Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25796/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4 September 2013	**On 12 September 2013**

Before

UPPER TRIBUNAL JUDGE PITT

Between

Amitkumar Gajjar
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr Makol of Maalik & Co Solicitors
For the respondent: Mr Tufan, Senior Home Office Presenting Officer

DECISION ON APPLICATION FOR PERMISSION TO APPEAL TO THE UPPER TRIBUNAL

and

DETERMINATION AND REASONS

1. The appellant wishes to appeal against the determination dated 21 January 2013 of First-tier Tribunal Manchester made on the papers which dismissed the appeal against the respondent's refusal dated 2 November 2012 of the appellant's

application for further leave to remain as a Tier 4 student under paragraph 245ZX of the Points Based System (PBS).

2. The appellant's application to the First-tier Tribunal for permission to appeal to the Upper Tribunal was refused on 14 May 2013. The appellant does not dispute that the application was made over 3 months out of time. His explanation for the delay, contained in the grounds to the First-tier Tribunal and in the grounds before me, was that he had misunderstood the outcome of the First-tier Tribunal appeal. He thought his appeal had been allowed. He showed it to a few friends who had made similar applications and been granted further leave to remain and they thought he had won his appeal also. The appellant maintains that he and his friends thought this because the final paragraphs of the First-tier Tribunal determination stated:

> "31. The appeal in relation to the decision to refuse to vary leave under the Immigration Rules is dismissed.
>
> 32. The appeal on human rights grounds in relation to the decision to refuse to vary leave is dismissed.
>
> 33. The appeal in so far as it relates to the decision under s 47 is *allowed.* (my emphasis)"

3. The appellant's explanation for the delay went on to state that as he thought that his appeal before the First-tier Tribunal had been allowed, he did not challenge it. He did so only after he telephoned the respondent on 30 April 2013 to find out when he would be issued with his further leave to remain. He was told he had lost his appeal. He instructed his current solicitors immediately but was already 3 months out of time to appeal.

4. He made an application for permission to appeal nevertheless. It was refused by the First-tier Tribunal on 14 May 2013. The refusal of permission to appeal stated:

> "2. The application for permission to appeal was received on 6th May 2013. The Appellant has explained the late application by saying he was confused about the decision to dismiss the appeal against the Respondent's decision under the immigration rules because the appeal against the decision to make removal directions under s.47 was allowed. I do not accept that explanation. The decision to dismiss the appeal against the refusal of leave is perfectly clear from paragraph 31 of the determination, which is consistent with what the Judge said about his reasons for doing so in paragraph 20.
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> 3. The Tribunal was asked to decide the appeal on the papers, which it did, taking account of all relevant documents. The Judge found that the documents submitted to the Tribunal, including a mini statement from an ATM and a letter from the bank, did not discharge the burden of proof to the standard of balance of probabilities, and that was a decision he was entitled to reach. There is no arguable error of law. I would not have granted permission in any event."

5. The appellant then made an in-time application to renew his application for permission to appeal to the Upper Tribunal and thus the application came before me.

6. On 25 June 2013 I issued the following direction:

    1. The appellant has applied to the Upper Tribunal for permission to appeal.

    2. This follows the refusal of permission to appeal by the First-tier Tribunal, contained in a decision dated 14 May 2013. As set out in that refusal of permission, the application to the First-tier Tribunal for permission to appeal to the Upper Tribunal was lodged over 3 months late and the application was found to be out of time.

    3. The subsequent application to the Upper Tribunal includes grounds for the application to be admitted as in time and a statement from the appellant explaining why he lodged his application to the First-tier Tribunal so late.

    4. In **Ogundimu (Article 8 - new rules) Nigeria [2013] UKUT 00060 (IAC)**, the head note states:

        > "The expectation is that it will be an exceptional case in which permission to appeal to the Upper Tribunal should be granted where the lodging of the application for permission is more than 28 days out of time. Where, in such a case, a judge is minded to grant permission, the preferable course is to provide an opportunity to the respondent to make representations. This might be achieved by listing the permission application for oral hearing".

    5. This application for permission to appeal is accordingly listed for an oral hearing. If the appeal is admitted in time, the Tribunal will proceed to consider the grounds of appeal to establish if the determination of the First-tier Tribunal contains an error on a point of law. If a material error of law is found, the Tribunal is likely to be in a position to proceed to remake the appeal at that hearing.

    6. The parties are put on notice as to the following. The appellant applied for further leave to remain on 5 April 2012 when the specification as to the form of financial documents was contained in guidance rather than in the Immigration Rules. The requirements had been incorporated into the Immigration Rules by the time that the decision was made on 2 November 2012 but the application was not refused by the respondent for that reason. It was refused because the appellant was not found to have an established presence so needed to show funds of £7,200 which he could not do.

    7. The First-tier Tribunal Judge considered the appeal on the papers and found for the appellant on the sole reason for refusal put forward by the respondent, accepting that the appellant had an established presence and only needed to show funds of £1,600.

    8. The First-tier Tribunal went on to refuse the appeal, however, on another point, one on which the appellant did not have a chance to make submissions or

adduce evidence where the appeal was determined on the papers. The First-tier Tribunal Judge found that the appeal had to fail as the financial documents were not in the form specified in the Immigration Rules at the date of the decision.

9. If the application for permission to appeal is accepted as in time, this raises two possible questions:

   (i) Did a procedural error arise where the First-tier Tribunal did not put the point concerning the form of the financial documents to the appellant so that he could respond to it before the appeal was decided?

   (ii) If the respondent wishes to take the point about the form of the appellant's documents, did common law fairness demand that the respondent notify the appellant before the decision was made that the requirements of the Immigration Rules had changed by November 2012 and request him to provide that evidence again in the required form?

10. The appellant should note that if he wishes to defeat any point taken about the form of his financial documents, he would need to provide his financial evidence again in the format specified in the Immigration Rules which precludes a mini-statement."

7. There is no issue as to the application to the First-tier Tribunal for permission to appeal being made over 3 months out of time which is an extremely long period. Following the reported case of **Boktor and Wanis [2011] UKUT 00442** and **Ogundimu (Article 8 - new rules) Nigeria [2013] UKUT 00060 (IAC)** factors relevant to the exercise of discretion to extend time include a. the length of any delay, b. the reasons for the delay, c. the merits of the appeal and d. the degree of prejudice to the respondent if the application is granted. Both cases confirm that the merits of the case cannot be decisive. It must also be the case that the more extreme the delay the more compelling must be the reason for the delay and the merits.

8. Having heard submissions from Mr Makol and Mr Tufan on these matters, it was my view that the appellant's explanation for the delay was credible. He has been entirely consistent. It was not suggested for the respondent that he was not being truthful. I accepted that he had a genuine belief until 30 April 2013 that his appeal before the First-tier Tribunal had been allowed.

9. As to the merits of the substantive error of law challenge to the First-tier Tribunal, it was clear that the appellant had never been put on notice that his application fell to be refused for want of financial documents in the correct format but this was why his appeal before the First-tier Tribunal failed. An arguable procedural fairness issue arose, therefore.

10. In addition, at the time that he applied for further leave to remain in April 2012, the appellant had submitted documents in a lawful format under the Immigration Rules, the guidance on the format of those documents at that time being outside the Rules and only incorporated on 9 July 2012.

11. The appellant therefore argued that the respondent should have asked him for the documents in the correct format in line with the new Immigration Rules before refusing his application in November 2012. He relied on the respondent's "evidential flexibility policy" which by the time of the respondent's refusal on 2 November 2012 had been incorporated into the Immigration Rules at paragraph 245AA. This paragraph states:

> 245AA. Documents not submitted with applications
>
> (a) Where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the UK Border Agency will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with subparagraph (b).
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> (b) If the applicant has submitted:
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> (i) A sequence of documents and some of the documents in the sequence have been omitted (for example, if one bank statement from a series is missing);
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> (ii) A document in the wrong format; or
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> (iii) A document that is a copy and not an original document,
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> the UK Border Agency may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received by the UK Border Agency at the address specified in the request within 7 working days of the date of the request.
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> (c) The UK Border Agency will not request documents where a specified document has not been submitted (for example an English language certificate is missing), or where the UK Border Agency does not anticipate that addressing the omission or error referred to in subparagraph (b) will lead to a grant because the application will be refused for other reasons.
>
> (d) If the applicant has submitted a specified document:
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> (i) in the wrong format, or
>
> (ii) that is a copy and not an original document,
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> the application may be granted exceptionally, providing the UK Border Agency is satisfied that the specified documents are genuine and the applicant meets all the other requirements. The UK Border Agency reserves the right to request the specified original documents in the correct format in all cases where (b) applies, and to refuse applications if these documents are not provided as set out in (b).

12. The appellant maintained that the respondent should have asked him for the financial evidence in the correct format following paragraph 245AA(b)(ii). The respondent could not pray paragraph 245AA (a) in aid as the First-tier Tribunal had

found for him on the only reason given by the respondent for refusing the application, that of his having an established presence and only needing to show funds of £1,600.

13. As indicated at [10] of my direction, for this argument to have any force, the appellant has to show that he could have provided the financial evidence in the correct format if the respondent had asked for it prior to the decision. He did so at the hearing before me, providing an original bank statement for the required period showing the required funds.

14. Mr Tufan accepted for the respondent that the appellant would have provided the financial document in the correct format had the respondent followed paragraph 245AA (b) (ii) of the Immigration Rules. He confirmed that were I to extend the time for the application for permission to appeal, his position was that the decision of the First-tier Tribunal disclosed an error on a point of law for this reason such that it should be set aside and the appeal re-made as allowed. He did not concede that the permission to appeal should be accepted as in time, however.

15. It was my view that the overriding objective in Rule 2 (1) of the Procedure Rules for those Rules to enable the Upper Tribunal to deal with cases "fairly and justly" and the matters set out above should lead me to extend the time for the application for permission to appeal under Rule 5(3)(a). In making that decision I have taken into account the extremely lengthy delay, the appellant's credible reason for that delay, the accepted merits of the appeal and the low degree of prejudice to the respondent given Mr Tufan's concessions. Following Rule 21 (7) I admitted the permission to appeal as in time, finding that it was in the interests of justice to do so.

16. Having done so, for the reasons agreed by Mr Tufan as set out in [13] above, I found that the decision of the First-tier Tribunal disclosed an error on a point of law and re-made the appeal as allowed under the Immigration Rules.

Decision

17. The application for permission to appeal is accepted as having been made in time.

18. The determination of the First-tier Tribunal contains an error on a point of law such that it should be set aside other than the decision relating to Section 47 of the Immigration, Asylum and Nationality Act 2006.

19. I re-make the appeal as allowed under the Immigration Rules.

Fee Award

Note: this is **not** part of the determination.
In the light of my decision to re-make the decision in the appeal by allowing it, **I make a whole fee award** following rule 23A of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007) with

reference to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

Signed: Date: 10 September 2013
Upper Tribunal Judge Pitt