Upper Tribunal
(Immigration and Asylum Chamber)

Wang and Chin (extension of time for appealing) [2013] UKUT 00343 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 th June 2013	.....

Before

Mr C M G Ockelton, Vice President

Upper Tribunal Judge McKee

Deputy Upper Tribunal Judge McCarthy

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YUAN YUAN WANG

KIM HAI CHIN

Respondents

Representation :

For the Appellant: Mr Allan, Senior Home Office Presenting Officer

For the Respondents: Mr John Walsh, instructed by Stephen & Richard Solicitors LLP

When considering an application for permission to appeal that is out of time, a judge must (i) consider all available material including the material on file and bear in mind the need for evidence to rebut the presumption of service, (ii) consider the extent of the delay and whether any explanation covers the whole of that period; (iii) give brief reasons for the discretionary decision to extend time or refuse to do so. The same principles apply whichever side is the applicant.

DETERMINATION AND REASONS

1.
This is an appeal by the Secretary of State. The respondents ("the claimants") are nationals of Malaysia, husband and wife. The first respondent ("the claimant") appealed to the First-tier Tribunal against the decision of the Secretary of State on 22 December 2011 refusing her leave to remain in the United Kingdom. The second respondent had applied and appealed as her dependent: it is

common ground that the outcome of his appeal depended upon that of the claimant. Following a hearing on 9 February 2012, Judge Y J Jones issued her determination. She concluded that the claimant had failed to show that she was entitled to leave under the Immigration Rules, but allowed her appeal under Article 8 on the basis that it would not be proportionate to remove the claimants or require them to leave the United Kingdom given the length of their residence here. The Secretary of State now has permission to appeal against that decision.

2.
This appeal raises a difficult procedural question. In the interests of clarity, although at the expense of logic, we shall consider that question after dealing with the substance of the appeal.

3.
The claimant first came to the United Kingdom on 23 October 2001. She had entry clearance as a student. Her entry clearance as a student was extended and was due to expire on 31 October 2007. On 10 October 2006, however, the claimant was granted leave until 10 October 2011 as a work permit holder. Her work was to be for MHL Trading Ltd and work for that concern was a condition of her leave.

4.
The evidence showed that in March 2009 she was ill and unable to work, certainly until the end of July or later. Approached by MHL, she agreed to take unpaid leave in order to assist the company's financial difficulty. By February 2010 she was well enough to work, and began doing a certain amount of occasional work and more regular work for the Workers' Education Association (WEA). She regarded herself, according to her evidence, as still committed to MHL and awaiting return to work for them. In August 2011 she was informed that she had been removed from the payroll, following a change in ownership of that company. The application leading to the refusal under appeal was made on 7 October 2011.

5.
The evidence before the judge showed that the claimant had previously worked for WEA, apparently entirely legally as it was incidental. But, in the more recent period, she had in essence ceased to work for MHL and obtained a considerable income from her work with WEA.

6.
The claimant clearly could not now meet the requirements of the rules relating to employees, nor could she benefit from the "long residence" provisions of paragraph 276B of the Statement of Changes in Immigration Rules , HC 395 (which has since been superseded), because of earlier short breaks in her lawful residence owing to late applications. The judge's findings on the parts of the evidence relevant to her final decision are as follows:

"61. Although I find the first appellant to be generally credible I do not believe that she knowing that she was permitted to work for MHL Trading Limited, did not understand that she could [not] go off and work for another company without informing the Home Office. The work permit plainly enabled her to work for MHL Trading Limited. If there was no limitation on the employment then the work permit would be issued on the basis that she would be employed for the next five years. I find that she may have convinced herself of this situation and relied on legal advice that she was given on the basis that she was employed full time by MHL Company Limited. She was advised as is set out in the MacDonald's extract that she could undertake supplementary work not work instead of her employment with MHL Limited. The picture is of the first appellant burying her head in the sand until the time came to apply for indefinite leave to remain. As soon as she was placed on unpaid leave she

should have contacted the Home Office under the terms of her permit. Furthermore she earned a substantial amount with WEA and she was not receiving any income from MHL and had not received income since July 2009. She was clearly fit for work from November 2009 and indeed undertook work other than with MHL from that date until her work permit expired.

…

65. In this case also the first appellant breached the conditions of her work permit leave from 2009 onwards by not informing the respondent that she was no longer employed by MHL Company Limited and was working for WEA. I accept that in 2009 between March and November she was very unwell but once she had recovered and continued working for WEA on a regular basis she should have reported the fact of the change of employer to the respondent. I therefore find that she and her husband cannot benefit from the long residence rule as she has not had continuous lawful residence in the UK for a period of ten years".

7.
In dealing with Article 8, the judge set out the Razgar questions, and noted that the removal of the claimants together would not interfere with their family life. She then said this:

"68. The issue here is whether the appellants have established a private life in the UK and once again it cannot be denied that they have been here for a period of ten years and have built up relationships, friends and work in the UK. There is supporting evidence in respect of this from Mr Steve Marshall and Mrs Lee which shows that the appellants have been industrious during their time spent in the UK and have undertaken a substantial amount of volunteering in support of the Chinese community in the UK. I have no doubt that they have worked hard and contributed to their local community. The first appellant has told me that their life is now in the UK and that Malaysia seems a distant place to them. I find that they have established a private life in the UK.

69. The following questions in Razgar I answer in the affirmative.

70. In respect of proportionality I have to weigh in the balance those factors in favour of the appellants in particular whether it is necessary and proportionate to remove the appellants from the UK when they are so well established here. I have sympathy for the appellants who no doubt consider their breaches in continuous lawful residence were not of their making and the breach of the conditions of the first appellant's work permit occurred because of the first appellant's illness and then the unfair treatment by the Li family as a result of her illness. All of which are not disputed by the respondent.

71. Against the appellants are the facts that they have not complied with the Immigration Rules, they do not have close family in the UK and they do not own property in the UK. They have transportable working skills and could resume their life in Malaysia where it is still the case that they have spent most of their lives. They no doubt have family and friends in Malaysia and can return there to continue their private and family life.

72. However overall their conduct has been commendable and the breaks in their lawful residence can be considered unfortunate and probably not of their own making. They have produced substantial documentary evidence and live evidence to support their claims in respect of their lives in the UK. No doubt they have been extremely concerned about the outcome of this case.

73. On the balance of probabilities I find that weighing all the factors in the balance that it is not necessary or proportionate to remove these appellants and that their removal would amount to a

substantial interference in their private life in the UK. This decision will not result in them obtaining immediate indefinite leave to remain in the UK but may do in the future if they pay more attention to the legalities involved in the privilege of being allowed to remain in the UK".

8.
Thus she allowed the claimants' appeals. The Secretary of State's grounds for permission are, so far as material, as follows:

"1. … At paragraph 61 of the determination, the Immigration Judge does not believe that the appellant was not aware that she was not permitted to take employment with a company other than that stated on her work permit. However, when carrying out the balancing exercise, the Immigration Judge states at paragraph 70 of the determination that he has sympathy for the appellants, but finds that they have not complied with the immigration rules (paragraph 71 of the determination). It is submitted that the Immigration Judge's findings lack clarity.

2. The appellants will be removed together, there will therefore be no breach of their family rights which they can continue in Malaysia where they have spent the majority of their adult lives. As acknowledged by the Immigration Judge, the appellants have no property in the UK and have transportable skills. The private life they have established set out at paragraph 68 of the determination is also one that is transportable. It is submitted that the Immigration Judge has failed to make any or adequate findings on why the appellants cannot continue their private life in Malaysia with their transportable skills and maintain contact through modern means of communication.

3. The Immigration Judge notes that the breaks in the appellants leave, preventing them from being granted ILR under the Immigration Rules is unfortunate. It is submitted that this could be regarded as a near miss situation and the Immigration Judge has failed to give adequate reasons for finding that the immigration rules should not prevail over the appellants Article 8 rights. **MM & SA Pakistan 2010 UKUT 481 (IAC)** (paragraph 28). Judicial decision makers should be careful to identify and reject arguments based on alleged near-miss, which, on proper analysis, are an attempt to import extraneous qualifications into a provision of the rules… Such factors might have a legitimate part to play in the proportionality exercise, as weighing in favour of an applicant who has an independently strong private or family life case; but they should not be used to diminish the weight to be given to the consideration described in paragraph 16 of **Huang 2007 UKHL** ".

9.
The grounds were the subject of submissions to us by Mr Allan; he said that the position was that the decision to allow the appeal was not sufficiently clearly reasoned. The judge had failed properly to balance negative factors against the positive ones that she had identified. The judge had found that the claimants' work skills were transportable, and that they could resume their lives in Malaysia. The judge had failed to afford sufficient weight to the claimant's inability to meet the requirements of the immigration rules. We did not need to call on Mr Walsh to reply to the Secretary of State's grounds.

10.
It is perfectly clear to us that the judge took into account both positive and negative factors in making her assessment of the Article 8 rights of the claimant and the claimants together. She was obviously aware that she had made some negative credibility findings: that is no doubt what she had in mind when she said that "overall" the claimant's conduct had been commendable. There had been no curtailment of the claimant's leave, and the reference to breaks in "lawful residence" can therefore refer only to the short periods – totalling 20 days in 10 years – during which leave had expired before a renewal application had been made.

11.
The fact that individuals could return to their own country and live there does not of itself mean that it would be proportionate to require them to do so. The question of proportionality was a matter for assessment by the judge. Her conclusion was neither irrational nor in any other way defective in public law terms. The Secretary of State's appeal accordingly falls to be dismissed.

12.
We return now to the procedural difficulties. These arise out of the process by which the Secretary of State sought and obtained permission to appeal. The date typed on the judge's determination as the date of promulgation is "20.02.2012." on both the claimants' Tribunal files are copies of a covering letter indicating in each case that the determination was sent by post on 21 February 2012 to the parties, including the Secretary of State's Presenting Officers' Unit in Cardiff. The letter is annotated to indicate that the determinations were sent to each of the recipients by first class mail. The letters correctly indicate that any application for permission to appeal needed to be made within five days of receipt of the determination. The Secretary of State was also directed to pay to each of the claimants the amount the judge had awarded by way of recovery of fees. The Secretary of State's application for permission was not made shortly after that date. It was made on 18 October 2012. The explanation for the lateness reads, in full, as follows:

"Enquiries made with the IAC have confirmed that although the determination was promulgated on 20 th February it was not received by UKBA, a request for a second copy was made on or around 20 th February 2012, this was not acted upon until on or around 15 October 2012. The copy was received in the Specialist Appeals Team on 17 th October 2012. Due to the delay in receiving this allowed determination, permission is respectfully sought to lodge these grounds out of time".

13.
The judge responsible for determining the permission application dealt with this delay of nearly eight months as follows, also in full:

"There is an out of time application on this file. I have considered the reasons given in Section B as to why the application has been made out of time. In light of this explanation I extend time".

14.
Both the application and the manner of dealing with it raise considerable concerns.

15.
First, during the course of the hearing it became apparent that the truthfulness of the "explanation" provided by the Secretary of State was in considerable doubt. First, on its face the "explanation" cannot be right: even if the original determination had been sent out on the 20 th , which, according to the file, it was not, a second copy could not have been sought on or about the same date. Secondly, the Secretary of State had on at least one previous occasion been sent a copy of the determination by those acting for the claimants, who tried to cause the Secretary of State to put the determination into effect. Thirdly, despite the bold assertion that no copy of the determination had been received before 15 October 2012, it was apparent from the way in which Mr Allan dealt with the matter, that the Secretary of State has opened a number of different files under different reference numbers relating to these claimants, and that there appears to be no way of knowing whether the determinations were indeed put on one of those files. Indeed the letters to which we have referred have received no reply, it cannot be the case that if there is a communication to the Secretary of State dealing with these claimants, from whatever source, it does not arrive. The letters must be somewhere, and perhaps the

determination is with them. So it seems to us that there simply was no good reason for the Secretary of State to assert the facts that were asserted in the “explanation”.

16.
Secondly, the procedure rules provide, at rule 55(5) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (which still govern proceedings before the First-tier Tribunal), that a document sent by post from and to places within the United Kingdom is deemed to be served on the second day after it was sent, “unless the contrary is proved”. Proof requires evidence. There was no evidence of non-receipt by the Secretary of State tendered with the application or even referred to in it. In these circumstances it is difficult to see how the judge could have been satisfied that the Secretary of State’s “explanation” had been made out in the manner required for her to make a decision in the Secretary of State’s favour.

17.
Thirdly, it appears to us that the judge’s treatment of the matter, and her decision to extend time by many months, is simply not adequately dealt with in her decision. A permission decision on the papers is necessarily short, but it ought nevertheless to give some indication of the process by which a judge has reached a conclusion which may well be contentious. If she had considered the papers on the files, she would have been aware of the two separate letters each enclosing a copy of the determination sent to the Secretary of State on 21 February. She must have been aware of the procedural rule requiring non-delivery to be proved. Bearing in mind the length of the delay, she might have thought it right to consider whether the Secretary of State had left it unduly long to attempt to obtain a copy of the determination after the hearing in February. The decision was of course for her, but it needed to be a decision taking into account all relevant matters and giving some indication of the reasons for it. As written, her decision gives no hint of her having appreciated the difficulties we have mentioned.

18.
It is for those reasons that, following the grant of permission, the claimants sought to challenge the judge’s extension of time, and before us Mr Walsh argued that we had jurisdiction to reverse the judge’s decision to extend time. Mr Allan’s position was that even though in this case the extension of time had been obtained on the basis of a misstatement by the Secretary of State, and without the evidence that the Secretary of State ought to have provided, it was in essence unchallengeable and that he was entitled to rely on a decision so obtained.

19.
Because of our view as to the merits of the Secretary of State’s appeal, we think it is unnecessary to determine that issue of jurisdiction in these proceedings. Clearly it has some general relevance in the interpretation of the Upper Tribunal’s jurisdiction across all chambers, and it would perhaps not be right to express a concluded view from this chamber alone.

20.
It is, however, clear that a judge of the First-tier Tribunal dealing with a permission application which is out of time needs to ensure that he or she has considered all the available material, including indications of when the determination was sent and whether there is any evidence that it was not received in accordance with the deemed service provisions of the Procedural Rules. The judge will also need to consider the extent of the delay and whether the evidence or explanations provided cover the whole of that delay. The decision whether to extend time is the exercise of a judicial discretion,

and there should normally be reasons, which may well be very brief, supporting the decision reached. The same rules apply whether it is the individual or the government that seeks an extension of time.

21.
For the reasons given at paragraphs 10 and 11 above, this appeal is dismissed.

C M G OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 8 July 2013