Upper Tribunal
(Immigration and Asylum Chamber)

Samir (FtT Permission to appeal: time) [2013] UKUT 00003(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 12 September 2012	.....

Before

Mr C M G Ockelton, Vice President

Upper Tribunal Judge Gill

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SULTAN AHMED SAMIR

Respondent

Representation :

For the Appellant: Ms C Gough, Senior Home Office Presenting Officer

For the Respondent: Mr D Bazini, instructed by Trott & Gentry Solicitors

In a case where, following Boktor and Wanis(late application for permission) Egypt [2011] UKUT 00442 (IAC) , a grant of permission has to be regarded as conditional upon a decision whether time should be extended, the latter decision is part of the original decision on the application. If the application was to the First-tier Tribunal, the decision as to time is therefore made by the First-tier Tribunal, and if the application is not admitted there is the possibility of renewal to the Upper Tribunal.

DECISION UNDER RULE 21(7) OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Introduction

1.

This case raises questions relating to out-of-time applications for permission to appeal to this Tribunal. Suppose that, following a determination of the First-tier Tribunal, a party applies to that Tribunal for permission to appeal to the Upper Tribunal, but the application is not submitted within the time prescribed by the Rules. Suppose further that the First-tier Tribunal, considering the application, fails to notice that the application was out of time, and so makes no decision on whether to extend time, but issues a determination granting permission to appeal. In those circumstances, what precisely has happened so far? And what should happen next?

The Facts

2.
Mr Samir ("the claimant") is a national of Afghanistan. He came to the United Kingdom in 2000 and claimed asylum. He was refused asylum, but granted leave to remain, until 18 February 2005. Within the currency of that leave he applied for indefinite leave to remain as a person who had completed four years exceptional leave: that was a routine application under the Secretary of State's policy at that time. The Secretary of State then embarked on the consideration whether the claimant was guilty of war crimes. The Secretary of State reached the conclusion that he was, and on 9 February 2007 refused him indefinite leave to remain for that reason: he had been a member of KhAD, the Afghan State Security Organisation, which had committed crimes against humanity in the 1980's and 1990's. The claimant appealed against that decision. His appeal was dismissed on the basis that he was excluded from the Refugee Convention, and hence from the grant of indefinite leave to remain under the Secretary of State's policy, because of his association with KhAD.

3.
Reconsideration was ordered. On 18 May 2008, Senior Immigration Judge Deans dismissed the appeal, having found that article 1F(a) applied. The claimant then sought permission to appeal to the Court of Appeal. Permission was granted following the judgements in MH (Syria) and DS (Afghanistan) v SSHD [2009] EWCA Civ 226, but the appeal was then stayed in order to await the decision of the Supreme Court in JS (Sri Lanka) v SSHD [2009] UKSC 15. Following that decision, the appeal to the Court of Appeal was settled by consent, on the basis that the Secretary of State would make a new decision. No decision was made until 31 March 2011, but on that date a new decision was made, essentially repeating the old one: it was assessed that the claimant was excluded from the Refugee Convention by article 1F(a), and was therefore also not entitled to humanitarian protection or indefinite leave to remain.

4.
The claimant appealed against that decision to the First-tier Tribunal. His appeal was heard on 22 June 2011 by Judge N Manuel. The claimant did not attend the hearing. The judge made her decision on the basis of documentary evidence stretching back a number of years, including material which had been before the Tribunal and courts that had previously considered the claimant's case. She heard oral submissions from Mr Bazini and from a Home Office Presenting Officer. She concluded that the claimant was not excluded from the Refugee Convention, but was not a refugee: he was, however, entitled to indefinite leave to remain, on the basis of the policy that applied at the date of his application. Her determination was signed on 7 July 2011. It was sent to the Secretary of State (only), under the procedure regulating decisions in asylum appeals, to be found in rule 23 of the First-tier Tribunal's Procedure Rules. It was received by the Secretary of State on 13 July. Late in the afternoon of 25 July 2011, the Tribunal received notice of an application by the Secretary of State for permission to appeal to the Upper Tribunal. The grounds were, in summary, that the judge erred in concluding that the claimant was not excluded by article 1F. The part of the application form dealing with time

limits was completed properly. In a box at the beginning of part B of the form, the date of receipt of the First-tier Tribunal's determination is entered as "13/07/2011". The form then goes on to set out the time limits for making an application, which for present purposes was five days after receipt of the determination. In the box for giving reasons why the application is made late, the following has been entered:

"This application is being submitted 3 days after time. The determination was allocated to me to consider on the 18/07/2011 but unfortunately was misplaced between various court bundles provided in anticipation of hearings on 25/07/2011. I became aware of it being outstanding last night (24/07/2011), and therefore I am seeking to rectify this error at the first available opportunity having been required to attend Field House earlier today.

This error is purely of my doing for which I apologise sincerely and request that the Secretary of State's position be not prejudiced as a result. The appeal, as relating to exclusion is of paramount importance to the department so I would again ask that my error be not held against the organisation I represent. I would be happy to address to the court personally on this point if believed to be necessary."

5.
That explanation was provided by a Presenting Officer, Caroline Gough, who signed the application form.

6.
The application was dealt with by Senior Immigration Judge Waumsley as a judge of the First-tier Tribunal. He said that he had

"little (if any) hesitation in concluding that the grounds on which the respondent has applied for permission to appeal raise arguable points of law which merit, indeed require, further consideration".

He granted permission, saying nothing about the fact that the application was late.

7.
The appeal was accordingly listed for hearing before the Upper Tribunal, and came before Deputy Upper Tribunal Judge Lever at Field House on 29 February 2012. The claimant was again represented by Mr Bazini; Mr Walker represented the Secretary of State. Mr Bazini submitted that the Secretary of State should not be allowed to proceed with her appeal because the application was out of time and the Tribunal had not extended time. Mr Walker was not able to expand on the reasons given in the application. Judge Lever reserved his decision on this issue. After considering the authorities, Judge Lever concluded that he should treat the grant of appeal as conditional on his decision whether time should be extended; and after considering the authorities and the facts concluded that time should not be extended. He concluded his written decision as follows:

"I do not grant the respondent's application for an extension of time for appealing the decision of the First-tier Tribunal in this case and in accordance with rule 24 of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I therefore do not admit the respondent's application for grant of permission to appeal and accordingly I uphold the decision of the First-tier Tribunal."

8.
That decision was sent out, again in accordance with procedure applicable to asylum appeals, to the Secretary of State (only) on 20 March 2012. The covering letter was in the form IA150, indicating that the enclosure was the Upper Tribunal's determination of the appeal, and that any further recourse

was, with permission, to the Court of Appeal. A response by the Secretary of State, on 5 April, was a form of application to the Upper Tribunal for permission to appeal to it. The application is again signed by Caroline Gough and is dated 5 April 2012. It was received late in the evening of that day. It describes itself as "potentially" out of time, and gives the following explanation:

"As will be seen from the grounds themselves, the decision we are appealing against has been recorded as being an IA150, which would allow 14 days for submission on an in-time appeal. If the Tribunal ultimately decide to proceed on the basis that the decision remains an IA150, these grounds should be viewed as in time.

There is however some confusion as to exactly what decision the SOS is appealing against. On advice we are instructed to treat the decision above as a refusal to admit the application for permission to appeal (please see paragraph 32 of Judge Lever's decision) as a result of FTT Judge Waumsley omitting consideration of the extension of time argument. A decision ultimately on behalf of the FTT. If that is in fact the case then this application is being made out-of-time.

We would request that due to the confusion highlighted above, and, the need to secure a funding agreement before pursuing any application to the Court of Appeal, the application be substantively considered and an extension of time be granted. This application has been, up until this time treated as a response to an IA150 and therefore UKBA has complied with the time limits set."

9.
The grounds begin as follows:

"This application is being made to the Upper Tier Tribunal (UTT) [sic] as a result of what we deem to be a refusal to extend time by the First Tier Tribunal (FTT). Although it was a Deputy Judge of the UTT who refused to admit the application, this occurred as a result of the omission by Judge Waumsley, acting on behalf of and in response to an application to the FTT.

In the alternative we would ask for the decision to be reviewed under the UTT Procedure Rule 21.

If we are wrong to assume either of the above apply, we would request that this application be treated as one made via the UTT to the Court of Appeal."

10.
The grounds go on to challenge Judge Lever's decision, and to ask that the substantive grounds supporting the application made to the First-tier Tribunal be considered.

11.
It is that application that was ordered for an oral hearing.

The Law

12.
Section 11 of the Tribunals, Courts and Enforcement Act 2007 provides for a right of appeal from a determination of the First-tier Tribunal to the Upper Tribunal on a point of law. The right may be exercised only with permission, which may be given by the First-tier Tribunal or the Upper Tribunal. Section 22 of the same Act allows the making of "Tribunal Procedure Rules", and paragraph 4 of Schedule 5 allows rules to make provisions for time limits "as respects initiating, or taking any step in, proceedings before the First-tier Tribunal or the Upper Tribunal".

13.

The procedure rules of the First-tier Tribunal are those which apply to the Asylum and Immigration Tribunal before the transfer of its functions in 2010, when they were adopted by the Tribunal Procedure Committee. They are therefore the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 230/2005) as amended. Part 3 of the rules is headed “Appeals to the Upper Tribunal” and the relevant provisions are as follows:

“24. (1) A party seeking permission to appeal to the Upper Tribunal must make a written application to the [First-tier] Tribunal for permission to appeal.

(2) Subject to paragraph (3) [which does not apply in this case], 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.

(5) An application under paragraph (1) must –

(a) identify the decision of the Tribunal to which it relates;

(b) identify the alleged error or errors of law in the decision; and

(c) state the result the party making the application is seeking. “

14.
Rule 25 requires a decision to be made on an application, and communicated to the parties in writing.

15.
The rules governing the procedure in the Upper Tribunal are the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2698/2008) as amended. The relevant provisions are as follows:

“21(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.

(3) An application for permission to appeal must be made in writing and received by the Upper Tribunal no later than -

…

(aa) subject to paragraph (3A) , 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) seven working days after the date on which notice of the First-tier Tribunal's refusal of permission was sent to the appellant;

…

(ab) subject to paragraph (3A), in an asylum case or an immigration case where the appellant is outside the United Kingdom at the time that the application is made, fifty six days after the date on which notice of the First-tier Tribunal's refusal of permission was sent to the appellant;

…

(3A) Where a notice of decision is sent electronically or delivered personally, the time limits in paragraph (3)(aa) and (ab) are –

(a) in sub-paragraph (aa)(i), five working days;

(b) in sub-paragraph (aa)(ii), two working days; and

(c) in sub-paragraph (ab), twenty eight days.

…

(6) If the appellant provides the application to the Upper Tribunal later than the time required by paragraph (3) or by an extension of time allowed 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 not admit the application.

(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 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. "

16.
"Appellant" is defined in rule 1(3) for present purposes as the person who applies for permission to appeal to the Upper Tribunal. The Upper Tribunal rules relate largely to decisions where one party is a Minister of the Crown. In these circumstances the definition is somewhat odd: although whether the Minister in question is in the United Kingdom on a particular date is probably a matter of public record, it is odd that the rule should be framed in such a way that the time limit appears to depend on the Minister's engagements or the place of his or her holiday. It is probably fair to assume, as the Secretary of State's representatives in the present case appear to assume, that the true "appellant" in an application by the Secretary of State is some entity independent of the Secretary of State herself, perpetually present in the United Kingdom.

17.
Issues as to the effectiveness of the grant of permission in response to an application whose lateness had not been considered by the judge granting the permission were the subject of the decision in Boktor and Wanis [2011] UKUT 00442 (IAC). That decision was made by Upper Tribunal Judge Allen and is recorded as a decision of this Tribunal. The Tribunal's summary of the decision is as follows:

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

Discussion

18.
We see no reason to depart from either the reasoning or the decision of Judge Allen in Boktor and Wanis . The present rules both of the First-tier Tribunal and of the Upper Tribunal made clear the importance attached to making applications in time; and the separate notion of the admission of applications on the grant of permission makes it clear that an out of time application has to go separately through the process of being admitted before it is eligible for a grant of permission. The only doubt we have as to the decision in Boktor and Wanis is whether it is correctly described as a decision of the Upper Tribunal.

19.
In our judgement it is clear from the Rules, and to a limited extent also from the 2007 Act, that it is intended that a party whose application to the First-tier Tribunal is unsuccessful should have the opportunity of making an application to the Upper Tribunal for permission to appeal to it. That that process applies even if the First-tier Tribunal refuse to admit the application because it was late is confirmed by Upper Tribunal rule 21(7), which we have set out in paragraph 15 above. It follows that the process set out by Judge Allen, in which a grant on the merits is treated as conditional, subject to time being extended when the matter is brought to the Tribunal's attention, must be seen as part of the First-tier Tribunal process of considering the application for permission to appeal. If the outcome of that process is a decision that the application should not be admitted, because it was out of time and time should not be extended, the applicant must have an opportunity to put his case again to the Upper Tribunal.

20.
After all, if the judge considering the application to the First-tier Tribunal had dealt with the issue of time and had refused to admit the application, there would be no doubt that the applicant could apply again to the Upper Tribunal. It cannot be that the applicant is deprived of a level of application simply by the judge's mistake in failing to appreciate or deal with matters of time.

21.
For these reasons, when a judge of the Upper Tribunal is faced with these issues, he will need to sit as a judge of the First-tier Tribunal to determine them. Properly interpreted, that is clearly what Judge Allen was doing (or should have been doing) in Boktor and Wanis , and it must be what Judge Lever is to be interpreted as having done in the present case. Despite the trappings of the Upper Tribunal, the decision he made was the completion of the task begun by Judge Waumsley, which was the consideration of the application for permission to appeal, made to the First-tier Tribunal.

22.
Following that decision, the Secretary of State, as applicant, had the opportunity of making an application to the Upper Tribunal, which she did. She was out of time again, but we do not think that that can be held against her, because the Tribunal itself had wrongly indicated that the method of challenging Judge Lever's decision was by an application for permission to appeal to the Court of Appeal, for which a longer time limit is appropriate. Indeed the correct notice, indicating that the application for permission to appeal to the First-tier Tribunal had not been admitted, has never been sent out.

23.
The application made by the Secretary of State does not, however, comply with the rules: rule 21(7)(a) requires material to be included in it, which was not included. Although in the present case, it is no doubt possible for the Upper Tribunal to discover what had been said previously, the intention of the rule is clearly that the reasons originally given should be repeated (or even amplified) so that the application before the Upper Tribunal can be dealt with properly, on the basis of all that the applicant wishes to say. We doubt (without wanting to decide the issue) whether non-compliance with rule 21(7)(a) would be sufficient to invalidate an application: nevertheless, the failure to comply with it is a matter to take into account in the circumstances of the present case.

The application to the Upper Tribunal for permission to appeal to the Upper Tribunal

24.
The application is in the following terms:

"The history of this appeal is set out between paragraphs 2-6 of Deputy Upper Tribunal Judge Lever's determination, which came about as a result of the hearing on 29 th February 2012, following the grant of permission to appeal by First Tier Tribunal Judge Waumsley dated 5 th August 2011.

Paragraphs 7 & 8 of the determination notes a challenge to the grounds made by the appellant's representative, on the basis that the Tribunal had not addressed the issue of the application for permission being out of time. Judge Lever went on to refuse the application for an extension of time and therefore the grounds themselves received no substantive consideration.

The Judge gives the following summary reasons for the decision within paragraph 31:

1)
The explanation for the delay provided did not explain the totality of the delay and pointed towards "systems failure".

2)
The matter of whether the appellant should have been excluded as a war criminal should have been dealt with back in 2000.

3)
The respondent granted the appellant ELR for four years setting in train the appellant's stay.

4)
The respondent failed to deal with the specific issue of 1F(a) for over a 2 year period.

5)
The evidence of previous serious delays in this case.

6)
Prejudice to the appellant who was granted ILR 9 months ago after a 12 year process and lengthy delay on the part of the respondent.

It is submitted that the above reasons are flawed for the following reasons (respectively):

1)
Paragraph 23 of the determination features the consideration with regards to the above finding. It shows the unexplained delay, as referred to by the Judge, was in fact a two day period after receipt of the determination, whilst still “in time”, during which the determination made its way from the post room to the Specialist Appeals Team and then onto me as an individual. It is submitted firstly that as the matter was still “in time” it was not in fact part of the “delay” that needed to be justified, however, in addition it is submitted that two days is not an unreasonable length of time to process the determination from receipt to consideration, especially considering the size of the organisation. The explanation provided for the remaining delay was accepted, and was down to a mistake by myself rather than system failure as assumed. This was a material mistake of fact and in law .

2)
In 2000 when the appellant was initially refused asylum there was in fact no system in place to exclude someone from the convention on the basis of war crimes. Post government change, when a process was implemented, the organisation was quick to action exclusion in this case: interviewing, investigating and issuing the appellant with a decision within 2 years of applying to extend his leave. This period included requests for further information.

3)
Exceptional Leave to Remain was granted to the appellant in 2000 after the refusal of his asylum application. This was simply as a result of the country situation at that time and due to an inability to remove the appellant. This blanket policy position, coupled with the absence of any war crimes procedure at the time in question, can not be said to have given rise to any expectation that the appellant would not later be held to account for his contribution to the commission of crimes against humanity.

4)
It is submitted that the time taken in dealing with the 1f(a) issue is neither exceptionally long, nor has it had the effect as described within EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41 between paragraphs 14-16. It is further submitted that the approach taken in Strbac & Anor v Secretary of State for the Home Department [2005] EWCA Civ 848 adds support to the submission that the decision in this respect was flawed. The case was reconsidered by agreement after the appellant himself chose to wait for the outcome of new caselaw on the 1f issue. Our agreement to do so should not now be held against us.

5)
This matter is discussed in paragraph 30. It is evidence of delays due to all parties, not just the Secretary of State.

6)
It is submitted the judge made mistakes of fact in this instance . This matter has in fact been live for seven years rather than twelve. As noted above, the initial decision took around two years, including investigation and consideration. There was then 3 years of judicial process before the matter came back to the Secretary of State to reconsider the matter simply as a result in a change in caselaw. It is

also incorrect that ILR was granted to the appellant, because although his initial appeal was successful, the decision was vitiated by an error of law, and no grant was in fact ever made. Finally, relying upon prejudice to an appellant who has failed to attend the last two appeal hearings, hearings which arose as a result of his involvement in serious crimes, appears somewhat irrational when the remaining reasons are removed.

In addition to those points it is also worthy to mention that the challenge from the appellant's representatives was made only the day before the hearing directly to Field House. The respondent was therefore not on notice about this issue, and whilst it is true that no adjournment request was made, it is submitted that it could not have been in the mind of the representative that the Judge would take points against the Secretary of State of the above nature. Having accepted that the grounds had merit and related to an important and significant issue, it was essential that the Secretary of State be given proper opportunity to address any concerns that troubled the Tribunal, especially considering the expectation given as a result of the grant of permission by Judge Waumsley, and the late stage at which the application was challenged. It should also be noted that within the grounds themselves I offered to attend if the matter required any further evidence.

It is also unclear whether or not the Judge applied the "general" principles highlighted from the case BO and Others [2008] UKAIT 00035 [30(e)], which it is submitted would be a further error considering the significance and importance noted in this particular case [28].

It is requested that time be extended to cover the 5 day delay in submitting the initial application, that the substantive grounds be considered and the decision of FTT Judge Manuel be set aside."

25.
We have considered those matters, as amplified before us by Miss Gough, but we remind ourselves that we are concerned primarily with whether the Secretary of State, who had allowed her appeal rights to become exhausted by the passage of time following the receipt of Judge Manuel's decision, should be allowed to reinstate the appeal in order to demonstrate that the claimant ought not to have succeeded. The delay is that set out by Miss Gough in her original application, and recorded by us at para 4 above. What we now have is a series of objections to Judge Lever's conclusions on those issues.

26.
The position is that time ran from receipt of the determination by the Secretary of State on 13 July. An application for permission to appeal, if made in time, had to be made by 20 July: the First-tier Tribunal's rules provide at rule 57(1) that:

"Where a period of time for doing any act is specified by these Rules or by a direction of the Tribunal, that period is to be calculated –

(a) excluding the day on which the period begins; and

(b) where the period is 10 days or less, excluding any day which is not a business day (unless the period is expressed as a period of calendar days)."

27.
16 and 17 July 2011 were the weekend, so the five days in question were 14 , 15, 18, 19 and 20 July, by the end of which day the application needed to be submitted. As Judge Lever correctly observed, there is no exclusion of non-business days for the calculation of time in other circumstances, and so an application received on 25 July was five days late: that is to say, that the time taken to put in the application has to be regarded as double that allowed by the rules.

28.
It is also, in our judgement, quite wrong to suggest that the period of time elapsing while an in-time application could have been made is to be ignored: if an application had been put in time it does not matter whether it was put in at the beginning or the end of the requisite period, but if the application is out of time, there needs to be an explanation covering the whole of the period of time available to the applicant. As Judge Lever observes, there is, in the present case, no explanation at all for the Secretary of State's failure to deal with the matter for the first three working days (over half the time allowed). After that, the explanation for the failure to put in an application during the rest of the time allowed, and during the whole of the next five days, is that of an individual personal failure by the Secretary of State's employee.

29.
Those explanations have to be considered in the context of the case as a whole, as set out by Judge Lever. What is now said is that this is a very important case, raising issues as to the application of article 1F and the appellant's potential exclusion from the benefits of the Refugee Convention. We note what the Secretary of State says about the lack of a policy on such matters in 2000, but by then the Refugee Convention had been in force for very nearly fifty years, and its principal provisions must have been well-known to the Secretary of State's predecessors. No point was taken on the claimant's potential exclusion from its benefits. Secondly, despite Miss Gough's submission, we agree with Judge Lever that this is not a case which has been dealt with very speedily at a time when a decision from the Secretary of State has been awaited. Thirdly, and perhaps most important for present purposes, the treatment of this case in the period after the sending out of Judge Manuel's determination does not give any reason to suppose that anybody thought that it was a matter of great importance. Indeed, none of the material submitted either to us or to Judge Lever suggests that Judge Manuel's determination was identified as raising any difficult or important question of law, in advance of the drafting of Miss Gough's grounds.

30.
Miss Gough has also relied, at both stages, on the size of the Secretary of State's organisation. The Secretary of State has the advantage, not shared by individual applicants, of a very large budget and a very large salaried staff. It does not seem to us that it is in principle open to the Secretary of State to say that the size of her organisation puts her at a disadvantage in meeting the requirements of those rules which also have to be met by individual applicants. We have little doubt that the Secretary of State has opportunities for prioritising matters that she considers are of particular importance, and making sure that they are dealt with appropriately promptly. As we have said, it does not look as though anybody other than Miss Gough thought that this was a case of particular importance, and it is difficult to see why the mere fact that, perhaps, mistakes are more likely to be made in a large organisation than a small one should lead to the conclusion that the outcome of a mistake should be condoned.

31.
In dealing with the facts, we have had to mention Miss Gough a number of times. We would emphasise that we do not intend that any personal blame should be attributed to her. She is not the Secretary of State, and she is not personally responsible for the Secretary of State's policy in allocating either funds or work. Mistakes do happen in large organisations as well as small ones: the consequences arising from policy decisions as to the allocation of funds and of work need to be faced by those responsible for the policy decisions.

32.

Looking at the matter as a whole as we do it seems to us that the Secretary of State took double the time allowed in order to make the present application. There is no reason given for the decision not to deal with the matter promptly on its arrival, and no evidence that the matter was then regarded as having the importance that is not attributed to it. To put it bluntly, the judgement of Judge Manuel was first ignored, and then forgotten about. That is not a good reason for extending time.

33.
It is right nevertheless in the circumstances of this case to look at the strength of the grounds of appeal. They are that Judge Manuel failed to resolve conflicts of evidence and made findings that were "irrational/inadequately reasoned in light of statutory guidance". No statutory guidance is identified, but the interpretation and the precise ambit of the exclusionary provisions of article 1F of the Refugee Convention cannot be regarded as settled. So far as concerned matters of the conflict of evidence, the Immigration Judge had all the evidence before her, and reached her own findings of fact. Those findings may be ones that not every immigration judge would have reached, but this is not a case in which it can be said that the grounds of appeal have a high prospect of success. In order to succeed, the Secretary of State would have to show both that the immigration judge's findings of fact were not open to her and that she had misunderstood the impact of article 1F. It does not appear to us that any substantial injustice is suffered by allowing Judge Manuel's determination to stand.

34.
Judge Lever's decisions for refusing to extend time were good ones. For the reasons we have given we are not satisfied that it is in the interests of justice that time for the application for permission should now be extended, and we therefore decline to admit the Secretary of State's application. There is no appeal pending before the Upper Tribunal.

C M G OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 5 December 2012