Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01190/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 April 2014	**On 9 May 2014**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GURI HYSTUNA

Respondent

Representation:

For the Appellant: Mr C. Avery, Home Office Presenting Officer
For the Respondent: Mr A. Pretzell, Counsel instructed by Malik & Malik, Solicitors

DECISION UNDER RULE 21(6) OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

1. The appellant in these proceedings is the Secretary of State. However, for convenience I refer to the parties as they were before the First-tier Tribunal.

2. Thus, the appellant is a citizen of Kosovo, born on 25 June 1985. Two different dates are given for his arrival in the UK, 9 September 1999 and 9 January 2000, although nothing turns on this. The further history can be taken quite shortly.

3. He was granted indefinite leave to remain on 17 January 2012. However, on 19 January 2012 and 21 January 2012 respectively, he committed offences of assault occasioning actual bodily harm and intimidating a witness. He received a custodial sentence of three months for the assault and a consecutive sentence of nine months for the offence of intimidating a witness, making 12 months in total. On 5 June 2013 the Secretary of State made a decision to make a deportation order. The appeal against that decision was allowed by a Panel of the First-tier Tribunal.

4. The Secretary of State sought permission to appeal against the decision of the First-tier Tribunal but that application was refused by a First-tier Tribunal judge. A renewed application was made to the Upper Tribunal and a judge of the Upper Tribunal purported to grant permission to appeal. The grounds seeking permission to appeal, in summary, were that in concluding that the appellant's deportation would result in unjustifiably harsh consequences the First-tier Tribunal failed to give adequate reasons. The grounds also refer to and quote from MF (Nigeria) [2013] EWCA Civ 1192, although do not say in what respect the First-tier Tribunal failed to take that decision into account, the First-tier Tribunal having referred to and considered it in its reasons.

5. The decision of the First-tier Tribunal refusing permission to appeal was sent by first class post to the Secretary of State on 17 January 2014. This meant that any application to the Upper Tribunal for permission to appeal had to be received by the Upper Tribunal no later than seven working days after the notice of the First-tier Tribunal's refusal of permission to appeal was sent. That meant that it had to be received no later than 28 January 2014. In fact, it was received on 30 January 2014 and was therefore out of time. This was a matter that was in fact identified by Tribunal administrative staff and indicated on the Tribunal file. The Upper Tribunal Judge who purported to grant permission to appeal did not deal with the timeliness issue.

6. Rule 21(6) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Procedure Rules") provides as follows:

> "(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."

7. The timeliness issue in this case was not flagged up prior to the hearing by either party. I mention that not as a criticism but simply to indicate that neither party was initially prepared to deal with the point. Mr Pretzell had the opportunity to consider the point whilst this appeal was waiting to be called on. I rose to allow Mr Avery time to make enquiries in relation to when the refusal of permission by the First-tier Tribunal was served on the Secretary of State.

8. In due course Mr Avery agreed with the chronology of events as set out above. He did not apply for a longer adjournment for this issue to be considered further. He agreed that time for receipt by the Upper Tribunal of the application ran out on 28 January 2014, that there was no application to extend time and no reason given as to why the application was late.

9. The Presidential Guidance Note of 2011 (amended in September 2013) suggests at [24] that by parity of reasoning with Boktor and Wanis (late application for permission) Egypt [2011] UKUT 00442 (IAC) where an UT Judge has not dealt with the issue of lateness, the grant of permission can be considered as being conditional with the issue of an extension of time to be considered by the UT Judge seized of the appeal.

10. In line with the decision in Boktor and Wanis and Samir (FtT Permission to appeal: time) [2013] UKUT 00003(IAC), and taking into account the Presidential Guidance Note at [24], I consider that the grant of permission to appeal by the Upper Tribunal is conditional because the timeliness issue has not been dealt with.

11. Mr Avery submitted that it was important to bear in mind when considering whether to extend time that there was a serious legal issue involved in this appeal, concerning as it does deportation and the public interest inherent in the case. He said that the only explanation he could offer was that at the time of making the application there were manpower difficulties and a shortage of staff, so he had been informed.

12. Mr Pretzell relied on the decision in Boktor and Wanis and BO and Others (Extension of the time for appealing) Nigeria [2006] UKAIT 00035. He submitted that the strength of the grounds was not a good ground for extending time. In this case, the explanation provided was not satisfactory and was unsupported by any evidence. In fact, in the matter before me there was no explanation provided at the time of making the application.

13. Whilst in the main I accept Mr Pretzell's submissions, I disagree with him on one point. Boktor and Wanis did not decide that the strength of the grounds was not a good ground for extending time, which is what I understood his submission to be. Commenting on the starred decision of the Asylum and Immigration Tribunal in AK (Tribunal appeal – out of time) Bulgaria [2004] UKIAT 00201, it was said in Boktor and Wanis at [13] that:

> "The Tribunal commented that it was of course impossible to provide a list of what might be "special circumstances". It was clearly of the view that the strength of grounds of appeal could not by itself be a ground for extending time, for if that was the case, as was pointed out, a person who had strong grounds of appeal would never need to comply with any time limits. The strength of the grounds might, however, be relevant in assessing the circumstances as a whole.

14. It was the Tribunal's view that the strength of the grounds could not "by itself" be a ground for extending time. The point was endorsed in Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 00060 (IAC) at [16] where the Upper Tribunal, with a Panel including the President, said that the merits of the appeal cannot be decisive.

15. In the matter before me the application was not only out of time, there was no explanation for its being late, and there was no application for an extension of time. The explanation proffered at the hearing before me was insufficient to cure those defects in the application for permission made to the Upper Tribunal, not least because under rule 21(6)(a) the application must include a request for an extension of time and the reason why the application was not provided in time.

16. Ultimately, on the facts before me, the only basis on which it could be suggested that time for submitting the application should be extended was the merits of the application. However, as has already pointed out, by itself that is not a sufficient basis on which to extend time.

17. In the circumstances, I refuse to extend time under rule 5(3)(a) of the Procedure Rules and the application to the Upper Tribunal for permission to appeal is not admitted.

18. The consequence of that conclusion is that there is no appeal before the Upper Tribunal and the decision of the First-tier Tribunal to allow the appeal therefore stands.

Upper Tribunal Judge Kopieczek

14/04/14