In the Upper Tribunal (Immigration and Asylum Chamber)

R (on the application of Onowu) v First-tier Tribunal (Immigration and Asylum Chamber) (extension of time for appealing: principles) IJR [2016] UKUT 00185 (IAC)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Heard on
22 January 2016

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE O'CONNOR

Between

The Queen on the Application of
Clever Onowu

Applicant

and

First-tier Tribunal (Immigration and Asylum Chamber)

Respondent

Secretary of State for the Home Department

Interested Party

Representation:

Mr A Gilbert, instructed by Wilsons LLP Solicitors appeared on behalf of the Applicant.

Mr Z Malik, instructed by Government Legal Department appeared on behalf of the Interested Party.

The Respondent was not represented

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JUDGMENT

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In considering whether to exercise discretion to extend time for seeking permission to appeal to the Upper Tribunal, both the First-tier Tribunal and the Upper Tribunal should apply the approach commended by the Court of Appeal in Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; Denton v White [2014] EWCA Civ 906 and R (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1663.

Introduction

1. This is an application for judicial review of a decision made by First-tier Tribunal Judge Cruthers, sent to the parties on 17 March 2015, extending time for the respondent to apply for permission to appeal to the Upper Tribunal against a decision of First-tier Tribunal Judge Canavan allowing the applicant's appeal, on human rights grounds, against the respondent's decision to remove him to Italy - permission having been granted by the Vice President on the 14 September 2015.

2. Judge Canavan's decision allowing the applicant's appeal was promulgated on 15 January 2015. The Secretary of State's application for permission to appeal against this decision was not lodged with the First-tier Tribunal until 25 February 2015, significantly beyond the 14-day timeframe permitted for doing so pursuant r.33 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014 No. 2604) ("the 2014 FtT Rules").

3. Recognising that this was so the Secretary of State applied in the following terms for an extension of time:

> "1. The decision under challenge was dated 15 January 2015 and this application for appeal is out of time. The appellant accordingly seeks an extension of time for bringing her appeal. She contends that it is in the public interest to allow the appeal to be heard for the following reasons:
>
> (i) the limited consideration given by the learned judge to the considerable case law and evidence relating to Italy Dublin II cases amounts to a clear error of law, set out below. It is in the interests of justice for this error to be corrected on appeal;
>
> (ii) the case concerns complex issues of fact and law which are shortly to be heard in the Administrative Court in judicial review proceedings (CO/7110/2013 and other linked proceedings), in a substantive hearing listed for three days between 24th and 26th March 2015. It is in the interests of justice that Mr Onuwo's application under Article 3, which involves identical issues (and has indeed been cited in the Administrative Court proceedings), be determined consistently with the cases before the Administrative Court;
>
> 2. The appellant regrets the lateness of this application but the decision was not considered until it came to the Treasury Solicitor's attention after it was included

within the extensive further evidence served by the claimants in the Administrative Court cases late on Friday 13th February 2015, as the Treasury Solicitors do not usually have conduct of First-tier Tribunal proceedings. The appellant has acted promptly since observing that decision."

4. In the decision under challenge, Judge Cruthers granted the Secretary of State permission to appeal to the Upper Tribunal, stating:

> "1. By a decision promulgated on 14 January 2015, First-tier Tribunal Judge Canavan allowed this appeal. Having assessed the evidence, the judge concluded that: "the appellant's removal to Italy in consequence of the decision would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with his rights under Article 3 of the European Convention" (her paragraph 40).
>
> 2. The application for permission to appeal is out of time (by about 25 days). But having regard to the interests of justice, I have decided to admit this application.
>
> 3. To a degree, the grounds on which the respondent seeks permission to appeal might be seen as only a quarrel with the judge's assessment of the evidence before her. But overall, I think it is just arguable – as per the grounds – that the judge erred in her assessment – and in her application of relevant case law – such as **EM (Eritrea) [2014] UKSC 12** and **Tarakhel v Switzerland (Application No.29217/12 – 4 November 2014**).
>
> 4. As suggested at paragraph 4 of the respondent's grounds, it may be sensible if this matter is now 'stayed behind the substantive Administrative Court cases to be heard between 24th and 26th March 2015'.
>
> 5. There may also be relevance in the decided case of: **R (on the application of Weldegaber v Secretary of State for the Home Department (Dublin Returns – Italy) IJR [2015] UKUT 00070 (IAC), circulated on 12 February 2015**."

The 2014 FtT Rules

5. The relevant provisions of the 2014 FtT Rules read as follows:

> "**Overriding objective and parties' obligation to cooperate with the Tribunal**:
>
> 2.-(1) The overriding objective of these Rules is to enable the 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 and of the Tribunal;
>
> (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 Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The 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... .

Case management powers

4.-(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure...
...
(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may –
(a) extend or shorten the time for complying with any rule, practice direction or direction;
...

Application for permission to appeal to the Upper Tribunal

33.-(1) A party seeking permission to appeal to the Upper Tribunal must make a written application to the Tribunal for permission to appeal.
(2) Subject to paragraph (3), an application under paragraph (1) must be provided to the Tribunal so that it is received no later than 14 days after the date on which the party making the application was provided with written reasons for the decision.
...

Tribunal's consideration of an application for permission to appeal to the Upper Tribunal

34.-(1) ...
(2) If the Tribunal decides not to review the decision, or reviews the decision and decides to take no action in relation to the decision, or part of it, the Tribunal must consider whether to give permission to appeal in relation to the decision or that part of it.
(3) The Tribunal must send a record of its decision to the parties as soon as practicable.
(4) If the Tribunal refuses permission it must send with the record of its decision –
(a) a statement with its reasons for such refusal; and
(b) notification with a right to make an application to the Upper Tribunal for permission to appeal...".

Discussion

Applicable Legal Principles

6. It is initially necessary to identify the correct approach a Tribunal should take when faced with an application for an extension of time to apply for permission to appeal. We found it somewhat surprising that neither party's skeleton argument drew our attention to a trio of recent decisions from the Court of Appeal, which are of undoubted significance to the issue we are required to consider.

7. Both parties, in their respective written cases, took the aforementioned matter as having been settled by the decision of a three judge Deputy Presidential panel of the Asylum and Immigration Tribunal in BO and Others (Extension of time for appealing) Nigeria [2006] UKAIT 00035, the headnote to which reads:

> "…If a notice of appeal is given out of time, the first task in deciding whether to extend time is to see whether there is an explanation (or series of explanations) that cover the delay. If there is, it and all other relevant factors, such as the strength of the grounds, the consequences of the decision, the length of the delay and any relevant conduct by the Respondent are to be taken into account in deciding whether "by reason of the special circumstances it would be unjust not to extend time"

8. Reference in BO to *"by reason of the special circumstances it would be unjust not to extend time"* is to a feature of the procedure rules then in force governing the AIT. We pause here briefly to observe that this procedural regime was replaced by the 2014 FtT Rules on 20 October 2014, in relation to appeals in the First-tier Tribunal. The Upper Tribunal (IAC) came into existence on 15 February 2010 and has its own procedural regime, governed by The Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 209 No. 2698) ("the 2008 UT Rules").

9. Unlike the procedural regime considered in BO, neither the 2014 FtT Rules nor the 2008 UT Rules identify a specific 'test' to be applied when considering applications for an extension of time to lodge an application for permission to appeal, but rather such consideration is aligned with the overriding objective of the Rules to deal with cases '*fairly and justly*'.

10. Turning to the first in time of the three recent and relevant decisions of the Court of Appeal, Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537, [2014] 1 WLR 795. The Court of Appeal therein upheld a Master's decision that a claimant who had served a costs budget six days late required relief from sanctions under CPR 3.9. before the costs budget could be considered by the court.

11. The decision in Mitchell was followed shortly thereafter by that of Denton v White [2014] EWCA Civ 906, [2014] 1 WLR 3926, which concerned three conjoined appeals each of which involved the application of CPR 3.9. to cases where the claimants had failed to comply with court orders or rules. For the purposes of our decision it is only necessary to draw attention the following passages:

> "[35] [The court] will take account of the seriousness and significance of the breach (which has been assessed at the first stage) and any explanation (which has been considered at the second stage). The more serious or significant the breach the less likely it is that relief will be granted unless there is good reason for it. Where there is good reason for a serious or significant breach, relief is likely to be granted. Where the breach is not serious or significant, relief is also likely to be granted.
>
> [36] But it is always necessary to have regard to all the circumstances of the case. The factors that are relevant will vary from case to case. As has been pointed out in some of the authorities that have followed Mitchell, the promptness of the application will be a relevant circumstance to be weighed in the balance along with all the circumstances.

Likewise, other past or current breaches of the rules, practice directions and court orders by the parties may also be taken into account as a relevant circumstance."

12. The decisions in Mitchell and Denton had as their contextual setting private law civil proceedings. In R (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1663 the court concluded that the same approach should be adopted in the public law arena; acknowledging when doing so that a public law claim may raise important issues for the public at large and that this should be a factor taken into account when considering whether there is a good reason for extending time.

13. At [93] of its decision in Secretary of State for the Home Department v SS (Congo) & Others [2015] EWCA Civ 387, the Court drew together the learning from Mitchell, Denton and Hysaj, in these terms:

> "…a Judge should address an application for relief from sanction in three stages, as follows:
>
> i) The first stage is to identify and assess the seriousness or significance of the failure to comply with the rules. The focus should be on whether the breach has been serious or significant. 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) The second stage is to consider why the failure occurred, that is to say whether there is a good reason for it. It was stated in *Mitchell* (at para. [41]) that if there is a good reason for the default, the court will be likely to decide that relief should be granted. The important point made in *Denton* was 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) The third stage is to evaluate all the circumstances of the case, so as to enable the court to deal justly with the application. The two factors specifically mentioned in CPR rule 3.9 are of particular importance and should be given particular weight. They are (a) the need for litigation to be conducted efficiently and at proportionate cost, and (b) the need to enforce compliance with rules, practice directions and court orders…"

14. The following further guidance can also be distilled from the judgment in Hysaj:

    (i) There is no merit in constructing a special rule for public authorities; they have a responsibility to adhere to the court's rules even if their resources are 'stretched to breaking point' [42];

    (ii) A solicitor or public body having too much work will rarely be a good reason for failing to comply with the rules [42];

    (iii) Particular care needs to taken in appeals concerning claims for asylum and humanitarian protection to ensure that appeals are not frustrated by a failure by a party's legal representatives to comply with time limits. The nature of the

proceedings and identification of responsibility for a failure are matters to be considered at the third stage of the process [42];

(iv) The inability to pay for legal representation cannot be regarded as providing a good reason for delay [43];

(v) In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process [46].

15. In ZP (South Africa) v Secretary of State for the Home Department [2015] EWCA Civ 1273, the court also confirmed that the fact that an appellant had applied for legal aid and was awaiting a decision from the Legal Aid Agency should not normally be regarded as providing good reason for a delay.

16. Although none of the decisions cited above were made in the specific context that presents itself in the instant matter, we can see no good reason, and none was advanced by the parties, as to why the approach commended in Mitchell, Denton and Hysaj should not equally be applied to the First-tier Tribunal's, and Upper Tribunal's, consideration of an application for an extension of time to apply for permission to appeal (assuming of course that the notice of appeal was actually filed out of time). Nothing in the approach rehearsed above is in discord with the overriding objective of either the 2014 FtT Rules or 2008 UT Rules to deal with cases *justly and fairly;* indeed, it is the aspiration of achievement of these very objectives which was identified by the court in Denton, at [24], as underpinning the rationale for the third stage of the process of consideration.

17. Although it should go without saying, we nevertheless emphasise that insofar as there is any difference in the approach commended by the Tribunal in BO, and that identified by the Court of Appeal in Mitchell, Denton and Hysaj, then it is the latter which should be followed.

18. Having identified the relevant principles that are to be applied when consideration is being given to an application for an extension of time for applying for permission to appeal, we turn to a further 'issue of principle' raised by Mr Malik.

19. In reliance on the absence of a positive obligation in the 2014 FtT Rules to provide reasons for granting permission to appeal, in particular in rule 34 thereof which enshrines the requirement to provide a statement of written reasons for refusing permission to appeal, Mr Malik submits that no such obligation exists.

20. We have no hesitation in rejecting this submission. The duty on a judicial decision-maker to provide reasons is firmly entrenched in the common law (see for example the decision of Griffiths LJ to this effect, now of over 30 years vintage, in Eagil Trust Co Ltd v Pigott-Brown [1985] 2 All ER 119).

21. A more apt example of this duty in action can be seen from an analysis of the Court of Appeal's decision in R (Tofik) v Immigration Appeal Tribunal [2003] EWCA Civ 1138.

22. Tofik sought judicial review of a refusal by the Immigration Appeal Tribunal to grant an extension of time to apply for permission to appeal against a decision of an immigration adjudicator. He contended that the Immigration Appeal Tribunal was obliged (by virtue of the Immigration and Asylum Appeals (Procedure) Rules 2000) to give reasons for refusing to extend time. Sedley LJ (giving the judgment of the Court) accepted this submission but observed as follows in the alternative at [17]:

> "If this were wrong, however, I would come to exactly the same conclusion at common law…The exercise of the power to extend time is correspondingly critical for the applicant. It is a matter of judgment, not of discretion, and it should be taken as governed by the same principles as have been set out by this court in English v Emery Reimbold and Strick Ltd [2002] 1 WLR 2409, in particular paragraphs 15 to 21. Without travelling through the body of recent authority on the topic (not all of which was cited to the court in English), one can say with confidence that such a decision cannot lie outside what is now the general obligation of judicial and administrative decision-makers to explain, however succinctly, why they are deciding as they are."

23. In our conclusion, the absence of a positively stated requirement in the Tribunal Procedure Rules to provide reasons for granting permission to appeal does not come close to negating the weight of legal authority against Mr Malik on this issue.

24. The nature and extent of the duty on a judicial decision maker to provide reasons is context specific. In the context of deciding an application for permission to appeal to the Upper Tribunal that duty is not burdensome. Nevertheless, the decision must engage with the core of the appellant's arguments, including any submissions on the issue of whether time for applying for permission to appeal should be extended, and express, albeit succinctly, what the judge thought of those arguments.

Application of legal principle to the instant case

25. It is prudent to recall that Judge Cruthers' decision on the issue of whether to extend time for the Secretary of State to apply for permission to appeal to the Upper Tribunal comprises of only two discrete sentences, which when combined read:

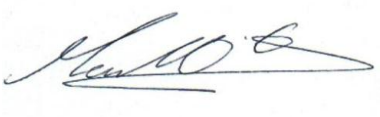
> "The application for permission to appeal is out of time (by about 25 days). But having regard to the interests of justice, I have decided to admit the application."

26. On any analysis the reader of Judge Cruthers' decision cannot determine whether the judge undertook the three stage process required of him by the legal authority analysed above. Breaking that process into its component parts, the decision does not divulge whether the judge took the view that a delay of "about 25 days" in making the application for permission to appeal constituted a "serious and significant delay". If it is to be taken as such, then the judge was required to go on and consider the quality of the explanation for that delay. Again, the decision is deficient in this regard. Finally, at the third stage of the process, the judge was required to evaluate

all the circumstances of the case so as to enable the application to be dealt with justly. Save for a consideration of the merits of the grounds of appeal, a matter which should not have featured at all in the judge's consideration of the application to extend time given his characterisation of the grounds as being "just arguable", there is no further identification of what the judge considered to be the relevant circumstances and how the judge treated those circumstances.

27. Duly analysed, the most striking feature of the First-tier Tribunal's decision to extend time to the Secretary of State to apply for permission to appeal is its lack of analysis of any feature of the case that could be said to be relevant to such decision. In short, the decision is completely unreasoned and unexplained and falls far short of complying with even the limited duty to give reasons that applies to decisions on applications for permission to appeal. For this reason we conclude that Judge Cruthers' decision to extend time for the Secretary of State to apply for permission to appeal to the Upper Tribunal must be quashed as, in consequence, must his decision granting permission to appeal. The Secretary of State's applications remain pending determination by the First-tier Tribunal.

Signed:



Upper Tribunal Judge O'Connor