OUTER HOUSE, COURT OF SESSION

[2025] CSOH 65

P986/24

OPINION OF LORD SANDISON

in Petition of

MOHAMED ELKABANY

Petitioner

for

Judicial Review of a decision of the Upper Tribunal (Immigration and Asylum Chamber) dated 29 July 2024 refusing to admit an application to the Tribunal

Petitioner: Winter; Drummond Miller LLP
Respondent: Maciver (Secretary of State for the Home Department); Office of the Advocate General for Scotland

18 July 2025

Introduction

[1] This petition for judicial review challenges a decision of the Upper Tribunal (Immigration and Asylum Chamber) dated 29 July 2024 refusing to admit an application which the petitioner had made to it for permission to appeal a decision of the First-tier Tribunal to refuse his appeal against a decision of the Secretary of State for the Home Department to reject his claim for asylum. The petitioner seeks declarator that it is competent to challenge the Upper Tribunal's decision under section 11A(4)(a) of the Tribunals, Courts and Enforcement Act 2007, and asks the court to reduce that decision.

The Advocate General for Scotland, on behalf of the Secretary of State, is the respondent to the petition. The matter came before the court for determination of the petitioner's application for permission to proceed in terms of section 27B of the Court of Session Act 1988.

Relevant statutory provisions

[2] The Court of Session Act 1988 contains the following provisions:

"**27B Requirement for permission**

(1) No proceedings may be taken in respect of an application to the supervisory jurisdiction of the Court unless the Court has granted permission for the application to proceed.

(2) Subject to subsection (3), the Court may grant permission under subsection (1) for an application to proceed only if it is satisfied that—
  (a) the applicant can demonstrate a sufficient interest in the subject matter of the application, and
  (b) the application has a real prospect of success.

(3) Where the application relates to a relevant Upper Tribunal decision, the Court may grant permission under subsection (1) for the application to proceed only if it is satisfied that—
  (a) the applicant can demonstrate a sufficient interest in the subject matter of the application,
  (b) the application has a real prospect of success, and
  (c) either—
    (i) the application would raise an important point of principle or practice, or
    (ii) there is some other compelling reason for allowing the application to proceed.

…

(6) In this section, '*a relevant Upper Tribunal decision'* means—
…
  (b) a decision of the Upper Tribunal in an appeal from the First-tier Tribunal under section 11 of the Tribunals, Courts and Enforcement Act 2007."

[3] The Tribunals, Courts and Enforcement Act 2007 contains the following provisions:

"**11 Right to appeal to Upper Tribunal**

(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than ...

(2) Any party to a case has a right of appeal ...

(3) That right may be exercised only with permission ...

(4) Permission … may be given by–
(a) the First-tier Tribunal, or
(b) the Upper Tribunal,
on an application by the party."

"**11A Finality of decisions by Upper Tribunal about permission to appeal**

(1) Subsections (2) and (3) apply in relation to a decision by the Upper Tribunal to refuse permission (or leave) to appeal further to an application under section 11(4)(b).

(2) The decision is final, and not liable to be questioned or set aside in any other court.

(3) In particular—
(a) the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision;
(b) the supervisory jurisdiction does not extend to, and no application or petition for judicial review may be made or brought in relation to, the decision.

(4) Subsections (2) and (3) do not apply so far as the decision involves or gives rise to any question as to whether—
(a) the Upper Tribunal has or had a valid application before it under section 11(4)(b),
(b) he Upper Tribunal is or was properly constituted for the purpose of dealing with the application, or
(c) the Upper Tribunal is acting or has acted-
(i) in bad faith, or
(ii) in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice.

…

(7) In this section—
'decision' includes any purported decision;
…
'the supervisory jurisdiction' means the supervisory jurisdiction of—
…
(b) the Court of Session, in Scotland…"

[4] The Tribunal Procedure (Upper Tribunal) Rules 2008/2698 contain the following provisions:

"**5.— Case management powers**

(1) Subject to the provisions of the 2007 Act and any other enactment, the Upper Tribunal may regulate its own procedure.

…

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Upper Tribunal may—
(a) extend or shorten the time for complying with any rule, practice direction or direction …

…

7.— Failure to comply with rules etc.

(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction, does not of itself render void the proceedings or any step taken in the proceedings.

…

21.— Application to the Upper Tribunal for permission to appeal

…

(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, 14 days after the date on which notice of the First-tier Tribunal's refusal of permission was sent to the appellant …

(4) The application must state—

(a) the name and address of the appellant;

(b) the name and address of the representative (if any) of the appellant;

(c) an address where documents for the appellant may be sent or delivered;

(d) details (including the full reference) of the decision challenged;

(e) the grounds on which the appellant relies; and

(f) whether the appellant wants the application to be dealt with at a hearing.

(5) The appellant must provide with the application a copy of—

(a) any written record of the decision being challenged;

(b) any separate written statement of reasons for that decision; and

(c) if the application is for permission to appeal against a decision of another tribunal, the notice of refusal of permission to appeal, or notice of refusal to admit the application for permission to appeal, from that other tribunal.

(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."

Background

[5] The petitioner is a citizen of the Arab Republic of Egypt aged 28. He claims that on 27 September 2019 he was with a friend at a café in his home village there when a demonstration against the Egyptian government took place outside. He maintains that he had nothing to do with the demonstration, but was arrested and found to be in possession of a list of names and a modest sum of money which related to a charity collection he had been undertaking. He was supposedly detained, falsely accused of being involved in the

demonstration and of being a member of the proscribed Muslim Brotherhood, and was regularly interrogated and beaten for over 7 months before being released on bail and on the expectation that he would become a police informer. Instead, his family made arrangements for him to be smuggled on board a ship and he fled Egypt, eventually arriving in the United Kingdom, where he claimed asylum on 15 June 2020.

[6] The Home Office refused his claim, but he appealed that refusal under the provisions of the Nationality, Immigration, and Asylum Act 2002 to the First-tier Tribunal, claiming that he would be at risk if returned to Egypt due to his imputed political opinion or alternatively that he was entitled to humanitarian protection. So far as material for the purposes of these proceedings, after a hearing on 22 September 2023, F-tT Judge McLaren issued a judgment on 20 October 2023 in which it was noted that in an appeal on asylum grounds, the burden lay on the petitioner to show, to a reasonable degree of likelihood, a well-founded fear of persecution for a Convention reason such as race, religion, nationality, membership of a particular social group, or political opinion, and that in an appeal on humanitarian protection grounds he required to show to the same standard the existence as at the date of the hearing a real risk of serious harm should he be returned.

[7] As part of his asylum claim, the petitioner had relied on an expert report from a forensic document examiner stating that certain documents bearing to relate to the supposed legal process against him in Egypt, which were said to have been sent to his Scottish solicitors by an Egyptian lawyer, accompanied by a document bearing to be a certification by that lawyer as to their provenance, were indeed genuine. Those documents appeared to show that the petitioner faced charges in the State Security Criminal Court involving participation in an unauthorised rally; damage to public property; the carrying of anti-regime placards intending to overthrow the regime, destabilise public security and

endanger citizens' lives; violent assault on police officers in the execution of their duties; and the terrorisation of citizens, disruption of traffic, and blasting of train rails and vital installations.

[8] The judge decided to place little weight on the expert report because it was not clear that the expert had been provided with all the papers relevant to the petitioner, there was no evidence that he had any recognised qualifications in forensically examining documents, there was nothing in his report to indicate that he had a particular expertise in considering Egyptian documents, it was not particularly clear what methodology he had used in examining the documents, and he appeared to have adopted a "broad-brush" approach to the documents placed before him as a whole, without stating in any detail the specific aspects of each document which had led him to a conclusion that it was genuine. One document in particular, bearing to be a "Certificate from the Court Docket" changed in style and voice as it progressed without any explanation, and this led the judge to place less weight on it than might otherwise have been the case.

[9] The judge was also concerned that certain documents had not been sent to the Home Office as part of the assessment of the petitioner's claim for protection, again without explanation. This was regarded as a further reason for less weight to be placed on the documents in question.

[10] The judge separately formed doubts about the petitioner's own credibility, noting that he had claimed not to have had legal representation in Egypt while at the same time producing a document stating that his legal representative there had received all the documents in his case. An internet search had revealed no record of the claimed demonstration on 27 September 2019, albeit it was possible that it might have occurred and not been reported on. There was no medical evidence in support of the petitioner's

claim to have been tortured in custody in circumstances where a report of one kind or another touching on the matter might have been expected. The account given by the petitioner of his conduct at the time of the alleged incident, in particular about his having remained at the café despite the occurrence of a demonstration in which he wanted no part, was thought by the judge to lack plausibility and internal consistency. His witness statement on matters germane to that issue was not consistent with what he had said in his asylum interview or in his oral evidence to the Tribunal, and that evidence was in itself unclear, internally inconsistent and at odds with what he had previously said. Those concerns about the petitioner's credibility were so wide-ranging that they could not be explained away by the vulnerability to which the judge had found the petitioner was subject on account of difficulties with his mental health. The judge concluded that the petitioner was not telling the truth, that he had not established to the requisite standard that he had a well-founded fear of persecution on account of his imputed political beliefs in Egypt or that he faced a real risk of serious harm in the event of his return there, and dismissed his appeal.

[11] The petitioner timeously sought leave of the First-tier Tribunal to appeal that decision to the Upper Tribunal. The grounds of appeal very largely concentrated on the adequacy of the reasons given by Judge McLaren, claiming in many and various respects that an informed reader would be left in "real and substantial doubt" about the reasons for aspects of the decision. The only exception to that general approach was a claim that the F-tT had erred in law in failing to recognise that there could be cases where a duty lay on the Home Office to seek to verify documentary evidence, and that this was such a case, relying on *PJ (Sri Lanka)* v *Secretary of State for the Home Department* [2014] EWCA Civ 1011, [2015] 1 WLR 1322 at [29] - [31]; *AR (Pakistan), Appellant* [2017] CSIH 52 at [34]; *QC* v *Secretary of*

State for the Home Department [2021] UKUT 33 (IAC) at [28], [33] and [63]; and *Mbuyi-Biuma (Democratic Republic of Congo), Petr* [2019] CSOH 93.

[12] On 9 November 2023 F-tT Judge Seelhoff refused permission to appeal. As to the documents, Judge McLaren had considered the evidence in the round and had identified reasons for concern, including the delay in providing the documents, and issues on their face. The judge had set out detailed reasons for rejecting the expert report, which involved no error of law. *QC* v *Secretary of State* had noted that an obligation on the Home Office to verify documents would arise only exceptionally (ie rarely), where the document was central to the claim and could easily be authenticated, and where authentication was unlikely to leave any "live" issue as to the reliability of its contents. Those criteria were not clearly satisfied in the present case and the relative decision was affected by no arguable error of law. The identification of inconsistencies in the evidence was a matter for the judge. The grounds of appeal amounted to expressions of disagreement with the judge's decision rather than identifying errors of law.

[13] On 9 May 2024 the petitioner sought permission to appeal Judge McLaren's decision directly from the Upper Tribunal. That application was presented more than 5½ months after the routine time limit for making such an application had expired. The substantial grounds on which the appeal, if permitted, was to proceed were substantially similar to those which had been presented to the F-tT when its permission to appeal had been sought. Upper Tribunal Judge O'Brien considered the application on the papers, and on 29 July 2024 decided not to admit it. In deciding whether to extend time, the judge applied the principles set out in *Denton* v *TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926. There had been a serious and significant delay. The explanation given was that the petitioner's representatives had been struggling to access the new online tribunal portal, but no

evidence or detail of those struggles (such as email correspondence) had been provided. The delay had not been satisfactorily explained. The judge had nonetheless considered all the circumstances, including the merits, but concluded that the interests of justice did not require an extension of time.

[14] The grounds of appeal, said Judge O'Brien, criticised Judge McLaren's approach to documents relied upon by the petitioner, to the expert report, and to the inconsistencies identified. However, in each instance, the judge had given unarguably adequate reasons for reaching the relevant conclusions, each of which were unarguably open to the tribunal. The grounds of appeal sought to reargue the case and to disagree with the judge's findings, but disclosed no arguable error of law. They were certainly not so meritorious as to swing the balance in favour of extending time.

[15] This petition was presented to the court on 25 October 2024 and was sisted until 11 February 2025 to enable the petitioner's application for legal aid to be determined. As presented, the petition argued that section 11A of the Tribunals, Courts and Enforcement Act 2007 was null and void as breaching Article XIX of the Treaty of Union 1707. After the opinion of the Inner House in *Singh* v *Secretary of State for the Home Department* [2025] CSIH 4, 2025 SLT 146 was issued on 24 January 2025, rendering any such argument unviable, the petition was amended to strip out that claim and now proceeds on the basis that it is competent to subject the Upper Tribunal's decision to review under section 11A(4)(a) of the 2007 Act.

[16] On 17 April 2025 I fixed an oral hearing to determine whether to grant permission for the petition to proceed, indicating that the issues which I wished to be discussed were the competency of the petition standing the terms of section 11A of the 2007 Act and, if it was competent, the adequacy of the pleaded basis for maintaining that the Upper Tribunal's

assessment of where the interests of justice lay in deciding whether or not to extend time was substantively amenable to review. After hearing parties, I refused permission to proceed in terms of section 11A(2) of the 2007 Act, indicating my reasons for so doing orally at the close of the hearing. As a reclaiming motion against my refusal of permission to proceed has been marked, I now state those reasons in writing.

Submissions for the petitioner

[17] Counsel for the petitioner submitted that he had a real prospect of success in his application to the supervisory jurisdiction. If there was any doubt about that, then permission should be granted: *MIAB* v *Secretary of State for the Home Department* [2016] CSIH 64, 2016 SC 871, 2016 SLT 1220 at [66].

[18] The petition fell within the exception provided for by section 11A(4)(a) of the 2007 Act to the general finality accorded to the Upper Tribunal's decisions to refuse permission to appeal expressed in sections 11A(2) and (3) thereof. Rule 21 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as a whole set out the conditions with which an application to the Upper Tribunal for permission to appeal had to comply if it was to be regarded as a valid such application. Although the application in the present case complied with the formal requirements for validity set out in Rule 21(4) and (5), it was presented out of time, and in such cases, unless the time for making the application was extended by the Tribunal, the Tribunal could not admit the application, all in terms of Rule 21(6). If, as here, the Tribunal decided not to extend time and therefore not to admit the application, then it had no valid application before it and the terms of section 11A(4)(a) of the 2007 Act were engaged to exempt the application from the finality provisions of section 11A(2) and (3). The statutory language of both the 2007 Act and the 2008 Rules required to be interpreted

in terms of the ordinary meaning of the words used: *McEntegart* v *Fishman* [2012] CSIH 72, 2013 SC 55, 2012 SLT 1133 at [12]. That did not mean that any late application for permission to the Upper Tribunal which was not admitted by it on the ground of its lateness would automatically be subject to review by way of the supervisory jurisdiction; the ordinary test for permission to proceed with such an application would still require to be considered and applied by this court before any substantive review here could take place.

[19] If the current application was indeed competent, the court should grant permission for it to proceed. The Upper Tribunal had materially erred in law in assessing whether it was in the interests of justice to admit the petitioner's application to it, and in refusing to do so. Reference was made to *Bhavsar* v *Secretary of State for the Home Department* [2019] UKUT 196 (IAC) at [56] and *R (on the application of Onowu)* v *First-tier Tribunal (Immigration and Asylum Chamber)* [2016] UKUT 185 (IAC), [2016] Imm AR 822 at [6] - [24], [26]. All material factors had to be taken into account, and it was for the court to determine what was a material factor: *Tesco Stores Ltd* v *Secretary of State for the Environment* [1995] 1 WLR 759 at 764G - H. One material factor was whether it could be said that there was any prejudice to the Secretary of State. The Upper Tribunal did not identify any such prejudice; no removal directions had been made in relation to the petitioner. The refusal to admit the application for permission to appeal had brought the appeal process to an end, rendering the petitioner liable to removal and making the issue an important one for him. Further, the responsibility for missing the deadline for applying to the Upper Tribunal for permission to appeal was that of the petitioner's solicitors, not that of the petitioner himself. He was blameless in the matter. The informed reader had been left in real and substantial doubt as to whether the Upper Tribunal had assessed those factors and, if it did, what was made of them in its assessment of whether it was in the interests of justice to admit the application.

[20] Further, the Upper Tribunal had failed to recognise that the First-tier Tribunal had arguably erred in law and as a consequence erred when finding that the grounds of appeal were not so meritorious that it was in the interests of justice to admit the application: *Ahmed* v *Secretary of State for the Home Department* [2020] CSIH 59 at [9]. The grounds of appeal did not simply express disagreement with the decision of the First-tier Tribunal, but relied on material errors of law contained therein. Where the Upper Tribunal had acted in a manner which was fundamentally flawed as a matter of law, it deserved no deference: *Tikka* v *Secretary of State for the Home Department* [2018] Imm AR 1084 at [28].

[21] The "second appeal" test contained in section 27B(3) of the Court of Session Act 1988 was not the test to be applied to the subject-matter of the petition: *Singh* at [45]. The definition of a relevant Upper Tribunal decision set out there only included an Upper Tribunal decision which was subject to a right of appeal under section 11 of the 2007 Act. If that was wrong, then for the reasons already canvassed there was a legally compelling reason for allowing the application to proceed: *PR (Sri Lanka)* v *Secretary of State for the Home Department* [2011] EWCA Civ 988, [2012] 1 WLR 73 at [23] and [36].

Submissions for the respondent

[22] In a brief response for the respondent, counsel submitted that what was now complained of was a straightforward administrative decision of the Upper Tribunal. The First-tier Tribunal had assessed the evidence before it and arrived at conclusions which were unassailable in point of law. It had refused permission to appeal. The Upper Tribunal had only been asked for its permission to appeal 5½ months out of time, and was not persuaded that any good reason existed for the delay, or that anything in the decision of the First-tier Tribunal meant that permission should nonetheless be granted. That was an end to the

matter in terms of section 11A(2) and (3) of the 2007 Act. The application to the Upper Tribunal for permission to appeal had been perfectly valid; the Tribunal had simply refused to admit it on account of its lateness.

Decision

[23] This application to the supervisory jurisdiction of the court is incompetent. Section 11A of the 2007 Act is specifically directed at rendering decisions of the Upper Tribunal about decisions to appeal immune from review save in the extremely specific and exceptional circumstances which it instances. The language of sections 11A(2) and (3) could scarcely be more emphatic - such decisions are to be "final, and not liable to be questioned or set aside in any other court". The Tribunal is not to be regarded as having exceeded its powers by reason of any error (whether of fact or law) made in reaching its decision, howsoever plain that error may be, and the supervisory jurisdiction "does not extend to, and no application or petition for judicial review may be made or brought" in relation to such a decision. One cannot evade the bar on review by maintaining that the decision complained of is only a "purported" such decision.

[24] The exceptions to the general rule are narrowly drawn, applying only where the decision which it is sought to challenge involves or gives rise to a question as to whether the Tribunal was properly constituted for the purpose of dealing with the application, acted in bad faith or in such a procedurally defective way as to amount to a fundamental breach of the principles of natural justice, or (the matter in issue in the present case) had a valid application for permission to appeal under section 11(4)(b) before it in the first place.

[25] The validity of an application for permission to appeal in the circumstances of the present case depends on two matters of substance and one of form. Firstly, as a matter of

substance the application has to be for permission to appeal on a point of law from a decision of the First-tier Tribunal - section 11(1) of the 2007 Act. Secondly, again as a matter of substance, an application to the Upper Tribunal for permission to appeal requires to have been preceded by an unsuccessful application for permission to appeal to the First-tier Tribunal itself - Rule 21(2) of the 2008 Rules. Thirdly, in point of form the application has to be in writing - Rule 21(3) - and contain the details and materials prescribed by Rules 21(4) and (5).

[26] An application for permission to appeal which is made out of time is not *per se* an invalid such application. Rule 7(1) states the general principle that failure to comply with a requirement of the Rules does not render any step taken in the proceedings void, and the Upper Tribunal has the power under Rule 5(3) to extend the period of time for complying with any other Rule - here, Rule 21(3)(aa), which requires this kind of application to be made no later than 14 days after notice of the First-tier Tribunal's decision has been given to the applicant. If an application for permission to appeal is made out of time and no request for an extension of time is sought, the Upper Tribunal cannot entertain it. The supervisory jurisdiction cannot be invoked in such circumstances as there is no decision of the Upper Tribunal to be challenged and the underlying decision of the First-tier Tribunal is not reviewable as a means of appeal against it has been provided by statute and not utilised.

[27] If an application for leave to appeal is lodged late and is accompanied by a request for an extension of time, the jurisdiction (or, to put it more straightforwardly, the decision-making power) of the Upper Tribunal is engaged and it makes a decision on that request. If that decision is to refuse the request, that does not render the application for leave to appeal invalid; the Tribunal has considered it and decided, to use the very precise words adopted in Rule 21(6)(b), not to admit the application. The Rules do not say,

presumably deliberately, that an application in respect of which a request for extension of time has been made and refused is not a valid application, merely that it has not been admitted for consideration of the substantive issues which it raises. That conclusion flows, in my view quite clearly, from the ordinary meaning of the words used in the provisions of primary and subordinate legislation which are engaged.

[28] Moreover, the issue of the extent to which the supervisory jurisdiction should be available to review decisions of the Upper Tribunal refusing leave to appeal to it is far from one which first drew attention with the introduction of section 11A into the 2007 Act by the Judicial Review and Courts Act 2022 and its coming into force on 14 July 2022. In *Eba* v *Advocate General for Scotland* [2010] CSIH 78, 2011 SC 70, 2010 SLT 1047 at [65], the First Division of this court ruled that such a decision was amenable to judicial review under the supervisory jurisdiction of the court and that the grounds on which it could be reviewed were not subject to any limitation on policy or discretionary grounds. In *R (Cart)* v *Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663, [2011] 3 WLR 107, the UKSC determined as a matter of the law of England and Wales that unrestricted judicial review of such decisions was not necessary for the maintenance of the rule of law and was not proportionate. It ruled that the tribunal structure deserved a more restrained approach to judicial review than had previously been the case, but that some overall judicial supervision was needed in order to guard against the risk that errors of law of real significance might slip through the system. That supervision would be adequate if judicial review was available only in the circumstances in which permission then might be granted for a further appeal to the Court of Appeal, namely that the proposed appeal would either raise some important point of principle or practice, or there was some other compelling reason for the appeal to be heard.

[29] When *Eba* came to be considered by the UKSC, [2011] UKSC 29, 2012 SC (UKSC) 1, 2011 SLT 768, that court decided that effectively the same approach should be adopted in Scotland, and that while access to the supervisory jurisdiction should continue to be available to the citizen as of right, that remedy should be tailored according to the nature and the expertise of the Upper Tribunal and the subject matter of the decisions that had been entrusted to it by Parliament. That remained the law until July 2022, and continues to be reflected in section 27B(3) of the Court of Session Act 1988 for attempts judicially to review substantive decisions of the Upper Tribunal in appeals from the First-tier Tribunal under section 11 of the 2007 Act.

[30] I would accept, as counsel for the petitioner submitted, that at least now that Parliament has intervened to introduce section 11A to the 2007 Act specifically to deal with attempts judicially to review decisions of the Upper Tribunal to refuse permission to appeal to it from the First-tier Tribunal, section 27B(3) of the 1988 Act is not engaged in judicial reviews of such decisions, not least because they are not decisions made in any appeal from the First-tier Tribunal under section 11 of the 2007 Act, but are rather decisions refusing permission for any such appeal to proceed to a substantive determination. That, however, does not assist the petitioner's argument as to the proper interpretation of section 11A of the 2007 Act. That section went further than the decision in *Eba* by removing the right to invoke the supervisory jurisdiction in such cases ("the supervisory jurisdiction does not extend to, and no application or petition for judicial review may be made or brought in relation to, the decision") except in the very narrow circumstances set out in section 11A(4). Parliament's intervention in 2022 can on no sensible view be regarded as having been intended as a liberalising measure. Indeed, it seems to have been the general exclusion of the right of recourse to the supervisory jurisdiction which provoked the claim that the Treaty of Union

had been breached by the enactment of section 11A and which was ultimately rejected in *Singh*. The somewhat open-textured "second appeal" criteria were considerably tightened and made more specific.

[31] Yet, if the petitioner's approach to statutory interpretation is correct, decisions of the Upper Tribunal refusing to extend the prescribed time to seek permission to appeal to it from the First-tier Tribunal are amenable to judicial review despite decisions refusing permission to appeal to it on more substantive grounds not being in general so amenable, for no particular reason in principle that can be identified. Moreover, judicial review of decisions of the Upper Tribunal refusing to extend time are to be granted permission if the relevant petition meets the most basic test of disclosing a real prospect of success, even though other decisions of the Tribunal are either not subject to review at all or are, at least, subject to the more demanding second appeal test, all again for no principled reason that could be suggested and in the context of legislative reform plainly intended to tighten rather than to loosen the availability of review for decisions of the Upper Tribunal refusing permission to appeal to it. That would be an absurd outcome which could only be justified by the clearest statutory wording, which simply does not exist. Rather, the statutory language in the 2007 Act and the 2008 Rules makes it plain, for the reasons set out above, that an application for permission to appeal to the Upper Tribunal out of time which was refused remains a valid application to the Tribunal under section 11(4)(b); the Tribunal has simply refused to admit it for further consideration. An analogy can be drawn with the example of a petition to this court for judicial review being refused permission to proceed. Such a petition does not metamorphose into an invalid petition; it is a valid petition which does not proceed to any further substantive consideration because it does not pass the tests to be permitted to do so.

[32] That disposes of the petitioner's application for the permission of this court to bring his proposed judicial review. The petition is incompetent because of the provisions of section 11A of the 2007 Act and no such permission may, accordingly, be granted. I pronounced an interlocutor to that effect at the close of the permission hearing.

[33] In light of the foregoing, it seems of little if any avail to express any view on whether if in some other legal universe it might have been possible to grant permission for the petition to proceed, such permission would indeed have been granted, and I do so only in brief terms.

[34] The decision of the Upper Tribunal which it is sought to place under review was one to refuse a request to extend the time limit for an application to be made to it for permission to appeal the decision of the First-tier Tribunal. In *Onowu*, the Upper Tribunal at [13] - [14] made certain observations about how such a request should be dealt with, under reference to three cases decided in the English Court of Appeal: *Mitchell* v *News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR 795; *Denton* (*supra*) (the case specifically relied upon by Upper Tribunal Judge O'Brien in the instant case); and *R (Hysaj)* v *Secretary of State for the Home Department* [2014] EWCA Civ 1663, and to a summation of those cases, again provided by the Court of Appeal, in *Secretary of State for the Home Department* v *SS (Congo) & Others* [2015] EWCA Civ 387. The Tribunal observed at [16] that, although the decisions in *Mitchell*, *Denton* and *Hysaj* were not made in the specific context that presented itself in *Onowu* (being the issue with which the instant case is also concerned), it could see no good reason as to why the approach commended there should not equally be applied to the Upper Tribunal's consideration of a request for an extension of time to apply for permission to appeal to it, consistently with the overriding objective of the 2008 Rules to deal with cases justly and fairly.

[35] The approach commended was a three-stage one. The first stage was to identify and assess the seriousness or significance of the failure to comply with the rules. The second stage was to consider why the failure occurred, that is to say whether there was a good reason for it. The third stage was to evaluate all the circumstances of the case, so as to enable the court to deal justly with the application. In this context, particular weight was to be afforded to the need for litigation to be conducted efficiently and at proportionate cost, and to the need to enforce compliance with rules, practice directions and court orders. In most cases the merits of the appeal would have little to do with whether it was appropriate to grant an extension of time. Only in those cases where the court could see without much investigation that the grounds of appeal were either very strong or very weak would the merits have a significant part to play when it came to balancing the various factors that had to be considered at stage three. The theme that the court should enforce time limits provided for in tribunal rules so as to prevent them from being substantially undermined had already been emphasised by the Senior President of Tribunals (Ryder LJ) in *KM (Bangladesh)* v *Secretary of State for the Home Department* [2017] EWCA Civ 437 and by Mance LJ in *Ozdemir* v *Secretary of State for the Home Department* [2003] EWCA Civ 167; to permit otherwise, it was said, 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.

[36] In the present case, Judge O'Brien applied the correct three-stage test. He considered that there had been a serious and significant delay in the making of the application for permission to appeal. Given the length of the delay involved, it would have been astonishing had he concluded otherwise. He passed to the second stage, namely to ask whether there was any good reason for that delay. He was of the opinion that no

satisfactory explanation had been offered. He did not accept that the petitioner's agents had experienced difficulties in filing the application. No details or evidence of such difficulties, such as email requests to the Tribunal's administrative staff for assistance, had been produced. Again, that was an entirely reasonable view to form in the circumstances. The judge passed to the third stage, and considered that the apparent merits of the proposed appeal were not such as to overcome the clearly established legal policy in favour of enforcing time limits provided for in tribunal rules. That was a view he was also entitled to take in considering how to exercise his discretion whether or not to accede to the request for an extension of time. The petitioner may consider that a system which enforces time limits unless there is some compelling reason not to do so is not a system which works for him and his interests. It is, however, a system which works in the public interest, which is vastly more important. The judge was correct in his view that there was nothing especially meritorious about the proposed grounds of appeal. The reasons given by the First-tier Tribunal were quite clear; the criticism made of them did indeed amount to nothing more than a disagreement with the conclusions reached on the material available to the F-tT judge, cloaked in the cliché that they gave rise to real and substantial doubt. The question as to the circumstances in which a duty to verify documents may rest on the Home Office is far from straightforward, as the cases cited by the petitioner make clear and as F-tT Judge Seelhoff pointed out. Only had the grounds been very strong would they have had a significant part to play when it came to balancing the various factors involved. They were not.

[37] The remaining authorities cited by the petitioner in relation to the assessment of the prospects of the proposed challenge are not in point. *Bhavsar* was concerned with the procedure in a case where no permission to appeal had been sought timeously, or obtained,

from the First-tier Tribunal, with the consequence that Rule 21(7) of the 2008 Rules, which has no application to this case, was engaged. In any event, no approach to the assessment of a request to extend time different to that put forward in *Onowu* and the cases underlying it was there posited. *Ahmed* was not a case where the Upper Tribunal was being criticised for refusing to accede to a request for extension of time, but for its substantive refusal of permission to appeal. In such circumstances the focus is very often and naturally on whether the Upper Tribunal erred in law by failing to recognise that the First-tier Tribunal had arguably fallen into error in some important respect. Here, the challenge would have to be specifically directed to the Upper Tribunal's refusal to extend time, a matter with which (per *Onowu*) the merits of the proposed appeal normally will have little to do.

[38] Far from being a case with real prospects of success, the proposed challenge would in any event have been likely to be productive of nothing more than precisely the kind of pointless and systemically harmful delay deprecated by the Senior President of Tribunals in *KM (Bangladesh)*.