



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/23670/2012

THE IMMIGRATION ACTS

Heard at Newport  
On 11 March 2015

Decision & Reasons Promulgated  
On 6 May 2015

Before

UPPER TRIBUNAL JUDGE GRUBB  
(SITTING AS A FIRST-TIER TRIBUNAL JUDGE)

Between

ENTRY CLEARANCE OFFICER - AMMAN

Appellant

and

HAREM BAIZ SALEEM

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer  
For the Respondent: Mr G Hodgetts, instructed by South West Law

DECISION ON WHETHER TO ADMIT AN APPLICATION  
FOR PERMISSION TO APPEAL

## **Background**

1. Harem Saleem ("the respondent") is a citizen of Iraq who was born on 1 July 1995. In July 2012, he applied for entry clearance to join his adoptive parents, both Iraqi nationals, who had come to the UK in 2001 (in the case of his father) and in 2003 (in the case of his mother). On 18 October 2012, the ECO refused the respondent's application under para 301 of the Immigration Rules (Statement of Changes in Immigration Rules, HC 395 as amended).
2. The respondent appealed to the First-tier Tribunal and, in a determination promulgated on 28 August 2013, Judge Y J Jones dismissed the respondent's appeal. The Entry Clearance Officer ("the appellant") sought permission to appeal to the Upper Tribunal. That application was initially refused by the First-tier Tribunal on 12 December 2013 but granted by the Upper Tribunal on 7 January 2014. Thereafter, the Upper Tribunal in a determination promulgated on 4 April 2014 allowed the respondent's appeal and remitted his appeal to the First-tier Tribunal.

## **This Appeal**

3. The remitted appeal came before Judge Powell in the First-tier Tribunal on 22 July 2014. In a determination promulgated on 28 January 2014, Judge Powell allowed the respondent's appeal under the Immigration Rules.
4. The ECO sought permission to appeal to the Upper Tribunal. That application was made on 18 August 2014 and, as is now accepted, was out of time. It should have been filed by 6 August 2014 at the latest. In Section B of the application form under the rubric "Reasons why the application is made late (if applicable)" it is stated:

"The determination was incorrectly served on POU Cardiff, instead of SAT Angel Square, who are responsibility, as is widely known, for the assessment of allowed appeal determinations, The errors in the determination are such as to render it proper to grant permission to appeal."
5. In a decision dated 1 October 2014, the First-tier Tribunal (Judge Lambert) noted that application had been filed out of time and also the reason given by the ECO that the determination, sent on 28 July 2014, had been incorrectly sent to the Presenting Officers Unit ("the POU") Cardiff rather than the Specialist Appeals Team ("the SAT"), at Angel Square in London. Judge Lambert considered that the grounds established an "arguable error of law" and her decision is stated to be: "Permission to appeal is admitted". The decision does not expressly record any (reasoned) decision to extend time for the out of time application.
6. In response to Judge Lambert's decision being sent to the respondent's representatives, a rule 24 reply dated 13 October 2014 was filed with the Upper Tribunal. In addition to dealing with the merit of the Entry Clearance Officer's appeal against Judge Powell's decision, the rule 24 reply pointed out that Judge Lambert had not explicitly extended time for the ECO's out of time application for permission and that an expedited preliminary hearing should be listed in order to

consider the issue of the extension of time. As a consequence, the appeal was listed before me to deal with the extension of time as a preliminary issue.

7. In addition to the respondent rule 24 reply, Mr Hodgetts, who represented the respondent, submitted a detailed skeleton argument dealing with the relevant procedure rules in the First-tier Tribunal and case law concerned with extending time. In addition, there was a witness statement dated 14 October 2014 from Ms Marie-Christine Allaire-Rousse, a solicitor with South West Law, the respondent's legal representatives.
8. For the ECO, there was a skeleton argument prepared by Mr Richards who represented the ECO together with a witness statement from Mr John McGirr of the SAT at Angel Square in London.

### **The Immigration Rules**

9. The relevant rules applicable in the First-tier Tribunal which deal with permission to appeal to the Upper Tribunal are in Part 3 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230 as amended) ("the 2005 Rules"). Since 20, October 2014, the relevant provisions have been replaced by Part 4 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604). I will, however, focus on the Rules relevant to this appeal.
10. Rules 24–26 provide as follows:

#### **"PART 3**

#### **Appeals to the Upper Tribunal**

##### **Application for permission to appeal to the Upper Tribunal**

24. – (1) A party seeking permission to appeal to the Upper Tribunal must make a written application to the Tribunal for permission to appeal.
- (2) Subject to paragraph (3), an application under paragraph (1) must be sent or delivered to the Tribunal so that it is received no later than 5 days after the date on which the party making the application is deemed to have been served with written reasons for the decision
- (3) Where an appellant is outside the UK, the time limit for that person sending or delivering an application under paragraph (1) is 28 days.
- (4) If a person makes an application under paragraph (1) later than the time required by paragraph (2) –
  - (a) the Tribunal may extend the time for appealing if satisfied that by reason of special circumstances it would be unjust not to do so; and
  - (b) unless the Tribunal extends time under sub-paragraph (a), the Tribunal must not admit the application.
- (5) An application under paragraph (1) must –

- (a) identify the decision of the Tribunal to which it relates;
- (b) identify the alleged error or errors of law in the decision; and
- (c) state the result the party making the application is seeking.

**Tribunal's consideration of an application for permission to appeal to the Upper Tribunal**

- 25.— (1) On receiving an application for permission to appeal the Tribunal must first consider whether to review the decision in accordance with rule 26.
- (2) If the Tribunal decides not to review the decision, or reviews the decision and decides to take no action in relation to the decision, or part of it, the Tribunal must consider whether to give permission to appeal in relation to the decision or that part of it.
  - (3) The Tribunal must make a decision under paragraph (1) and, where relevant, paragraph (2), no later than 10 days after receiving the application.
  - (4) Subject to rule 27, the Tribunal must send to the parties —
    - (a) written reasons for a decision under this rule; and
    - (b) if the application is refused, notification of the right to make an application to the Upper Tribunal for permission to appeal and the time within which, and the method by which, such application must be made.
  - (5) The Tribunal may give permission to appeal on limited grounds, but must comply with paragraph (4) in relation to any grounds on which it has refused permission.

**Review of a decision**

- 26.— (1) The Tribunal may only undertake a review of a decision pursuant to rule 25(2) if it is satisfied that there was an error of law in the decision
- (2) Subject to rule 27, the Tribunal must notify the parties in writing of the outcome of any review, and of any right of appeal in relation to the outcome.
  - (3) If the Tribunal takes any action in relation to a decision following a review without first giving every party an opportunity to make representations, the notice under paragraph (2) must state that any party that did not have an opportunity to make representations may apply for such action to be set aside and for the decision to be reviewed again."

- 11. Although I have set out rule 26 dealing with "review" of a decision, this appeal does not raise any issue in relation to that.
- 12. Rule 24 makes provision for an application to be made in writing to the First-tier Tribunal for permission to appeal to the Upper Tribunal. In relation to when such an application must be made, rule 24(2) provides that it must be received by the Tribunal "no later than five days after the date on which the party making the application is deemed to be served" with the determination. Where the appellant is

outside the UK and it is the appellant who is seeking permission to appeal, the five days is extended to 28 days. The period is always 5 days for the respondent before the First-tier Tribunal.

13. By virtue of rule 55(5) a document is deemed to have been served “unless the contrary is proved” where that document is sent by post “on the second day after it was sent”.
14. Where an application is made outside the permitted time, then under rule 24(4) the First-tier Tribunal may extend time if satisfied that “by reason of special circumstances it would be unjust not to do so”. If time is not extended, then, by virtue of rule 24(4)(b), the Tribunal “must not admit the application”. Consequently, in such a case the First-tier Tribunal does not “refuse” permission to appeal but rather does “not admit” the application.
15. Rule 25 requires the First-tier Tribunal to first consider whether to review the decision under rule 26 and, if it does not, must then consider whether to grant “permission to appeal”. Reasons for that refusal must be served upon the parties thereafter.
16. It was common ground between the parties that where, as here, the First-tier Tribunal fails explicitly to consider and make a decision to extend time, any grant of permission is necessarily “conditional”. Before the Upper Tribunal can consider the merits of the appeal, the First-tier Tribunal – and not the Upper Tribunal itself – must make a decision on whether to extend time. If it does so, then the Upper Tribunal considers the appeal on its merits. If the First-tier Tribunal does not extend time and so does “not admit” the application, it is open to the unsuccessful applicant for permission to renew an application for permission to appeal directly to the Upper Tribunal under its procedure rules, namely Part 3 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended). That legal framework follows, and it was accepted that it did, from the case law of the Upper Tribunal: Boktor and Wanis [2011] UKUT 00442 (IAC); Wang and Chin [2013] UKUT 343 (IAC); Samir [2013] UKUT 3 (IAC) and Mohammed [2013] UKUT 467 (IAC).
17. In this appeal, despite Judge Lambert’s phraseology in her reasons that “permission to appeal is admitted”, it was common ground between the parties that she had in fact not made a decision, let alone a reasoned decision, to extend time. Indeed, if she had done then, given her view of the merits, she should have “granted permission” which she did not explicitly do. The Judge's decision did not explicitly, as is required, include a reasoned decision to extend time (see, AK\* [2004] UKIAT 00201 and Mohammed). Her decision, at best, amounted to a “conditional” grant of permission which required the First-tier Tribunal (in which capacity I now sit) to make a decision on whether to extend time in respect of the ECO out of time application for permission to the First-tier Tribunal (see, e.g. Samir).

## The Submissions

18. Mr Richards, on behalf of the ECO relied upon his skeleton argument and the witness statement of John McGirr.
19. Mr Richards did not submit that service on the POU at Cardiff was not proper service upon the ECO or Secretary of State. Rather, Mr Richards' submissions focused on whether the delay caused by service on the POU in Cardiff merited an exercise of discretion in the ECO's favour to extend time. He invited me to exercise discretion to extend time and admit (and thereafter grant permission for) the application which Judge Lambert had considered had merits. He relied upon the statements in the ECO's application for permission that the application was wrongly served on the POU Cardiff rather than the SAT at Angel Square in London. He drew my attention to a copy of the First-tier Tribunal's notice, attached to his skeleton argument, dated 28 July 2014 and addressed to the POU in Cardiff. That notice, he submitted, contained a date stamp "RECEIVED" and dated "14 Aug 2014". He submitted that this demonstrated that the notice of the decision sent on 28 July 2014 had only been received by the SAT in Angel Square on 14 August 2014. It had wrongly been sent to the POU Unit in Cardiff. Mr Richards relied upon the witness statement of John McGirr of the SAT at Angel Square which set out the practice, said to have been agreed with the Tribunal, that allowed determination appeals would be sent to the SAT in Angel Square rather than to the relevant POU.
20. Mr Richards accepted that there was no record when the notice of decision had been received by the Cardiff POU or, indeed, when it had been sent to the SAT in Angel Square. He submitted, however, that the initial fault - even if there was some delay in sending it onto Angel Square - lay with the First-tier Tribunal and the ECO should not be penalised for that. He submitted that the justice of the case should lead to an exercise of discretion to extend time.
21. Mr Hodgetts adopted his detailed rule 24 reply, skeleton argument and response to the Entry Clearance Officer's skeleton argument.
22. Mr Hodgetts' primary submission was that the Tribunal should only consider material submitted with the paper application. He submitted that the First-tier Tribunal had no power to deal with the permission application - in particular to extend time in circumstances such as this case - at an oral hearing. In any event, he submitted that the ECO should not be put in a better position evidentially if an oral hearing took place. Consequently, only evidence submitted with the application and the explanation, if any, contained within the written application for extending time could be considered.
23. On that basis, Mr Hodgetts submitted that there was simply no adequate explanation for the delay in the ECO filing the permission application on 18 August 2014. He submitted that there was no evidence in the application as to when the POU in Cardiff received the notice of decision and no evidence as to when they sent it to the SAT in Angel Square. He submitted that, as the notice was sent by the First-tier Tribunal on 28 July 2014, the POU in Cardiff was deemed to have received it on 30 July 2014 in the absence of any contrary evidence. There was no explanation for the

delay in the SAT filing the application on 18 August 2014, some 19 days later and 12 days out of time. Time for appealing had expired on 6 August 2014 and the delay was simply unexplained.

24. In the alternative, Mr Hodgetts submitted that if the additional evidence could be considered there still was no explanation for the delay. There was no evidence of when the POU in Cardiff received or sent on the notice to the SAT in Angel Square. He submitted that the date stamp of "14 Aug 2014" did not establish that it was received on that day by the SAT. In any event, that did not explain, and there was no other evidence which did explain, why the Cardiff POU deemed to have received the notice on 28 July 2014, did not send the notice sooner so that it was only received by the SAT on 14 August 2014. Mr Hodgetts placed reliance upon the statement of Ms Allaire-Rousse dated 14 October 2014 in which she recounted an enquiry made by her on 14 October 2014 to the POU in Cardiff. Having spoken to a Ms Thomas at the POU Unit and who had checked the respondent's file, Ms Allaire-Rousse states at para 9:

"Ms Thomas then told me that she had checked the appellant's file and had found nothing on it and that if the determination allowed the appeal then it went directly to Angel Square."

25. Mr Hodgetts submitted that this evidence supported the view that the POU in Cardiff had not, in fact, received the notice but rather that it had been received directly by the SAT in Angel Square.
26. During the course of the submissions, I drew the parties to an additional notice held on the Tribunal's file dated 28 July 2014 and sent to the respondent, the respondent's representatives and the SAT Unit at Angel Square. That notice states that the "First-tier Tribunal's determination" of the respondent's appeal is enclosed.
27. Mr Hodgetts submitted that also supported the conclusion that the determination had been properly served on the SAT Unit and, given it was sent on 28 July 2014, deemed receipt would be on 30 July 2014.
28. In response, Mr Richards submitted that if Mr Hodgetts was correct in his submission that this application for permission could only be determined on paper, it would be wrong to take into account any evidence produced or oral submissions made before me. The proper course would be for me not to make a decision but to direct that the file be considered by a First-tier Tribunal Judge to determine the extension of time issue on the papers and material submitted at the time of the application.

## **Discussion**

### An oral hearing?

29. I will deal first with the issue of whether an oral hearing is permitted in a case such as this. It is, of course, the common practice that applications for permission made to the First-tier Tribunal, including decisions on whether to extend time are decided by

judges on the basis of the papers alone. The same applies to renewed applications for permission made directly to the Upper Tribunal. There, however, oral hearings are exceptionally convened in appropriate cases where, for example, an issue of law arises or a matter which would benefit from an oral hearing (see, for example Anoliefo (Permission to appeal) [2013] UKUT 345 (IAC)). The power to do so is clearly recognised in the Upper Tribunal Rules dealing with case management. Rule 5(2)(f) states that:

“...the Upper Tribunal may -

(f) hold a hearing to consider any matter, including a case management issue;....”

30. That provision is mirrored in rule 4(3)(f) of the First-tier Tribunal’s 2014 Procedure Rules in effect from 20 October 2014.
31. That particular provision is not, however, to be found in the 2005 Rules which are applicable in this appeal. Nothing in Part 3 of the 2005 Rules prevents an application for permission being determined at an oral hearing, including the issue of whether to extend time. Indeed, that was precisely what happened in the cases to which I referred above. However, in Mohammed, a Panel of the Upper Tribunal (reconstituting itself as the First-tier Tribunal) expressed doubt whether an application for permission itself could be listed for an oral hearing by the First-tier Tribunal. Having noted that the Upper Tribunal could list an application made directly to it for oral hearing, the Tribunal continued at [40]:
- "This only applies to applications for permission to appeal made direct to the Upper Tribunal; there is no equivalent provision in the Asylum and Immigration Tribunal (Procedure) Rules 2005 which govern proceedings in the First-tier Tribunal (Immigration and Asylum Chamber). As the Upper Tribunal indicates in Wang and Chin, a First-tier Tribunal Judge must consider the application on the papers. It is only where the First-tier Tribunal has failed to complete its task, as here, that the Upper Tribunal will have to reconstitute itself to address the issue of timeliness since the appeal to the Upper Tribunal cannot be admitted - irrespective of any merits in the application - unless discretion is exercised by the First-tier Tribunal."
32. It is not clear upon what basis the Tribunal drew a distinction between the First-tier Tribunal itself seeking to list an application for an oral hearing and a case being listed in the Upper Tribunal but that tribunal reconstituting itself as the First-tier Tribunal and being entitled to deal with the imperfect grant of leave as the First-tier Tribunal. The decision in Wang and Chin is not authority for drawing that distinction. It was simply a case where the Tribunal assumed the usual situation that a decision in the First-tier Tribunal on a permission application will be made on the papers (see [17]). In both situations, the deciding tribunal is governed by the relevant First-tier Tribunal Rules. The fact that a case has initially been listed in the Upper Tribunal, but Upper Tribunal Judges sitting as First-tier Tribunal Judges decide the issue, is in my view irrelevant. Either an oral hearing of a permission application in the First-tier Tribunal is permissible or it is not.
33. Although I was not referred to it by the parties, in my judgment, the power to determine a permission application in the First-tier Tribunal at an oral hearing can be



found in Part 5 of the 2005 Rules which are “general provisions” applicable to all proceedings in the First-tier Tribunal. Rule 43 deals with the “Conduct of appeals and applications” and provides in rule 43(1):

“The Tribunal may, subject to these Rules, decide the procedure to be followed in relation to any appeal or application.” (emphasis added)

34. The wording of rule 43(1) recognises that the “procedure” to be followed in relation to “an application” (which would include an application for permission) is a matter for the First-tier Tribunal. In my judgment, that power includes deciding to deal with such an application by way of an oral hearing. As I have already noted, there is nothing in Part 3 of the 2005 Rules to prevent the First-tier Tribunal from dealing with an application for permission at an oral hearing.
35. It does not appear that the Tribunal in Mohammed was referred to rule 43(1) of the 2005 Rules. In my judgment, it clearly contradicts the position expressed by the Tribunal at [11]. As a result, I do not agree with Mohammed on this point. However, in any event, the Tribunal in Mohammed accepted that the Upper Tribunal (as in this appeal) could reconstitute itself as the First-tier Tribunal and deal with the uncompleted task of determining the application for permission at an oral hearing. Consequently, even though I consider the distinction drawn in Mohammed to be untenable, nothing in Mohammed prevents me dealing with this application in an oral hearing.
36. For those reasons, I reject Mr Hodgetts’ submission that the issue I have to decide can only be determined on the papers without an oral hearing.

#### Material to be considered

37. That, then, leaves the issue of whether I should decide the issue of extension of time on the basis of the material (and explanation) submitted with the application or I may take into account the more recent material submitted by both parties at the oral hearing. This is not an easy point to determine. Neither party drew my attention to any authority on the point. There is undoubtedly some merit in Mr Hodgetts’ submission that the applicant seeking permission to appeal should not be able to adduce further evidence, and thereby be advantaged, not submitted with the application. He should not be able to have a ‘second bite of the cherry’. In the ordinary course of events, the application would be decided on the papers and the applicant has an obligation to provide a satisfactory explanation established by evidence to justify an extension of time. It is only the happenstance that a judge considering the application on the papers does not complete her task in dealing with the application that an oral hearing may take place and the opportunity to submit further evidence to explain any delay arises. Of course, the advantage may be to both parties - as in this appeal where the respondent also relies on further evidence to rebut the ECO’s arguments that time should be extended.
38. On the other hand, applying the ‘overriding objective’, economy of judicial and other resources may suggest that the First-tier Tribunal at an oral hearing, such as in the

present appeal, should have all the relevant and available evidence to reach a decision on the application, in particular whether to extend time. If it cannot consider that further evidence and decides not to admit the application, the Upper Tribunal will be able to consider that evidence on a renewed application made directly to it and consider whether the "interest of justice" require that renewed application to be admitted (see rule 21(7) of the Upper Tribunal Procedure Rules). Economy of judicial and other resources may militate in favour of that material being considered by the First-tier Tribunal itself and potentially avoiding the need for a further application to the Upper Tribunal.

39. It is not necessary to decide this point as, in my judgment, the ECO cannot succeed whether the extension of time issue is decided solely on the basis of the material (or lack of it) submitted with the initial application or on the material submitted for the purposes of the oral hearing before me.

The proper approach to extending time

40. The proper approach to the exercise of discretion to extend time is well-established in the case law. In BO and Others (Extension of time for appealing) Nigeria [2006] UKAIT 00035, the AIT summarised in the headnote the approach under the 2005 Rules to extending time where an appeal notice was filed out of time as follows:

" the first task in deciding whether to extend time is to see whether there is an explanation (or a series of explanations) that cover the delay. If there is, it and all other relevant factors, such as the strength of the grounds, the consequences of the decision, the length of the delay and any relevant conduct by the Respondent are to be taken into account in deciding whether "by reason of special circumstances it would be unjust not to extend time".

41. That general approach is equally applicable to the issue of timeliness under the 2005 Rules in respect of an application for permission to appeal. In Ogundimu (Article 8 - new rules) Nigeria [2013] UKUT 60 (IAC), the Upper Tribunal dealt with the extension of time in respect of a permission application made direct to the Upper Tribunal at [16] and [20] as follows:

"16. Factors relevant to the exercise of discretion to extend time under rule 5(3)(a) of the 2008 Rules will include, but are not limited to: (i) the length of any delay, (ii) the reasons for the delay, (iii) the merits of the appeal and (iv) the degree of prejudice to the respondent if the application is granted. The merits of the appeal cannot be decisive (see the reasons given in Boktor and Wanis [2011] UKUT 442).

.....

20. There must always be a reason shown why time limits have not been complied with and the longer the period of non-compliance the more powerful those reasons should be. Whilst each case must be determined on its own facts, given the strict time limits in immigration appeals generally and the reason behind those time limits, the expectation is that it will be an exceptional case where permission to be appeal should be granted where there has been a significant delay in filing an application; by significant delay we would certainly include any period more than 28 days out of time."

42. In Mohammed, the Tribunal correctly, in my view, considered these observations to be equally applicable to a decision made by the First-tier Tribunal whether to extend time under the 2005 Rules because of the similarity of the rules in both chambers. (see [12]).
43. In relation to any explanation offered for delay in filing an application, that must be established by evidence and not mere assertion. The Tribunal must consider whether the explanation covers the whole, or only part of, the period of delay. Likewise, any claim to rebut the presumption that a determination is deemed to be received two days after it was sent by post must be established by evidence. In Wang and Chin, the Upper Tribunal said (at [16] and [20]):

"16... the procedure rules provide, at rule 55(5) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (which still govern proceedings before the First-tier Tribunal), that a document sent by post from and to places within the United Kingdom is deemed to be served on the second day after it was sent, "unless the contrary is proved". Proof requires evidence. There was no evidence of non-receipt by the Secretary of State tendered with the application or even referred to in it. In these circumstances it is difficult to see how the judge could have been satisfied that the Secretary of State's "explanation" had been made out in the manner required for her to make a decision in the Secretary of State's favour.

....

20. It is, however, clear that a judge of the First-tier Tribunal dealing with a permission application which is out of time needs to ensure that he or she has considered all the available material, including indications of when the determination was sent and whether there is any evidence that it was not received in accordance with the deemed service provisions of the Procedural Rules. The judge will also need to consider the extent of the delay and whether the evidence or explanations provided cover the whole of that delay. The decision whether to extend time is the exercise of a judicial discretion, and there should normally be reasons, which may well be very brief, supporting the decision reached. The same rules apply whether it is the individual or the government that seeks an extension of time."

#### The explanation of delay

44. I will consider first only the material and explanation contained within the application for permission. No supporting material was provided with the application.
45. Looking at the explanation set out in the application, it does not provide a satisfactory explanation based upon evidence for the delay. As the case law makes clear, any explanation must be established by evidence. First, the application form contains merely assertion that the determination was incorrectly served on the POU Cardiff rather than the SAT at Angel Square in London. There is no evidence with the application to rebut the presumption of service on the POU Cardiff two days after it was sent. Secondly, there is no evidence when it was sent to, and received by, the SAT at Angel Square to explain the fact that the application was not filed until 18 August 2014. Even if the assertion in the application is taken at face value that the notice was sent to the POU in Cardiff, deemed receipt of that would be on 30 July

2014. There is no evidence which explains the delay in filing the application until 19 days later (12 days out of time) on 18 August 2014.

46. Taking, therefore, simply the material submitted with the application, there is no adequate explanation for the whole (or even a substantial part) of the period of 19 days delay (including 12 days out of time) in filing the application for permission after deemed service of the determination on the POU in Cardiff.
47. Secondly, however, even taking into account all the new evidence, in particular that relied upon by the respondent and the witness statement of Ms Allaire-Rousse, I am not persuaded that any adequate explanation has been established for the delay.
48. Taking John McGirr's evidence at its highest, it relies upon an agreement with the Tribunal for the service of non-asylum determination when an appeal is allowed to be served on the SAT in Angel Square. John McGirr has no personal knowledge of the circumstances of this appeal. Assuming that policy to exist – and that was not an issue explored before me – it remains the case that deemed receipt of the determination on the POU Cardiff would be on 30 July 2014. Thereafter, it is not entirely clear what occurred. Mr Richards relied upon a notice from the Tribunal addressed to the POU at Cardiff said to enclose the Tribunal's determination. That is dated 28 July 2014 and also has a "RECEIVED" stamp dated "14 Aug 2014". Mr Richards submitted that I should accept this stamp as indicating the date that the determination was received at the SAT from, it is assumed, the POU in Cardiff. That is certainly one possible interpretation of the stamp and Mr Richards did not suggest that it represented acknowledgement of receipt by the POU in Cardiff. That said, however, the witness statement of Ms Allaire-Rousse recounts a telephone conversation with the POU in Cardiff:

"She had checked the appellant's file and had found nothing on it and that if the determination allowed the appeal then it went directly to Angel Square."

49. As I have said, the ECO's case is that the notice of the determination was sent to the POU in Cardiff and only, subsequently, sent to the SAT in Angel Square.
50. In truth, there is a paucity of evidence concerning receipt by the POU in Cardiff and the SAT in Angel Square. There is no supporting evidence concerning the provenance of the "14 Aug 2014" date stamp on the Tribunal's notice of 28 July 2014. It is not suggested it relates to receipt by the POU in Cardiff. The evidence relied on by the ECO does not, in my judgment, rebut the presumption in rule 55(2) that receipt is deemed to have occurred two days after posting which, in the case of this determination based upon the notice relied upon by the ECO, equates to receipt by the POU in Cardiff on 30 July 2014. There is no evidence when the notice was sent to the SAT at Angel Square in London Mr Richards relied on the notice as demonstrating receipt by the SAT in Angel Square on 14 August 2014. Even taking it as notice of receipt by the SAT, as Mr Richards invited me to do, there is no explanation why it took 15 days to be sent and received if deemed receipt in Cardiff was on 30 July 2014. The result is that it was received by the SAT eight days after the

time for filing the application expired on 6 August 2014 and that delay is simply not explained.

51. Ms Allaire-Rousse reports in her witness statement that a person (not Ms Thomas) to whom she initially spoke in the POU in Cardiff indicated that:

“If a decision had been sent to the POU Unit in Cardiff it would be emailed on the same day to the POU Unit in Angel Square.”

52. If the notice (with the determination) was indeed received by the SAT in Angel Square on 14 August 2014, on the basis of that evidence it would either have been emailed on that date or, applying the deemed receipt rule, would have been sent on 12 August 2014. Deemed receipt by the POU in Cardiff was 30 July 2014 and there is no explanation for the 15 days’ delay in sending the application, six of which were after the last date for appealing, namely 6 August 2014. Had it been sent promptly, it would have been received before time for filing the application expired, perhaps giving as much as 6 days to do so if e-mailed on the same day.
53. One final point concerns the additional Tribunal notice dated 28 July 2014 which was addressed to the SAT at Angel Square in London. It was neither party's case that the determination had been directly served on the SAT, on the basis of deemed receipt, that being 30 July 2014. Neither representative had a copy of that notice. It may be, therefore, that it was not in fact sent. However, if it had been sent accompanied by the determination the ECO case is not assisted one iota. *A fortiori*, there would be no explanation for the delay in not filing the application until 18 August 2014.
54. Consequently, even taking into account the new material I am not satisfied that there is an adequate explanation for the whole of the delay.

#### The merits

55. In exercising my discretion whether to extend time for filing the application for permission, I should also have regard to the merits of the ECO's application. It is, of course, the law that the merits of an application are not a sufficient condition to extend time (see Bokor and Wanis; and AK). A good arguable claim does not necessarily excuse a delay in filing a timely application. However, they can be taken into account particularly where the merits are strong or a matter of particular legal importance arises.
56. In this appeal, the respondent's appeal was allowed under para 297 of the Immigration Rules on the basis that there were “serious and compelling family or other considerations” which made his exclusion, as a child “undesirable”. The judge set out his consideration of the “features” at paras 26-41. At para 42 he balanced those factors, some of which were adverse to the respondent's claim, and nevertheless accepted that it was established that the requirements of para 297 were met.

57. The ECO's grounds argued that the matters relied upon by the judge did not "either separately or cumulatively" constitute "serious and compelling considerations". In particular, the grounds argue that the respondent's disability had been coped with by his carers in Iraq for ten years since his adoptive parents had come to the UK in 2010. The grounds argue that the fact that the respondent is disabled, is attached to his UK sponsor, believes they are parents, that they have visited him and that his mother in the UK is depressed, is not sufficient to qualify for leave under para 297 of the Rules.
58. As Mr Hodgetts pointed out in his response to the ECO's skeleton argument, that the grounds do not explicitly rely upon a lack of reasoning or that the findings are irrational. The latter must, however, be the basis upon which the judge's decision is challenged. The ECO can only succeed, therefore, if the judge's decision was one which no reasonable judge properly directing himself could reach. Of course, at the permission stage that issue need only be shown to be arguable. In my judgment, the grounds present a weak legal challenge to Judge Powell's decision. The fact that the respondent had been cared for by his family in Iraq for ten years was, perhaps, a factor militating against his claim. However, the sponsors in the UK were his parents, albeit by adoption. He is financially supported by the sponsors from the UK and there was evidence that his mother was increasingly suffering as a result of separation from the respondent. Despite the fact that he was cared for by his aunt and uncle in Iraq, the favourable decision challenged upon the basis of irrationality is, in my judgment, a difficult one to succeed upon. The merits of the ECO's appeal may just be arguable but they are, in my view, not strong. They do not sufficient to justify an exercise of discretion in the ECO's favour given the absence of an evidenced explanation for the delay in filing the application 12 days out of time.

#### Other factors

59. Only two other matters were raised by the parties. Mr Hodgetts rightly relied upon the prejudice to the respondent's family and private life if the First-tier tribunal's decision could be challenged out of time. The appeal proceedings would further prolong the separation of the family. Mr Richards relied on the delay being the fault of the Tribunal in not sending the determination to the SAT. The ECO should not be prejudiced by that error. This point is of limited weight. As I have already indicated, despite the error, there is insufficient evidence to explain why the application still could not have been filed in time if it had been sent only promptly by the POU in Cardiff.

#### Decision

60. In my view, the ECO has not established "special circumstances" such that it would be "unjust not" to extend time. For the above reasons, I do not exercise my discretion to extend time. I reach that decision on the basis of (1) the application and any material submitted with it alone; and also (2) the application and all the material submitted including that for the oral hearing.

61. For these reasons, by virtue of rule 24(4)(b), **this application for permission to appeal by the ECO is not admitted.**
62. It remains, of course, open to the ECO to seek permission to appeal directly from the Upper Tribunal.

Signed

UTJ A Grubb  
(sitting as a Judge of the First-tier Tribunal)