Case No: AC-2024-LON-002649

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2025] EWHC 313 (Admin)

The Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 28 January 2025

BEFORE:
MRS JUSTICE LANG

BETWEEN:

THE KING
(on the application **of**
(1)MARINELA ISAKU
(2) ERALD ISAKU)

Claimants

- and -

UPPER TRIBUNAL
(Immigration and Asylum Chamber)

Defendant

- and -

SECRETARY OF STATE FOR HOME DEPARTMENT

Interested Party

MR D BAZINI (instructed by Warren Grant Immigration) appeared on behalf of the Claimant.
THE DEFENDANT did not appear and was not represented.
MS N HART (instructed by Government Legal Department) appeared on behalf of the Interested Party.

JUDGMENT
(Approved)

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1. MRS JUSTICE LANG: This is a renewed application for permission to apply for a judicial review of the decision of Upper Tribunal Judge Kebede in the Upper Tribunal (Immigration and Asylum Chamber) ("UT"), on 7 June 2024, in which she granted the Interested Party ("the Secretary of State") an extension of time to apply for permission to appeal against the decision of Judge Lawrence in the First-tier Tribunal ("the FtT") promulgated on 6 December 2023, allowing the claimant's appeals against the Secretary of State's decision to deprive them of British citizenship.

2. Permission was refused on the papers by Sheldon J on 23 September 2024.

3. The renewal application should have been made within seven days of service but was not filed until 10 October 2024. The reason for the delay was the claimants' solicitor became seriously ill. He was admitted to hospital on 26 September 2024 and was discharged on 7 October 2024. He is a sole practitioner and so there was no one else who could take over conduct of the case during his illness. He obtained instructions from the claimants to proceed with the application on 6 October 2024 and then instructed counsel. His account is verified in his witness statement, which also exhibits his medical records. In my view, the delay was minimal and there was good reason for it. Therefore, I grant the necessary extension of time for filing the renewal application.

4. I have taken the facts from the decision of Judge Lawrence. The claimants are siblings, who were born on 28 September 1982 and 30 April 1987, respectively. Their father is Islam Isaku, their mother is Primari Isaku and they have a sister called Eglantina. They are all Albanian nationals, not Kosovans.

5. The claimants entered the UK as minors on 5 October 1999 with their father, who claimed asylum as Kosovan. Erald was identified as Islam Isaku's nephew, not his son. Over a lengthy period of time, the claimants and their parents and sister obtained indefinite leave to remain and were naturalised as British citizens,

6. Section 40(3) of the British Nationality Act 1981 gives the Secretary of State power to deprive a person of that status if he is satisfied that it was obtained by means of fraud, false representation or concealment of a material fact.

7. On various dates in 2021, the Secretary of State decided to deprive the claimants and the other family members of their British citizenship, on the ground that they had perpetrated fraud in their dealings with the Home Office by using false identities.

8. On 6 December 2023, the FtT allowed the claimants' appeals on the grounds that, as they were minor at the relevant times, they were not complicit in the deception, applying the Secretary of State's Nationality Instructions. On the same occasion, the FtT dismissed the appeals by the claimants' other family members.

9. Any application to appeal should have been lodged within 14 days of the tribunal's decision and the deadline has been calculated as 20 December 2023.

10. FtT Judge ID Boyes granted the claimants' mother and sister permission to appeal to the UT on 22 February 2024.

11. On 8 April 2024, the Secretary of State applied for permission to appeal out of time against the FtT's decision to allow the claimants' appeals. Applying the test in *R(Onowu) v First-tier Tribunal* [2016] UKUT 00185 (IAC), the Secretary of State recognised that the application was filed some 14 weeks after the deadline and that the breach was significant. In answer to the question, "Is there a good reason for the breach?" the Secretary of State said:

> "5. The reason for the breach is because the SPO who was allocated this case to review in December 2023 failed to do so and then left the Home Office at Christmas 2023 without informing anybody that the review had not been undertaken. This position was flagged on 3rd April when the Specialist Appeals Team undertook rule 24 replies in relation to appellants 1 and 4. The allowed appeals of appellants 3 and 5 were then reallocated as soon as possible."

12. In answer to the question whether, in all the circumstances, is it just to grant an extension, the Secretary of State said:

> "6. Whilst the SSHD recognises the importance of compliance with the rules and conducting litigation efficiently and proportionately, it is submitted in this case that an extension of time should be granted.
>
> 7. It is submitted that, as there will, in any event, be an error of law hearing in relation to Appellants 1 and 4, there will be no additional burden on court time as the SSHD's appeals in relation to Appellants 3 and 5 can be heard at the same time. It is further submitted that, given

the scope and merits of the grounds as set out below, the fact that the public interest issue at stake is nationality fraud, it is proportionate and in the interests of justice to extend time."

13. I interpose here to say that Mr Bazini submits that the grounds relied on by the Appellants 1 and 4 are quite distinct from those relied upon by Appellants 3 and 5 and so there will be no time saving at an appeal hearing. I consider that there will be some time saving, but it will be minimal.

14. In her Grounds of Appeal, the Secretary of State submitted that FtT Judge Lawrence erred in disregarding Marinela Isaku's deception as to her true nationality and date of birth when she applied to be naturalised, by which time she was an adult. Similarly, the Secretary of State submitted that FtT Judge Lawrence erred in disregarding Erald Isaku's deception as to his true nationality, date of birth and family when he applied for an extension of stay, then for a travel document and then for naturalisation, when he was an adult.

15. FtT Judge Moon refused the application for an extension of time on 1 May 2024. She considered that the Secretary of State had not established a good reason for the delay. It was incumbent on her to have processes in place to check whether work allocated had been completed. She described what happened as "an oversight". She rejected the submission that there was no prejudice to the claimants, as they were entitled to assume that there would be no challenge to the decisions once the time limit expired, and the claimants will face further uncertainty when they were entitled to expect that the matter had been settled.

16. On 7 June 2024, UT Judge Kebede granted an extension of time and permission to appeal to the Secretary of State.

17. In light of the decision of FtT Judge Moon, she directed herself that rule 21(7)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 was engaged and so the application could only be admitted if it was in the interests of justice to do so.

18. Judge Kebede set out her reasons for her decision as follows:

> "3. In the case of *R(on the application of Onowu) v First-tier Tribunal (Immigration and Asylum Chamber) (extension of time for appealing: principles)* IJR [2016] UKUT 185, the Upper Tribunal

considered the principles in relation to extensions of time applying the approach of the Court of Appeal in previous cited cases which involved a three-stage consideration process. As Judge Moon found, with regard to stages one and two, the delay is serious and significant. Judge Moon set out the reason provided for the delay, namely, that the matter was assigned to a caseworker who left the Home Office in December 2023 without notifying the wider team that a review of the decision was outstanding. Judge Moon did not consider the respondent's explanation for the delay to be a good reason. Whilst I agree with Judge Moon's observation that this was an oversight by the respondent, I do not agree that the reason is a wholly unsatisfactory one. Whilst there is the need to enforce compliance with rules, practice directions and court orders, there are specific and unusual circumstances in this case which led to the delay and which have been explained by the respondent.

4. I have also had regard to the wider picture and have evaluated all the circumstances in accordance with the guidance given in *Onowu*. Whilst there is a need for litigation to be conducted efficiently and at proportionate cost, it is relevant that Judge Lawrence's decision is to be considered as an error of law hearing in any event as a result of the applications made by the appellants whose appeals he dismissed. Further, there is a serious public issue at stake as the respondent's grounds assert, in that this case concerns nationality fraud. There is also a public interest in clarifying the role of other family members in a fraud which initially commenced at a time when they were minors and the application of policy guidance in that regard. As the respondent asserts in the grounds, Judge Lawrence, albeit having regard to parts of the policy, arguably erred in his application of that policy and failed to consider relevant parts of the policy in chapter 18. Although the merits of the grounds is not a reason in itself to extend time. as made clear in *Onowu*, neither is it a matter to be ignored as part of the overall circumstances when there is such arguable merit as I consider there to be in this case.

5. Accordingly, taking all of the above together, I consider that it is ultimately in the interests of justice to extend time. I therefore, do so and I admit the application."

19. In *Onowu*, the UT referred to the well-known authorities of *Mitchell v News Group Newspapers Limited* [2013] EWCA Civ. 1537, [2014] 1 WLR 795; *Denton v White* [2014] EWCA Civ 906, [2014] 1 WLR 3926; *R(Hysaj*) *v Secretary of State for the Home Department* [2014] EWCA Civ 1663; and *Secretary of State for the Home Department v SS (Congo) and Others* [2015] EWCA Civ 387.

20. In *Hysaj*, the court concluded that the principles in *Mitchell* and *Denton* should also be applied to public law claims. Such claims may raise important issues for the public at large and that should be a factor taken into account when considering whether there is a good reason for extending time. However, in most cases, the merits of the appeal will have little to do with whether it is appropriate to grant an extension. It is only likely to be relevant in cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak.

21. In *SS (Congo)* Richards LJ summarised the three-stage test to be applied at [93]:

> "It is common ground that the governing principles are those laid down in *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, in which this court held that applications for extension of time for filing a notice of appeal should be approached in the same way as applications for relief from sanction under CPR rule 3.9 and in particular that the principles to be derived from *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR 795 and *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926 apply to them. According to the *Denton* restatement of the *Mitchell* guidance, in particular at paras. [24]-[38] of the judgment of the Master of the Rolls and Vos LJ in *Denton*, 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. As stated in para. [35] of the judgment in *Denton*:
>
> 'Thus, the court must, in considering all the circumstances of the case so as to enable it to deal with the application justly, give particular weight to these two important factors. In doing so, it 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 ….'"

22. I agree with Sheldon J. that UT Judge Kebede's decision does not disclose any arguable error of law. At stage one, Judge Kebede agreed with Judge Moon that the delay was serious and significant. There is no dispute that she was entitled to reach this conclusion.

23. At stage two, UT Judge Kebede found that a good reason for the delay had not been established. She applied the correct test at stage two. She clearly understood that, in consequence, she had to move on to consider stage three. In my view, it was permissible for her to comment on the reason given by the Secretary of State in the course of her consideration of stage two, and her observations cannot fairly be taken as an indication that she was applying a lower threshold than the prescribed "good reason" test.

24. At stage three, in my judgment, UT Judge Kebede was entitled to accept the explanation given by the Secretary of State, which I consider was specific and clear, not "vague" and ambiguous, as Mr Bazin suggests, in his overly forensic analysis. The explanation was set out in the application notice and accompanied by a statement of truth signed by a member of the Home Office. There was no reason to doubt the veracity of the account given and I consider there was no need for further evidence in support to be adduced, contrary to Mr Bazini's submissions. The judge did not act unfairly. In my view, the judge's description of the circumstances as "unusual" and "an oversight", adopting Judge Moon's term, was apt.

25. UT Judge Kebede expressly referred to the factors specifically mentioned in CPR 3.9, namely, the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules. She clearly recognised their importance. She was entitled to take into account that there was a pending appeal against FtT Judge Lawrence's decision in any event. Mr Bazini's submissions that she did not give the factors in CPR 3.9 sufficient weight is not, in my view, remotely arguable.

26. UT Judge Kebede correctly directed herself in accordance with *Onowu* and *Hysaj* in stating that the merits of the appeal are not generally a reason for extending time unless they are very strong, one way or the other. In my judgment, she did not err in law in observing that the merits of the appeal were not to be ignored as part of the overall circumstances. She was entitled to take into account, applying *Hysaj* at [41], that the claim raises serious issues of importance to the public, namely, nationality fraud and the position of family members who were children when their parents embarked upon the deception. Contrary to Mr Bazini's submission, I consider that there is an issue on the correct construction of the Nationality Instructions in regard to the position once the appellants obtained their majority. The Secretary of State submits that FtT Judge Lawrence erred in law by misconstruing and misapplying the guidance.

27. In my view, Mr Bazini's submission that the judge was not entitled to conclude that the claim raised an issue of importance to the public is based on a misreading of the authorities, such as *Hysaj* and *BR(Iran) v Secretary of State for the Home Office* [2007] EWCA Civ 198. They do not prescribe an exhaustive list of issues of public interest.

28. Overall, I consider that UT Judge Kebede lawfully exercised her discretionary judgment. The claimants disagree with her exercise of judgment, but they have failed to demonstrate any arguable error of law which would justify the grant of permission to apply for judicial review. Therefore, permission is refused.

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