one. Again, the circumstances of the case were such that in the interests of efficiency and proportionate cost, it was appropriate to give an extension (if one was needed).

66. I do not consider that it would be efficient or proportionate to permit this application to proceed. The Judge was entitled to conclude that it was appropriate to extend time (if that was indeed necessary), despite the brevity of his reasoning. The applicant's arguments on Article 1F(b) can, indeed must, be considered in the context of the appeal to the Upper Tribunal.

67. Judicial review is a discretionary remedy and is not appropriate here. The grounds for review do not disclose any properly arguable public law error in the First-tier Judge's decision to grant permission to appeal to the Upper Tribunal.

Order

68. **The application for judicial review of the First-tier Tribunal's decision to extend time for appealing and to grant permission to appeal is refused.**

69. The parties have not been able to agree the consequential matters arising from that decision.

16 December 2022 Note

70. On Friday 16 December 2022, a joint Note submitted by Mr Gill KC and Ms Solanki set out the applicant's submissions both on costs and by way of proposed grounds of appeal to the Court of Appeal. The contents of that Note are considered under the Costs and Appeal headings below.

Costs

71. In their joint Note, the applicant's Counsel said that the history of the matter had been unfairly summarised in the judgment above and criticised an earlier draft of [66] above. They reminded the Upper Tribunal that the third stage of the *Onowu* test requires consideration of the strength of the proposed grounds of appeal. They relied on the grant of

permission to seek judicial review and on the Interested Party's mishandling of the correspondence over the summer of 2021, which Mr Irwin did not dispute at the hearing.

72. The applicant contended that it was not open to the Interested Party to change her position over time and to assert in her detailed grounds of defence that the 1 July 2021 email was an in time application for permission to appeal to the Upper Tribunal, whereas in the 29 September 2021 MyHMCTS application, she had admitted that it was out of time and sought an extension of time. The Interested Party's position had evolved impermissibly between the summary grounds, the detailed grounds of defence, and the skeleton argument.

73. In an email dated 19 December 2022, received by the Upper Tribunal at 12:09 hours, Mr Klevis Taho of Oliver and Hasani Solicitors, who represent the applicant, provided two alternative versions of a proposed draft order and observed that they had endeavoured to agree costs but there had been no response from the Interested Party to the last correspondence from the applicant's solicitors.

74. The applicant's position remained that the Interested Party should not get her costs and that, if anything, the applicant should be awarded costs as the claim had resulted from the conduct of the Interested Party. That position was not taken in the 16 December 2021 Note by the applicant's Counsel.

75. The Interested Party also provided a draft order and made brief written submissions on costs. She contended that she was entitled to her costs of defending the claim, which she has resisted substantially since the outset. The fact the Applicant was legally aided was not a reason to make no order as to costs; her means was relevant to enforcement of any costs order, but not relevant to the question of whether or not to make a costs order in principle.

76. I have considered all the submissions. The applicant is the unsuccessful party. Despite the eloquence of Counsel's Note and the email from Oliver and Hasani, I am not satisfied that any proper reason has been provided why costs should not follow the event.

77. **I therefore order that the applicant pay the respondent's reasonable costs of these proceedings, to be assessed if not agreed.**

78. The applicant is legally aided. She has the benefit of the protection afforded in section 26 of the Legal Aid and Punishment of Offenders Act 2012 (LASPO) and the Civil Legal Aid (Costs) Regulations 2013. Accordingly:

    (1) No steps shall be taken to recover costs against her until there has been a determination of the amount (if any) which it is reasonable for her to pay, pursuant to section 26 of the LASPO Act, following an application by the Interested Party pursuant to regulation 16 of the Civil Legal Aid (Costs) Regulations 2013; and

(2) There shall be detailed assessment of the applicant's publicly funded costs.

Appeal

79. The applicant seeks permission to appeal, arguing that it was not open to the Upper Tribunal to conclude that the 1 July 2021 application for permission to appeal was validly submitted and that no extension of time was required. The applicant contends that I have failed properly to apply *Onowu* and that I was not seised of the issue of the validity of that earlier application.

80. Alternatively, the applicant relies on the grant of permission and the admission by Mr Irwin that the Interested Party had handled things badly, in particular in the failures of correspondence and confusion in August and September 2021. Had the First-tier Judge been made aware of all that, the applicant contends that permission would not have been granted.

81. Further, the applicant contends that I should have given more weight to the Presidential guidance that the MyHMCTS system was to be used for beginning proceedings before the First-tier Tribunal, and should have been prepared to read into that a direction that applications to the Upper Tribunal also required to be issued on MyHMCTS if they were to be valid.

82. There is no merit in the proposed grounds of appeal. The grant of permission is not the same as a successful judicial review application. The failure properly to put the case regarding the 1 July 2021 application forms part of the overall confusion caused by the Interested Party's approach over the summer of 2021, but the question whether an appeal is or is not submitted validly and in time is one of fact.

83. If the 1 July 2021 application was not out of time, which is what I have found, then the 29 September 2021 application was otiose and the extension of time unnecessary. It would be artificial to refuse to consider the 1 July 2021 application, which was identical as to the grounds of appeal.

84. These grounds of appeal are in reality no more than a vigorously expressed disagreement with the outcome of the judicial review.

85. **Permission to appeal is refused.**