Upper Tribunal
(Immigration and Asylum Chamber)

Bhavsar (late application for PTA: procedure) [2019] UKUT 00196 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 7 March 2019

Decision & Reasons Promulgated

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Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE GLEESON

Between

CHETAN BHAVSAR
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G O'Ceallaigh, instructed by Eagles Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

(1) There is nothing in the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 that prevents the First-tier Tribunal from refusing to admit an application for permission to appeal to the Upper Tribunal, where the application is made outside the relevant time limit and the First-tier Tribunal does not extend time.

(2) The appropriate course, in the case of such an application, is for the First-tier Tribunal to refuse to admit it. This will mean that any subsequent application to the Upper Tribunal in the case for permission to appeal to that Tribunal will be subject to rule 21(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008, whereby the Upper Tribunal must only admit the application made to it (whether or not that application was in time) if the Upper Tribunal considers it is in the interests of justice for it to do so.

DECISION AND REASONS

A. INTRODUCTION

1. The appellant, born in 1988, is a citizen of India. He first entered the United Kingdom in September 2011, with entry clearance as a student until 8 June 2013. The appellant came here to pursue a course in Tourism Management at the University of West London, which he completed in 2013. In that year, he obtained further leave to remain as a student until September 2016. The appellant's purpose in obtaining this further leave was to study under the auspices of Glyndwr University, which at the time had an agreement with the London School of Business and Finance (LSBF) to deliver tuition for Chartered Institute of Management Accountants courses.

2. The appellant's statement of 9 October 2017 describes a number of important problems he encountered regarding his course with Glyndwr/LSBF, as well as complaints about the activities of his agent who pressured the appellant into parting with a considerable sum of money in respect of the course.

3. In January 2014, the appellant received confirmation from Glyndwr University of its decision to withdraw him as a student, by reason of his alleged poor attendance at classes.

4. On 9 September 2014, Glyndwr University wrote to the appellant to inform him that he had been withdrawn for the additional reason that the University had been informed by the UKVI that the appellant had obtained an invalid ETS TOEIC test certificate.

5. On 12 November 2014, the appellant made a human rights application to the respondent, on the basis of his private and family life in the United Kingdom. Despite the voluminous nature of the materials assembled by the appellant in connection with the appeal proceedings, our attention has not been drawn to a copy of this application. As far as can be seen, however, the application did not rest on the appellant's contention that his human rights demanded the respondent should grant him a limited period of leave to pursue further studies. Certainly, the respondent's decision of 23 May 2016, refusing the human rights claim, makes no mention of this. Under the heading "Decision Under Exceptional Circumstances" the only aspect raised by the appellant is said to be that he has "family and friends in the UK".

B. APPEAL TO THE FIRST-TIER TRIBUNAL

6. The appellant's appeal against the respondent's refusal decision was heard by First-tier Tribunal Judge G Clarke at Hatton Cross on 11 May 2018. The judge dismissed the appellant's appeal. In doing so, the judge carefully considered the issue of whether the appellant had cheated in his TOEIC test, by using a proxy to take the test for him. The judge found that, in the particular circumstances of the appellant, he

had had nothing to gain by taking the test because he had already been accepted onto the CIMA course on the strength of his IELTS Certificate, rather than the TOEIC.

7. That being so, the judge found that the appellant met the suitability requirements in paragraph 276ADE(1) of the Immigration Rules. In order to meet the remaining requirements of paragraph 276ADE, however, the appellant had to show that there were very significant obstacles to his reintegration in India. The judge found that the appellant had lived the vast majority of his life in India, where he had been raised and educated. He was familiar with its culture and way of life. He had also shown resolve, resilience and resourcefulness in coming from India to an unfamiliar country such as the United Kingdom. Those qualities and characteristics would, according to the judge, benefit the appellant, were he to return to India.

8. Having therefore found that the appellant could not meet the requirements of the Immigration Rules, by reference to his private life, the judge turned to consideration of the appellant's Article 8 rights, outside those rules.

9. Understandably, the judge considered that the relevant question in the present case was the fifth of those posed by Lord Bingham in Razgar v Secretary of State for the Home Department [2004] UKHL 27; namely, whether the interference with the appellant's private life, by requiring him to leave the United Kingdom, was proportionate to legitimate public end sought to be achieved.

10. In determining that issue, the Judge had regard, as he was required to do, to the relevant factors contained in section 117B of the Nationality, Immigration and Asylum Act 2002. The judge decided that little weight should be attached to the appellant's private life, which had been built up in the United Kingdom whilst his immigration status had been "precarious". We note in passing that, for these purposes, it has now been authoritatively decided that a person with only limited leave to remain occupies a precarious position in the United Kingdom (Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58).

11. At paragraph 62, the judge considered that the appellant had overstayed and therefore shown a disregard for the immigration laws of the United Kingdom. It is, however, common ground that the appellant has at no material time been an overstayer. His extant leave was extended by reason of section 3C of the Immigration Act 1971.

12. The judge's conclusions were as follows: -

> "65. I rely on all my earlier findings in respect of Paragraph 276ADE(1) which I do not need to repeat here. I also rely on the fact that the Appellant came to the United Kingdom in 2011 with leave as a student and therefore he ought not to have harboured any expectation of being permitted to stay in the United Kingdom on a permanent basis.
>
> 66. I accept that the Appellant has family here in the United Kingdom. His evidence is that he has an aunt and uncle who support him financially and a sister as well as cousins. I find it extremely unusual that none of his family submitted a Witness Statement in support of his appeal or attended the hearing. In any

event, the Appellant will be able to maintain his relationships and friendships through modern means of communication such as phone and Skype and various forms of social media. There is nothing in the Appellant's family dynamics or friendships that would tip the balance in his favour when weighing the proportionality of his removal.

67. The submission was made that the Appellant's life has been ruined by taking the TOEIC test and if he had never taken it he would not be in the situation in which he finds himself.

68. On the specific facts of this case, there is no credible evidence that the Appellant's removal is a disproportionate interference with his family life.

69. I find that the public interest is strong. There is nothing in the specific facts of this case that would outweigh the public interest.

70. Accordingly, the appeal is refused."

C. PROCEDURAL ISSUES

13. We turn now to the procedural issues raised by this case. As will be seen, they raise matters of considerable general significance.

(a) The application to the First-tier Tribunal for permission to appeal

14. The First-tier Tribunal's decision was sent to the appellant's solicitors under cover of a notice (Form IA60) dated 20 June 2018. The notice contained the following information:-

> "Either party may apply to the First-tier Tribunal for permission to appeal to the Upper Tribunal on a point of law arising from the First-tier Tribunal's decision.
>
> Any application must be made in accordance with the relevant Procedure Rules and 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 …"

15. It is not disputed that the appellant's solicitors received the decision and notice on 22 June 2018.

16. On 5 July 2018, at 18:18 hours, the First-tier Tribunal received, by fax, the appellant's application for permission to appeal to the Upper Tribunal. On 20 September 2018, the First-tier Tribunal refused permission to appeal. The First-tier Tribunal Judge who considered the application said the following:-

> "1. The Appellant seeks permission out of time to appeal against a decision of the First-tier Tribunal (Judge G Clarke) promulgated on 20 June 2018 whereby it dismissed the Appellant's appeal against the Secretary of State's decision to refuse him leave to remain on the basis of his private and family life. The grounds for permission to appeal were received by fax on 5 July, 2018 at 18:18 which is after the close of business when they should have been received on 4

July, 2018 in terms of the Tribunal Procedure (Amendment) Rules 2018. The application is refused.

2. In terms of R (on the application of Onowu) v First-tier Tribunal (IAC) (extension of time for appealing: principles) IJR [2016] UKUT 00185 (IAC) I find there is no merit in the grounds in any event. The grounds do not set out where the Judge has arguably erred in law. They are simply a disagreement with the decision. It is submitted that any public interest in removal is outweighed by the specific circumstances of the Appellant established as per the 5 stage Razghar [sic] test. The Judge has considered the evidence and made appropriate findings which were open to him to make having also had the benefit of oral evidence on the day of the hearing. It was open for the Judge to consider what weight he felt it appropriate to place on the evidence before him in the proportionality exercise. The Judge has given adequate reasons for his decision with reference to section 117B of the Nationality, Immigration and Asylum Act 2002.

4. [sic] The grounds disclose no arguable error of law."

(b) The application to the Upper Tribunal for permission to appeal

17. The appellant purported to apply to the Upper Tribunal for permission, pursuant to rule 21 of the Tribunal Procedure (Upper Tribunal) Rules 2008. On 29 November 2018, Swift J, sitting as a judge of the Upper Tribunal, granted permission to appeal "subject to determination of whether the Upper Tribunal has the jurisdiction to hear the appeal". Swift J explained his conditional grant of permission as follows in the reasons for decision:-

"1. In this case the First-tier Tribunal refused the application for permission to appeal on the ground that the application was made too late (see Tribunal Rules of Procedure 2014, rule 33(2)).

2. The application for permission to appeal made to the Upper Tribunal did not include any statement of the reasons why the application to the First-tier Tribunal was not made within the time permitted (see Tribunal Procedure (Upper Tribunal) Rules 2008, rule 21(7)(a)). Any failure to comply with rule 21(7)(a) arguably goes to the jurisdiction of the Upper Tribunal to hear the appeal.

3. Whether rule 21(7)(a) applies, and if so whether the Appellant's failure to comply with it goes to this Tribunal's jurisdiction to entertain the appeal should be determined as preliminary issues. Given the discrete nature of the substantive issue raised by the Grounds of Appeal, the preliminary issues can be listed for hearing with the substantive appeal to follow in the event that the Appellant succeeds on the preliminary issues."

(c) The First-tier Tribunal Procedure Rules

18. It is necessary at this point to refer to various provisions of the Procedure Rules, both past and current.

The Asylum and Immigration Tribunal (Procedure) Rules 2005

19. On the establishment of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal in February 2010, the Asylum and Immigration Tribunal (Procedure) Rules 2005 were amended, so as to become the Procedure Rules of the Immigration and Asylum Chamber of the First-tier Tribunal. Rule 24 (Application for permission to appeal to the Upper Tribunal), insofar as relevant, provided as follows:-

> "**24**.-(1) A party seeking permission to appeal to the Upper Tribunal must make a written application to the Tribunal for permission to appeal.
>
> (2) … An application under paragraph (1) must be sent or delivered to the Tribunal so that it is received no later than 5 days after the date on which the party making the application is deemed to have been served with written reasons for the decision.
>
> …
>
> (4) If a person makes an application under paragraph (1) later than the time required by paragraph (2) –
>
> (a) 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
>
> (b) unless the Tribunal extends time under sub-paragraph (a), the Tribunal must not admit the application.
>
> …"

The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

20. On 20 October 2014, the 2005 Rules were replaced by the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("the 2014 Rules"). Rule 2 sets out the overriding objective, which is to enable the Tribunal to deal with cases fairly and justly. Rule 2(3)(b) requires the First-tier Tribunal "to give effect to the overriding objective when it interprets any rule …" .

21. Rule 4(1) states that, subject to the provisions of the Tribunals, Courts and Enforcement Act 2007 and any other enactment, the Tribunal may regulate its own procedure.

22. Rule 6 (Failure to comply with rules, etc), so far as relevant, provides as follows:-

> "**6.** - (1) An irregularity resulting from a failure to comply with any requirement in these Rules, … does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules,… the Tribunal may take such action as it considers just, which may include—

(a) waiving the requirement;

(b) requiring the failure to be remedied; or

(c) …"

23. Rule 33 (Application for permission to appeal to the Upper Tribunal) so far as relevant, reads:-

"**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) … 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.

…

(6) If a person makes an application under paragraph (1) when the Tribunal has not given a written statement of reasons for its decision—

(a) the Tribunal must, if no application for a written statement of reasons has been made, treat the application for permission as such an application; and

(b) may—

(i) direct under rule 36 that the application is not to be treated as an application for permission to appeal; or

(ii) determine the application for permission to appeal.

(7) If an application for a written statement of reasons has been, or is, refused because the application was received out of time, the Tribunal must only admit the application for permission if the Tribunal considers that it is in the interests of justice to do so." (Our emphases in paragraph (2))

24. Again, so far as relevant, rule 34 (Tribunal's consideration of an application for permission to appeal to the Upper Tribunal) reads:-

"**34**. - (1) On receiving an application for permission to appeal the Tribunal must first consider whether to review the decision in accordance with Rule 35.

(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 to appeal it must send with the record of its decision—

(a) a statement of its reasons for such refusal; and

(b) notification of the right to make an application to the Upper Tribunal for permission to appeal and the time within which, and the manner in which, such application must be made.

…"

25. The reason why we have emphasised in bold certain words in rule 33(2) above is that those words were substituted by SI 2018/511 with effect from 14 May 2018. Up to that date, rule 33(2) of the 2014 Rules read as follows:-

> "(2) … 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."

26. According to the Explanatory Note to SI 2018/511, the replacement of references to "provided" with references to "sent" was done "in order to clarify that the time period for an application to be sent to the Tribunal is calculated by reference to the date on which the written reasons for the decision are sent to the party making the application".

(d) Was the application in time?

27. As we have seen, the First-tier Tribunal's decision in the appellant's appeal was sent to his solicitors on 20 June 2018, after the amendments made by SI 2018/511 had taken effect. Accordingly, the date by which the First-tier Tribunal needed to receive his application was 3 July 2018 (not 4 July 2018, as the judge who refused permission appears to have thought).

28. As we have also seen, however, the notice IA60 sent with the First-tier Tribunal's appeal decision, still referred to the provisions of rule 33, as they had existed up to 14 May 2018. Despite the implication in the Explanatory Note to SI 2018/511 that the substitution of "sent" for "provided" had been made merely in order "to clarify" the position, it is, in our view, clear that a substantive change had in fact been made. As a matter of ordinary language, a person is "provided" with a physical thing when he or she receives or takes possession of it. In the present case, that was on 22 June 2018, when the appellant's solicitors received the First-tier Tribunal's decision, along with form IA60. The fourteen-day time limit, accordingly, would have expired on 5 July 2018, but for the amendment to rule 33 made by SI 2018/511.

29. As we have seen, the appellant's application was received by the First-tier Tribunal on 5 July 2018. Although the judge who refused permission considered it significant that the fax containing the application had arrived after business hours, there is nothing in the 2014 Rules to say that, in such circumstances, the application was not deemed to be received until the next business day. Accordingly, but for the rule change, the appellant's application would have been in time.

(e) The jurisdictional issue: rule 21 of the Tribunal Procedure (Upper Tribunal) Rules 2008

30. We turn to the issue raised by Swift J in his conditional grant of permission to appeal. This concerns rule 21 (Application to the Upper Tribunal for permission to appeal) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the 2008 Rules"), which (again so far as relevant) states:-

> "**21**. (1) …
>
> (2) A person may apply to the Upper Tribunal for permission to appeal to the Upper Tribunal against a decision of another tribunal only if—
>
> (a) they have made an application for permission to appeal to the tribunal which made the decision challenged; and
>
> (b) that application has been refused or has not been admitted or has been granted only on limited grounds.
>
> (3) An application for permission to appeal must be made in writing and received by the Upper Tribunal no later than—
>
> …
>
> (aa) … in an asylum case or an immigration case where the appellant is in the United Kingdom at the time that the application is made –
>
> (i) 14 days after the date on which notice of the first First-tier Tribunal's refusal of permission was sent to the appellant; or
>
> …
>
> (7) If the appellant makes an application to the Upper Tribunal for permission to appeal against the decision of another tribunal, and that other tribunal refused to admit the appellant's application for permission to appeal because the application for permission or for a written statement of reasons was not made in time –
>
> (a) the application to the Upper Tribunal for permission to appeal must include the reason why the application to the other tribunal for permission to appeal or for a written statement of reasons, as the case may be, was not made in time; and
>
> (b) the Upper Tribunal must only admit the application if the Upper Tribunal considers that it is in the interests of justice for it to do so.
>
> …"

31. The jurisdictional issue is predicated on the assumption that rule 21(7) of the 2008 Rules applies in the appellant's case. In fact, however, the judge who refused permission in the First-tier Tribunal did not refuse to admit the application because it was out of time. On the contrary, her decision was "Permission to appeal is refused".

32. On the face of the Rules, the judge's decision to refuse can be regarded as understandable. A comparison of rule 24 of the 2005 Rules and rule 33 of the 2014 Rules reveals that there is no longer a provision that requires the First-tier Tribunal to refuse to admit a late application, where the Tribunal declines to extend time. The effect of rule 33(7) of the 2014 Rules is that the First-tier Tribunal is expressly required to refuse to admit an application for permission to appeal, only in the circumstances where the written statement of reasons (as opposed to the application itself) has been refused because the application for reasons was received out of time.

33. Given that the judge did not refuse to admit the application but, rather, refused to grant permission, we therefore find that rule 21(7) of the 2008 Rules has no purchase.

34. However, even in a case to which rule 21(7) does apply, we do not consider that a failure to comply with the requirement of paragraph (7)(a) causes the Upper Tribunal to lose jurisdiction. So much is plain from rule 7(1), which provides that a failure to comply with a requirement of the Rules does not of itself render void the proceedings or any step taken in them.

35. In any event, it would be remarkable if a failure to comply with paragraph (7)(a) were to have that effect, since it would mean that, even where the Upper Tribunal considered it to be "in the interests of justice" to admit the application made to it, the Tribunal would be without the power to do so. One can envisage a scenario in which there may be a good case for giving relief, both in respect of a late application to the First-tier Tribunal and also in respect of a failure to comply with rule 21(7)(a).

36. The more difficult question is whether the judge should have refused to grant permission or, instead, have refused to admit the application, with the result that rule 21(7) would undoubtedly have applied. We therefore turn to this issue.

(f) The First-tier Tribunal's response to a late application for permission to appeal

37. Before us, Mr Wilding submitted that in all cases in which the Immigration and Asylum Chamber of the First-tier Tribunal refuses permission to appeal, where the application made to it is late and time is not extended, rule 21(7) should be read as if the reference to refusing to admit the appellant's application included a reference to refusing permission to appeal. Were that not the case, Mr Wilding said, then, in reaching its decision on an application for permission to the Upper Tribunal which may be in time, the Upper Tribunal could not pay any regard to the fact that the application to the First-tier Tribunal was out of time. This would be particularly problematic in a case where the application to the First-tier Tribunal was months or even years late.

38. Although not drawn to our attention, the judgments of the Court of Appeal in KM (Bangladesh) v Secretary of State for the Home Department [2017] EWCA Civ 437 are of relevance. In that case, an Upper Tribunal judge, faced with an application for permission to appeal to the Court of Appeal against a decision of that Tribunal, refused to admit the application, on the ground that it was made out of time. The

judge had, however, overlooked rule 44(6) of the 2008 Rules, which governs the position:-

> "(6) If the person seeking permission to appeal provides the application to the Upper Tribunal later than the time required by paragraph (3), (3A), (3D) or (4) or by an extension of time under rule 5(3)(a) (Power to extend time) –
>
> (a) the application must include a request for an extension of time and the reason why the application was not provided in time; and
>
> (b) unless the Upper Tribunal extends time for the application under rule 5(3)(a) (power to extend time) the Upper Tribunal must refuse the application."

39. At paragraph 16 of the judgments in KM, the Senior President of Tribunals (Sir Ernest Ryder) held that the judge's refusal to admit the application "must be read as an order refusing permission as that was what the UT Rules required her to do".

40. The question for the court then became how to approach the lateness of the application to the Upper Tribunal, given that the application for permission made to the court itself had been made within the time limit set by Practice Direction 52D for statutory appeals from the Upper Tribunal. The Senior President addressed this question as follows:-

> "26. The leading case on the question is *Ozdemir v Secretary of State for the Home Department* [2003] EWCA Civ 167. It is a permission decision of a two judge court which gave leave at the time to cite it as authority. Although the tribunal rules were different in 2003 and *Ozdemir* involved the predecessor tribunal to the existing First-tier and Upper Tribunals, namely the Immigration Appeal Tribunal, a point of principle was identified which has subsequently been followed by this court.
>
> 27. In *Ozdemir*, the appellant had been unsuccessful in the IAT. She applied to the IAT for permission to appeal to the Court of Appeal but her application was a month out of time. The then existing tribunal rules contained no provision to extend time. The IAT determined that it lacked jurisdiction to hear the permission application, and that accordingly it could neither grant nor refuse it. The question was whether or not this excluded the Court of Appeal's jurisdiction to hear the appeal given that under paragraph 23 of schedule 4 of the Immigration and Asylum Act 1999 the Court of Appeal's jurisdiction only arose once the IAT had "refused" a permission to appeal application.
>
> 28. The Secretary of State argued that the Court of Appeal's jurisdiction had not been triggered, and that the appellant's only mechanism for challenging the IAT's determination would be by judicial review. Mance LJ found this proposition "unattractive" on the basis that recourse to judicial review would weaken finality and cause extra delay. Mance LJ reasoned that paragraph 4(1)(b) of schedule 4 of the 1999 Act provided a power in the Lord Chancellor to make rules enabling a tribunal to dismiss an appeal for procedural reasons. He saw this as evidencing a Parliamentary intention that procedural failures would lead to *refusal*.

29. Mance LJ concluded that the IAT's determination should be read as a refusal and that the IAT's way of expressing this refusal should be read as a reflection of the fact that the IAT was refusing the application for procedural reasons. He then went on to consider the question relevant to these proceedings that is, how the Court of Appeal should approach the question of extension of time?

30. The question was answered by Mance LJ at [37] to [42] as follows:

    a. If the PD to CPR 52 which sets out the special provisions relating to appeals from the IAT is construed in a similar way to the right of appeal provisions in schedule 4 of the 1999 Act, an applicant could always be in time to seek permission to appeal to the Court of Appeal however out of time the applicant had been in seeking permission to appeal from the tribunal;

    b. That cannot be right. The concept of refusal in the CPR PD is not necessarily the same as in the 1999 Act. The PD refers to the tribunal rules which provide for two ways in which an application for permission to appeal may be refused: either on the merits or on the basis of lack of jurisdiction. The PD relates to the former not the latter;

    c. If the special provision of the PD does not apply, the general rules relating to appeals remain which provide for a fixed time within which an application for permission to appeal must be made from the substantive decision. That time period runs not from the AIT's decision on permission to appeal but from the substantive AIT decision and unless extended it follows that the period within which an appellant must apply for permission to appeal a substantive decision to the court of appeal will have expired.

    31. I will consider the point of principle that arises and the examples that this court has followed the same in due course. It is first important to note that since *Ozdemir* the FtT and the UT have been created. A right of appeal to this court from the UT is provided for in section 13 of the Tribunals, Courts and Enforcement Act 2007. For present purposes, all that needs to be said is that by section 13(4) permission to appeal may be given by the UT or this court on an application by a party and by section 13(5) an application to this court may only be made if permission has been refused by the UT. Accordingly, prior refusal by the UT is still the trigger for this court's consideration of a permission application.

    32. As I have already remarked, the UT now has power to extend time to consider a permission application (rule 5(3)(a) of the UT Rules) but if no application is made to extend time or the UT declines to exercise that power, the UT must refuse the application (rule 44(6)(b) of the UT Rules). The procedural position is therefore that which Mance LJ was seeking to address i.e. there is no jurisdiction in the UT to do other than refuse a permission application which is out of time and for which an extension of time has not been granted.

    33. The procedural provisions identified by Mance LJ are repeated in the modern rules and practice directions with modifications that are not relevant to this appeal other than the fact that the time limits have changed. The special provision for appeals from the UT to this court is to be found in

CPR PD52D at paragraph 3.3. That replicates paragraph 21.7 of CPR 52PD-087 save that the time period is now 28 days rather than 14 days from the date on which the UT decision on permission is sent to the appellant. The general rule is 21 days from the substantive decision by reason of CPR 52 rule 12.2 which replicates the former CPR 52 rule 4(2)(b) save that the time limit used to be 14 days.

34. The point of principle which Mance LJ identified is that this court should enforce the time limits provided for in the tribunal rules to prevent them from being substantially undermined. To permit otherwise would enable a party to wait months or even years before making a decision to appeal an adverse immigration determination while continuing to take advantage of the delay that would be the consequence. This court should rigorously apply the tribunal rules so that permission to appeal will not be granted if an appellant has not made application for an extension of time to appeal a determination where the application is otherwise out of time."

41. The Senior President concluded as follows:-

"40. I am persuaded that the principle in *Ozdemir* should be applied to the application in this case for two reasons: a) it has been treated as binding by this court since it was decided and there is neither material difference in the rules and practice directions to distinguish it nor any argument put before this court to regard it as *per incuriam,* and b) the legal policy underscoring the decision remains sound, namely that tribunal rules are to be complied with unless application is made for good reason and this court should enforce that principle.

41. If the principle in *Ozdemir* is applied, the application for permission to appeal in this case must be refused for the additional reason that no application has been made to this court to extend time and it necessarily follows that the absence of any reason to explain the delay that occurred is fatal. If my Lord agrees, I would refuse permission and dismiss the appeal. I would give permission to report and rely upon this judgment."

42. In his concurring judgment, Underhill LJ, having agreed with the approach to be adopted to the categorisation of the Upper Tribunal's permission decision, continued:-

"44. The next question is what is the relevance to the application for permission in this Court of the fact that the prior application to the Upper Tribunal was made out of time. I at first thought that that prior delay had to be treated as irrelevant because para. 3.3 of the Practice Direction to rule 52 provides that time for applying for permission to appeal to this Court from the UT runs from the date of notification of "the Upper Tribunal's decision on permission to appeal". However, that produces the very unsatisfactory result that the prior delay is wiped from the slate as long as the application to this Court is in time. As the Senior President points out, in *Ozdemir* the Court was prepared to adopt a purposive construction of the rules/practice direction governing appeals from the Immigration Appeal Tribunal, which were broadly similar in structure, in order to avoid that result. The then practice direction provided for time to run from the date of notification "of the Tribunal's decision to give or refuse permission to appeal under [the then rules]". Mance LJ held at para. 40 of his judgment that the reference to a decision "to give or refuse permission" was only

to decisions on the substantive merits rather than to decisions based on non-compliance with time limits, so that the special rule did not apply. In my view it is no more difficult to apply the equivalent purposive construction to the phrase in the current practice direction, namely "the Upper Tribunal's decision on permission to appeal". It is indeed inherently unlikely that those responsible for the wording of the current Practice Direction intended to produce the very result which this Court in *Ozdemir* (and indeed the subsequent decisions identified by the Senior President in which it has been followed) regarded as unacceptable. The result produced by applying an *Ozdemir* approach to the current rules/practice direction can be summarised as follows:

(1) The special time limit for appeals from the UT in para. 3.3 of the Practice Direction does not apply where the UT has refused permission on the basis of non-compliance with time-limits rather than on the merits.

(2) Instead the ordinary time limit in (now) CPR 52.12 (2) applies.

(3) Since *ex hypothesi* the application to the UT was out of time the application to the CA will be even more so, but the CA can grant an extension under CPR 52.15 if satisfied that the missing of the original deadline (and any subsequent delay) was justifiable. This will involve considering the same matters as the UT will have done, if it refused an extension; but it is not, as such, an appeal from the UT's decision.

45. That being so, it is necessary to ask whether the Applicant has shown a good reason for his delay in applying to the Upper Tribunal for permission to appeal to this Court. We are not reviewing the decision of Judge Kekic about the delay in applying to the UT but are making our own decision. However, we ought to give considerable weight to what she decided, and why, for the reasons given by the Senior President at para. 24 of his judgment.

46. I have not found the question whether there was good reason for the delay entirely straightforward. It is clear from the contemporary correspondence, of which I need not give the details, that the appellant's solicitors were genuinely unaware that the UT had made a decision and were pressing UKBA for a decision, receiving some confused and misleading replies. This is not, therefore, a case where the time limit was missed as a result of insouciance. On the other hand, there is obvious force in Judge Kekic's point that it is hard to accept that both the notice of the hearing and the notice of decision had failed to be delivered not only to the solicitors but also to the appellant. The more likely explanation is that they were lost or overlooked by the solicitors and the appellant personally, in which case the delay is their fault. As I say, it is right to attach weight to the conclusion of Judge Kekic to that effect, even if it was rather more succinctly expressed than I would have liked. In the end, however, the point is not crucial because the appeal to the UT was bound to fail on the merits, for the reasons I give below.

47. It seems to me that even if the application was in time it could not satisfy the second appeals test. Even if there was an error of law by the FtT or the UT, it raises no question of principle or practice; nor is there any other reason why the appeal should be allowed to proceed. The fact that the appellant was not represented at the UT cannot be such a reason since the right route to remedy

> any injustice arising out of non-service of the notice of hearing was to apply under rule 43. Nor am I satisfied that there was an error of law in the substantive reasoning, for the reasons quoted from my original refusal at para. 11 of the Senior President's judgment and amplified by him at paras. 19-22."

43. We do not consider that the judgments in KM (Bangladesh) provide any support for Mr Wilding's submission that any refusal of permission by the First-tier Tribunal on "lateness" grounds should be treated as a refusal to admit the application, thereby triggering the operation of rule 21(7) of the 2008 Rules. In KM (Bangladesh), the Upper Tribunal was expressly required by the 2008 Rules to refuse a late application made to it, unless time was extended. It was therefore but a small step for the court to categorise what the Upper Tribunal judge did as amounting to such a refusal. By contrast, there is nothing in the 2008 Rules that requires the Upper Tribunal to categorise the refusal of permission by the First-tier Tribunal as a refusal to admit an application.

44. That being so, it would be wrong for the Upper Tribunal to take it upon itself to categorise a refusal by the First-tier Tribunal to grant permission in response to a late application as a refusal by that Tribunal to admit the application, merely in order to invoke rule 21(7) of the 2008 Rules. Such a course would only increase the likelihood of applicants failing to comply with rule 21(7)(a), since they would have to know that a decision of the First-tier Tribunal which, on its face, said that permission to appeal is refused must, in fact, be read as a decision to refuse to admit the application.

45. Although we are unable to accept Mr Wilding's proposed way of dealing with the problem, KM (Bangladesh) supports his underlying submission, since it emphasises the extreme undesirability of allowing delay in applying for permission to the court or tribunal below to be "wiped from the slate as long as the application to [the appellate body] is in time", to use the words of Underhill LJ at paragraph 44 of the judgments.

46. For the reasons we have just given, the solution does not lie in an *ex post facto* recategorization by the Upper Tribunal of a refusal of permission as a refusal to admit. Instead, the solution lies in realising that the 2014 Rules in fact do not prevent a First-tier Tribunal judge from refusing to admit a late application for permission to appeal.

47. Despite the disappearance of rule 24(4) of the 2005 Rules, there is nothing in the 2014 Rules that compels the First-tier Tribunal to refuse to grant permission to appeal, where it is faced with a late application and decides not to extend time. There is nothing equivalent to rule 44(6)(b) of the 2008 Rules.

48. The concept of refusing to admit an application made out of time is firmly embedded in the procedure rules of the Chambers of the First-tier Tribunal, as well as in the 2008 Rules of the Upper Tribunal. In some First-tier Tribunal Chambers, such as the General Regulatory Chamber, one finds provisions akin to rule 24(4) of the 2005 Rules (GRC rule 42(4)).

49. The ability of the First-tier Tribunal to refuse to admit an application is directly recognised in rule 21(2) of the 2008 Rules as providing one of the avenues whereby an applicant may seek permission to appeal from the Upper Tribunal:

> "(2) A person may apply to the Upper Tribunal for permission to appeal to the Upper Tribunal against a decision of another tribunal only if-
>
> (a) they have made an application for permission to appeal to the tribunal which made the decision challenged; and
>
> (b) that application has been refused or has not been admitted or has been granted only on limited grounds."

50. In rule 21(7), the opening words make it plain that the Tribunal's ability to refuse to admit an application is wide-ranging. The words "because the application for permission or for a written statement of reasons was not made in time" would be unnecessary if they described the only situation in which that ability may arise.

51. Against this background, the decision of the drafter of the 2014 Rules not to reproduce rule 24(4) of the 2005 Rules, far from creating a restriction on the ability of the Immigration and Asylum Chamber of the First-tier Tribunal to refuse to admit an application on the specific grounds of lateness, appears to be a recognition of the Chamber's inherent power to act in this manner, where it declines to extend time and give what is known as relief from sanctions. In the light of the existence of rule 21(7) of the 2008 Rules and the undesirability of its being rendered otiose in this large category of cases, it is inconceivable that the drafter of the 2014 Rules intended to impose such a restriction, in the absence of a clear provision to the contrary.

52. One looks in vain in the 2014 Rules for such a provision. The requirement in rule 33(7) of those Rules not to admit an application for permission, where an application for a written statement of reasons had been refused on lateness grounds, cannot be read as a legislative pronouncement that it is *only* in such a scenario that the Tribunal may refuse to admit an application. Particularly in the light of what we have just said, such an interpretation would be inconsistent with the overriding objective and falls to be rejected, pursuant to the canon of construction contained in rule 2(3)(b).

53. There is, then, nothing in any enactment that fetters the power of the First-tier Tribunal under rule 4(1) to regulate its own procedure in this area. We therefore find that the First-tier Tribunal has power to refuse to admit an application made to it for permission to appeal to the Upper Tribunal, where the application is made late and the First-tier Tribunal decides not to exercise its discretion to extend time under rule 4 or waive the requirement under rule 6.

54. Whilst it is true that rule 34(3) and (4) of the 2014 Rules at first sight appear not to apply to decisions to refuse to admit, that cannot be right because, otherwise, a refusal to admit pursuant to rule 33(7) would not need to be communicated, along with information as to how to make an application to the Upper Tribunal. Accordingly, rule 34(3) and (4) must be read as applying, not only to refusals of permission, but also to every case in which the First-tier Tribunal refuses to admit an application for permission, whether by reason of rule 33(7) or otherwise.

55. Henceforth, a judge of the First-tier Tribunal (Immigration and Asylum Chamber) should state in terms, as his or her decision, that the application for permission to appeal is not admitted, where the application is made out of time and the judge decides not to grant relief from sanctions. The judge's reasons for coming to this decision should be expressed in the "Reasons for Decision" part of the relevant document. The First-tier Tribunal's administration should then ensure that rule 34(4)(b) is complied with in such a case.

56. If an applicant whose application has not been admitted on lateness grounds by the First-tier Tribunal then makes an application for permission to appeal to the Upper Tribunal, rule 21(7) will apply, as intended, with the result that the Upper Tribunal may admit the application made to it (whether or not *that* application is in time), only if the Upper Tribunal considers that it is in the interests of justice for it to do so. In short, the slate is not wiped clean.

D. DECIDING THE APPEAL

57. We return to the facts of the appellant's appeal. As we have found, because the judge's decision was, in terms, to refuse to grant permission, and cannot be read as a refusal to admit, rule 21(7) does not apply. The grant of permission falls to be treated as unconditional in nature. We accordingly turn to the substantive grounds of challenge.

58. Ground 1 contends that the First-tier Tribunal judge who dismissed the appeal erred in law because of the incorrect presumption that the appellant was an overstayer. Ground 2 asserts that the First-tier Tribunal Judge erred in law in failing to consider whether the appellant should be granted a short period of leave in order to continue his studies.

59. We shall deal with ground 2 first, since it raises the wider issue of how any hypothetical judge, faced with the human rights case as advanced by the appellant, could legitimately respond to it.

60. It is manifest from the appellant's statement, in particular paragraphs 135 to 141, that the appellant no longer had the financial means to study in the United Kingdom, as a result of parting with his money to Glyndwr University, which they are refusing to return to him. The appellant does not point to any source of funds, which might enable him either to "complete" his existing studies or study for something else in the United Kingdom. Indeed, it does not appear from the judge's decision that this was how the case for the appellant was put by counsel who appeared at the First-tier Tribunal hearing.

61. Before us, Mr O'Ceallaigh (who did not appear below) sought to draw support from the judgments of the Court of Appeal in Ahsan & Others v Secretary of State for the Home Department [2017] EWCA Civ 2009. There, the court was required to consider a number of appeals from judicial review decisions of the Upper Tribunal, refusing permission to bring judicial review proceedings to challenge removal decisions under section 10 of the Immigration and Asylum Act 1999, made on the basis that the applicants had used deception in obtaining extensions for leave to remain by using

proxies for the spoken part of their TOEIC tests. One of the issues considered by the Court of Appeal was whether the appellants had a suitable alternative remedy to judicial review, in the form of a human rights appeal. Underhill LJ said:

> "103. Thus, to summarise, Ms Giovannetti's case should be analysed as being that:
>
> (a) as long as the old regime remained in effect, the Appellants could have triggered a right to an in-country appeal against the section 10 decision simply by making a human rights claim – relying on the Nirula work-around if the claim post-dated the notice; and
>
> (b) once the new regime came into effect, they could and can acquire a right to an in-country appeal by making a human rights claim challenging the decision to remove them and, if and when it is refused, appealing against that refusal.
>
> Although the position under the new regime is for that reason relevant to the issues before us, despite the initial decisions in the Appellants' case being made under the old regime, Ms Giovannetti discouraged us from considering the position as regards a case where the initial decision was made after the coming into effect of the 2014 Act, since no such case is before us. I accept that we should not do so (save to the extent necessary in Mr Ahsan's case).
>
> …
>
> 115. I start from the position that, other things being equal (though that is an important qualification in this case), it is better for the issue whether a person has cheated in their TOEIC test to be determined in an appeal to the FTT rather than by way of judicial review proceedings in the UT. The FTT is, generally, the more appropriate forum for the determination of disputed issues of primary fact, and as a matter of the best use of judicial resources the UT ought not to be burdened with cases that could properly be determined in the FTT. That approach is reinforced by the consideration that Parliament specifically provided for appeals against section 10 decisions to be heard in the FTT, albeit out-of-country. (The FTT is also, though this is perhaps a neutral point, a jurisdiction where costs are not normally awarded.)
>
> 116. Of course, as already established, the direct route to the FTT by way of an old-style appeal against the section 10 decision itself would not provide an effective remedy in these cases, because it is out-of-country. The question before us is whether a different route to the FTT (in-country), via a human rights appeal, constitutes an appropriate available remedy. In my judgment, it may do, if but only if all of the following conditions are satisfied:
>
> (A) It must be clear that on such an appeal the FTT will determine whether the appellant used deception as alleged in the section 10 notice.
>
> (B) It must be clear that if the finding of deception is overturned the appellant will, as a matter of substance, be in no worse position than if the section 10 decision had been quashed in judicial review proceedings.
>
> (C) The position at the date of the permission decision must be either that a human rights claim has been refused (but not certified), so that the applicant is in a position to mount an immediate human rights appeal, or

that the applicant has failed to accept an offer from the Secretary of State to decide a human rights claim promptly so that a human rights appeal would become available.

If those conditions are satisfied, the UT would in my view normally be entitled to refuse permission to apply for judicial review – though it is impossible to predict the idiosyncrasies of particular cases, and I should not be regarded as laying down a hard-and-fast rule. I should say something more about each of the conditions.

117. As for (A), if in a case of this kind permission were given to apply for judicial review of the section 10 decision, the applicant would obtain a judicial determination of whether he or she did or did not cheat in their TOEIC test, since that is a matter of precedent fact on which the lawfulness of the decision depends. I regard the right to such a determination as a matter of real value because of the potentially grave other consequences of an official finding of that character, as identified at paras. 20-21 above, even where (untypically) it is not, or no longer, central to any removal decision. However, an appellant would prima facie also obtain such a determination in a human rights appeal. The tribunal would of course have to decide the deception issue for itself rather than simply review the Secretary of State's finding on rationality grounds, and the appeal would to that extent be an appropriate alternative. But if there is any risk that the appeal will be determined on a basis which does not require such a determination, e.g. for the reasons suggested by Mr Biggs at para. 113 above, that will not be the case.

118. I should say, for the avoidance of doubt, that the reasoning in the previous paragraph does not mean that in every case where a finding of deception is made the subject of that finding is entitled to a judicial determination of the truth of the allegation. Whether it does so will depend on the legal context in which the question arises, including whether it is material to a human rights claim. That there are cases where only a rationality review is available is illustrated by Giri (see para. 43 above). Ms Giovannetti was asked by the Court whether an appellant was entitled to pursue a challenge to a deception finding in its own right, irrespective of its impact on the question of leave to remain or potential removal. She said that in principle they would be, but she submitted, relying on Giri, that such a challenge could only be on Wednesbury grounds.

119. I turn to condition (B). Mr Biggs must be right that where the FTT on a human rights appeal finds that the appellant did not cheat, that will not formally lead to the reversal of the section 10 decision: that is a different and prior decision which will not as such be the subject of the appeal. In contrast, a successful judicial review challenge would lead to the section 10 decision being quashed. But I would not regard that difference as necessarily conclusive. This is an area where we should be concerned with substance rather than form. I would regard the crucial question as being whether the fact that the section 10 decision remained formally in place – so that leave to remain was still formally "invalidated" (see section 10 (8)) – would leave an appellant worse off as a matter of substance than if the decision had been quashed. Unfortunately this aspect was not explored in the oral submissions as fully as it might have been, no doubt as a result of the late emergence of the human rights claim issue; and the guidance I can give must be rather tentative.

120. The starting-point is that it seems to me clear that if on a human rights appeal an appellant were found not to have cheated, which inevitably means that the section 10 decision had been wrong, the Secretary of State would be obliged to deal with him or her thereafter so far as possible as if that error had not been made, i.e. as if their leave to remain had not been invalidated. In a straightforward case, for example, she could and should make a fresh grant of leave to remain equivalent to that which had been invalidated. She could also, and other things being equal should, exercise any relevant future discretion, if necessary "outside the Rules", on the basis that the appellant had in fact had leave to remain in the relevant period notwithstanding that formally that leave remained invalidated. (I accept that how to exercise such a discretion would not always be easy, since it is not always possible to reconstruct the world as it would have been; but that problem would arise even if the decision were quashed on judicial review.) If it were clear that in those ways the successful appellant could be put in substantially the same position as if the section 10 decision had been quashed, I can see no reason in principle why that should not be taken into account in deciding whether a human rights appeal would constitute an appropriate alternative remedy. To pick up a particular point relied on by Mr Biggs, I do not regard the fact that a person commits a criminal offence by remaining in the UK from (apparently) the moment of service of a section 10 notice as constituting a substantial detriment such that he is absolutely entitled to seek to have the notice quashed, at least in circumstances where there has been no prosecution. (It is also irrelevant that the appellant may have suffered collateral consequences from the section 10 decision on the basis that his or her leave has been invalidated, such as losing their job; past damage of that kind cannot alas be remedied by either kind of proceeding.)

121. So far so good, but the law in this area is very complicated and I am not confident that all its ramifications were fully explored before us. I do not feel in a position to say definitively that the Secretary of State will always be able to exercise her discretion, in the aftermath of a successful human rights appeal, so as to achieve the same substantive result as the formal quashing of the section 10 decision. There may, for example, be legislation (i.e. primary or secondary legislation rather than simply the Rules) which would result in the appellant having to be differently treated depending on whether he or she had leave to remain during a particular period. If there were any real doubt about whether in a given case a successful human rights appeal would be as effective as the formal quashing of the section 10 decision the applicant should have the benefit of that doubt and be permitted to pursue judicial review proceedings.

122. As for condition (C), I believe Mr Knafler was right to concede that if at the permission stage a human rights claim has already been made and refused, so that the claimant could appeal forthwith, then the UT would be entitled to refuse permission on the basis that an appropriate alternative remedy was available (assuming that the other two conditions are satisfied). That would lead to the crucial question being determined in what I believe to be the most appropriate forum."

62. We do not consider that Mr O'Ceallaigh's reliance upon Ahsan assists the present appellant. There is no section 10 decision in his case.

63. Furthermore, there is only a hazy relationship, at best, between the curtailment decision in August 2015 and the respondent's refusal of the human rights claim that was made in November 2014. As we have already noted, the appellant had been withdrawn from his course of studies by Glyndwr University well before the University was informed by the respondent about the issue regarding the appellant's taking of an English language test. The appellant had not achieved a satisfactory level of attendance on the course. The appellant's witness statement acknowledges problems with his attendance, owing to issues with his accommodation and a course of dental treatment.

64. In these circumstances, it is not possible to invoke Ahsan as authority for the proposition that, even if the case had been argued on this basis, the First-tier Tribunal judge should have allowed the human rights appeal to enable the respondent to give a period of leave commensurate with the period of just over one year that would have taken the appellant to 26 September 2016 (his leave being curtailed with effect from 11 September 2015). Allowing the appeal on that basis would not affect the decision of Glyndwr University to withdraw the appellant from the course because of his problematic attendance. Nor, of course, would it put the appellant in the position of having sufficient funds to resume his studies. In any event, as ground 1 points out, on the facts of this case the appellant's leave was statutorily extended by section 3C of the Immigration Act 1971, albeit that section 3C leave has somewhat different characteristics than leave which is actually granted by the respondent.

65. For these reasons, even if the appellant's human rights appeal had been advanced before the First-tier Tribunal judge on the basis now sought to be relied upon, it would have been doomed to fail. The appellant's case, as now advanced, is very far from the sort of case the Court of Appeal envisaged, when it spoke of attempting to put a person in the same position as if the decisions to curtail and remove had not been taken. On the contrary, the suggestion that the appellant ought to be granted a short period of further leave in essence boils down to the proposition that because his later studies in the United Kingdom have not gone as he might have hoped, owing in part to the fault of others, the appellant should be compensated by the grant of a period of leave. His appeal, however, is a human rights appeal and human rights are not to be dispensed in such a manner.

66. Our conclusion on ground 2 therefore means that the First-tier Tribunal judge's error in respect of the issue of overstaying could make no material difference to the appellant's appeal. The appellant entered the United Kingdom as an adult, in order to study at West London University. He did so and obtained a qualification from that institution. Thereafter, his dealings with a person who may have been an unscrupulous and greedy agent led him to part with a considerable sum of money, so as to embark on another course of studies, which had become problematic, even before the English language test issue arose. The appellant has no clearly articulated plans for how he would spend his time in the United Kingdom, were he to be granted further leave, although his statement refers to a desire to work here, so that he might provide financially for his parents in India. His relationships with friends and relatives in the United Kingdom were, rightly, given little weight by the First-tier

Tribunal judge, having regard to Part VA of the 2002 Act. The appellant would be able to reintegrate in society in India, where he has parental relatives.

67. In all the circumstances, therefore, the judge's error, identified in ground 1, was of no significance. We decline to exercise our power under section 12 of the 2007 Act to set aside his decision.

E. DECISION

68. The appeal is dismissed.

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber