Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00124/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13 September 2013	**On 4 October 2013**
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Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUSTAFA ABDULLAI

Respondent

Representation:
For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Mr G Hodgetts, Counsel, instructed by Wilson and Co Solicitors

DETERMINATION AND REASONS

1. The respondent to this appeal, hereinafter "the claimant," is a citizen of Somalia. He was born on 3 March 1984 and so is now 29 years old. He appealed successfully to the First-tier Tribunal (First-tier Tribunal Judge Finch and Mrs C St Claire (non-legal member)) a decision of the appellant (hereinafter "the Secretary of State") to deport him from the United Kingdom.
2. The Secretary of State was refused permission to appeal that decision by the First-tier Tribunal but permission was given by the Upper Tribunal and so I must decide the Secretary of State's appeal against that decision.
3. Mr Hodgetts, for the claimant, had prepared a very full written response under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008.
4. It was his first contention that I had power to set aside the decision of the Upper Tribunal to give permission to the Secretary of State to appeal and

that I should use the power in this case because the decision to give permission to appeal did not satisfy the requirements of the Procedure Rules.

5. As far as I am aware there is no authoritative decision to guide me on whether or not I have power. The Tribunal touched upon the point in **Wang and Chin (extension of time for appealing) [2013] UKUT 00343 (IAC)** but it did not have to decide the point to determine that appeal and declined to decide whether or not it had jurisdiction to set aside a decision to give permission to appeal, in that case made by the First-tier Tribunal, when an application was made late.

6. In **Ogundimu (Article 8 – new Rules) Nigeria [2013] UKUT 00060 (IAC)** an Upper Tribunal judge had given permission to appeal where an application was known to have been made very late. The Upper Tribunal recorded that it was "common ground between the parties" that there is no power to revoke a grant of permission to appeal if the judge had power to grant it. The decision in that case was written by Upper Tribunal Judge O'Connor who sat with the President, Blake J. Although it did not decide if there is power to revoke a grant of permission, it seems somewhat unlikely that the Tribunal would have gone along with the law as agreed by the parties unless it agreed with the premise on which the argument was conducted. Nevertheless, the case does not determine the point authoritatively because it was not argued before the Tribunal.

7. The papers show that the First-tier Tribunal heard the case on 7 May 2013 and the determination was promulgated on 31 May 2013. The application for permission to appeal made to the First-tier Tribunal was known to be late. According to part B of the application form, the First-tier Tribunal determination was received on 4 June 2013. The form is a standard text and indicates when an application must be received. In this case, according to the form, it should have been received within "**5 working days** after the date on which you were deemed to have been served with the First-tier Tribunal's decision".

8. The form then explains that if the application was likely to be late the proposed appellant "must ask the Tribunal to extend the time limit for making the application, giving full reasons why it is late".

9. Reasons were given. The Secretary of State said:

> "It is respectfully asked that the Tribunal extends the time limit for making this application. The main reason for delay was because the Specialist Appeals Team on behalf of the Secretary of State did not receive the Tribunal's determination within two working days. It is respectfully submitted that the delay has been through no fault of the Secretary of State and the Specialist Appeals Team have endeavoured to deal with this case as soon as possible. An extension of time is respectfully requested."

10. According to the Form IA60 the determination was served on the claimant and his solicitors by posting the determination on 31 May 2013 and on the Secretary of State "by hand" on the same day. I understand that this is less than a strictly accurate description of service on the Secretary of State but would be understood by all those involved to mean that delivery was

by internal government mail. According to Rule 55(5) of the Asylum and Immigration Tribunal (Procedure) Rules 2005:

> "Any document that is served on the person in accordance with this Rule shall, unless the contrary is proved, be deemed to be served – (a) where the document is sent by post or document exchange from and to a place within the United Kingdom, on the second day after it was sent".

11. I take note that there is no delivery on Sundays and so the second day for these purposes means Monday 3 June 2013. Mr Walker for the Secretary of State showed me that the Secretary of State's copy of the letter was endorsed "SAT admin received 4 June 2013" ("SAT admin" means the administrative department of the Specialist Appeals Team and is nothing to do with Saturday).

12. If it was served on Tuesday 4 June then any application for permission to appeal should have been received no later than 11 June 2013.

13. The claimant contends that the determination was deemed to have been served on Monday 3 June and therefore any application should have been received no later than Monday 10 June 2013. In any event the application is out of time.

14. The First-tier Tribunal did not admit the application. It made plain that it had considered the merits and would not have given the permission if the application had been made in time, but said at paragraph 2:

> "The application is out of time. The [Secretary of State] states that the determination was received on 4 June 2013. The application should therefore have been received by 11 June 2013. It was not received until 12 June 2013. There is no explanation for this delay or application to extend time. Accordingly, I am given no reason to extend time and I do not do so."

15. When deciding whether to admit a late application the First-tier Tribunal has to consider paragraph 24 of the Asylum and Immigration Tribunal (Procedure) Rules 2005. Rule 24(4)(a) provides that where the Tribunal is considering an application made later than the time required, the Tribunal "may extend the time for appealing if satisfied that by reason of special circumstances it would be unjust not to do so".

16. The application for permission to appeal to the Upper Tribunal made to the Upper Tribunal records correctly that the First-tier Tribunal refused to admit the application because it was late, and then says as follows:

> "It is respectfully asked that the Tribunal extends the time limit for making this application. The main reason for delay in our application to the First-tier Tribunal was because the Specialist Appeals Team on behalf of the Secretary of State did not receive the Tribunal's determination within two working days. It is respectfully submitted that the delay has been through no fault of the Secretary of State and the Specialist Appeals Team have endeavoured to deal with this case as soon as possible. Furthermore, the Secretary of State did notify the First-tier Tribunal of these reasons in our application (a copy of which is enclosed) and these reasons were not taken into consideration. An extension of time is respectfully requested."

17. For the avoidance of doubt, the application to the Upper Tribunal was not made late. The reference to "an extension of time" was a request for the delay in serving the First-tier Tribunal to be excused. When faced with an application that was not admitted by the First-tier Tribunal, the Upper Tribunal must have regard to Rule 21(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008. This provides:

> "21(7) If the appellant makes an application to the Upper Tribunal for permission to appeal against the decision of another Tribunal, and that other Tribunal refused to admit the appellant's application for permission to appeal because the application for permission or for a written statement of reasons was not made in time –
>
> (a) the application to the Upper Tribunal for permission to appeal must include the reason why the application to the other Tribunal for permission to appeal or for a written statement of reasons, as the case may be, was not made in time; and
>
> (b) the Upper Tribunal must only admit the application if the Upper Tribunal considers that it is in the interests of justice for it to do so."

18. In dealing with this point the Upper Tribunal said when it gave permission to appeal:

> "The explanation given by the respondent for the delay of one day is in my view a valid one and I consider it just in all the circumstances to extend time."

19. Mr Hodgetts argued firstly that there was no basis for finding that the application was only one day late. We were shown at the hearing a paper date-stamped appropriately, but this had not been produced on an earlier occasion and there was nothing to go behind the deemed date of service which would have made the application two days late. Secondly, he said that the purported "explanation" was nothing of the kind. The fact that the determination arrived one or two days later than expected is not, without more, any kind of explanation at all for the application for permission to appeal being served late.

20. Nevertheless I remind myself that the Upper Tribunal judge, faced with an application for permission to appeal where another Tribunal had refused to admit the application, had to have regard to Rule 21(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008. An appellant in these circumstances was obliged to include the reasons for the application to the other Tribunal being made late and the Upper Tribunal was restrained from admitting an application unless "it is in the interests of justice for it to do so".

21. I do not agree with Mr Hodgetts's submission that the explanation given to the Upper Tribunal could not be described properly as an explanation at all. Those of us that are familiar with the ways of government departments understand without being told that tasks that have to be started late are rarely given priority lest other tasks are made late too. In organisations that are strained to their limits there is always a concern that taking special steps to deal with one piece of work that is late can cause other pieces of work to be late, and is not done.

22. Further, it is quite plain that the Upper Tribunal judge had in mind the correct test when he found that it was "just in all the circumstances to extend time". I cannot look at the reasons for extending time and say with confidence that the Rules have been ignored, or that the decision is incapable of being right. I consider this important in the context of an invitation to set aside a decision.

23. Clearly the decision complained of cannot be appealed to the Court of Appeal (see Tribunals, Courts and Enforcement Act 2007, Section 13(8)(c) and I should be very slow to construe the Procedure Rules in a way that gives the appellant what would really be a right of appeal to the Upper Tribunal against a decision that could not be appealed to the Court of Appeal. Of course Mr Hodgetts was very careful to ask me to set aside the decision, but in reality he was seeking to appeal. It was his case that the decision should be looked at again because the judge that made it made it badly.

24. The Procedure Rules give express powers to set aside "a decision which disposes of proceedings" (Rule 43). This is of little relevance here because the decision complained of most certainly did not dispose of proceedings but. At least in the Upper Tribunal, it created them. In any event, the rest of the Rule makes it plain that there are conditions, and the conditions show that the Rule is concerned with procedural irregularities rather than alleged bad decisions.

25. Mr Hodgetts properly reminded me that the Upper Tribunal has the same power as the High Court in relation to the attendance and examination of witnesses, the production and inspection of documents and "all other matters incidental to the Upper Tribunal's functions" (Section 25 Tribunals, Courts and Enforcement Act 2007). I do not agree that setting aside a decision that brings an appeal before the Upper Tribunal is properly described as a matter "incidental to the Upper Tribunal's functions". Certainly I accept the Rules are illustrative rather than restrictive (see Tribunals, Courts and Enforcement Act 2007, Schedule 5, paragraph 15(3) and Jacobs (Tribunal Practice and Procedure) 15.34). It may be, for example, that the Upper Tribunal could set aside a decision to give permission to appeal that was shown to be based on fraud, or, improbably, such a complete misreading of the facts that there was no decision at all on the points raised. In those circumstances the Tribunal would not be acting as an appellate court examining the reasons for the lower court's decision, but deciding that there had been no decision at all on the points that mattered. I regard these as examples of different kinds of procedural irregularities. It is extremely unlikely that such a situation would actually occur, but a very large number of decisions are made every year and a small number of them do take a peculiar course.

26. In short, I am satisfied that I do not have power to set aside the decision to give permission to appeal in this case and I decline to set it aside.

27. I must now go on to look at the merits of the decision and begin by looking at the First-tier Tribunal's determination.

28. This shows that the claimant was born in 1982 and is a national of Somalia. He was given leave to enter the United Kingdom in 1993 when he was nearly 11 years old and his leave was extended in stages until he was given indefinite leave to remain in 2000.

29. In 2007, when he was nearly 25 years old, he was convicted following a trial of one act of rape and one act of attempted rape and was sentenced to prison for ten years. In 2008 he was warned that he was liable for deportation and he indicated that he would resist deportation on human rights grounds. In July 2011 he applied for asylum.

30. The Tribunal rejected his contention that he risked persecution or other serious ill-treatment in the event of his being deported to Somaliland.

31. The Tribunal further accepted that although the appellant had lived in the United Kingdom since February 1993 he left Somalia some four years before that, and lived in a refugee camp in Ethiopia. The Tribunal accepted that the appellant has no close or extended family members or friends in Somalia or Somaliland, and that his lack of experience of life in Somalia or Somaliland, his tattoo, his ignorance of the language, and general ignorance of cultural mores would make him a figure of attention in Somaliland. Paragraphs 25 and 26 are particularly important. It was noted that the claimant had been in the United Kingdom for more than 20 years but there was a statutory presumption in favour of his deportation because of his having convicted a serious crime. The Tribunal expressly recognised that the United Kingdom is entitled to impose strict immigration controls to protect the public interest in the prevention of disorder and crime and the protection of the rights and freedoms of others.

32. At paragraph 26 the Tribunal reminded itself just how nasty was the extent of the appellant's offending. It said:

> "Nevertheless, the [Secretary of State] has to establish that the [claimant's] deportation would be proportionate in all the circumstances of this case. We have begun our consideration of this aspect of this appeal by considering the [claimant's] criminal record. The [claimant] was sentenced to ten years' imprisonment for one count of rape and one count of attempted rape. We also note that when he sentenced the [claimant], His Honour Judge Marron noted that the [claimant] had attacked an innocent woman in her early 20s in her own home when she was asleep in her own bed and had held a knife to her throat while he raped her in two different ways. He also noted that she was pregnant at the time and that the [claimant] had threatened to kill her. We do not seek to minimise the seriousness of this offence."

33. The Tribunal recognised that fear of his own family's disapproval and the condemnation of his own community made it harder for him to accept his guilt. The Tribunal also noted that the appellant's sentence was his first experience of custody and would be "likely to have heightened his experience of detention".

34. The appellant did disclose his guilt when he was in immigration detention and had been working on "The Victim Empathy" work with his probation officer.

35. The probation officer opined that the appellant posed a medium risk of harm with a low to medium risk of reoffending, but the assessment was made before he had completed his Community Sex Offender Group Program or his work on victim empathy. He had attended the Community Sex Offender Group Program regularly for over a year when the First-tier Tribunal heard the appeal.

36. The Tribunal was also impressed with the report of Dr Harriet Hunt-Grubbe who noted the claimant had expressed regret and remorse and that in her opinion there was now a low risk of him committing serious offences. This was supported by his having behaved in accordance with his terms of bail whilst wearing an electronic tag and complying with a curfew.

37. It was noted that he had changed his friendship groups and was now living with his uncle and family and that he spent much of time he was allowed to spend away from his uncle's home in accordance with his curfew taking care of his mother's aunt.

38. The Tribunal noted that to the appellant's discredit he had been caught in possession of a small amount of cannabis while on licence and had been fined rather than being returned to prison. He had taken a drug awareness course and tested negative of any further use. This element of his life was being monitored by the probation officer.

39. The determination refers to the claimant having living in the United Kingdom since he was aged 8 years. I cannot see the basis for that finding. He says he was born in 1982 and entered the United Kingdom in 1993.

40. The Tribunal made it plain that it was following the guidance given in **Masih (deportation – public interest basic principles) Pakistan [2012] UKUT 00046** and also **Uner v the Netherlands application number 46410/99** and **Maslov v Austria [2009] INLR 47 ECHR**.

41. The key points were that he had no relatives in Somaliland or experience of living there since he was a boy. He would attract condemnation because he was tattooed contrary to the teaching of Islam but more significantly he had established a considerable private life during his long stay in the United Kingdom.

42. In considering the evidence of Dr Harriet Hunt-Grubbe the Tribunal expressly reminded itself that she had only seen the claimant for a two hour consultation but noted she was very experienced. It was Dr Harriet Hunt-Grubbe who had drawn attention to the disabling effect on the claimant of finding the body of his dead brother which resulted in his almost immediate admission to Charing Cross Hospital Mental Health Unit for a short period and deporting him would deprive him of the emotional support provided by his mother and immediate family and would serve to increase his risk of suicide.

43. The appeal was allowed with reference to Article 8.

44. The grounds make two substantial challenges. The first was described by the Upper Tribunal judge as "devoid of merit". It is based on the

contention that the amendment to the Immigration Rules discharge fully a consideration as required by the "**Maslov**/**Boultif**" principles and the Tribunal is wrong not to follow the Rules and to see it as a complete encapsulation of the United Kingdom's obligations under the European Convention on Human Rights. This is a well-trodden path. It is wholly contrary to the decision of the Tribunal in **MF (Nigeria) [2012] UKUT 00393 (IAC)** and unless and until that decision is authoritatively shown to be wrong, I will not take time answering the point said to be raised in ground 1. Mr Walker raised them formally and I dismiss them formally.

45. Ground 2 is, with respect, well summarised in the grant of permission to appeal and I set out below the terms of the ground. The Upper Tribunal Judge said:

> "I consider that ground 2 identifies an arguable error of law. In particular, it is not apparent that the panel gave any reasons why it was prepared to accept the opinion of Markus Hoehne as an expert opinion and why it was prepared to ascribe very significant weight to the report of Dr Harriet Hunt-Grubbe, albeit acknowledging that she had only seen the appellant for a two hour consultation.
>
> It is also not clear why the panel considered that the particular context which hampered the appellant's ability to confess his guilt externally or his eventual disclosure of his guilt somehow cancelled out the public interest in the deportation of a person guilty of attacking an innocent pregnant woman in her early 20s in her own home when she was asleep in her own bed and held a knife to her throat and threatened to kill her. The panel says they take this factor into account in paragraph 27, but they appear to treat it as negated by their findings in paras 28/29."

46. Dr Harriet Hunt-Grubbe is a member of the Royal College of Psychiatrists. She was awarded that degree in 2006. She describes herself as a locum consultant in forensic psychiatry and at the time of writing her report was working as an honorary specialist registrar at Broadmoor Hospital. Dr Hunt-Grubbe in her report noted factors that had caused people to be cautious about the claimant's propensity to reoffend before deciding that in her opinion the risk of further serious violent or sexual offending was low. She attributed this to the fact that he had expressed deep remorse for his actions and was undertaking work to understand his offending behaviour and the impact it had on other people. Really she is saying that the appellant had made progress since the probation officer's opinion was expressed.

47. Dr Harriet Hunt-Grubbe is clearly qualified to give the opinions that she does and is perhaps in a better position than anyone else to know if she could express that opinion competently after only a short interview with the claimant. There is no contrary evidence from anybody instructed by the Secretary of State and I fail to see any proper reason for challenging the use the Tribunal made of her evidence.

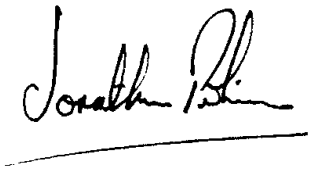
48. I do not find the evidence of Markus Hoehne of particular significance. Indeed, Mr Hoehne's opinions by and large seem unremarkable. It is frequently said before the Tribunal that being tattooed is contrary to Islamic teaching and a person who is tattooed will therefore attract the

disapproval of those who believe Muslims should not allow their bodies to be adorned in such a way. Given the enormous role of the clan system and clan traditions in shaping Somali society, a person who is Somali but not imbued in those traditions can be expected to find it difficult to acclimatise. It was not suggested by Mr Hoehne that the claimant could not conceivably establish himself in Somaliland. Rather, very understandable and real risks were identified and were part of the Tribunal's reasoning. However, as I read the determination the critical points were not the fact that the claimant would find it hard to establish himself in Somaliland but rather the fact that he had been in the United Kingdom for such a very long time. I do not find it a proper reading of the determination to say that the public interest in removing the claimant, who the Tribunal recognise has committed very serious offences indeed, was "negated" by paragraphs 28 and 29 that reflect on his belated recognition of his guilty. Rather, the point there is that although the claimant has committed serious offences he has at last faced up to what he has done and has taken significant steps to put behind him that kind of criminal behaviour. That finding was wholly open to the Tribunal.

49. The rest is a matter of balance. The Tribunal identified the two competing compelling points. On the one hand is the seriousness of his offence bringing with it a statutory presumption in favour of his deportation and on the other hand the amount of time he has spent in the United Kingdom. That, taken with the rational finding that he is unlikely to be in this kind of trouble again, enabled the Tribunal to reach the decision that it did.

50. This may well be the kind of case where the balancing exercise could have been determined differently and lawfully by a differently constituted Tribunal. However, although I have reflected carefully on the grounds and Mr Walker's submissions, I am quite unpersuaded that the Tribunal misdirected itself in any material way or reached a decision that was not open to it for the reasons that it has given.

51. It follows therefore that I find no material error in the decision of the First-tier Tribunal to allow the appeal and I dismiss the Secretary of State's appeal against that decision.

Signed
Jonathan Perkins
Judge of the Upper Tribunal  Dated 3 October 2013