



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/34001/2013

THE IMMIGRATION ACTS

Heard at Field House
On 11 December 2014

Determination Promulgated
On 23 December 2014

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR ASAD MUHAMMAD MALIK
(No Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Mr P Nath a Senior Home Office Presenting Officer

For the Respondent: Mr A Jafar of counsel instructed by Lee Valley Solicitors

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department ("the Secretary of State"). The respondent is a citizen of Pakistan who was born on 13 March 1984 ("the claimant"). The Secretary of State has been given permission to appeal the determination of First-Tier Tribunal Judge Rastogi ("the FTTJ") who allowed the claimant's appeal against the Secretary of State's decision of 5 August 2013 to refuse to grant him further leave to remain in the UK on Article

8 private life human rights grounds. The appeal was allowed only to the limited extent that the Secretary of State's decision was found not to be in accordance with the law and should be reconsidered by her before reaching a lawful decision.

2. The Secretary of State's decision stated that the application was refused on Article 8 human rights grounds under the Immigration Rules. Furthermore, the claimant had not shown that there were exceptional circumstances which justified the grant of leave outside the Rules. The Secretary of State also said that the claimant had no right of appeal as his application is made at a time when he did not have valid leave to be in the UK.
3. The claimant appealed and the FTTJ heard the appeal on 20 June 2014. The Secretary of State's position at the hearing continued to be that the claimant had no right of appeal. The FTTJ concluded that the Secretary of State had made an immigration decision and that the claimant had a right of appeal which had been exercised in time.
4. The claimant's representative indicated that the claimant wished to raise a fresh ground of appeal; 10 years continuous lawful residence under the provisions of paragraph 276AB of the Rules. The Secretary of State's representative accepted that the claimant was entitled to do this but it was common ground that if he did the application would first need to be considered by the Secretary of State. It was for this reason that the FTTJ allowed the appeal to the limited extent that the Secretary of State's decision was not in accordance with the law and should be reconsidered by her before reaching a lawful decision.
5. The FTTJ went on to give reasons for her conclusion that the Secretary of State had made an immigration decision and that the claimant had a right of appeal which had been exercised in time. There was an issue as to whether the claimant had submitted photographs in the correct format with his application. The Secretary of State argued that he had not. The FTTJ found that the Secretary of State had failed to produce the photographs and as a result had failed to show that they did not meet the requirements.
6. The Secretary of State applied to the First-Tier Tribunal the permission to appeal. The ground submits that the FTTJ erred in law in reaching the conclusion that she had jurisdiction to hear the appeal. The judge who considered the application for permission to appeal refused to admit it on the basis that it was out of time and the Secretary of State had failed to establish that there were special circumstances which merited the extension of time under the provisions of Rule 24 (4) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (as amended).
7. The Secretary of State renewed her application to the Upper Tribunal and permission to appeal was granted by a judge in the Upper Tribunal. Nothing

was said about the timeliness issue except for; “the application for permission to appeal to the First-Tier Tribunal was not considered on its merits due to timeliness issues”.

8. I asked the representatives to address me on the preliminary issue of whether the Secretary of State’s application for permission to appeal to the Upper Tribunal was in time and if not whether there were exceptional circumstances which merited time being extended.
9. I referred the representatives to BO and Others (Extension of time for appealing) Nigeria [2006] UKAIT 00035 (12 April 2006), Boktor and Wanis (late application for permission) Egypt [2011] UKUT 442 (IAC) (22 November 2011) and Samir (FTT Permission to appeal: time) Afghanistan [2013] UKUT 3 (IAC) (04 January 2013). Both of them told me that they were aware of these cases. BO is referred to in the Secretary of State’s grounds of appeal.
10. It is common ground that the FTTJ’s determination was promulgated on 27 June 2014. The deadline for applying for permission to appeal was 7 July 2014. The application for permission to appeal was received by the Tribunal three weeks late on 28 July 2014. The only reasons given by the Secretary of State for the late submission of the application were; “The reason this application was not made in time is due to a shortage of resources within the Secretary of State’s Specialist Appeals Team, it was not possible to have the Determination reviewed within the time limit for appeal.” The grounds also state that the strength of the grounds of appeal weigh particularly heavily towards permission being granted.
11. Mr Nath relied on the grounds of appeal and the considerations set out in BO. The strong merits of the appeal were an important factor which should lead to time being extended.
12. Mr Jafar submitted that the only reason given by the Secretary of State was a shortage of resources. This was not an individual reason relating to the circumstances of this case but a generic explanation. It was not likely that a similar explanation would assist an individual rather than the Secretary of State. Three weeks was a significant delay. The Secretary of State had even now failed to provide the photographs which she said merited the refusal of the claimant’s application.
13. I indicated that I would rule against the Secretary of State for reasons to be given in writing.
14. Boktor and Wanis provides, in the headnote prepared by the author of the determination; “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." I find that as the judge who granted permission to appeal in the Upper Tribunal did not consider whether there were special circumstances making it unjust not to extend time her granted permission to appeal was conditional and I must consider this question.

15. Following Samir and as the decision on the application for permission to appeal to the First-Tier Tribunal was a decision to refuse to extend time because special circumstances had not been demonstrated and the decision on the renewed application to the Upper Tribunal did not consider whether there were special circumstances the decision I now take is a decision in the Upper Tribunal and there is no possibility to renew the application to the Upper Tribunal.
16. As is conceded I find that the application for permission to appeal was out of time by three weeks. The only explanation was; "The reason this application was not made in time is due to a shortage of resources within the Secretary of State's Specialist Appeals Team, it was not possible to have the Determination reviewed within the time limit for appeal." The Secretary of State has submitted no evidence to support the explanation. It is not suggested that the application had been lost or that a mistake had been made. The explanation appears to cover the whole of the period of delay. It gives the very strong impression of a generic explanation applying to a number of cases rather than an individual explanation limited to this case. It is difficult to see how it does not or does not come close to an acknowledgement of fault. I find that in these circumstances whilst an explanation has been provided it is not a satisfactory explanation.
17. The Secretary of State has not suggested that the issues in this appeal have any wider public importance or that she would suffer any serious denial of justice if permission to appeal was not granted.
18. Should I be mistaken in my conclusion that the Secretary of State has not provided a satisfactory explanation I consider the question of whether the strength of the grounds of appeal should be taken into account and assist her. This is a complicated case but I consider that the grounds are no more than arguable. The consequence of the decision adverse to the Secretary of State is to some degree diminished by the fact that the decision is to send the case back to her for further consideration rather than allowing the appeal outright, albeit in the light of the findings of fact made by the FTTJ.
19. I have not been asked to make an anonymity direction and in the circumstances of this case can see no good reason to do so.

20. In the light of the provisions of Rule 24 of The Asylum and Immigration Tribunal (Procedure) Rules 2005 (as amended) I find that the time for appealing should not be extended because I am not satisfied that by reason of special circumstances it would be unjust not to do so. In the circumstances I must not and do not admit the Secretary of State's application for permission to appeal to the Upper Tribunal.

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Signed
Upper Tribunal Judge Moulden

Date 13 December 2014