



**First-Tier Tribunal  
(Immigration and Asylum Chamber)**

**Appeal  
Number**

**IA/26054/2013**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 11 November 2014**

**Decision  
promulgated  
On 12 November 2014**

**Before**

**Judge of the First-tier Tribunal I. A. Lewis**

**Between**

**Tamara Badalyan**  
(Anonymity order not made)

**Appellant**

**and**

**Secretary of State for the Home Department**  
**Respondent**

**Representation**

For the Appellant: Mr. P. Ward of James & Co.  
For the Respondent: Mr. N. Bramble, Home Office Presenting  
Officer.

**DECISION TO REFUSE TO EXTEND TIME TO APPEAL**

1. This case was initially listed before me as an Upper Tribunal hearing to consider the Appellant's appeal against the decision of First-tier Tribunal Judge Colvin promulgated on 2 January 2014, dismissing the Appellant's appeal against a decision of the Respondent dated 17 July 2013 to refuse to vary leave to remain and to remove the Appellant from the UK. In the event - for the reasons set out below and pursuant to the guidance in **Samir (FtT Permission to appeal: time) [2013] UKUT 3 (IAC)** - I have disposed of this matter in my capacity as a First-tier Tribunal Judge.

## **Background**

2. The Appellant is a national of Armenia born on 13 October 1944. On 28 February 2012 she entered the UK pursuant to a multiple entry visit visa valid from 9 February 2012 until 9 August 2012. On 6 August 2012 the Appellant applied for indefinite leave to remain as the dependent parent of Ms Ruzanna Badalyan. The application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 9 July 2013, and a Notice of Immigration Decision communicating a refusal of variation of leave to remain and a removal decision dated 17 July 2013 was served on 19 July 2013. The RFRL is a matter of record on file and it is unnecessary to reproduce its contents here: the Respondent's decision was taken with reference in particular to paragraphs 317(iii) and (v), paragraph 276ADE(iii) and (vi) of the Immigration Rules; reference was also made to Appendix FM.

3. The Appellant lodged a Notice of Appeal on 29 July 2013 requesting an oral hearing. The Grounds of Appeal were limited to the single sentence: "*The decision is incompatible with the Article 8 ECHR Private and Family Life Rights of myself, my daughter, my grandson and my son as it represents a disproportionate interference with the same.*" Mr Ward confirmed to me today that this was, to date, the only formal response to the Respondent's decision.

4. The appeal was duly listed for hearing, and came before First-tier Tribunal Judge Colvin on 16 December 2013. There was no appearance by or on behalf of the Appellant. The First-tier Tribunal Judge had regard to the information on file, which appeared to indicate due service of the Notice of Hearing on both the Appellant and her legal representative: see, for example, paragraph 3 of Judge Colvin's determination. An attempt to contact the Appellant's representative was unsuccessful. In the circumstances the Judge proceeded to determine the appeal in accordance with the evidence in the papers on file. These papers essentially consisted of the Respondent's bundle, the Appellant not having filed any evidence further to the Notice of Appeal. For reasons set out in her

determination the First-tier Tribunal Judge dismissed the Appellant's appeal.

5. The determination was promulgated on 2 January 2014.

6. It was not until 7 August 2014 that the Appellant applied for permission to appeal. (See further below in respect of the intervening period.) The application for permission to appeal was considered, and granted, by First-tier Tribunal Judge Chambers on 18 September 2014. However, although Judge Chambers identified that the application for permission to appeal was made 'out of time', he did not expressly state that time to appeal was extended, or otherwise offer any reason for extending time, or otherwise give any indication as to engagement with the issue of 'time'.

7. Mr Bramble indicated that the Respondent took issue with the timeousness of the application for permission to appeal.

### **Consideration**

8. The application for permission to appeal was made just shy of 7 months out of time. The application for permission to appeal offers reasons why the application was made late, and further particulars are set out in the accompanying witness statement signed by Mr Ward on 1 July 2014. Essentially it is said that because the Appellant and her representative had not received the Notice of Hearing they were unaware of the proceedings on 16 December 2013; it was assumed that this was essentially a product of an administrative error on the part of the Tribunal and accordingly in the first instance a request had been made to set aside the decision rather than challenge it by appealing.

9. Further to the above I note the following:

(i) It is acknowledged that the Appellant's representative received the determination on 5 January 2014. The deadline for appealing would therefore have been 13 January 2014.

(ii) It is said that Mr Ward initially contacted the Tribunal on 8 January 2014 asserting a failure of service of the Notice of Hearing, and requesting a fresh hearing.

(iii) In the absence of any response to the communication of 8 January 2014, Mr Ward sent an email to the Tribunal on 12 February 2014 again requesting a fresh hearing.

(iv) Mr Ward then states in his witness statement: *"I received a response by return advising that the appeal had been unsuccessful and that "the reasons for the judge's decision*

*was set out in the form of a written determination sent to all applicable parties on 02/01/2013”.*

(v) Although Mr Ward states that there was no information in this communication about whether it was possible to correct the error and obtain a fresh hearing, he does not assert that he took any further steps to clarify this matter, or otherwise to seek to have the determination of Judge Colvin set aside. This is notwithstanding the plainly conclusive tone of the communication received from the Tribunal; the email response as reported by Mr Ward does not hint of a willingness to take any further steps or actions but suggests that the determination stands for what it is.

(vi) It appears that no further steps were taken by or on behalf of the Appellant in the matter until the witness statements of the Appellant and her daughter were signed on 24 April 2014.

(vii) There appears then to have been no further action until Mr Paul’s own witness statement was signed on 1 July 2014.

(viii) There is yet further delay before the application for permission to appeal was sent to the Tribunal by fax on 7 August 2014.

10. In my judgement Mr Ward was wholly unable to offer any adequate explanation for the absence of any more prompt action consequent to the reply by return to his email of 12 February 2014 – either by way of making further representations or seeking clarification in respect of setting aside the determination, or by way of an application for permission to appeal. Mr Ward accepted that there was such delay, and the best that he could manage by way of explanation was that he was unsure what to do. That is not an adequate explanation for the considerable periods of inaction. Moreover, it in no way explains the delay between 1 July 2014 (by which date, according to paragraph 5 of Mr Ward’s witness statement it is clear that it had been decided that an application for permission to appeal would be pursued) and 7 August 2014 (when the application was eventually made).

11. I am grateful to the representatives for drawing my attention to the cases of **AK and others (Tribunal Appeal- out of time) Bulgaria \* [2004] UKIAT 00201** and **Boktor and Wanis (late application for permission) Egypt [2011] UKUT 00422 (IAC)**. I have also had regard to **BO and Others (Extension of time for appealing) Nigeria [2006] UKAIT 00035**, which is cited in **Boktor**. I have had due regard to all three cases: in particular I have noted paragraphs 20-23 and 24-28 of **AK**, the headnote and paragraphs 16-19 of **Boktor**, and the headnote and paragraphs 9-

22 of **BO**. **BO** relates to applications for extension of time for lodging a Notice of Appeal against an immigration decision, and not specifically to an application for permission to appeal against a First-tier determination: nonetheless in general terms it provides relevant instructive guidance as to the applicable principles when considering 'time'.

12. I have also had regard to paragraphs 24-27 of the Asylum and Immigration Tribunal (Procedure) Rules 2005, which relate to appeals to the Upper Tribunal, and in particular rule 24. These were the Procedure Rules in force at the date Judge Chambers considered the application for permission to appeal, and are the Rules that formed the framework of the consideration of the issues in the cases cited above. In this latter regard, in particular, the Tribunal in **Boktor** considered the relevance of rule 24(4) as reinforcing the reasoning in **AK**.

13. New procedure rules are now in force with effect from 20 October 2014: the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Rules 33 and 34 relate to applications for permission to appeal to the Upper Tribunal; rule 33(5)(e) provides that an application for permission to appeal should include any application for an extension of time and the reasons why such an extension should be given. The Rules are otherwise silent as to the 'test' to be applied, and do not carry a similar provision to that of rule 24(4)(a). However, the overriding objective and parties obligations to cooperate with the Tribunal set out under rule 2, and the Tribunal's powers in circumstances where there has been a failure to comply with the rules, both preserve the concept of acting 'justly', which informed the test under the old rule 24(4)(a). I see nothing in the reformulation of the Procedure Rules, which would warrant a departure from the established jurisprudence of the Tribunal in considering applications for extension of time.

14. Even if it were otherwise, bearing in mind the transitional provisions set out at rule 46 of the 2014 Rules, which permit the Tribunal to apply provisions of the 2005 Rules - and specifically make reference at 46(2) to a time period that started to run before the date on which the new Rules came into force (albeit in the context of one where the time period is still running), and bearing in mind that the contingent grant of permission to appeal that is before me was itself made pursuant to the 2005 Rules, I would be minded to apply the approach and jurisprudence founded on the 2005 Rules and to disapply the 2014 Rules. However, for the reasons already given, in my judgement the principles involved are the same irrespective of the specific 'rule regime' to be applied.

15. My starting point is that where Judge Chambers did not address the issue of extending time, the grant of permission must

be seen as in effect conditional on time being extended (**AK** at paragraph 23). The matter having been raised by Mr Bramble, plainly there has been no waiver of the irregularity in granting permission without also extending time. It is, then, for the Appellant now to pursue the application for extension of time further to the matters set out in the application for permission to appeal.

16. I have addressed above the circumstances in which it is said the application came to be made out-of-time. There is very substantial, delay with no adequate explanation.

17. A passage from paragraph 14 of **BO** is very slightly mis-paraphrased in the first sentence of paragraph 17 of **Boktor**. The passage is, in fact in the following terms:

*“So the first question is, what is the explanation for the lateness? If there is no explanation at all, or no satisfactory explanation, or an explanation which is not supported by evidence that ought to have been readily available, we regard it as very unlikely indeed that it will be right to say that time should be extended.”*

18. However, as is made clear in **BO**, such a circumstance is not inevitably determinative. Indeed, consideration will need to be given to all relevant matters which, as identified at the end of paragraph 17 in **Boktor** “*may include the strength of the grounds of appeal... the consequences of the decision, the length of delay, prejudice to the respondent and mistakes, delays and breaches of Rules by the respondent*”.

19. In this context Mr Ward places reliance on three matters: the grounds of appeal assert that the Appellant lost the opportunity of presenting her case through no fault of her own but by reason of an apparent administrative failure in properly serving Notices of Hearing, and to that extent the grounds have merit; the Respondent’s initial decision was not in accordance with the Immigration Rules because the wrong rules were considered; there was delay on the part of the Respondent between 6 August 2012 (when the application was made) and 9 July 2013 (when it was determined).

20. There is nothing to indicate that the delay in determining the Appellant’s application was excessive by the normal standards of the Respondent. I do not consider that this adds anything of substance to the issue before me.

21. As regards the Respondent’s consideration of the wrong Rules, I note the following.

(i) In the first instance this was not a matter raised in the Notice of Appeal to the First-tier Tribunal which was restricted to Article 8 grounds.

(ii) In any event, whilst it might be the case that the application should not have been considered with reference to paragraph 317, it is nonetheless the case that the Respondent did also give consideration to Appendix FM, and particularly so – albeit briefly and somewhat perfunctorily – to the Appellant’s relationship with her adult children: *“It is noted that some of your adult children are resident in the United Kingdom. You have stated that some are settled in the United Kingdom, whilst others are here on a temporary basis. Your relationship with adult children is not sufficient to meet the criteria of Appendix FM of the Immigration Rules. Nor is it considered that this is a sufficiently compelling factor to justify a grant of leave on exceptional grounds.”*

(iii) In general terms, it is to be observed that the regime for an adult dependent parent under Appendix FM is somewhat stricter than under paragraph 317, and accordingly it is difficult to see that any technical error in this regard is one that could have materially assisted the Appellant or otherwise strengthens the overall merits of her case.

22. Again, in my judgement, this aspect of the case carries no particular weight in a consideration of the issue of extending time. Indeed, in general terms, it seems to me that the Appellant is in considerable difficulty in placing any particular weight on the overall merit of her case in circumstances where even to date – and notwithstanding the Directions issued by the Upper Tribunal on 14 October 2014 to the effect that the parties should prepare for the forthcoming hearing on the basis that the Tribunal may wish to remake the decision at the hearing listed for today, such preparation to include filing *“any further evidence”* – no further evidence has been filed in response to the Respondent’s decision. The only response on record is the single line asserting Article 8 in the Notice of Appeal.

23. As regards the merits of the specific challenge to the decision of the First-tier Tribunal – in effect, that it was in breach of natural justice, because of the failure of service of Notice of Hearing – I accept that in the abstract (and without having tested the evidence contained in the witness statements as to that failure of service), there may be some merit. However, such merit should not in itself be determinative: see, for example, **AK** at paragraph 27. In any event, in my judgement, the overall merits of the Appellant’s case on appeal – i.e. the merits of succeeding substantively rather than just succeeding in overturning the decision of Judge Colvin – are not

apparent in the absence of any proper response to the Respondent's decision and in the absence of the filing of evidence.

24. In all of the circumstances I am not satisfied that there exist any special circumstances such that it would be unjust not to extend time. Accordingly I refuse the Appellant's application for an extension of time to make an application for permission to appeal to the Upper Tribunal.

25. Pursuant to paragraphs 19-20 of the decision in **Samir** (see paragraph 1 above), my consideration of whether time to appeal should be extended must be seen as part of the First-tier Tribunal process of considering the application for permission to appeal. Accordingly I make the decision herein in my capacity as a First-tier Tribunal Judge. The consequence - as intended in **Samir** - is that the Appellant is not deprived of the opportunity of putting her case for permission to appeal to the Upper Tribunal.

**Decision**

26. Permission to extend time to appeal to the Upper Tribunal is refused. There is no appeal before the Upper Tribunal.

27. The decision of the First-tier Tribunal stands.

**Judge of the First-tier Tribunal I. A. Lewis 11  
2014**

**November**