Upper Tribunal
(Immigration and Asylum Chamber)

Ndwanyi (Permission to appeal; challenging decision on timeliness) [2021] UKUT 00378 (IAC)

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre via Skype for Business On 7 August and 16 October 2020	**Decision & Reasons Promulgated** ……

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ELISHA NDWANYI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms Aboni (7 August 2020); Mr McVeety (16 October 2020)
For the Respondent: Mr Cole (7 August 2020) and Ms Khan (16 October 2020)

If a decision of the First-tier Tribunal that an application for permission to appeal was in time represents the clear and settled intention of the judge then, as it is an 'excluded decision' (see the Appeals (Excluded Decisions) Order 2009 (SI 2009/275, as amended), it may only be challenged by way of judicial review; that remains so even if both parties agree that the decision is wrong in law. Only if the judge has overlooked the question of timeliness and any explanation for delay will the

grant be conditional upon the Upper Tribunal exercising a discretion to extend time (see Boktor and Wanis (late application for permission) Egypt [2011] UKUT 00442 (IAC)).

DECISION AND REASONS

1. I shall refer to the appellant as the 'respondent' and the respondent as the 'appellant', as they appeared respectively before the First-tier Tribunal. The appellant was born on 12 February 1997 and is a male citizen of Rwanda. He appealed to the First-tier Tribunal against a decision of the Secretary of State dated 6 June 2019 refusing his application for international protection. The First-tier Tribunal, in a decision promulgated on 20 December 2019, allowed the appeal on asylum and human rights (Article 3 ECHR) grounds. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. At the initial hearing held via Skype for Business on 7 August 2020, I was asked by both parties' representatives to deal with a preliminary issue arising from the grant of permission of First-tier Tribunal Judge Chohan. Paragraph (1) of the grant of permission states, 'The application is in time.' The remainder of the grant consists of the judge's reasons for finding it arguable that the First-tier Tribunal had erred in law. At the initial hearing, both representatives told me that they agreed that Judge Chohan had been wrong to find that the application for permission to appeal had been made in time. Mr Cole, who appeared for the appellant, submitted that I should find that the application for permission had been out of time, that I should not extend time and that I should decline to hear the appeal accordingly. The respondent submitted that, if I considered it necessary, I should exercise discretion to extend the time for appealing.

3. The judge's finding at [1] is strange given that, at Part B of the application, the Secretary of State has given her reasons for applying for an extension of time: 'Although it might be considered that this application is 4 days out of time, the decision was received over the Christmas holiday/bank holidays where an inadequate amount of staff was available to consider the decision and lodge grounds of appeal and therefore it is requested that in the interests of justice time is extended.' Following a brief discussion, I adjourned the initial hearing to enable both parties to make further written submissions on Judge Chohan's decision as to timeliness. Both parties have delivered helpful submissions and the initial hearing was concluded by Skype for Business on 16 October 2020. I reserved my decision.

4. First, I have considered whether Judge Chohan has simply overlooked the Secretary of State's application to extend time. At the hearing on 7 August 2020, I told the representatives that, in the Tribunal's file, there is a copy of the notice of receipt of application for permission to appeal which bears two endorsements. First, there is a sticker placed on the document by a member of the First-tier Tribunal administrative staff and which reads, 'Dear Sir/Madam. Please find enclosed Application made that the application had been made 'OOT' [out of time]. Date due: 06.01.2020. Date Rec'd 07.01.2020' Adjacent to the sticker is a manuscript note signed by Judge Chohan. This note reads, 'Xmas bank holidays must be taken into account. Application in time.'

The judge's note is dated 22 January 2020. Whilst the Secretary of State's statement in Part B of the application form is somewhat equivocal ('*…it might be considered that…*'), I am satisfied that the judge was aware that timeliness was an issue. At paragraph (1) of the grant of permission, he has given his reason why he did not consider it necessary to exercise any discretion as to an extension of time.

5. The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ('The Procedure Rules'), paragraph 33(2) provides:

> Subject to paragraph (3), an application under paragraph (1) must be sent to the Tribunal so that it is received no later than 14 days after the date on which the party making the application was sent the written reasons for the decision.

The Secretary of State's application for permission was delivered to the First-tier Tribunal on 7 January 2020. The Tribunal file has a copy of the covering letter sent to the parties with the First-tier Tribunal decision. That letter has been endorsed 'issued' by post 'via rep[resentative]' 23 December 2019'. The parties agree that the last date for the application to have arrived at the First-tier Tribunal in time was 6 January 2020 and that consequently the application was one day out of time (not four days, as the Secretary of State herself seems to have believed). Whilst it is clear from the judge's note on the file that he believed that bank holidays (i.e. Christmas Day, Boxing Day and New Year's Day) should be 'taken into account' both parties accept that the judge was wrong. The appellant's skeleton argument contends at [11]:

> The 14 day time-limit relates to calendar days and not working days. This is not specifically stated in the Tribunal Procedure Rules, but it is accepted practice that it is only time limits of 5 days or less that exclude Bank Holidays and other non-working days (see CPR 2.8(4)).

The only provisions in the Procedure Rules regarding time appear at paragraph 11:

> 11.—(1) An act required or permitted to be done on or by a particular day by these Rules, a practice direction or a direction must, unless otherwise directed, be done by midnight on that day. (2) Subject to the Tribunal directing that this paragraph does not apply, if the time specified by these Rules, a practice direction or a direction for doing any act ends on a day other than a working day, the act is done in time if it is done on the next working day.

6 January 2020 was a Monday and so not a 'day other than a working day'.

6. I have not been asked to determine whether the 'accepted practice' in the First-tier Tribunal of excluding non-working days applies only to time limits of 5 days or less (as CPR 2.8(4) indeed provides) is legally correct; both parties have made their submissions on the understanding that it is. What is clear, however, is that there is no support in the Procedure Rules for Judge Chohan's declaration that bank holidays 'must be taken into account.'

7. The sticker placed on the file by Tribunal staff was, therefore, correct; the application for permission was one day out of time. The question remains as to what, if anything, the Upper Tribunal can and should do to correct the judge's error.

8. First, I have considered whether the Upper Tribunal should, with the support of both parties or otherwise, reverse Judge Chohan's decision that the appeal was in time. In short, it cannot. In *NA (Excluded decision; identifying judge) Afghanistan* [2010] UKUT 444 (IAC), the Upper Tribunal considered the question: 'Does a right of appeal lie to the Upper Tribunal against a decision that a notice of appeal is out of time and not to extend that time?'. By extension, the question posed by Judge Chohan's decision will have the same answer. The Tribunal in *NA* held:

> 18. As will be clear, the right of appeal is from any decision of the First-tier Tribunal on a point of law other than an "excluded decision". Section 11(5) of the 2007 Act sets out what, for the purposes of subsection (1) is an "excluded" decision. None of the decisions in s.11(5), as originally enacted, are relevant to this appeal. However, Article 3 of the Appeals (Excluded Decisions) Order 2009 (SI 2009/275 as amended) adds a further decision to the category of "excluded decisions" which is relevant. Article 3 states that:
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> "3. For the purposes of section 11(1) and 13(1) of the Tribunals, Courts and Enforcement Act 2007, the following decisions of the First-tier Tribunal or the Upper Tribunal are excluded decisions –
>
> ….
>
> (m) any procedural, ancillary or preliminary decision made in relation to an appeal against a decision under section 40A of the British National Act 1981, section 82, 83 or 83A of the Nationality, Immigration and Asylum Act 2002, or regulations 26 of the Immigration (European Economic Area) Regulations 2006."
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> 19. That provision reflects the wording of s.103A(7) of the Nationality, Immigration and Asylum Act 2002 (now repealed) which excluded from the category of decisions of the Asylum and Immigration Tribunal which could be subject to the reconsideration process any "decision on an appeal" which was "a procedural, ancillary or preliminary decision". The words "procedural, ancillary or preliminary" which define the nature of the decision remain the same; the current provision (s.11(1)) requires that the decision be "in relation to an appeal", whilst the reconsideration framework (s.103A(7)) required it to be a decision "on an appeal".
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> 20. There is no doubt that the decision in this case is a "preliminary" decision by the First-tier Tribunal. Indeed, rule 10(6) of the First-tier Tribunal Procedure Rules states, inter alia, that
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> "The Tribunal must decide any issue as to whether a notice of appeal was given in time, or whether to extend the time for appealing, as a preliminary decision without a hearing…" (emphasis added)

21. That, in our judgment, reflects what must be the natural meaning, and consequent effect of, the legislative words initially in s.103A(7) of the 2002 Act and now found in Art 3 (m) of the 2009 Order as amended.

At [23], the Tribunal concluded:

23. In our judgment, there was no statutory basis upon which to grant permission to appeal to the Upper Tribunal in this case. The fact that it was granted cannot confer a jurisdiction upon the Upper Tribunal which it does not have. There is no valid appeal before the Upper Tribunal.

The Upper Tribunal has no jurisdiction to reverse the decision on timeliness taken by the First-tier Tribunal. That both parties agree that the decision was wrong makes no difference to the position; the parties cannot give the Tribunal a jurisdiction it does not possess.

9. Can the Upper Tribunal exercise a discretion as to the extension of time because the First-tier Tribunal has failed to exercise it? The appellant relies on the Upper Tribunal decision in *Boktor and Wanis (late application for permission)* Egypt [2011] UKUT 00442 (IAC):

Where permission to appeal to the Upper Tribunal has been granted, but in circumstances where the application is out of time, an explanation is provided, but that explanation is not considered by the judge granting permission, in the light of AK (Tribunal appeal - out of time) Bulgaria [2004] UKIAT 00201 (starred) and the clear wording of rule 24(4) of the Asylum and Immigration (Procedure) Rules 2005, the grant of permission to appeal is conditional, and the question of whether there are special circumstances making it unjust not to extend time has to be considered.

The Upper Tribunal in *Samir (FtT Permission to appeal: time)* [2013] UKUT 3 (IAC) followed *Boktor* save that it held that, 'if the application was to the First-tier Tribunal, the decision as to time is therefore made by the First-tier Tribunal, and if the application is not admitted there is the possibility of renewal to the Upper Tribunal'. The Tribunal in *Samir* considered that, where an issue of timeliness had been overlooked by the First-tier Tribunal and was then raised before the Upper Tribunal, it would be necessary for the Upper Tribunal Judge to determine the question sitting as a judge of the First-tier Tribunal.

10. The appellant in the instant appeal relies on *Boktor* and argues that 'whether to extend time is a discretionary judgment for the relevant judge considering all the relevant circumstances and, in this particular case, Judge Chohan has not exercised that discretion … it is submitted that this case is no different from the established cases where the issue of timeliness has not been considered at all' [skeleton argument, 15 and 16].

11. I disagree. First, the approach advocated by the appellant would lead to the procedural problem identified in *Samir*; if, sitting as a judge of the First-tier Tribunal, I decided the issue of timeliness against the respondent, I would be unable to refuse to hear the appeal in the Upper Tribunal (as the appellant proposes) without depriving the respondent of the opportunity to renew her application for permission to the Upper Tribunal. There is, however, a more fundamental problem with the

appellant's argument. The judge found that no issue as to timeliness arose at all. He decided (wrongly, as it happened) that the appeal was in time. In my view, it is not possible for the Upper Tribunal to ignore and then circumvent the judge's decision on timeliness simply because it is wrong. The decision is clear and unambiguous. Unlike the Tribunal in *Boktor*, it is clear from the file note and paragraph 1 of the grant of permission that the judge has considered the reasons given for delay but concluded that these were not relevant. As soon as his decision had been recorded in its final form, Judge Chohan became *functus officio*; as we shall see at [11] below, it was thereafter not possible for Judge Chohan or any other judge of the First-tier Tribunal to change the decision unless the 'slip rule' applies. Equally, it would be wholly inconsistent with the doctrine of *functus officio* for the Upper Tribunal to ignore a decision on timeliness and to exercise its own discretion on the basis that, because both parties agree that it was wrong, the judge's decision, in effect, does not exist. By finding that the application for permission was in time, the judge has decided that it was unnecessary to exercise any discretion. This is not a case where the judge has simply overlooked the fact that the application was out of time; on the contrary, he has engaged with the issue of timeliness and has reached an unequivocal decision on that issue. The circumstances here are, perhaps, unusual as we have the judge's file note but, even if we did not, it is difficult to see how it would be possible to go behind his clear finding at paragraph 1 of the grant that the application had been made in time. It follows that, if a remedy exists, then it is not to be found in the principles of law and practice articulated in *Boktor* and *Samir.*

12. Since both parties agree that Judge Chohan made a mistake, can that mistake be corrected under the 'slip rule'? Paragraph 31 of the Procedure Rules provides:

> 31. The Tribunal may at any time correct any clerical mistake or other accidental slip or omission in a decision, direction or any document produced by it, by— (a) providing notification of the amended decision or direction, or a copy of the amended document, to all parties; and (b) making any necessary amendment to any information published in relation to the decision, direction or document.

In the recent decision *MH (review; slip rule; church witnesses)* Iran [2020] UKUT 125 (IAC), the Upper Tribunal held that:

> *A decision which contains a clerical mistake or other accidental slip or omission may be corrected by the FtT under rule 31 (the 'slip rule'). Where a decision concludes by stating an outcome* ***which is clearly at odds with the intention of the judge****, the FtT may correct such an error under rule 31, if necessary by invoking rule 36 so as to treat an application for permission to appeal as an application under rule 31. Insofar as Katsonga [2016] UKUT 228 (IAC) held otherwise, it should no longer be followed.* **[my emphasis]**

The problem with Judge Chohan's decision is that, no matter how wrong it may have been, it is undoubtedly what he intended; the decision recorded on the grant of permission was manifestly not 'clearly at odds with the intention of the judge'. As the Court of Appeal held in *Bristol-Myers Squibb Company v. Baker Norton Pharmaceuticals Inc and Napro Biotherapeutics Inc* [2001] EWCA Civ 414 at [25]:

25. … the slip rule cannot enable a court to have second or additional thoughts. Once the order is drawn up any mistakes must be corrected by an appellate court. However it is possible under the slip rule to amend an order to give effect to the intention of the Court.

Paragraph 31 of the Procedure Rules, therefore, offers no assistance.

13. The appellant [skeleton argument, 17] accepts that, where a judge has exercised discretion regarding the extension of time unlawfully, then judicial review is the appropriate remedy (for an example, see *R (on the application of Onowu) v First-tier Tribunal (Immigration and Asylum Chamber) (extension of time for appealing: principles)* IJR [2016]) UKUT 185 (IAC). Judicial review is the only means by which Judge Chohan's decision to admit the application for permission can be challenged. That remains the case notwithstanding that both the appellant and the Secretary of State agree that the judge was wrong to find that the application had been made in time. As the First-tier Tribunal's grant of permission has not been disturbed on judicial review, I have proceeded to consider the Secretary of State's appeal on its merits. Both parties' representatives made submissions regarding error of law at the initial hearing on 16 October 2020.

14. There is one ground of appeal:

At the paragraphs 35-36, the FTTJ states that the appellant failed to answer the questions asked and the therefore the FTTJ decided that consideration of the expert report would be determinative of the claim. However, after having considered points on both sides regarding the expert report, the FTTJ nonetheless are concludes that the appellant's account is plausible at paragraph 58, even though there was a lack of evidence to support the appellant's account as noted at paragraph 57.

The decision of the FTTJ is therefore inconsistent and lacking in reasons especially in respect of why the SSHD lost the appeal. Both parties have a right to know why one party lost and the other won, but that it lacking *(sic)* throughout this decision.

The appellant claims to fear the Rwandan government. Born in Zaire (now the Democratic Republic of Congo (DRC)), he fled to Rwanda in 1995 following the death of his parents. He now holds a Rwandan passport. The appellant has worked for a number of government agencies and joined the World Food Programme (WFP - an agency of the United Nations) in 2017. In February 2017, the appellant visited the United Kingdom. In September 2017, at his office in Kigali, the appellant claims that he received, apparently in error, an email from a government security agency. The email concerned Rwandan troop movements on the DRC border. The appellant claims that he was alarmed that the UN was aware 'that these things were happening' and photographed the email. Over the next few weeks, the appellant became aware that the Rwandan secret service (the Directorate of Military Intelligence - DMI) had become interested in him. He travelled to the United Kingdom on 14 October 2017. Some time between 20-25 October 2017, he learned that a friend (a Mr Bamporiki) to whom he had sent the photograph of the email and who had 'broadcast' that troops were about to enter the DRC, had been murdered. The appellant then claimed asylum.

15. The respondent accepts that the appellant worked for the WFP. She also agrees that, if his account is found to be true, then the appellant faces a real risk of suffering harm on return to Rwanda (see First-tier Tribunal decision at [64]). Otherwise, the respondent submits that the appellant's account is inconsistent and unreliable.

16. The First-tier Tribunal (Judge Cox) [36] agreed 'with the representatives and believe that my assessment of the expert report will be determinative.' Judge Cox considers in detail the report of the expert, Dr Joseph Mullen, at [37-54]. He records that the Presenting Officer sought to rely on certain passages of the report in support of his submission that the appellant's account was implausible. The Presenting Officer noted that the expert had been 'a little puzzled' by the appellant's claim that a highly restricted email should have 'gone astray'. The Presenting Officer also drew the judge's attention to the fact that the expert had, despite researching relevant websites, been unable to 'triangulate' the death of Mr Bamporiki. Dr Mullen had also not considered it 'likely' that, as the appellant claims, the head of the WFP in Rwanda had passed the appellant's name to the DMI. In the case of each passage of the expert report cited by the Presenting Officer, the judge records the response made by the appellant's counsel. The judge's approach throughout is measured and even-handed.

17. At [56], Judge Cox acknowledges that the appeal was 'difficult to determine'. He found 'troubling' the absence of any evidence regarding the murder of the appellant's friend and that the expert considered it unlikely that any colleague of the appellant at the WFP would have passed the appellant's name to the DMI. However, at [58], the judge accepted that the core of the appellant's account was true and at [59-63] he has given clear and cogent reasons for reaching that conclusion. He noted that the expert had accepted that the DMI may have had agents operating in the office of the WFP and found also that the email had been sent in error. He considered the appellant's evidence in the wider context of politics in the region (both parties accept that there had been troop movements on the border around the time the email had been sent) and the appellant's own circumstances; the judge found that the appellant would not have abandoned his job and good standard of living for the uncertainty of life as a refugee had he not genuinely feared for his safety and he also took into account that the appellant had been born in DRC and was a naturalised citizen of Rwanda; that was a relevant factor given the significance of ethnicity in the politics of the region. I reject the respondent's submission that 'the decision is lacking in reasons.'

18. I accept that not every judge would have reached the same findings as Judge Cox on the same evidence. However, that is not the point. Further, I do not consider that the findings of the judge are perverse. Indeed, Mr McVeety, who appeared for the Secretary of State, acknowledged that, on the evidence, there 'were ways the judge could have allowed the appeal.' In my opinion, the judge took one such way. He engaged fully with the relevant evidence; his analysis of the expert report, especially those parts which were not obviously favourable to the appellant, is thorough and even-handed. Moreover, the judge did not find in favour of the appellant in the teeth of a negative conclusion from Dr Mullen; the expert unequivocally states at the end of his report [26] that the appellant's return to either DRC or Rwanda 'is likely to

result in a life-threatening situation.' Contrary to what is asserted in the grounds, the respondent has been left in no doubt as to why she lost; ultimately, the grounds amount to nothing more than a disagreement with findings available to the Tribunal on the evidence.

19. Finally, in his oral submissions, Mr McVeety cast doubt on the use by the judge, when discussing the email, of the phrase 'I cannot exclude the possibility'. Mr McVeety submitted that the judge appeared to have departed from the appropriate standard of proof. I do not agree and in any event, Mr McVeety acknowledged that this challenge does not appear in the grounds of appeal as drafted.

20. For the reasons I have given, the Secretary of State 's appeal is dismissed.

Notice of Decision

The Secretary of State's appeal is dismissed

Signed Date: 30 November 2020
Upper Tribunal Judge Lane