UT Neutral citation number: [2022] UKUT 00132 (IAC)

SA (Non-compliance with rule 21(4)) Bangladesh

Upper Tribunal
(Immigration and Asylum Chamber)

Heard at Field House

THE IMMIGRATION ACTS

Heard on 21 February 2022
Promulgated on 28 March 2022

Before:

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE GILL

Between

S A — Appellant
(ANONYMITY ORDER MADE)

And

The Secretary of State for the Home Department — Respondent

Anonymity

We make an order under rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. No report of these proceedings shall directly or indirectly identify her. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings.
We make this order because this is a protection claim.
The parties at liberty to apply to discharge this order, with reasons.

Representation:

For the appellant: Mr R Spurling, of Counsel, instructed by Shahid Rahman Solicitors.
For the respondent: Ms J Isherwood, Senior Home Office Presenting Officer.

1. *An in-time application which does not comply with rule 21(4) in one or more ways is nevertheless a valid application which must be decided by the Upper Tribunal. If it had been intended otherwise, the UT Rules could easily have said so.*

2. *Where the Upper Tribunal receives an application which does not comply with rule 21(4)(e) because it is not accompanied with the grounds (whether or not the covering letter accompanying the application or the completed IAUT-1 form states that the grounds are attached or enclosed), an Upper Tribunal Lawyer (or the Tribunal) will write to the applicant (if his address has been supplied pursuant to rule 21(4)(a)) and (if represented) to his or her legal representative:*

   (i) stating that the grounds were not received with the application;

   (ii) requiring (pursuant to rule 7(2)(b)) that the failure be remedied, in that the appellant must now submit the grounds within a specified number of working days beginning with the date of the letter; and

   (ii) explaining that upon expiry of the deadline, the application will be placed before an Upper Tribunal Judge for a decision on the application on the material before the Upper Tribunal.

3. *The Upper Tribunal Judge deciding an application for permission to appeal that is not supported by any grounds will be obliged to consider whether there are any grounds for granting permission, following the approach articulated at para [69] of AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 245 (IAC); namely, a ground:*

   "… which has a strong prospect of success for the original appellant; or for the Secretary of State, where the ground relates to a decision which, if undisturbed, would breach the United Kingdom's international treaty obligations; or (possibly) if the ground relates to an issue of general importance, which the Upper Tribunal needs to address".

4. *If the grounds (in their final form) were not in existence by the expiry of the relevant deadline in rule 21(3), it would be an abuse of process or akin to an abuse of process for an applicant and/or his legal representatives to submit an application within the relevant deadline in the knowledge that rule 21(4)(e) cannot be complied with. The proper and correct approach in such cases is to make the application when it can be submitted with the grounds and, if necessary, request an extension of time.*

5. *The Upper Tribunal's approach, where it receives an application that does not comply with rule 21(4)(a), is likely to be as follows: An Upper Tribunal Lawyer (or the Tribunal) will write to the applicant's representative:*

(i) stating that the application does not state the appellant's name and address contrary to rule 21(4)(a); and

(ii) requiring (pursuant to rule 7(2)(b)) that the failure be remedied by the legal representative providing, within a (usually short) number of working days, either:

(a) the appellant's name and address; or

(b) written confirmation that, pursuant to the duty of the representative under rule 2(4) to help the Upper Tribunal to further the overriding objective and to co-operate with the Upper Tribunal generally, the representative has explained to the appellant that failure to provide the Upper Tribunal with his or her name and address means that he or she is at risk of not receiving notifications from the Upper Tribunal concerning the appeal.

NOTICE OF DECISION ON
APPLICATION FOR PERMISSION TO APPEAL

Permission to appeal is granted.

REASONS
(including any decision on extending time)

1. This is an out-of-time application by the appellant, a national of Bangladesh born on 5 July 1976, for permission to appeal against a decision of Judge of the First-tier Tribunal Karbani who, in a decision promulgated 14 January 2021 following a hearing on 23 December 2020, dismissed her appeal on asylum, humanitarian protection and human rights grounds against a decision of the respondent of 24 October 2019 which refused her asylum and humanitarian protection claims of 14 January 2019 and also refused to grant leave to remain on human rights grounds.

2. Judge of the First-tier Tribunal Chohan refused the application to the First-tier Tribunal ("FtT") in a decision sent to the parties on 30 March 2021. The application to the Upper Tribunal was received by email on 14 April 2021. It is accepted by the parties that the deadline for making the application expired on 13 April 2021. At the time, the appellant was represented by David Wyld Solicitors. She instructed Shahid Rahman Solicitors on 18 October 2021.

3. The application for permission to appeal has been listed for an oral hearing with a view to providing guidance on the following issues:

(i) The consequence(s) of an application to the Upper Tribunal for permission to appeal that does not comply with rule 21(4) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "UT Rules"). For example, the application does not state the name and address of the appellant as required by rule 21(4)(a) or does not provide the grounds relied upon as required by rule 21(4)(e). We deal with this in section A (iii) below.

(ii) The approach to be taken by the Upper Tribunal when it receives an application for permission to appeal that does not comply with rule 21(4). We deal with this in section A (i), (ii) and (iv)-(vi) below.

4. In the instant case, although section F "*Reasons for appealing*" of the completed form IAUT-1 stated "*Please see attached*", the application received by the Upper Tribunal did not include any grounds. The application therefore did not comply with rule 21(4)(e).

5. We set out in the annex to this decision (hereafter the "Annex") a chronology of steps taken by the Upper Tribunal to obtain the grounds and the responses (or lack of responses) to its requests. In summary, beginning on 5 May 2021, the Upper Tribunal attempted on several occasions to obtain the grounds from David Wyld Solicitors, both by letters and by telephone. Directions were also issued on five occasions, on four of which the directions were for the appellant's grounds to the Upper Tribunal to be filed. These directions were sent on 19 August 2021, 6 September 2021 and 29 September 2021 to David Wyld Solicitors and on 1 November 2021 sent to Shahid Rahman Solicitors.

6. On 5 October 2021, the Upper Tribunal received from David Wyld Solicitors by email a copy of the grounds that had been submitted to the FtT in support of the application to the FtT for permission to appeal (the "FtT Grounds"). The directions issued on 1 November 2021 to Shahid Rahman Solicitors were issued in response to an application by them for further time to submit the appellant's grounds. On 11 November 2021, the Upper Tribunal finally received the appellant's grounds in support of her application to the Upper Tribunal for permission to appeal (hereafter the "UT Grounds") within the deadline given in the directions dated 1 November 2021.

7. It follows that the UT Grounds were received 211 days after the application for permission to appeal was received and 212 days after the deadline had expired.

8. In addition to giving general guidance as explained at para 3 above, we need to decide the following issues which are specific to the instant case and which we deal with in section B below:

(i) whether time should be extended for the application;

(ii) if time is extended, whether the appellant should be permitted to rely upon the UT Grounds in support of her application for permission to appeal; and

(iii) whether permission to appeal to the Upper Tribunal should be granted.

9. The basis of the appellant's asylum claim, in summary, is as follows: She was a practising lawyer in Bangladesh who had acquired a number of properties. She was befriended and pursued for marriage by Mr H who was used by a local political minister to intimidate persons without affecting the reputation of the political party. In August 2017, he threatened her. On 21 February 2018, he kidnapped her and raped her. He videoed the attack and released her on her promise that she would marry him in a year. He threatened to release the video and kill her if she told anyone or did not keep her promise. He has since threatened her through her father and sister in Bangladesh.

10. The judge rejected the basis of the appellant's protection claims and therefore dismissed her protection claims. There is no challenge to the judge's decision to dismiss the appellant's Article 8 claim.

A. NON-COMPLIANCE WITH RULE 21(4) OF THE UT RULES

(i) Why guidance is needed

11. The time limit for making an application to the Upper Tribunal for permission to appeal is set out at rule 21(3)(aa). Rule 21(4) specifies various matters which the application must state. Rule 21, insofar as relevant, reads:

> **Application to the Upper Tribunal for permission to appeal**
>
> 21.-(2) A person may apply to the Upper Tribunal for permission to appeal to the Upper Tribunal against a decision of another tribunal only if—
>
> (a) they have made an application for permission to appeal to the tribunal which made the decision challenged; and
> (b) that application has been refused or has not been admitted or has been granted only on limited grounds.
>
> (3) An application for permission to appeal must be made in writing and received by the Upper Tribunal no later than—
> (a) …;
> (aa) in an asylum case or an immigration case where the appellant is in the United Kingdom at the time that the application is made, 14 days after the date on which notice of the First-tier Tribunal's refusal of permission was sent to the appellant;
> (b) otherwise, a month after the date on which the tribunal that made the decision under challenge sent notice of its refusal of permission to appeal, or refusal to admit the application for permission to appeal, to the appellant.
>
> (4) The application must state—
> (a) the name and address of the appellant;
> (b) the name and address of the representative (if any) of the appellant;
> (c) an address where documents for the appellant may be sent or delivered;
> (d) details (including the full reference) of the decision challenged;
> (e) the grounds on which the appellant relies; and
> (f) whether the appellant wants the application to be dealt with at a hearing.
>
> (5) The appellant must provide with the application a copy of—
> (a) any written record of the decision being challenged;
> (b) any separate written statement of reasons for that decision; and
> (c) if the application is for permission to appeal against a decision of another tribunal, the notice of refusal of permission to appeal, or notice of refusal to admit the application for permission to appeal, from that other tribunal.
>
> (6) 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)—
>
> (a) the application must include a request for an extension of time and the reason why the application was not provided in time; and
> (b) 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.

12. As can be seen, rule 21(4) requires an application for permission to appeal to state various matters. We will hereafter refer to an application which does not comply with rule 21(4) as a "*non-compliant application*".

13. Non-compliant applications are usually applications that fail to comply with rule 21(4)(a) and/or (e). In the case of rule 21(4)(e), the applications are made without any grounds at all or (as in this case) grounds are not attached although it is stated either in the completed form IAUT-1 or a cover letter that grounds are attached. Much time and effort is then spent by the administrative staff of the Upper Tribunal in attempting to obtain the grounds. If, as happened in this case, the efforts made do not produce positive results, the file is then taken to a judge for instructions. The judge may then decide the application for permission on the material before him or her or he or she may decide to issue directions giving the applicant a limited time to provide the grounds.

14. The expectation of some consistency of approach, absent particular circumstances in individual cases, is plainly desirable in the interests of justice. In addition, an explanation as to the approach that the Upper Tribunal is likely to take in the case of non-compliant applications (whether they are made in-time or not) should provide clarity to claimants, court users and practitioners and enable the Upper Tribunal to utilise its resources more efficiently; all in pursuance of the overriding objective.

15. There is also another very important reason for what we have just said. In the instant case, directions were first issued on 23 August 2021, that is, four months after the deadline for making the application had lapsed. By this time, the administrative staff of the Upper Tribunal had already contacted David Wyld Solicitors (the appellant's representatives at the time) for the grounds by email on four occasions and by telephone on three occasions. The fourth and final set of directions was issued on 1 November 2021, over 6 months after the deadline for making the application for permission to appeal had passed. The UT Grounds were lodged on 11 November 2021, within the deadline specified in the directions issued on 1 November 2021 but 212 days after the deadline for making the application with the grounds had expired. If the applicant is permitted to reply upon the UT Grounds, then (subject to time being extended for her late application), she will effectively have secured in excess of 200 days to provide her grounds.

16. Whilst this is an extreme example, there is a clear need to ensure that the strong public interest in the fair and efficient disposal of cases, as to which the deadlines in rule 21(3) for the submission of applications for permission *with the grounds* plays an important role, is not eroded or significantly compromised.

17. In addition to non-compliance with rule 21(4)(e), applications are made on behalf of individual appellants (as opposed to the Secretary of State) which do not provide the name and address of the appellant, contrary to rule 21(4)(a). Where this happens, the appellant will almost always be legally represented by a firm of solicitors whose name and address will be given in the space given for the name and address of the appellant to be provided. In these cases, too, the administrative staff of the Upper Tribunal often write to the legal representatives and request that the Upper Tribunal be provided with the missing details.

(ii) The relevant provisions

18. We have set out rule 21 above. Also relevant are the following: rule 2, which explains the overriding objective and provides that the parties must help the Upper Tribunal to further the overriding objective and co-operate with the Upper Tribunal generally; rule 5 (case management powers); rule 7 (failure to comply with the rules); and rule 8 (strike out provisions). These provisions, together with the definitions of "*asylum case*" and "*immigration case*" in rule 1 which are relevant to rule 8, read as follows:

> **Citation, commencement, application and interpretation**
>
> 1.- (1) …
>
> (2) …
>
> (3) In these Rules—
>
> "asylum case" means proceedings before the Upper Tribunal on appeal against a decision in proceedings under section 82, 83 or 83A of the Nationality, Immigration and Asylum Act 2002 in which a person claims that removal from, or a requirement to leave, the United Kingdom would breach the United Kingdom's obligations under the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol to the Convention;
>
> "immigration case" means proceedings before the Upper Tribunal on appeal against a decision in proceedings under section 40A of the British Nationality Act 1981, section 82 of the Nationality, Immigration and Asylum Act 2002, regulation 26 of the Immigration (European Economic Area) Regulations 2006, regulation 36 of the Immigration (European Economic Area) Regulations 2016 or the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 that are not an asylum case;
>
> **Overriding objective and parties' obligation to co-operate with the Upper Tribunal**
>
> 2.- (1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
> (d) using any special expertise of the Upper Tribunal effectively; and
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Upper Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
>
> (a) help the Upper Tribunal to further the overriding objective; and (b) co-operate with the Upper Tribunal generally.
>
> **Case management powers**
>
> 5.- (1) …

(2) The Upper Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Upper Tribunal may—

(a) extend or shorten the time for complying with any rule, practice direction or direction;

…

Failure to comply with rules etc.

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.

(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—

(a) waiving the requirement;
(b) requiring the failure to be remedied;
(c) exercising its power under rule 8 (striking out a party's case); or
(d) except in a mental health case, an asylum case or an immigration case, restricting a party's participation in the proceedings.

Striking out a party's case

8.- (1A) Except for paragraph (2), this rule does not apply to an asylum case or an immigration case.

(1) …

(2) The Upper Tribunal must strike out the whole or a part of the proceedings if the Upper Tribunal—

(a) does not have jurisdiction in relation to the proceedings or that part of them; and
(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(iii) The status of an application that does not comply with rule 21(4)

19. Rule 7 provides that any irregularity resulting from a failure to comply with any requirement of the UT Rules does not of itself render void the proceedings or any step taken in the proceedings. This indicates that an application which does not comply with rule 21(4) is nevertheless an application.

20. Rule 7 was considered by the Court of Appeal in NA (Bangladesh) v Secretary of State for the Home Department [2016] EWCA Civ 651. This was a decision of the Court of Appeal on an application by a national of Bangladesh for permission to appeal against a decision of the Upper Tribunal which set aside a decision of the FtT allowing her appeal and which re-made the decision on her appeal by dismissing it. The claimant argued that the application by the Secretary of State for the Home Department to the Upper Tribunal for permission to appeal was invalid because it had not been accompanied by an application for time to be extended and no explanation was provided for the delay in making the application as was required by rule 21(6).

Accordingly, it was argued on her behalf that the Upper Tribunal was *bound* not to admit the application.

21. Christopher Clarke LJ rejected the submission that the Secretary of State's application to the Upper Tribunal for permission to appeal was invalid. His Lordship dealt with the claimant's argument at paras 11-24 as follows:

> "11. 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.
>
> 12. 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.
>
> 13. 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.
>
> 14. 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.
>
> 15. 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.
>
> 16. 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 –
>
> 17. waiving the requirement; *[sic]*
>
> 18. requiring the failure to be remedied*..." [sic]*
>
> 19. 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.
>
> 20. That the intention of the legislator is a material consideration appears from the case of R v Secretary of State for the Home Department, ex p Jeyeanthan [1999] EWCA Civ 3010. I note also that in that case Lord Woolf hoped that provisions intended to have an effect

such as argued for in this case would be few and far between and held that, in determining what are to be the consequences of failing to comply with a procedural requirement, the tribunal's task will be to seek to do what is just in the circumstances because procedural requirements are designed to further the interests of justice. He also recognised that a requirement may be clearly directory because it lays down a time limit, but a tribunal is given an express power to extend the time for compliance.

21. Fourth, if the position is not such that the application was a complete nullity, then the Appellant was entitled to waive the non-compliance and in my judgment, must be taken to have done so by failing to rely before the Upper Tribunal on the point that the application did not contain a request for an extension of time and reasons. That failure continued in the first skeleton argument.

22. Fifth, the Appellant's own arguments seem to me to have certain curiosities. It appears to be accepted that the Upper Tribunal could, prior to adjudicating on the application to extend time, have permitted amendment of the application to include a request for extension, a circumstance which would mean that the failure to include the request could be retrospectively remedied.

23. Secondly, it is suggested that one route round the problem would be for the Secretary of State to file another application seeking an extension of time and citing as the reason for delay the filing of the earlier application which was invalid through failure to identify the fact that that earlier application was made out of time or to seek an extension and give reasons there for. If these expedients are open, it seems to me difficult to see why the Appellant's austere interpretation should be adopted in the first place.

24. For these reasons, I decline to grant permission to appeal on the new way of putting it, despite Mr Fripp's able arguments on this new point. I am quite satisfied that it was open to the Upper Tribunal Judge to grant a one day extension and that for the reasons given by Moore-Bick LJ, the appeal has no realistic prospect of success and certainly does not pass the second appeals test."

22. Although NA (Bangladesh) concerned a failure to comply with rule 21(6), much of the reasoning of the Court in that case applies by analogy to applications which do not comply with rule 21(4). Thus we note that, whilst rule 21(4) requires an application to the Upper Tribunal to state the various matters specified in (a)-(f) of rule 21(4), there is nothing in rule 21(4) or the UT Rules which states that the Upper Tribunal must not entertain the application or that it must treat the application as invalid or that denies the Upper Tribunal jurisdiction if the provisions of rule 21(4)(a)-(e) are not complied with.

23. In addition, in our view, such a construction could lead to injustice. For example, if the only aspect of rule 21(4) that an application does not comply with is rule 21(4)(f) (which requires the application to state whether the appellant wants the application to be dealt with at a hearing), the Upper Tribunal would have all the material that it requires in order to make a decision on the application without a hearing. In such a case, it would be unfair to deprive an applicant of a decision on the application simply because rule 21(4)(f) had not been complied with. This could not have been the intention of the legislator.

24. We therefore agree with Mr Spurling that an in-time application which does not comply with rule 21(4) in one or more ways is nevertheless a valid application which must be decided by the Upper Tribunal. If it had been intended otherwise, the UT Rules could easily have said so.

(iv) The Upper Tribunal's powers in dealing with non-compliant applications

25. Before turning to the Upper Tribunal's powers in dealing with non-compliant applications, it is necessary to recall the need for procedural rigour and the reasons why it is important. In R (Talpada) v Secretary of State for the Home Department [2018] EWCA Civ 841, Singh LJ stressed the importance of procedural rigour, saying, at paras 67-69, as a follows:

> "67. I turn finally to the question of procedural rigour in public law litigation. In my view, it cannot be emphasised enough that public law litigation must be conducted with an appropriate degree of procedural rigour. I recognise that public law litigation cannot necessarily be regarded in the same way as ordinary civil litigation between private parties. This is because it is not only the private interests of the parties which are involved. There is clearly an important public interest which must not be overlooked or undermined. In particular procedure must not become the master of substance where, for example, an abuse of power needs to be corrected by the court. However, both fairness and the orderly management of litigation require that there must be an appropriate degree of formality and predictability in the conduct of public law litigation as in other forms of civil litigation.
>
> 68. In the context of an appeal such as this it is important that the grounds of appeal should be clearly and succinctly set out. It is also important that only those grounds of appeal for which permission has been granted by this Court are then pursued at an appeal. The Courts frequently observe, as did appear to happen in the present case, that grounds of challenge have a habit of "evolving" during the course of proceedings, for example when a final skeleton argument comes to be drafted. This will in practice be many months after the formal close of pleadings and after evidence has been filed.
>
> 69. These unfortunate trends must be resisted and should be discouraged by the courts, using whatever powers they have to impose procedural rigour in public law proceedings. Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them. Otherwise there is a risk that there will be unfairness, not only to the other party to the case, but potentially to the wider public interest, which is an important facet of public law litigation."

26. Although Talpada was an appeal in a judicial review claim issued in the High Court, procedural rigour is also important in statutory appeals in Immigration and Asylum Chamber of the Upper Tribunal given the public interest in the fair and efficient disposal of such appeals. They are not cases that only involve the private interests of the parties to the case.

27. It is also necessary to recall the overriding objective to deal with cases fairly and justly. In NA (Bangladesh), Christopher Clarke LJ referred to R v Secretary of State for the Home Department, ex p Jeyeanthan [1999] EWCA Civ 3010. Jeyeanthan is a long-standing authority on the consequences of a breach of a procedural requirement. In that case, Lord Woolf held that, in determining what are to be the consequences of failing to comply with a procedural requirement, the Tribunal's task is to seek to do what is just in the circumstances because procedural requirements are designed to further the interests of justice. Where a procedural requirement is clearly directory because it lays down a time limit, it is necessary to take into account that the Tribunal is given an express power to extend the time for compliance.

28. Turning then to the Upper Tribunal's powers to deal with non-compliant applications, an application that does not comply with rule 21(4) plainly amounts to "*an irregularity*

resulting from a failure to comply with [the requirements of rule 21(4)]" within the meaning of rule 7(1). Rule 7(2) provides that the actions that the Tribunal may take include the four actions set out in (a) to (d) of rule 7. Rule 7(d) is not available in an asylum case or an immigration case. Rule 7(c) refers to the power to strike out under rule 8. We agree with Mr Spurling that, unless rule 8(2) applies, the power in rule 8 to strike out a case is not available to the Upper Tribunal in dealing with a non-compliant application.

29. This leaves the actions specified in rule 7(a) and (b), that is, the Upper Tribunal may waive the requirement or require it to be remedied. We agree with Mr Spurling that the Upper Tribunal's powers are not limited to waiver of the requirement in question or requiring it to be remedied and that the Upper Tribunal does have power to impose sanctions short of a strike-out. For example, it is open to the Upper Tribunal to direct an appellant to file his or her grounds within a specified period and give notice that, if the grounds are not filed within the period in question, the Upper Tribunal will proceed to decide the application for permission to appeal.

30. However, Mr Spurling submitted that the Upper Tribunal should be slow to decide an application if it does not have any grounds and should only do so as a last resort because, in his submission, this would be *"functionally equivalent"* to a strikeout. We do not agree. When a case is struck out, it is disposed of solely on the ground of non-compliance with one or more requirements of the UT Rules without any consideration of the substance of the case, whereas the imposition of a sanction to the effect that the application will be decided does not mean that the substance of the case is not considered. The judge deciding the application has a duty to consider whether there are any "Robinson obvious" grounds, as explained by the Upper Tribunal at para [69] of AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 245 (IAC); namely, a ground:

> "… which has a strong prospect of success for the original appellant; or for the Secretary of State, where the ground relates to a decision which, if undisturbed, would breach the United Kingdom's international treaty obligations; or (possibly) if the ground relates to an issue of general importance, which the Upper Tribunal needs to address".

(v) The appellant's submissions

31. We will now set out the submissions advanced by Mr Spurling as to the approach that the Upper Tribunal should take in dealing with non-compliant applications.

32. Mr Spurling submitted that the importance of procedural rigour does not make it the sole or even the most important consideration in immigration and asylum cases; that, whilst it is a significant consideration, other considerations are also important; and that, insofar as the UT Rules contain an indication of the approach the Tribunal should take towards procedural defects, they encourage it to be generous.

33. Mr Spurling submitted that the Upper Tribunal's options are as follows:

(i) issue a direction for the party who is in breach of rule 21(4) to comply with the relevant provision of rule 21(4), giving that party a reasonable opportunity to

comply with the direction and notice of the sanction that would be applied by the Upper Tribunal if the direction is not complied with; or

(ii) issue a direction as in (a) above but without imposing a sanction for failure to comply with the direction; or

(iii) decide the application before it in the form in which it appears so that, in effect, the Upper Tribunal waives the requirement in question.

34. Mr Spurling submitted that the question whether it is appropriate to waive a breach or require it to be remedied with or without a sanction is likely to involve some, although not all, of the same principles of assessment, albeit with different questions, that are engaged in the three-stage procedure for deciding whether to extend time in relation to applications made out of time, set out at para 14 of the *Joint Presidential Guidance 2019 No 1 Permission to appeal to UT(IAC)* (hereafter the "2019 Presidential Guidance Note") issued by the Presidents of the Immigration and Asylum Chambers of the First-tier Tribunal (see our para 70 below). He submitted that the relevant questions include consideration of, but not limited to, the following:

(i) At stage 1: The seriousness of the breach in question and whether it is largely formal. The examples given by Mr Spurling of such breaches include the failure to expressly specify an address for service if the application includes the address of the appellant and/or his or her representative and a failure to provide a full reference for the decision being challenged in circumstances where it is nevertheless easily identifiable by other means.

If the breach is trivial, Mr Spurling submitted that it is unlikely to be necessary to consider stages 2 or 3.

(ii) At stage 2: The reason for the breach, whether the circumstances suggest that the breach was inadvertent (for example, an attachment becoming detached and going astray) or wilful (that is, something akin to abuse of process).

Mr Spurling submitted that, if there is a very good reason for the breach, it is unlikely to be necessary to consider stage 3.

(iii) At stage 3: The relevant circumstances, including:

a) whether it was the first such breach, or whether there have been other breaches;

b) whether the breach was the fault of the party or his or her representative or someone else; Mr Spurling submitted that if the breach was not the fault of the party, the Tribunal should be slow to impose sanctions;

c) the efforts (if any) that the defaulting party has made to remedy the breach and how conscientiously the defaulting party attempted to cooperate with the Upper Tribunal and its procedures in its conduct of the case;

e) what the defaulting party can do to remedy the breach;

f) what prejudice the breach has caused to the other side; and

g) whether the Upper Tribunal has already waived the breach or done something to create that impression.

35. Mr Spurling submitted that it would not normally be proportionate for the Upper Tribunal to waive the breach if it is so serious that it interferes with the Tribunal's ability to exercise its judicial function of deciding the application. In particular, in his submission, in the case of an application for permission to appeal that does not state any grounds, it would not be appropriate in most cases to waive the breach; firstly, because this would mean that the application for permission to appeal would be decided on the basis that there were no grounds in support of the application; secondly, because the result of such a course of action would be likely to be that the application for permission to appeal would be refused which, in his submission, would mean that the waiver of the breach would be "*functionally equivalent*" to a strikeout which we have dealt with above.

36. In Mr Spurling's submission, the appropriate course in most cases would be to require the appellant to remedy the breach by giving him or her a further opportunity to lodge grounds. If simply notifying the appellant that the grounds are missing and asking for them to be sent by return does not produce a rapid response, the Upper Tribunal should then issue a direction to the appellant to submit the grounds which may or may not specify a sanction for non-compliance with the direction, depending on the view that the Upper Tribunal takes of the reason for the breach. If, in the end, the Upper Tribunal has tried to obtain the grounds by less onerous means and has warned the appellant that unless grounds are received by a certain date it will decide the application without them and still its attempts to obtain grounds prove unsuccessful, then it may have to decide the application without grounds but, in Mr Spurling's submission, this *"should very much be a last resort"* because deciding the application without grounds would in most cases have the effect of stifling the appeal.

37. However, Mr Spurling submitted that it would not only be inappropriate but disproportionate to follow the above procedure in cases in which the decision of the FtT contains "*such glaringly Robinson obvious errors that the Upper Tribunal can identify them as arguable without the assistance of pleaded grounds"*. In such cases, Mr Spurling submitted that it would *usually be disproportionate* to require the appellant to remedy the breach and the breach would be insufficiently serious to apply any kind of sanction, so that the appropriate course would be to waive the breach and grant permission to appeal.

(vi) Assessment

38. We will consider first applications that do not comply with rule 21(4)(e).

39. It can be seen that Mr Spurling suggests an initial phase during which a judge decides whether he or she is able to grant permission without the benefit of any grounds on Robinson obvious principles. If the answer is "yes", the judge should waive the breach and grant permission; it would be disproportionate to do otherwise. If the answer is "no", then the judge needs to consider whether to issue a direction

with or without a sanction, waiver of the breach not being appropriate (in his submission). At the end of any period for compliance with the direction, the judge should consider the three-stage approach applicable in deciding whether to extend time for an application that is out-of-time. The Upper Tribunal should only proceed to decide an application that is not supported by any grounds as a last resort and only after attempts have been made to obtain the grounds.

40. We are very grateful to Mr Spurling for his helpful submissions. However, we decline to accept the approach he has advanced. We consider that such an approach would inevitably lead to unacceptable delays in disposing of applications for permission, in particular, applications that are not accompanied by grounds, as a result of which the relevant deadline in rule 21(3) for making an application for permission would be robbed of any utility for all applications that fail to comply with rule 21(45)(e). It also has the potential of enabling unscrupulous litigants to abuse the process, if all they had to do in order to gain time and avoid the relevant deadline in rule 21(3) for making the application for permission was to submit an application without grounds. The process suggested by Mr Spurling, if implemented, would mean that, in most cases, it would be inappropriate for the Upper Tribunal to waive the breach and decide the application on the material before the Upper Tribunal except as a last resort and even then only after (it seems) more than one attempt has been made by the Upper Tribunal to obtain the grounds.

41. The deadlines in rule 21(3) are plainly imposed so that decisions are challenged timeously. The periods specified in rule 21(3) have been chosen by Parliament, as representing the appropriate period of time that takes account both of the public interest in the efficient disposal of appeals and the public interest in ensuring that appellants are given a fair opportunity to take legal advice, if they wish to do so, and finalise their grounds. The clear expectation is that this is sufficient time in the generality of cases for an applicant to submit the application *and the grounds* and thus comply with both the deadline for making the application in rule 21(3) *and* the requirement in rule 21(4)(e). Compliance with *both* rule 21(3) and rule 21(4)(e) enables the efficient, fair and just disposal by the Upper Tribunal of applications for permission to appeal. The basic point is that, if a party decides to challenge the decision of the First-tier Tribunal by applying to the Upper Tribunal for permission to appeal, they must have a reason for saying that decision was wrong in law and therefore are expected to articulate that reason at the time when they apply to the Upper Tribunal.

42. There are a small number of cases in which the application is made accompanied by the grounds but, for technical reasons (for example, failure of the fax machine or other technical difficulty) or human oversight, the grounds are not sent or, if sent, are not received by the Upper Tribunal. Typically, such cases are speedily resolved. A request by the administrative staff of the Upper Tribunal should thus result in the grounds being re-submitted to the Upper Tribunal.

43. If an applicant is unable to lodge an application accompanied by his grounds within the deadline in rule 21(3), it would be an abuse of process or akin to an abuse of process (whether or not it was intended as such) if the application for permission to appeal is nevertheless lodged without any grounds unless the grounds are also lodged with the Upper Tribunal within the rule 21(3) deadline. This is because the lodging of an application within the rule 21(3) deadline when the appellant is unable

to lodge his grounds within the same deadline would amount to an attempt to circumvent the clear intention behind rules 21(3) and 21(4)(e) taken together, that *applications* must be made within the rule 21(3) deadline and that the application must state the grounds. In effect, it would amount to an attempt to circumvent the rule 21(3) deadline.

44. The correct and proper approach in such cases is to make the application when it can be submitted with the grounds and, if necessary, request an extension of time. The Upper Tribunal would then decide whether time should be extended by applying the three-stage approach set out at para 14 of the Presidential Guidance Note. That approach includes having regard to the underlying grounds of challenge; but only if they are very strong or very weak. Accordingly, the approach can be conducted only if the Tribunal knows the case for permission that is being advanced by the applicant. This would ensure parity of treatment between those who comply with the Rules and those who do not. It would reduce the need for the Upper Tribunal to use its limited resources to chase parties for their grounds when they have failed to comply with rule 21(4).

45. In view of the fact that there exists an established practice for dealing with out-of-time applications pursuant to established case-law in a way that is lawful and fair, the guidance we give is intended to cater for those applications for permission that are lodged with the grounds or intended to be lodged with the grounds but for some technical reason or human error, the Upper Tribunal does not receive the grounds.

46. Henceforth, therefore, parties should assume that the Upper Tribunal's approach to applications that do not comply with rule 21(4)(e) is likely to be as follows: Where the Upper Tribunal receives an application which is not accompanied with the grounds (whether or not the covering letter accompanying the application or the completed IAUT-1 form states that the grounds are attached or enclosed), an Upper Tribunal Lawyer (or a judge) will write to the applicant (if his address has been supplied pursuant to rule 21(4)(a)) and (if represented) to his or her legal representative:

(i) stating that the grounds were not received with the application;

(ii) requiring (pursuant to rule 7(2)(b)) that the failure be remedied, in that the appellant must now submit the grounds within a specified number of working days beginning with the date of the letter; and

(ii) explaining that upon expiry of the deadline, the application will be placed before an Upper Tribunal Judge for a decision on the application on the material before the Upper Tribunal.

47. So far as concerns the period within which the breach is required to be remedied, we can see no reason why this should not be very short. Any period necessarily represents (in effect) an extension of the relevant deadline in rule 21(3) and rule 21(4)(e). Anything more than the shortest period to act upon the rule 7 requirement would effectively amount to an unwarranted extension by the Upper Tribunal of the deadline fixed by Parliament's approval of the 2008 Rules.

48. As we have said in paragraph 30 above, the Upper Tribunal Judge deciding an application for permission to appeal that is not supported by any grounds will be

obliged to consider whether there are any grounds for granting permission, following the approach articulated in AZ.

49. Mr Spurling submitted that the judge should always consider the grounds that were submitted in support of the application to the FtT for permission. In our judgment, there can be no expectation that the judge will do so. To accede to this submission would effectively elevate a case in which no grounds were submitted to the Upper Tribunal above a case in which such grounds are submitted. In the case of the latter, grounds that are not identified in the grounds to the Upper Tribunal or are not stated in the grounds to the Upper Tribunal as being relied upon are not normally considered by the judge.

50. If the grounds (in their final form) were not in existence by the expiry of the relevant deadline in rule 21(3), it would be an abuse of process or akin to an abuse of process for an applicant and/or his legal representatives to submit an application within the relevant deadline in the knowledge that rule 21(4)(e) cannot be complied with. As we have said above, the proper and correct approach in such cases is to make the application when it can be submitted with the grounds and, if necessary, request an extension of time.

51. We are conscious that the process we have set out above still carries a risk that unscrupulous litigants and/or practitioners may file an application without grounds in order to obtain an additional period in which to formulate or finalise their grounds, in circumstances where the grounds did not in fact exist at the time that the application was lodged. It will be appreciated that the additional period is not just whatever period is set under rule 7 by the Tribunal Lawyer (or judge) but also the time taken by the Tribunal's administrative staff to identify the lack of grounds and refer the matter for judicial decision. We shall therefore keep the matter under review.

52. We turn now to consider applications that do not comply with rule 21(4)(a) which requires the application to state the name and address of the appellant.

53. It often happens that applications for permission to appeal made on behalf of appellants who are represented fail to provide the name and address of the appellant as required by rule 21(4)(a) and that requests by the administrative staff of the Upper Tribunal for the name and address of the appellant to be provided fail to remedy the breach.

54. We remind all practitioners that rule 2(4) requires them to help the Upper Tribunal to further the overriding objective and to co-operate with the Upper Tribunal generally.

55. Compliance with rule 21(4)(a) is very important. If the legal representative subsequently ceases to act, the Upper Tribunal is left with no contact details for the appellant if his name and address are not stated in the application when lodged. If rule 21(4)(e) is also not complied with, this will mean that the appellant is likely to be completely unaware that grounds were not submitted to the Upper Tribunal. If the legal representative then fails to submit the grounds in response to a request from the Upper Tribunal, the result will be that the application will not be supported by any grounds. The instant case is a paradigm example of the risk that an appellant runs in the future of the application for permission being decided without the benefit of any grounds if his or her address is not provided in the application.

56. Henceforth, parties should assume that the Tribunal's approach, where it receives an application that does not comply with rule 21(4)(a), is likely to be as follows: An Upper Tribunal Lawyer (or a judge) will write to the applicant's representative:

(i) stating that the application does not state the appellant's name and address contrary to rule 21(4)(a); and

(ii) requiring (pursuant to rule 7(2)(b) that the failure be remedied by the legal representative providing, within a (usually short) number of working days, either:

(a) the appellant's name and address; or

(b) written confirmation that, pursuant to the duty of the representative under rule 2(4) to help the Upper Tribunal to further the overriding objective and to co-operate with the Upper Tribunal generally, the representative has explained to the appellant that failure to provide the Upper Tribunal with his or her name and address means that he or she is at risk of not receiving notifications from the Upper Tribunal concerning the appeal.

57. In our view, no articulation of the Tribunal's likely reaction is necessary in relation to rule 21(4) (b). If an appellant is represented, the application will usually state the name and address of the representative.

58. The same is true in respect of rule 21(4)(c) which requires the application to state an address where documents for the appellant may be sent or delivered. If the appellant is represented, the address of the legal representative is normally given. The difficulty that arises is when the appellant is represented but his or her address is not stated as required by rule 21(4)(a) which we have dealt with.

59. The same is true in relation to rule 21(4)(d), which requires the application to state details including the full reference of the decision being challenged. Provided the appeal number and the appellant's name are provided and these details correspond with what is in the Tribunal's database, the likelihood is that the database will contain details of the decision being challenged. Accordingly, in such cases, it will rarely be necessary for the Upper Tribunal to contact the appellant and/or the representatives in order to request them to supply this information.

60. In the case of an application that does not comply with rule 21(4)(f), the Upper Tribunal will not know whether the applicant wants his application to be dealt with at a hearing and, if so, the reasons why. However, the Upper Tribunal will be able to make its own decision as to whether an oral hearing for the application is necessary and, if it is concluded that an oral hearing is not necessary, the Upper Tribunal will have before it everything it needs in order to make a decision on the application on the papers. In such cases, if the application does not comply with rule 21(4)(f), it will rarely be necessary or proportionate for the Upper Tribunal to seek the appellant's view as to whether he or she wants their application to be dealt with at a hearing.

(vii) Breach of rule 21(4)(e) in the instant case

61. In the instant case, rule 21(4)(e) should have been complied with on 14 April 2021 when the application for permission to appeal was received. It was not complied with until 11 November 2021, i.e. 211 days late.

62. In deciding whether we should waive this breach of rule 21(4)(e), we take into account that the above guidance was not in existence when the appellant's application for permission to appeal was received. As a consequence, the time for complying with rule 21(4)(e) was effectively extended by the directions issued on 19 August 2021 and subsequently by the directions issued on 6 September 2021, 26 September 2021 and 1 November 2021.

63. On 1 November 2021, the Upper Tribunal sent to Shahid Rahman Solicitors the grounds of appeal that had been filed by David Wyld Solicitors on 5 October 2021, along with a direction to file any amended grounds by 12 November 2021, together with an application for time to be extended. The Upper Tribunal informed Shahid Rahman Solicitors that the appellant's application for permission will be allocated to a judge for a decision at the expiry of this period.

64. The Upper Tribunal then received the UT Grounds on 11 November 2021, i.e. within the time limit specified in the directions dated 1 November 2021.

65. In these circumstances, we are satisfied that the requirement in rule 21(4)(e) for the grounds to be stated with the application was effectively waived by the Upper Tribunal and the period for compliance with rule 21(4)(e) effectively extended from 14 April 2021 to 12 November 2021.

66. We turn now to consider the remaining issues. They are specific to the instant application.

B. ISSUES SPECIFIC TO THIS APPLICATION FOR PERMISSION

67. In this section, it is necessary for us to refer to the appellant's bundle that was before the FtT and her bundle before the UT for the hearing on 21 February 2022. We will refer to the former as FtT/AB and the latter as UT/AB, followed by the page number(s).

68. Unfortunately, the page-numbering in FtT/AB is problematic. The bundle begins with an index followed by pages 1-20 but the index indicates that the bundle was a 22-page bundle. Page 20 of the bundle is followed by a few disparate pages. There is then another index which does not match the first index and which indicates that there should be 29 pages in the bundle. However, the pages that follow the 2nd index are numbered 1-28.

(i) Whether time should be extended for the application

69. The principles to be applied in deciding whether time should be extended are well established. The leading authorities include the Court of Appeal's decisions in Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; Denton v White [2014] EWCA Civ 906, R (Hysaj) v Secretary of State for the Home Department [2014]

EWCA Civ 1633 and NA (Bangladesh) v Secretary of State for the Home Department [2016] EWCA Civ 651; and the Upper Tribunal's decisions in Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC); [2013] Imm AR 422 and R (Onowu) v First-tier Tribunal (Immigration and Asylum Chamber) (extension of time for appealing; principles) IJR [2016] UKUT 185 (IAC); [2016] Imm AR 822.

70. Paras 11-19 of the Presidential Guidance Note explain the relevant principles derived from the case-law. Para 14 explains the three- stage approach being as follows:

(i) Identifying and assessing the seriousness or significance of the failure to comply with the time limit. If a judge concludes that a breach is not serious or significant, then relief will usually be granted and it will usually be unnecessary to spend much time on the second or third stages; but if the judge decides that the breach is serious or significant, then the second and third stages assume greater importance.

(ii) Considering whether there is a good reason for the delay. If so, the judge will be likely to decide that relief should be granted. The important point made in Denton is that if there is a serious or significant breach and no good reason for the breach, this does not mean that the application for relief will automatically fail. It is necessary in every case to move to the third stage.

(iii) Evaluating all the circumstances of the case, so as to deal justly with the application. The need for litigation to be conducted efficiently and at proportionate cost is a particular factor. The substantive grounds will be relevant only if they are very strong or very weak.

71. This brief summary of the relevant principles suffices for the purposes of the instant case.

72. In his email dated 24 January 2022 (UT/AB/178), Mr Adil Shah of David Wyld Solicitors said that the application for permission was posted on 12 April 2021 by first class post; that a follow up call was made to the Upper Tribunal on 14 April 2021 to confirm receipt; and that the advice given by a customer services representative was to send the application again by email but to mention that this was posted earlier.

73. However, the Upper Tribunal has no record of having received any application by post. The application was only received by email on 14 April 2021, i.e. one day late.

74. Mr Spurling asked us to take into account that the first time that the Upper Tribunal notified the appellant that the application was received by the Upper Tribunal out of time was in the Directions of Upper Tribunal Judge Gill dated 15 December 2021 notwithstanding that directions had been issued by the Upper Tribunal on five earlier occasions. Although the first set of directions issued on 18 August 2021 recorded that the decision of the FtT to refuse permission was sent on 30 March 2021 and that the application was received on 14 April 2021, it did not specifically draw attention to the fact that the application was received out of time or that it was necessary for the appellant to make an application for time to be extended. We take these submissions into account and give them some weight in the appellant's favour.

75. The UT Grounds are dated 11 November 2021. They were therefore not in existence at the date that the application was made. It is plain beyond any doubt that only the FtT Grounds existed up until the submission of the UT Grounds. It was not stated at

any point that the FtT Grounds were relied upon in support of the application to the UT for permission to appeal.

76. Plainly, the guidance we have given in this decision was not in existence in April 2021 when the appellant's application for permission to appeal was received by the Upper Tribunal. It would therefore be unfair to take any aspect of it into account in deciding whether or not time should be extended in the instant case.

77. In all of these circumstances and given that the delay was one of one day, we are satisfied that time should be extended. We therefore exercise our discretion and extend time. It is therefore unnecessary for us to engage in any further detail with the evidence and explanations given for the delay to the effect that the appellant was not at fault personally for the fact that the application was received by the Upper Tribunal one day out of time.

(ii) Whether the applicant should be permitted to rely upon the UT Grounds

78. The Annex sets out the chronology of the steps taken by the Upper Tribunal to obtain the grounds and the responses (or lack of responses) to its requests. We have summarised these at paras 5-6 above.

79. It can be seen that it was only after the Upper Tribunal had notified the parties that it had identified this case as a suitable case by which guidance will be given on the approach to be taken to breaches of rule 21(4) that Shahid Rahman Solicitors wrote to the David Wyld Solicitors by a letter dated 18 January 2022 (UT/AB/170-177) sent by post and by email to adil@davidwyld.co.uk. The letter put various questions to Mr Shah concerning the conduct of the appellant's case by David Wyld Solicitors (AB/170-177).

80. In her witness statement dated 21 January 2022 (UT/AB/36-37), the appellant states, inter alia, that, despite what had happened, she did not wish to lodge any formal complaint against David Wyld Solicitors "*at this stage*" because they had provided her with "*good services*" until the FtT hearing and she is also grateful to them "*for their friendly behaviours and reasonable fees*".

81. We have some serious misgivings about the credibility of the appellant's assertions that she does not wish to lodge any formal complaint against David Wyld Solicitors, in view of the fact that, by the date of her witness statement, she was aware of their repeated failure to respond to the Upper Tribunal's requests for the grounds and the potential consequences for her of an adverse decision by the Upper Tribunal on her application for permission to rely upon the UT Grounds.

82. Nevertheless, we agree with Mr Spurling that, although the directions issued on 19 August 2021, 6 September 2021 and 26 September 2021 were not complied with, the failure to comply with each of these directions was effectively waived by the issue of the next set of directions and the failure to comply with the directions dated 26 September 2021 effectively waived by the directions dated 1 November 2021, as we have explained at paras 61-65 above.

83. Again, in view of the fact that the Upper Tribunal received the UT Grounds within the time limit specified in the directions dated 1 November 2021 and given the previous waivers of the appellant's failures to comply with the previous directions, we are satisfied that it would be unfair not to grant the appellant permission to rely upon the UT Grounds.

84. We therefore grant permission for the appellant to rely upon the UT Grounds.

85. It is therefore unnecessary for us to engage in any further detail with the evidence set out in the chronology in the Annex and the explanations (to the extent given) for the repeated failures to comply with the directions issued by the Upper Tribunal on 19 August 2021, 6 September 2021 and 26 September 2021 and the requests made by telephone on various occasions, although we record that Mr Spurling submitted that there were exceptional circumstances in the instant case to explain the delay, namely, the repeated failures of David Wyld Solicitors to comply with directions and respond to telephone calls from the Upper Tribunal.

86. The Tribunal will need to pursue with David Wyld Solicitors their actions (and inactions) in this case. Although we have said that we grant permission for the appellant to rely upon the UT Grounds, we have to say that Shahid Rahman Solicitors have also been responsible for some of the delay. Having been instructed on 18 October 2021, they requested an extension of 8 weeks, a period which takes no account of the fact that rule 21 requires an application with the grounds to be submitted within 14 days of the decision of the FtT refusing permission being sent to the parties, nor does it take any account of the period that had already elapsed since the deadline by the date of the request by them for an extension of 8 weeks. We have noted that Shahid Rahman Solicitors stated that they had requested David Wyld Solicitors for the appellant's papers and we have noted Mr Spurling's submission before us that it was necessary for the appellant's legal advisers to review the evidence that had been submitted to the FtT in addition to the decision of the FtT in order for the UT Grounds to be prepared. However, this case concerns an appellant who was a practising lawyer in her home country. The suggestion, implicitly made, that she did not have copies of any of the papers that were submitted to the FtT or a copy of the decision of the FtT is difficult to accept and is frankly astonishing, if true.

(iii) Whether permission to appeal should be granted

87. We turn now to the judge's decision.

88. At paras 41-44, the judge reminded herself of the applicable law, including the burden and standard of proof (paras 42 and 44) and the guidance in Tanveer Ahmed * [2002] UKIAT 439; [2002] Imm AR 318, as follows:

> "Relevant Law
>
> 41. The appellant claims that the respondent's decision is in breach of her international protection obligations under The Convention Relating to the Status of Refugees 1951 (the Refugee Convention) and for Humanitarian Protection under EU Qualification Directive (2004/83/EC) under Articles 2, and 3 of the ECHR.
>
> 42. The appellant has the burden of proving that there is a 'real risk of persecution' under the Refugee Convention to the lower standard proof, expressed as a 'reasonable degree of

likelihood' (Sivakumaran [1988] AC 958) or there is a 'real risk of suffering serious harm' under 339C of the Immigration Rules to qualify for humanitarian protection.

43. In Tanveer Ahmed [20021 UKIAT 439 it was held that it is for the individual claimant to show that a document is reliable in the same way as any other evidence he puts forward and seeks to rely upon; that it is manifestly incorrect to say that if the respondent alleges that a document is a forgery but fails to establish it on the balance of probabilities or to the higher criminal standard, than the claimant has established that validity and truth of the documents; the only question is whether reliance can be properly placed on the document; the document should not be viewed in isolation but by taking all the evidence in the round.

Findings and Reasons

Asylum and Humanitarian Protection

44. It is for the appellant to demonstrate that she has a well-founded fear of persecution on return to Bangladesh, to the lower standard of proof. I have only arrived at my conclusions after considering all the evidence in the round and with anxious scrutiny."

89. Having then reminded herself of the appellant's evidence (paras 45-53), the judge said as follows at paras 56-67:

"56. To the lower standard of proof, I am satisfied that the appellant is an educated woman who was practising as a lawyer in Bangladesh. I also find it plausible, that as a result she had a good income and she may have been able to purchase property.

57. The appellant also claims that she would not have left her good profession but for the threat to her life. I accept that if she was able to secure visitor visas to the UK, she was able to satisfy the ECO of sound means in Bangladesh. The appellant continues to be in contact with her family who are managing her rental income and properties. She is also legally represented and a lawyer herself. She has not provided any supporting evidence as to her financial circumstances or the success of her legal practice when she left Bangladesh, or now. Therefore, I attach little weight to her claim that she would not have left Bangladesh unless there was a threat to her life.

58. The appellant claims that [Mr H] is a cadre for MP [Mr XY]. She claims that [Mr H] is involved in extortion and rigging the vote. She claims he is a 'ghost' individual, used by politicians for nefarious purposes, but is not formally part of the Awami League. Even if I were to accept that it would be difficult to prove his connections due to this, it is the appellant's case that [Mr H] was the appellant's client and friend since 2010. I find that as a practising lawyer, it undermines her credibility that she has not been able to demonstrate with supporting evidence that he even exists or has ever communicated with her.

59. I have noted that she has provided a signed statement dated 7 August 2017, addressed to the Officer in Charge, [YZ] Station to support that she reported the incident on 6 August 2017 to the police. Although the letter is sealed by a Notary Public, there is no evidence that this was received by the Police station or formally filed and I attach no weight to this being evidence that the incident was actually reported.

60. I also find it inconsistent, that after she claims she first reported [Mr H] to the police, she did not get any reprisals from him. There was no suggestion that he was aware that she had made a report to the police, which undermines her claims that he has connections with the police which has prevented her reporting the February 2018 incident.

61. I find it inconsistent that [Mr H], whom she claims pursued her for marriage from 2014 to 2018, and subjected her to violent attacks in 2017 and 2018, did not pursue her at all in the five months before she left for the UK. Her evidence was that after the incident in February 2018, she continued to see him in passing after the incident where they would exchange 'hi/ hello's', because they lived in the same area. He did not threaten or pursue her and she was not aware that she was under his surveillance in this time.

62. I have considered Counsel's submission, [that] [Mr H] was using the video to intimidate her, this was enough to make her feel threatened. Putting this *[sic]* context, the appellant said she remained in Bangladesh after the first set of threats in 2017. She came to know *[sic]* that his connections to the police as well as politicians. She claims she was kidnapped and raped, being threatened with being killed and humiliated *[sic]* who felt that she and her son were in danger and her properties were at risk of being snatched following forced marriage. Despite all this, she continued to work and live in her local area until she left in 2018. I find this undermines her claim that she fears [Mr H].

63. Moreover, the appellant specifically said in her oral evidence that she only came to the UK in July 2018 to attend her son's graduation. She said she did not intend to seek asylum. The appellant had previously acquired visas to come to the UK and did so again shortly to attend her son's graduation, so this was clearly an option to explore if she needed to leave the country for her safety. Yet she made no attempt to leave Bangladesh until July 2018. I find that this undermines her claims that she was threatened or harmed by [Mr H] as claimed.

64. In addition to this, the appellant has not had any direct contact with [Mr H] since she left Bangladesh. She has not provided any supporting evidence or details of him stopping construction on her land or stealing items from her home. I find that even if this happened just days before the hearing, there is no credible reason why she could not have provided photos or police reports from her family overseeing her property in Bangladesh. I also note, that despite his threats to do so, there is no evidence that he has released the video footage even though she has been away from Bangladesh for over a year.

65. The appellant claims that [Mr H] has been threatening her through contact with her family members. I find the evidence that she and her family members have provided on this is brief and vague. Contrary to the appellant's evidence that she did not instruct them what to write, it appears that all the statements are almost identical as to the incident on 6 August 2017 and 21 February 2018, amended only to refer to 'daughter/ sister/ friend' as applicable. None refers to their own personal knowledge about when she told them about these horrific incidents. I attach little weight to the witness statements provided by her family members and friends in Bangladesh in support of her claim.

66. I remind myself that the standard of proof to succeed in an asylum claim is a low one. I have considered the appellant's claims with the evidence in the round. Overall, I am not satisfied that the appellant's claim is credible. I am not satisfied that even if [Mr H] exists, that he has any political connections, that he has been violent to the appellant or harmed her in any way. I am not satisfied that he has any interest in harming her or appropriating her property through forced marriage.

67. It follows that I am not satisfied that the appellant has a well-founded fear of persecution in Bangladesh or that she at risk of serious harm on her return. Consequently, I have not considered internal relocation, as I do not find there is any risk to her returning to Dhaka."

90. Before us, Mr Spurling submitted that the judge had materially erred in law as follows:

(i) The judge erred at paras 56 and 57 in that she adopted an irrational approach to the appellant's evidence of her motivation in coming to the United Kingdom. In effect, the appellant's evidence was that she had had a good life in Bangladesh and would not have come to the United Kingdom if it had not been for the threat to her. At para 56, the judge accepted that the appellant was a woman of substance in Bangladesh. At para 57, she accepted that the appellant was able to secure visit visas for the United Kingdom. However, the judge did not mention that, in issuing the visit visas to the appellant, the Entry Clearance Officer would have accepted on the balance of probabilities that the appellant was of sound means. In Mr Spurling's submission, the final two sentences of para 57 did not

make rational sense. In effect, the judge was saying that, although the appellant had proven to the Entry Clearance Officer that she was a person of sound means, she (the appellant) had not proven it to her (the judge). In Mr Spurling's submission, this was a legal flaw that was material to the outcome.

(ii) At para 58 of her decision, the judge had said that it was the appellant's case that Mr H was a client. Mr Spurling questioned whether this had ever been the appellant's case. The judge went on to state at para 58 that it undermined the appellant's credibility as a practising lawyer that she had not been able to demonstrate with supporting evidence that Mr H even existed or has ever communicated with her. Mr Spurling submitted that the judge had not explained what evidence she had expected to see or why it lacked credibility that she could not produce it.

(iii) At paras 62-63 of the decision, the judge said that she did not believe the appellant's evidence because she had not left Bangladesh sooner. Mr Spurling submitted that it was clear from the appellant's evidence at paras 45-52 of the judge's decision that she was describing stalking and abusive behaviour on the part of Mr H and attempts by him to control her which culminated in abuse. The judge should therefore have borne that in mind in considering the delay. Women under threat from stalkers and abusive men do not always immediately remove themselves from the situation.

(iv) At para 65, the judge had said that witness statements from family members were almost identical and that none had referred to their own personal knowledge about when the appellant had told them of the incidents with Mr H. Mr Spurling submitted that, contrary to the judge's finding, the appellant's sister (Ms IJ) did speak of her personal knowledge of the incident on 21 February 2018 in her witness statement. She spoke of her own experience of the appellant disappearing on the occasion of the abduction and returning distressed. There was also an affidavit from a Sub-Inspector and an affidavit from a practising lawyer (FtT/AB, 2nd page 15 and 2nd page 5 respectively) who gave evidence of what they knew of Mr H. Mr Spurling submitted that the sister's statement and the affidavits of these two witnesses were relevant but the judge did not refer to them or engage with them.

(v) (Para 6 of the UT Grounds) The weight that the judge gave to the supporting witness statements and affidavits, from the appellant's parents, siblings, colleagues, neighbours and friends, was inadequate.

91. We have carefully considered the submissions and have concluded that the judge arguably erred in law for reasons which we now give.

92. At para 58, the judge said that, even if she were to accept that it would be difficult to prove Mr H's connections, it was the appellant's case that he was her client and friend since 2010. The judge then said that she found that, as a practising lawyer, it undermined the appellant's credibility that she had not been able to demonstrate with supporting evidence that Mr H even exists or has ever communicated with her.

93. However, as Mr Spurling submitted, there was in fact an affidavit from a Sub-Inspector of the Dhaka Metropolitan Police (FtT/AB/2nd page 15) and an affidavit from

a practising lawyer of Dhaka Judge Court (FtT/AB/2nd page 5). They are capable of constituting evidence of the existence of Mr H which the judge arguably failed to engage with in reaching her view that the appellant had failed to adduce evidence of Mr H's existence.

94. The judge therefore arguably erred in law by overlooking relevant evidence; in the alternative, giving inadequate reasons for giving little or no weight to these documents, as contended in the UT Grounds.

95. In addition, bundle FtT/AB includes witness statements signed before a Notary Public from the appellant's father, sister and brother as well as three neighbours and a colleague. At para 65, the judge referred to these witness statements, saying:

> "… Contrary to the appellant's evidence that she did not instruct them what to write, it appears that all the statements are almost identical as to the incident on 6 August 2017 and 21 February 2018, amended only to refer to 'daughter/ sister/ friend' as applicable. None refers to their own personal knowledge about when she told them about these horrific incidents. I attach little weight to the witness statements provided by her family members and friends in Bangladesh in support of her claim."

96. With one exception, the judge was correct to say that all of these witness statements were almost identical as to the incident on 6 August 2017 and 21 February 2018 and that the witnesses did not refer to "*their own personal knowledge of when [the appellant] told them about these horrific events*". The exception was the witness statement of the appellant's sister. In her witness statement (FtT/AB/2nd page 12), the sister referred to the alleged abduction in terms that were different from the other witness statements. Furthermore, the sister explained that she started to get worried when the appellant did not return "*in a couple of hours*" and that "*at late night she came back home really stressed. That is when I came to know that [Mr H] kidnapped my sister when she was going home from shopping and kept her in an abandoned building*". Thus, it is at least arguable that, contrary to para 65 of the judge's decision, *all* the witness statements were not "*almost identical*". It is also at least arguable that, contrary to para 65, the sister did speak about her personal knowledge of when the appellant told her about this alleged incident.

97. Accordingly, the judge arguably erred in law by overlooking relevant evidence in the form of the witness statement of the appellant's sister; in the alternative, giving inadequate reasons for giving little weight to it, as contended in the UT Grounds.

98. We are satisfied that these errors are capable of being material to the outcome. We therefore grant permission to appeal.

99. Although the remaining grounds are weaker, we have decided not to restrict the grant of permission.

100. This appeal will therefore be listed for a hearing in order to decide whether the judge's decision contains an error of law and, if so, whether the decision should be set aside. The bundle we have referred to as "FtT/AB" is difficult to follow because of the inclusion of two different indices and because pages from the various witness statements have been jumbled up. For example, the father's witness statement is three pages long but page 3 does not follow page 2 of his statement. Page 1 of the friend's witness statement is followed by page 2 of the father's witness statement.

101. Accordingly, we issue the Directions below to require the appellant to submit a corrected bundle with the correct index and witness statements the pages of which must be arranged in the correct order.

DIRECTIONS

No later than 7 calendar days from the date on which this decision is sent to the parties, the appellant to file and serve the FtT/AB with the correct index and the pages arranged in the correct order.

Signed
Upper Tribunal Judge Gill Date: 28 March 2022

ANNEX[1]

Chronology

1. *On 30 March 2021, Judge of the First-tier Tribunal Chohan refused the appellant's application to the FtT for permission to appeal.*

2. *On 14 April 2021 (UT/AB/180), the Upper Tribunal received by email from David Wyld Solicitors the appellant's application for permission to appeal. The cover email stated that the application had also been posted on 12 April 2021. However, the postal copy was not received.*

3. On 5 May 2021, the Upper Tribunal requested Mr Adil Shah, consultant, of David Wyld & Co Solicitors (the appellant's then representatives), to provide a copy of the grounds by email. The Upper Tribunal did not receive any grounds.

4. The Upper Tribunal contacted David Wyld & Co Solicitors by telephone on 21, 24 May, 4 June 2021 and email on 25 May, 18 June and 22 July 2021 in order to request the same. There was no response.

5. On 23 August 2021, the Upper Tribunal sent (by email and post) to the parties Directions dated 19 August 2021 by Upper Tribunal Judge Kopieczek which stated that, unless grounds were received within 7 days of the directions being sent, the application for permission to appeal would be decided on the basis that no grounds in support of the application had been provided.

6. On 26 August 2021, the Upper Tribunal received an email from the appellant informing the Upper Tribunal that she had been unable to contact her representatives and that she required an extension of 28 days in order to appoint new representatives and provide instructions.

7. On 27 August 2021, the Upper Tribunal emailed David Wyld & Co Solicitors, requesting them to confirm the position regarding representation; that if they were coming off the record, a copy of the documents were to be provided by them to the appellant and the Upper Tribunal was to be updated; and that, until then the original timetable stood. No response was received by the deadline.

8. By way of directions dated 6 September 2021, the Upper Tribunal wrote to David Wyld & Co Solicitors in the same terms as the email dated 27 August 2021 except that David Wyld & Co Solicitors were given a 7-day deadline from the date of the letter to respond to the directions. No response was received.

9. The Upper Tribunal then attempted to obtain from David Wyld & Co Solicitors a copy of the appellant's application to the First-tier Tribunal for permission to appeal and the

[1] The chronology set out in the Annex is the same as the annex to the directions of Upper Tribunal Judge Gill dated 15 December 2021 save that the entries in italics are additions to the chronology, the information for which is taken from the directions dated 15 December 2021 or Mr Spurling's skeleton argument or the appellant's bundle for the hearing on 21 February 2022.

grounds attached thereto in order (apparently) to provide the appellant with a copy of the same, as follows:

i) by telephone and email on 24 September 2021;
ii) by telephone on 27 September 2021. On this occasion, the personal assistant of Mr Adil Shah informed the Upper Tribunal that Mr Shah was unavailable and assured the Upper Tribunal that Mr Shah would receive the message;
iii) by email on 28 September 2021 with a request that a copy of the application and grounds be provided by 4 p.m. of the same day along with a written explanation for their failure to comply with directions.

No response was received.

10. On 29 September 2021, the Upper Tribunal issued the Directions of Upper Tribunal Judge Rintoul (signed 17 September 2021) varying the time limit of 19 August 2021 specified in Judge Kopieczek's Directions (para 3. above) to 28 days after the date on which Judge Rintoul's directions were sent to the parties.

11. On 5 October 2021, the Upper Tribunal received from David Wyld & Co Solicitors by email a copy of the grounds of appeal in support of the application to the First-tier Tribunal for permission to appeal.

12. On 18 October 2021, the Upper Tribunal received a letter of authority from the appellant's new representatives, Shahid Rahman Solicitors, and a request by them for copies of all documents held by the Upper Tribunal and an extension of time of 8 weeks.

13. On 20 October 2021, the Upper Tribunal emailed Shahid Rahman Solicitors requesting confirmation as to whether they had received any paperwork from the appellant's previous representatives.

14. On 20 October 2021, Shahid Rahman Solicitors confirmed to the Upper Tribunal that they had not received any paperwork from the appellant's previous representatives and again requested the Upper Tribunal to provide copies of all the papers relating to the appeal.

15. On 21/22 October 2021, Shahid Rahman Solicitors were directed to contact the previous representatives for the case papers and update the Upper Tribunal by 29 October. They were informed that, if no update was received, the case would be allocated to an Upper Tribunal Judge for a decision on permission.

16. On 22 October 2021 (UT/AB/141), Shahid Rahman Solicitors emailed a letter to David Wyld Solicitors requesting the appellant's file.

17. On 25 October 2021, Shahid Rahman Solicitors emailed the Upper Tribunal to request further time as they had not received paperwork from the appellant's previous representatives.

18. On 26 October 2021, the Upper Tribunal emailed Shahid Rahman Solicitors asking them to provide an update by 4pm on 28 October 2021 before deciding how it will proceed with the appellant's permission to appeal application.

19. On 29 October 2021, Shahid Rahman Solicitors filed an application for time to be extended by a further two weeks.

20. On 1 November 2021, the Upper Tribunal sent to Shahid Rahman Solicitors the grounds of appeal that had been filed by the previous representatives, along with a direction to file any amended grounds by 12 November 2021 together with an application for time to be extended. The Upper Tribunal informed the representatives that the appellant's application for permission will be allocated to a judge for a decision at the expiry of this period.

21. On 2 November 2021 (UT/AB/144 & UT/AB/158), Mr Adil Shah of David Wyld Solicitors emailed Shahid Rahman Solicitors with various documents relating to the appellant's appeal.

22. On 11 November 2021, the Upper Tribunal received the UT Grounds and an application for time to be extended.

23. On 17 January 2022 (UT/AB/143), the appellant by an "Authority to represent & Disclose information" dated 17 January 2022 on letterheaded paper of Shahid Rahman Solicitors that "I have waived the legal privilege in respect of the instructions given to me to David Wyld Solicitors".

24. On 18 January 2022 (UT/AB/170-177), Shahid Rahman Solicitors wrote to the David Wyld Solicitors by a letter dated 18 January 2022 sent by email to adil@davidwyld.co.uk which put various questions to him.

25. On 24 January 2022 (UT/AB/178), Mr Adil Shah responded by email to Shahid Rahman Solicitors.