Upper Tribunal
(Immigration and Asylum Chamber)

NA (Excluded decision; identifying judge) Afghanistan [2010] UKUT 444 (IAC)

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 7 September 2010	
	……

Before

MR C M G OCKELTON, VICE PRESIDENT
SENIOR IMMIGRATION JUDGE GRUBB

Between

NA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No representative
For the Respondent: Mr K Hibbs, Home Office Presenting Officer

1. There is no right of appeal to the Upper Tribunal against a decision not to extend time under rule 10 of the First-tier Tribunal Procedure Rules when a notice of appeal has been given out of time. It is a "preliminary decision made in relation to an appeal" within Art 3(m) of the Appeals (Excluded

Decisions) Order 2009 (as amended) and consequently is an "excluded decision" for the purposes of s.11 of the Tribunals, Courts and Enforcement Act 2007.

2. The parties are entitled to know the judge who makes a decision in an appeal. In the case of an appeal determined without a hearing that means that the determination or decision must identify the judge. The absence of the Duty Judge's name identifying the decision-maker of the decision not to extend time resulted in a fundamental breach of justice which vitiated the decision.

DECISION

1. On 16 April 2010, the Secretary of State refused the appellant's claim for asylum and made a decision to remove him as an illegal entrant. The deadline for lodging an appeal by a notice of appeal to the First-tier Tribunal (Immigration and Asylum Chamber) was 11 May 2010. In fact, a Notice of Appeal was lodged on 17 May 2010 and thus was four working days out of time. On 19 May 2010, it appears (and the reason for our particular phraseology will become clear shortly) that a Duty Judge of the First-tier Tribunal concluded that the Notice of Appeal was out of time and refused to extend time under rule 19(5) of the First-tier Tribunal's Procedure Rules. The appellant sought permission to appeal this decision to the Upper Tribunal which was granted by SIJ Eshun on 10 June 2010

2. At the hearing before us the appellant was unrepresented. The respondent was represented by Mr Hibbs who helpfully told us something about the appellant's immigration history which was not disclosed on the file. The appellant, who claims to come from Afghanistan, first arrived in the UK on 8 January 2009. He claimed asylum at Calais. He absconded on 10 January 2009 for 6 days and then again on 27 February. His claim was deemed to have been abandoned because he absconded. He reappeared at Reading Police Station on 22 March 2010 claiming that he had just arrived in the UK. He was detained and removal directions were made for 26 March 2010. On 24 March 2010 he claimed asylum again. His claim was processed in the usual way. There was an initial interview, a screening interview on 26 March 2010 and an asylum interview on 8 April 2010. Further representations were made by the appellant's solicitors, Albany Solicitors on 19 April 2010. The Secretary of State's decision refusing asylum was served on 22 April 2010 and also, on that date, he was served with notice to remove him as an illegal entrant. The appellant had undergone a 'Merton' compliant assessment and assessed as an adult.

3. The circumstances that followed the service of the decision are contained in the Notice of Appeal to the First-tier Tribunal, the application for permission to appeal to the Upper Tribunal together with an accompanying handwritten letter dated 25 May 2010 from Ruth O'Neill of Asylum Justice. The appellant told us, through an interpreter, that following the receipt of the Home Office decision on Monday 26 April 2010 he went to see a solicitor (at, we understand, Albany Solicitors) and was told to await a letter. He received a letter from them with an appointment for Thursday 6 May 2010. When he attended he was told that the solicitor would not take his case. On Saturday 8 May 2010, he went to the offices of Asylum Justice. He

was told to come back on Tuesday 11 May 2010 which was, of course, the final day for lodging a notice of appeal. When he returned on that day, the offices of Asylum Justice were closed. He subsequently lodged a notice of appeal on Saturday 15 May 2010 with, it is apparent from what it contains, the assistance of Asylum Justice.

4. In their letter of 25 May 2010, Ruth O'Neill points out that Asylum Justice is staffed by volunteers. They operate open sessions only on Tuesdays and Saturdays each week. Asylum Justice was closed on Tuesday 11 May 2010 due to a shortage of volunteers and, it is noted, it is perfectly plausible that as a result the appellant was delayed until Saturday 15 May when there was the next open session.

5. The letter concludes that the delay in lodging the notice "was not in the most part" that of the appellant.

The Decision

6. The decision which is the subject of this appeal is set out in a document headed "Decision on Preliminary Issue – Timeliness" as follows:

"**THE IMMIGRATION ACTS**

Between

NA

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Rspondent

DECISION ON PRELIMINARY ISSUE – TIMELINESS
(PURSUANT TO RULES 7 & 10 OF THE ASYLUM AND IMMIGRATION TRIBUNAL (PROCEDURE) RULES 2005)

1. The Appeal

1:1 The Appellant seeks to Appeal the Respondent's decision dated 22 April 2010 refusing the appellant's Asylum/Human Rights applications. The Notice of Appeal records the deadline date as being 11 May 2010. That date has not been challenged by the Appellant. The appeal was lodged 17 May 2010. I am satisfied that the appeal is out of time.

2. The Relevant Law

2:1 For an extension of time to be granted I must be satisfied on the balance of probabilities that there are special circumstances that would render it unjust

not to do so (Rule 10(5) of the Asylum and Immigration Tribunal (Procedure) Rules 2005).

2:2 The principles to be followed in considering an out of time application are set out in the AIT decision of BO and Others (Extension of time for appealing) Nigeria [2006] 00035. The decision sets out the factors that are to be taken into account when determining the application. These include: the explanation for the delay, the strength of the grounds of appeal, the consequences of the decision and the length of delay.

2:3 BO provides that the starting point must be the explanation for the Appeal being out of time. If there is no explanation at all, or no satisfactory explanation, or an explanation which is not supported by evidence that ought to have been readily available, it is very unlikely that time should be extended. In the absence of an explanation time could only be extended where there are obvious and quite exceptional reasons for doing so and where the issue is one of wider public importance or where (despite the lack of information provided by the Appellant) it is clear that there has been a serious denial of justice.

3. The Explanation for the Delay

3:1 The application asserts that the Appellant was asked to attend at the offices of Asylum Justice on the deadline date for the appeal. On arrival there was no volunteer lawyer available to assist. No action was taken. The Appellant revisited AJ at the "next possible opportunity" namely Sat 15 May 2010.

4. The Decision

4:1 I am satisfied that the Appellant would have been aware of the time constraints for the Appeal as these are set out in the body of the decision Notice. They also appear in the margin notes in the Appeal form which would have been delivered with the Decision Notice. It was for the Appellant or his Representatives to arrange for the despatch of Appeal forms to ensure that they were received by the AIT on or before the deadline date.

4:2 The extension application is inadequate. I observe that there is no evidence from Asylum Justice to support the Appellant's application and no explanation as to why the Appellant was unable to seek assistance again before 15 May. The application refers to the Appellant revisiting at the "next possible opportunity" but it is unclear why he was not able to do so earlier. In any event it is not a prerequisite to an appeal that a person be represented or have accessed a lawyer. Accordingly the lack of assistance from a Legal Representative cannot in itself justify an extension of time. The application fails to establish why the Appellant was unable to complete and submit the appeal form himself particularly as he was aware of the deadline date for the appeal. I conclude that the Appellant has failed to establish to the standard of proof required that there is an acceptable explanation for the entire period of the delay.

4:3 Having considered the papers as a whole to include the Grounds of Appeal I am satisfied that this Appeal does not fall within the category as outlined in paragraph 2:3 above. I am not assisted by the fact that the Appellant has failed to submit a copy of the refusal letter. I am unable to identify any special circumstances relating to this Appeal which would render it unjust not to exercise my discretion under Rule 10(5) by enlarging time.

DECISION

The Appeal is out of time.

The time for Appeal is not extended.

Signed **Date: 19 May 2010**

Judge of the First-tier Tribunal"

7. Mr Hibbs submitted that the Duty Judge had not erred in law. He had applied the correct approach set out in BO and Others (Extension of time for appealing) Nigeria [2006] UKAIT 00035.

8. We have to say that we see considerable force in that submission. The only explanation offered by the volunteer from Asylum Justice in "section 2" of the Notice of Appeal relates to the appellant being required to attend on the last day for lodging (Tuesday 11th May) and then explaining no volunteer was available and the appellant was asked to attend "at the next possible opportunity" which was Saturday 15th May. The more detailed explanation which we have from Asylum Justice was not submitted with the Notice of Appeal and was not available to the Duty Judge who made the decision not to extend time. The appellant's explanation of what happened in respect of his previous solicitors prior to his seeking advice from Asylum Justice was not made available to the Duty Judge. Further, the Notice of Appeal was not accompanied by the Refusal Letter. The only basis for the appellant's claim and the strength of his claim was as set out by him (or on his behalf) in the Notice of Appeal. What is found there is cursory and, at times, wholly unenlightening when attempting to assess the strength of his claim. In essence, it is repeated on three occasions that he has "told the truth" and is in "grave danger" or faces a "real risk of serious harm" if returned. His country of origin is not mentioned.

9. The Duty Judge correctly applied the approach in BO (cited with approval by Dyson LJ in R (MK) v AIT [2007] EWCA Civ 554 at [4]). Given the patent lack of information about the appellant's claim and the limited scope of the explanation for the delay in lodging a notice of appeal, we see no basis for saying that the Duty Judge failed to

have regard to any relevant matter or reached a decision that was not properly open to her on the evidence for the reasons given.

10. That was the scope of the argument we heard. There are, however, two matters of difficulty raised in this appeal which do not turn upon the particular circumstances of the appellant. One concerns the form of the decision which is unsigned and does not identify the Duty Judge who made the decision. The other concerns the jurisdictional issue of whether there is a valid appeal before the Upper Tribunal. That latter, in particular, is an issue which we are bound to address in dealing with this case.

The Form of the Decision

11. First, there is the form of the Judge's decision. We set it out earlier in the precise way in which it appears. The Duty Judge (if that be whose work it is) has neither included his or her name on the formal part at the beginning or at the end which remains blank and unsigned. It is wholly unclear from the document who has made the decision and whether, in fact, it is the work of one of the Duty Judge's of the First-tier Tribunal. In our judgment, this is a fatal flaw which vitiates the decision.

12. It is a fundamental principle of justice that the public and litigants should know the name of any judge who is deciding or sitting as a judge in a case. That was made clear by the Divisional Court of the Queen's Bench Division in R v Felixstowe Justices, ex parte Leigh and another [1987] 1 All ER 551 (Watkins LJ, Russell and Mann JJ). There, a bench of magistrates adopted a policy of withholding the names of justices during the hearing of cases and from the public and press after cases were heard. In deciding that this was unlawful, Watkins LJ, with whom Russell and Mann JJ agreed, observed that (at p.560h)

> "So far as I am able to ascertain, anonymity has never been claimed other than by the number of justices I have mentioned by anyone who can be said to be a judicial or quasi-judicial person. This applies as much to High Court judges and circuit judges as to, for example, members of tribunals."

13. Watkins LJ noted that magistrates took the oath of allegiance and the judicial oath using their names (at p.560c-d). The same is, of course, true of Judges of the First-tier Tribunal. Also, he noted that a litigant was entitled to have his case heard and dealt with by a judge who was not disqualified by actual or apparent bias from adjudicating upon his case. Without knowledge of the judge's name there would be no effective way of the right to object being "fully and properly exercised" (at p.560f). Watkins LJ observed that from time to time judges were the subject of criticism or worse but this was no justification for anonymity (at pp.560j-561b). The Court concluded that it was a principle of open justice that "those who do justice be known" (at p.561b). A bona fide inquirer was entitled to know the name of a magistrate sitting on a case or who had done so (at p.561d).

14. In our judgment, this principle is no less applicable to decisions by judges of the First-tier Tribunal or, indeed, the Upper Tribunal. Watkins LJ specifically embraced within the principle he identified all judicial officers ranging between High Court Judges and tribunal members.

15. Of course, this is not a case where a judge has sought anonymity but that is the effect of what has happened. No-where on the face of the decision in this case can there be found the name of the Judge who made the decision. Indeed, it is simply not possible to know whether the person who made the decision was, or was not, a Judge of the First-tier Tribunal at all. The parties are entitled to know who the judge was. In the case of an appeal determined without a hearing that means that the determination or decision must identify the judge. In practice, of course the decision should, and will, also be signed (personally or electronically) by its author (see Senior President's *Practice Statements: Immigration and Asylum chambers of the First-tier tribunal and the Upper Tribunal*, para 10.1) and, in any event, where a hearing took place at which the appellant or his representative was present, there is likely to be no difficulty over identity. In some cases, it may be that the omission could be corrected under the 'slip rule' provision in rule 60 of the First-tier Tribunal Procedure Rules. The time for that has, however, passed in this case. The absence of the Duty Judge's name identifying the decision-maker of this decision resulted in a fundamental breach of justice which vitiated the decision.

Right of Appeal to the Upper Tribunal

16. There is a second, and more fundamental, difficulty raised by this appeal. 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? The short answer is: it does not.

17. The relevant provisions dealing with the right of appeal from decisions of the First-tier Tribunal to the Upper Tribunal are contained in s.11 of the Tribunals, Courts and Enforcement Act 2007 as follows:

> "**11. Right of appeal to the Upper Tribunal**
>
> (1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier tribunal other than an excluded decision.
>
> (2) Any party to a case has a right of appeal, subject to subsection (8).
>
> (3) That right may be exercised only with permission (or, in Northern Ireland, leave).
>
> (4) Permission (or leave) may be given by –
> (a) the First-tier Tribunal, or
> (b) the Upper Tribunal,
>
> on an application by a party." (our emphasis)

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:

> "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."

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".

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

> "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.

22. Is it, however, a decision made "in relation to an appeal"? It might be argued that only if an "appeal" is pending before the First-tier Tribunal could any decision be "in relation to an appeal". If so, any decision made prior to an appeal being instituted – such the decision in this case that one has not been instituted – would not fall within the category of "excluded" decisions. We do not consider that argument to be correct. The argument we have identified, if good, would also have meant that such a decision would have been subject to reconsideration when the AIT existed. Such a decision could no more be said to be a preliminary decision "on an appeal" than one

"in relation to an appeal". It is the collective understanding of the members of the Upper Tribunal sitting in this case that the effect of s.103A(7) was understood to exclude reconsideration of 'out of time' decisions made by judges of the AIT. The only legal recourse was to judicial review to challenge adverse decisions (see, e.g. R(MK) v AIT [2007] EWCA Civ 554). We do not consider that the minor change in the legislative wording in the excluded category from a preliminary decision "on an appeal" to one "in relation to an appeal" was intended to effect, or has in fact effected, any change in the legal procedure by which a challenge to 'out of time' decisions can be made. Such decisions were not subject to reconsideration and are not subject to appeal to the Upper Tribunal. We are in no doubt that the decision was "in relation to" an appeal, namely whether one had been properly instituted by the lodging of a notice of appeal in time or, if not, because time was to be extended. A decision such as the one in this case can only be challenged by way of judicial review.

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.

24. Although we have expressed our views on the merits of the case and the validity of the decision itself, the decision we make is that there is no valid appeal before the Upper Tribunal. Having said that, it will be apparent from our comments on the form of the decision that our view is that the First-tier Tribunal has not yet made any valid decision on whether time should be extended or the appeal accepted. It may well be that in the light of those views the First-tier Tribunal will take the opportunity to look at the appellant's Notice of Appeal again and make a further decision on it.

Signed

Senior Immigration Judge Grubb
Judge of the Upper Tribunal