IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005006

First Tier No's: HU/50106/2022
IA/00236/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 17 October 2023

Before

UPPER TRIBUNAL JUDGE LANE

Between

Secretary of State for the Home Department

Appellant

and

ARTESHAM BUTT

Respondent

Representation:
For the Appellant: Mr Mohamed, Kingston Law
For the Respondent: Mr Diwnycz, Senior Presenting Officer

Heard at Phoenix House (Bradford) on 19 July 2023

DECISION AND REASONS

1. I shall refer to the 'appellant' as the 'respondent' and the 'respondent' as the 'appellant', as they appeared respectively before the First-tier Tribunal . The appellant, a citizen of Pakistan, was born on the 22 March 1979. He appealed against a decision of the Respondent dated 30 December 2021 to refuse him leave to remain in the UK. The First-tier Tribunal allowed his appeal. the Secretary of State now appeals, with permission, to the Upper Tribunal.

2. The application takes a preliminary point regarding the validity of the grant of permission in the Upper Tribunal. He claims that the renewed application for permission was out of time and, as the application did not contain an explanation and an application to extend time, the Upper Tribunal should not entertain it.

3. The facts are similar to those considered by the Court of Appeal on an application for permission to appeal to it in *NA (Bangladesh)* 2016 EWCA Civ 651:

   Reliance is placed on rule 21(6) of the Tribunal Procedure (Upper Tribunal) Rules 2008 which provides:

i. "If the appellant provides the application to the Upper Tribunal later than the time required by paragraph (3) or by an extension of time allowed under rule 5(3)(a) (power to extend time) -
(b) the application must include a request for an extension of time and the reason why the application was not provided in time; and
(c) unless the Upper Tribunal extends time for the application under rule 5(3)(a) (power to extend time) the Upper Tribunal must not admit the application."

 The Appellant seeks to argue that the application of 2 October 2013 for permission to appeal was invalid because it included no request for an extension of time or any reason why the application was not provided in time. Accordingly, it is said the Upper Tribunal was bound by rule 21(6)(b) not to admit it. On 11 October 2013 the Upper Tribunal had failed to realise that the application was out of time and on 15 November 2013 it had failed to consider the particular requirements of rule 21(6). The decision to which it referred of Boktor and Wanis [2011] UKUT 442 had been a case in which there had been an application for extension of time in the original application. Whether these contentions were correct or not raised, it is submitted, an important question of practice.

 In my judgment, there is no realistic prospect of persuading the full court that the rules have this effect. I say that for a number of reasons.

 First, they do not say that. Rule 21(6)(a) requires a late application to include a request for an extension and rule 21(6)(b) provides that the Upper Tribunal must not entertain any application unless there is an extension of time, but the rule does not say that the Upper Tribunal must not entertain the application if a request for an extension is not included in the application. If that was what was intended, the rules could easily have said so.

 Second, what the rules do say is that the Upper Tribunal must not entertain a late application unless the Upper Tribunal extends time for the application under rule 5(3)(a). That rule is an entirely general power unfettered by conditions.

 Third, the result contended for would be manifestly unjust in many cases. If no request for an extension together with reasons is made in the application form, the position is, so the Appellants claims, forever lost.

 In such circumstances, no consideration is to be given to whether the failure to issue the application in time, or to include in it a request for extension, is excusable, nor is it relevant whether the Respondent has suffered any prejudice. The hapless alien with an excellent case who is ignorant of the time limit or has an understandable reason for failing to comply with it and who is ignorant of the rule must fail. The length of the delay in filing is immaterial. One day is the same as 100. Presumably also the objection could, absent anything that could amount to waiver be taken even if the appeal proceeds as far up the curial ladder as possible. If the application is to be regarded as a complete nullity, no waiver of the defect would be possible.

 That that is not a tenable view, it appears to me, confirmed by the provisions of rule 7:

i. "**Failure to comply with rules etc.**
ii. 7(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a Practice direction or a direction, does not of itself render void the proceedings or any step taken in the proceedings.
iii. (2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Upper Tribunal may take such action as it considers just, which may include -
 waiving the requirement;
 requiring the failure to be remedied..."

 Draco might have approved the position argued for, but it would, in my judgment, require a much clearer provision in order for it to be an acceptable interpretation of the rules. There are no doubt good policy reasons for providing that an application for permission should include within it an application for extension of time and reasons, but the legislator cannot, it seems to me, be taken to have intended by the words that he used that a failure to include a request for extension with reasons in the application was invariably fatal to its success.

4. In so far as the grant of permission is conditional upon my extending time (see *Boktor and Wanis (late application for permission) Egypt* [2011] UKUT 00442

(IAC)), then I grant permission. The delay was minimal and no discernible prejudice was caused to the appellant.

5. The First-tier Tribunal judge summarises the appellant's immigration history at [2-4]:

> 2. The Appellant was granted leave to enter the UK as a visitor from the 7th of December 2005 to the 7th of June 2006. The Appellant entered the UK on the 28th of January 2006.
> 3. The Appellant applied for leave to remain in the UK in relation to his private and family life on the 3rd of December 2016. This was refused on the 3rd of March 2018. The Appellant was served with a RED.0001 on the 17th of September 2020.
> 4. The Appellant made an application for leave to remain as a spouse on the 4th of May 2021 and this forms the basis of this appeal.

6. At [44], the First-tier Tribunal judge wrote:

> At the start of the appeal hearing, a discussion took place regarding the live issues. Both representatives acknowledged that contrary to the conclusions reached by IJ Fisher in the earlier determination, this was now a *Chikwamba* case with reference to Chen. It was agreed that the following issues required determination: (i) Does paragraph EX.1 and EX.2 apply in that the Appellant and his wife would face insurmountable obstacles to family life continuing outside the UK? (ii) Are there exceptional circumstances in this case that would mean that a refusal to allow the Appellant leave to remain in the UK would result in unjustifiably harsh consequences for the Appellant or his family. (iii) Is the decision to refuse the Appellant leave to remain in the UK with his wife a disproportionate interference with his right to family or private life pursuant to Article 8 ECHR?

7. In January 2023, the Court of Appeal handed down its judgment in *Alam [*2023] EWCA Civ 30. The decision pre-dates the promulgation of the First-tier Tribunal decision in the instant appeal but *Alam* states the law as it existed at the date of promulgation. The very limited application of *Chikwamba* [2008] UKHL 40 is now apparent:

> 106. In Chikwamba, the Secretary of State met a very strong article 8 case by relying on an inappropriately inflexible policy. The decision does not in my view decide any wider point than that that defence failed. There are three other matters that should be borne in mind when it is cited nowadays.
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> i. The case law on article 8 in immigration cases has developed significantly since Chikwamba was decided.
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> ii. It was decided before the enactment of Part 5A of the 2002 Act. Section 117B(4)(b) now requires courts and tribunals to have 'regard in particular' to the 'consideration' that 'little weight' should be given to a relationship which is formed with a qualifying partner when the applicant is in the United Kingdom unlawfully.
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> iii. When Chikwamba was decided there was no provision in the Rules which dealt with article 8 claims within, or outside, the Rules. By contrast, by the time of the decisions which are the subject of these appeals, Appendix FM dealt with such claims. Paragraph EX.1 of Appendix FM provided an exception to the requirements of Appendix FM in article 8 cases if the applicant had a relationship with a qualifying partner and there were 'insurmountable obstacles' to family life abroad.
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> 107. Those three points mean that Chikwamba does not state any general rule of law which would bind a court or tribunal now in its approach to all cases in which an applicant who has no right to be in the United Kingdom applies to stay here on the basis of his article 8 rights. In my judgment, Chikwamba decides that, on the facts of that appellant's

> case, it was disproportionate for the Secretary of State to insist on her policy that an applicant should leave the United Kingdom and apply for entry clearance from Zimbabwe.

8. In my opinion, it follows that the judge (and the representatives) in the instant appeal proceeded from on a false premise, namely the general application of the 'principles' of *Chikwamba* which the Court of Appeal has now clarified in *Alam*. The judge may excused for failing to anticipate the judgment in *Alam* but I find that his entire reasoning is coloured by his understanding, or rather misunderstanding, of *Chikwamba.*

9. Secondly, I agree with the respondent that the judge fell into further error at [66]:

> Also against the Appellant is the fact that he developed his relationship with his Sponsor at a time when he knew he had no legal immigration status in the UK. This point however is countered by the points made in EB (Kosovo) as highlighted above.

10. The respondent submits that 'The Judge holds, in terms, that section 117(B)(4) is countered by EB Kosovo at [66], the approach of displacing section 117(B)(4) by the Appellant's overstaying is a misapplication of caselaw [that cannot, in any event, displace an Act of Parliament]. This approach leads to the conclusion that a poor immigration history and a refusal to comply with an expectation to return to your home country has the effect of displacing statute to benefit your own poor behaviour. This is a material error in law.' I agree. The judge has wrongly applied the statutory provisions by finding that conduct which Parliament had manifestly intended should count against the appellant should be 'countered' or, in effect, nullified.

11. Thirdly, possibility as a result of his incorrect reliance on *Chikwamba*, the judge has failed to explain why the appellant's wife, who the judge finds does not face insurmountable obstacles to returning to Pakistan, should not be expected to relocate there in order to continue her family life with the appellant. The judge's failure to address that fundamental question vitiates his analysis.

12. In the circumstances, I set aside the decision.

Notice of Decision

The decision of the First-tier Tribunal is set aside. None of the findings of fact shall stand. The appeal is returned to the First-tier Tribunal for that Tribunal to remake the decision following a hearing *de novo.*

C. N. Lane

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 22 September 2023