Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/49019/2013

THE IMMIGRATION ACTS

Heard at Field House	**Promulgated on**
On 5 February 2015	**On 12 February 2015**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR PURNA PRASAD RAI
(No Anonymity Direction Made)

Respondent

Representation:
For the Appellant: Mr E Tufan a Senior Home Office Presenting Officer
For the Respondent: Mr R Jesurum of counsel instructed by Howe & Co

DECISION AND DIRECTIONS

1. The appellant is the Secretary of State for the Home Department ("the Secretary of State"). The respondent is a citizen of Nepal who was born on 9 September 1968 ("the claimant"). The claimant has been given permission to appeal the determination of First-Tier Tribunal Judge M R Oliver ("the FTTJ") who allowed, on Article 8 human rights grounds, his appeal against the Secretary of State's decision of 5 November 2013 to refuse to vary his leave to remain in the UK on the basis of private and family life and to remove him from the UK by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The claimant came to the UK in September 2002 on a visit visa and when that expired overstayed. His father, a former Gurkha soldier, who retired in 1976, was granted indefinite leave to remain in the UK on 6 June 2006. Subsequently, his wife joined him. They are both in very poor health. The claimant has lived with and cared for them. On 15 December 2009 he was granted discretionary leave to remain for three years expiring on 15 December 2012 in order to look after his parents. On 10 December 2012 he made an application for a second three-year period of discretionary leave on the same basis. On 9 October 2013 the Secretary of State asked for an up-to-date report on the situation regarding the health of his father. The application was refused on 5 November 2013. The Secretary of State said that the claimant did not meet the requirements of paragraph 276ADE of the Immigration Rules. He had a private life in the UK but, by implication, not a family life. He had not shown exceptional circumstances.

3. The claimant appealed and the FTTJ heard his appeal on 27 February and 25 April 2014. Both parties were represented, the claimant by Mr Jesurum, who appears before me. The claimant, his father and the chairman and vice-chairman of the Gurkha Peace Foundation gave oral evidence. There was an adjournment to enable the claimant's representatives to obtain an independent social worker's report after the Presenting Officer raised the question of whether his father was dependent on the claimant.

4. The FTTJ found that the claimant was not a wholly reliable witness, particularly in relation to his claim to fear persecution in Nepal, but concluded that any exaggeration was because of his anxiety to remain in the UK to look after his parents. His evidence about that was borne out by the evidence of others. His removal would, in the judgement of the social worker, leave his parents grieving his loss for the remainder of their lives. The care he had already provided had saved the public purse considerable sums. The FTTJ summed up his reasons and final conclusion in paragraph 15 where he said; "The situation which led to the grant of discretionary leave has essentially continued but not just continued as it was: his parents needs have increased. In these circumstances I can see no reason for a different decision now from that taken in 2009 by the respondent and no reason to depart from the decision on Article 8 made in the previous appeal."

5. The appeal was allowed on human rights grounds.

6. The Secretary of State applied for permission to appeal to the Upper Tribunal submitting that the FTTJ erred in law by failing to take into account that the way in which Article 8 human rights claims needed to be assessed had changed since the grant of leave in 2009. Gulshan and Nagre principles had not been applied. The claimant's parents' needs could be met by professional healthcare and, whilst this might not be the same as the care provided by the claimant, it did not mean that it would be unjustifiably harsh to expect the parents to access this and the claimant could maintain contact with them through modern methods of communication and visits. The

conclusion was fundamentally flawed and unsustainable in the light of the public interest in preserving a firm and coherent system of immigration control.

7. Permission to appeal to the Upper Tribunal was granted by a judge in the First-Tier Tribunal who said that the application had been made in time.

8. The claimant has submitted a Rule 24 response in which it is argued that the application for permission to appeal to the Upper Tribunal was out of time and that time should not be extended.

9. I will need to return to the question of whether the application for permission was in time and if not whether it should have been or should now granted.

10. I indicated to the representatives that I wished to hear submissions in relation to this question as a preliminary issue although, as this included consideration of the merits of the grounds of appeal, there was some overlap into the question of whether there had been a material error of law.

11. It is unfortunate but understandable that in the light of the information available to the claimant's representatives the Rule 24 response has been prepared on the basis that whilst the determination of the FTTJ was promulgated on 6 June 2014, was said to have been received by the Secretary of State on 16 June 2014 and the application for permission to appeal was said to have been sent to the Tribunal by the Secretary of State on 19 June 2014, the form was stamped by the Tribunal as having been received on 18 November 2014. In these circumstances the claimant argued that the application was 161 days out of time. As a result and as time had never been extended it was argued that the grant of permission to appeal was a nullity. The Upper Tribunal lacked jurisdiction and had no power to "reconstitute" itself as a First-Tier Tribunal to consider the issue. In the absence of any explanation for the delay, other than for the first eight days, time should not in any event be extended. Discretion should not be exercised in this way. Furthermore, there was no arguable error of law. If there was any error the facts would yield the same result.

12. I pointed out to the representatives that the information on the Tribunal file indicated a different set of circumstances. Whilst the determination had been sent out by the Tribunal on 6 June 2014 it was addressed to the Secretary of State's Presenting Officers Unit in Feltham. There was an email to the Tribunal from the Secretary of State's representative dated 19 June 2014 which said; "please see the enclosed application that is being emailed to the Tribunal directly due to our ongoing fax issues". There is a subsequent chain of emails. An internal email between two of the Secretary of State's representatives dated 17 November 2014 says; "your application has not been received by the IAC. Could you either resubmit your application or sign the case off". Another, dated 18 November 2014, with more than one recipient, states; "as you will see from the correspondence

chain below, I have been advised that the Tribunal did not receive a copy of my application for Permission to Appeal in the case of RAI (IA/49019/2013). I reattach that application, including a copy of the email in which that application was sent. I trust this will be sufficient confirmation that the application was lodged expeditiously and the matter can now be reviewed by the Tribunal accordingly". The Tribunal sent written notice of receipt of the application for permission to appeal to all parties on 19 November 2014. The letter said that the application had been received on 18 November 2014.

13. I find that the application for permission to appeal to the Upper Tribunal was sent by the Secretary of State to the Tribunal by email on 19 June 2014. Mr Jesurum submits that this was not proper service within the rules.

14. The relevant provisions of Rule 13 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in force at the relevant time provide;

> "Sending and delivery of documents
> 13.—(1) Any document to be provided to the Upper Tribunal under these Rules, a practice direction or a direction must be sent by pre-paid post [or by document exchange, or delivered by hand,] to the address specified for the proceedings;
> sent by fax to the number specified for the proceedings; or sent or delivered by such other method as the Upper Tribunal may permit or direct.
> (2) Subject to paragraph (3), if a party provides a fax number, email address or other details for the electronic transmission of documents to them, that party must accept delivery of documents by that method.
> (3) If a party informs the Upper Tribunal and all other parties that a particular form of communication, other than pre-paid post or delivery by hand, should not be used to provide documents to that party, that form of communication must not be so used.
> (4) If the Upper Tribunal or a party sends a document to a party or the Upper Tribunal by email or any other electronic means of communication, the recipient may request that the sender provide a hard copy of the document to the recipient. The recipient must make such a request as soon as reasonably practicable after receiving the document electronically.
> (5) The Upper Tribunal and each party may assume that the address provided by a party or its representative is and remains the address to which documents should be sent or delivered until receiving written notification to the contrary."

15. The question was raised as to whether there was any protocol in existence between the Tribunal and the Secretary of State as to how documents, including applications for permission to appeal, should be sent or delivered. The representatives agreed that I should make enquiries of the Upper Tribunal administration about this and there was no request that I should reconvene the hearing having after I had done so

16. My enquiries lead me to find that there is are protocols between the Tribunal and the Secretary of State as a result of which it has been agreed that First-Tier Tribunal determinations should be sent to the Secretary of State at her Presenting Officers Unit in Angel Square London and that applications for permission to appeal to the Upper Tribunal may be submitted by email. This accords with the provisions in Rule 13(1)(c). Rule 13 (2) and (4) make specific mention of emails. I find that the Tribunal sent the determination to an address for the Secretary of State which was not the agreed address. It was sent to the Feltham address not the address in Angel Square. The Secretary of State was entitled to submit the application for permission to appeal by email and did so on 19 June 2014. This was valid service, even though the email does not appear to have been linked to the file by the Tribunal.

17. Mr Jesurum relied on the authority of Mohammed (late application-First-tier Tribunal) [2013] UKUT 00467 (IAC). Paragraph 6 and 9 of this determination state:

> "6. It is necessary to recall the provisions of rule 24(4) of the 2005 Procedure Rules.
> "24 Application for permission to appeal to the Upper Tribunal.
> A party seeking permission to appeal to the Upper Tribunal must make a written application to the Tribunal for permission to appeal.
> …
> (4) If a person makes an application under paragraph (1) later than the time required by paragraph (2) The Tribunal may extend the time for appealing if satisfied that by reason of special circumstances it would be unjust not to do so; and
> unless the Tribunal extends time under sub-paragraph (a), the Tribunal must not admit the application."
> Because the two parts of rule 24(4) are conjunctive, if the First-tier Tribunal does not make a decision to extend time, then the application cannot be admitted. This means that until a decision on whether to extend time has been made by a judge of the First Tier Tribunal, the application for permission to appeal cannot proceed to the Upper Tribunal. The implication is that a judge seized of such an application is required to reach a decision on the timeliness if raised in the application or identified from the papers."
>
> "9. It is on the basis of this approach that we decided, after a significant amount of deliberation and with the consent of the parties, to resolve the fact that in this appeal the issue of timeliness remained outstanding before the First-tier Tribunal, by reconstituting ourselves as a panel of that Tribunal."

18. It would have been better if the First-Tier Tribunal Judge who granted permission to appeal had, in the light of the explanation for delay contained in the application, decided whether the application was in time and

explained why or if not, whether or not to extend time, giving reasons for that decision.

19. I find that if the explanation for the delay given by the Secretary of State, that the determination was sent to the wrong address, was not accepted then the application for permission to appeal should have been served within five working days of service of the determination, that is no later than 16 June 2014. If the explanation was accepted then service by email on 19 June 2014 was one day late.

20. I find that in line with Mohammed and in the circumstances of this appeal because the First-Tier Tribunal Judge should have but did not make a decision on whether or not to extend time then the application cannot be admitted. The issue remains outstanding. I am a judge of the First-Tier Tribunal as well as a judge of the Upper Tribunal. For this purpose, if it is necessary to do so, I make a decision on the application for permission to appeal and whether or not to extend time as a judge of the First-Tier Tribunal. The decision in Mohammed was made by a panel which might have needed to reconstitute itself as a panel of the First-Tier Tribunal. As a single judge I do not need to "reconstitute" myself.

21. I accept that the determination was not sent to the Secretary of State at the correct address. In the circumstances and as it was properly submitted by email it was one day late. I note that in making the calculation the Secretary of State appears to have thought that it was in time. I may extend the time for appealing if satisfied that by reason of special circumstances it would be unjust not to do so.

22. I find that there has been some explanation for the shortest of delays, one day. For reasons to which I will return there is arguable merit in the grounds. Although the claimant could reasonably argue that he had suffered prejudice when it was thought that the delay was 161 days there is little or no prejudice in a delay of one day. I am satisfied that there are special circumstances which would make it unjust not to extend the time for submitting the application for permission to appeal to the Upper Tribunal. I extend time accordingly.

23. I find that the FTTJ erred in law. There is a paucity of reasoning for the conclusion to allow the appeal on Article 8 human rights grounds. These grounds should have been considered under the Immigration Rules and fact-based reasons given for the conclusion as to whether the Rules were or were not satisfied. Even if it was conceded that the claimant could not meet the Rules the FTTJ should have reached his own conclusion and given reasons, even if these were in summary form.

24. Mr Jesurum's skeleton before the FTTJ correctly submitted that if the Article 8 provisions of the Rules were not met then the FTTJ should have gone on to consider whether it was necessary to address the grounds under the Strasbourg jurisprudence outside the Rules. There is no reasoning in the

determination which in any way reflects these requirements. There have been considerable changes in Article 8 jurisprudence since the decision made by the respondent in 2009. The FTTJ made no mention of what the law was then or what provisions he was applying in 2014.

25. Mr Jesurum's skeleton before the FTTJ made a number of detailed submissions as to why, in relation to the Article 8 grounds, the claimant should benefit from the case law and the Secretary of State's policies relating to the "historic injustice" done to the Gurkhas. These are not addressed in the determination.

26. I have not been asked to make an anonymity direction and can see no good reason to do so.

27. I find that the lack of reasoning and the failure to apply the correct Article 8 principles amount to errors of law. Whilst the claimant has what is arguably a strong case I am unable to find that he would inevitably have succeeded had the correct reasoning and principles been applied to the facts of this case. The errors of law are material errors.

28. There are insufficient clear findings of credibility and fact. Further findings are needed. In the circumstances the findings in the determination are not preserved. There should be a full rehearing in the First-Tier Tribunal.

Signed:.. Date: 8 February 2015
Upper Tribunal Judge Moulden