R (on the application of Isaac Kimondo) v Secretary of State for the Home Department (relevant rules; AoS requirements) IJR [2014] UKUT 00565 (IAC)

In the Upper Tribunal
Immigration and Asylum Chamber

Date of hearing:
10 October 2014

In the matter of an application for judicial review

The Queen on the application of Isaac Ngatia Kimondo

v

The Secretary of State for the Home Department

Before the President, The Honourable Mr Justice McCloskey
and Upper Tribunal Judge Rintoul

Having considered the papers lodged by both parties, together with the oral and written submissions of Mr I Kumi (of Counsel), instructed by Whitworth and Green Solicitors, on behalf of the Applicant and Mr A Byass (of Counsel), instructed by the Treasury Solicitor, on behalf of the Respondent.

(1) In judicial review applications transferred by the Administrative Court to the Upper Tribunal, the applicable procedural regime is that contained in the Tribunal Procedure (Upper Tribunal) Rules 2008. The Civil Procedure Rules have no effect thereafter; although the procedural history may be significant, particularly as regards time limits.

(2) The prohibition in rule 29(3) on a party who has not filed an acknowledgement of service from taking part in the application permission (without the Upper Tribunal's permission) applies also to a party who has failed to provide a copy of the AoS to the applicant, as required by rule 29(2A).

Decision on Preliminary Issue

Introduction

1. This decision was precipitated by a preliminary issue which arose on the date when the Applicant's renewed application for permission to apply for judicial review was listed. The circumstances are set forth in our decision of

10 October 2014, attached hereto as an appendix. In brief compass, the Respondent having failed to serve the Acknowledgement of Service on the Applicant at the appropriate time, it was suggested on behalf of the Applicant that the effect of this was to disbar the Respondent from participating in the hearing. The issue having arisen in an *ad hoc* manner, we adjourned the hearing, with some reluctance, to enable both parties to provide written submissions (see our ruling appended hereto). These have been received and we have considered same.

2. This judicial review application was transferred from the Administrative Court to the Upper Tribunal. During its period of currency in the Administrative Court, the Respondent filed an Acknowledgement of Service ("*AoS*"), on 14 October 2013. On 31 October 2013, the Administrative Court refused permission on the papers, and simultaneously, acceded to the Respondent's application to extend time for service of its AOS. In due course, the oral renewal hearing was listed in this forum on 10 October 2014. On the previous day, the Applicant contacted the Respondent's solicitor, requesting a copy of the AOS, which was provided at once by electronic means.

3. The two issues upon which further argument was invited are:

   (a) The procedural regime applicable to judicial review cases transferred from the Administrative Court to the Upper Tribunal.

   (b) The consequence of the Respondent's failure to serve its AOS on the Applicant.

First Question: Governing Procedural Regime

4. The provisions of primary legislation relating to the transfer by the High Court to the Upper Tribunal of specified cases are contained in section 31A of the Senior Courts Act 1981 and section 18 of the Tribunals, Courts and Enforcement Act 2007. These are to be considered in conjunction with the Direction of the Lord Chief Justice of England and Wales made on 21 August 2013. In the present case, paragraph 2(ii) thereof is engaged viz permission to apply for judicial review was refused on paper between 09 September 2013 and 04 November 2013, with no oral renewal hearing having been convened between these dates.

5. The first of the two questions formulated is not addressed in either of the statutory provisions specified above or the Direction. Thus we turn to consider the relevant provisions of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "*2008 Rules*"). Rule 1, under the rubric "Citation, commencement, application and interpretation" is framed, so far as material, in the following terms:

> "*(2) These Rules apply to proceedings before the Upper Tribunal.*
>
> *(3) In these Rules -*
>
> *'The 2007 Act' means the Tribunals, Courts and Enforcement Act 2007 ……..*
>
> *'Applicant' means –*

(a) A person who applies for permission to bring, or does bring, judicial review proceedings before the Upper Tribunal and, in judicial review proceedings transferred to the Upper Tribunal from a Court, includes a person who was a claimant or petitioner in the proceedings immediately before they were transferred ……..

'Immigration judicial review proceedings' means judicial review proceedings which are designated as an immigration matter –

(a) In a direction made in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005 specifying a class of case for the purposes of section 18(6) of the 2007 Act; or

(b) In an order of the High Court in England and Wales made under section 31A(3) of the Senior Courts Act 1981, transferring to the Upper Tribunal an application of a kind described in section 31A(1) of that Act …..

'Judicial review proceedings' means proceedings within the jurisdiction of the Upper Tribunal pursuant to section 15 or 21 of the 2007 Act, whether such proceedings are started in the Upper Tribunal or transferred to the Upper Tribunal ….

'Respondent' means ……..

(c) In judicial review proceedings -

(i) In proceedings started in the Upper Tribunal, the person named by the Applicant as the Respondent;

(ii) In proceedings transferred to the Upper Tribunal under …….. section 31A(2) or (3) of the Supreme Court Act 1981, a person who was a Defendant in the proceedings immediately before they were transferred."

6. These provisions speak for themselves and, in our estimation, give rise to the following two propositions:

(i) In all judicial review proceedings, whether initiated in the Upper Tribunal or transferred to this forum from the Administration Court, the applicable procedural regime from the date of initiation or transfer is that enshrined in the 2008 Rules.

(ii) In transferred cases, the applicable procedural regime was that contained in the Civil Procedure Rules, specifically CPR54 and its associated Practice Directions, prior to transfer but not thereafter.

We consider this analysis straightforward and, insofar as any reinforcement is required, this is found in rule 27 of the 2008 Rules, which, under the rubric "Application of this part to judicial review proceedings transferred to the Upper Tribunal", states, in material part:

> "*(1) When a Court transfers judicial review proceedings to the Upper Tribunal, the Upper Tribunal –*
>
> *(a) Must notify each party in writing that the proceedings have been transferred to the Upper Tribunal; and*
>
> *(b) must give directions as to the future conduct of the proceedings.*"

For the sole purpose of directing attention to its existence, we draw attention also to rule 27(2);

> "*The directions given under paragraph (1)(b) may modify or disapply for the purposes of the proceedings any of the following rules in this Part.*"

7. Thus, as appears from the above, we answer the first of the two questions as follows. In judicial review cases transferred from the Administrative Court to the Upper Tribunal, the applicable procedural regime is that contained in the 2008 Rules. The provisions of the CPR have no effect from the date of transfer. The procedural history may, of course, be significant, particularly as regards time limits: compare CPR 54.5(1) and UT rule 28(2). We would add that each of these conclusions is strongly dictated by common sense and logic.

Second question: consequences of failure to serve an AOS on the Applicant

8. In the Upper Tribunal procedural regime, the Acknowledgement of Service (hereinafter described as the "*AOS*") is governed by rule 29 of the 2008 Rules, which provides:

> *"(1) A person who is sent [or provided with] a copy of an application for permission under rule 28(8) (application for permission to bring judicial review proceedings) [or rule 28A(2)(a) (special provisions for [immigration judicial review] proceedings)] and wishes to take part in the proceedings must [provide] to the Upper Tribunal an acknowledgement of service so that it is received no later than 21 days after the date on which the Upper Tribunal sent[, or in [immigration judicial review] proceedings the applicant provided,] a copy of the application to that person.*
>
> *(2) An acknowledgement of service under paragraph (1) must be in writing and state—*
>
> *(a) whether the person intends to [support or] oppose the application for permission;*
> *(b) their grounds for any [support or] opposition under sub-paragraph (a), or any other submission or information which it considers may assist the Upper Tribunal; and*
> *(c) the name and address of any other person not named in the application as a respondent or interested party whom the person providing the acknowledgement considers to be an interested party."*

An amendment of this rule was effected by Rule 9(b) of the Tribunal Procedure (Upper Tribunal) (Amendment) Rules 2011/2343, effective from 17 October 2011. This was designed to make special provision for what are now "immigration judicial review proceedings". Rule 29(2A) provides:

> "*In immigration judicial review proceedings, a person who provides an Acknowledgement of Service under paragraph (1) must also provide a copy to –*
>
> *(a) the applicant; and*
>
> *(b) any other person named in the application under rule 28(4)(a) or Acknowledgement of Service under paragraph 2(c) no later than the time specified in paragraph (1).*"

This is followed by rule 29(3):

> "*A person who is provided with a copy of an application for permission under rule 28(8) or 28A(2)(a) but does not provide an Acknowledgement of Service to the Upper Tribunal may not take part in the application for permission unless allowed to do so by the Upper Tribunal, but may take part in the subsequent proceedings if the application is successful.*"

For completeness, we include here rule *28(8) and rule 28A(2)(a):*

> *"***28(8)** *[Except where rule 28A(2)(a) (special provisions for [immigration judicial review] proceedings) applies,] when the Upper Tribunal receives the application it must send a copy of the application and any accompanying documents to each person named in the application as a respondent or interested party*."
>
> *"***28A**
> ...
> (2) *Within 9 days of making an application referred to in paragraph (1), an applicant must provide—*
> *(a) a copy of the application and any accompanying documents to each person named in the application as a respondent or an interested party; and… "*

9. Mr Byass, on behalf of the Respondent, founded his main submission on the language of rule 29(3) of the 2008 Rules. This provision contemplates the discretionary disbarment of the Respondent from participation in permission proceedings. This sanction applies, at the Upper Tribunal's discretion, where the Respondent "*does not provide an Acknowledgement of Service to the Upper Tribunal ….*". The burden of the Respondent's argument is that the words "*does not provide an Acknowledgement of Service to the Upper Tribunal*", which embody the condition for discretionary disbarment, do not extend to a failure to serve the AOS on the Applicant. Implicit in this argument is the further contention that this additional requirement cannot reasonably be implied. As a discrete aspect of this argument, reliance is placed on the comparable provisions of the CPR, 54.9, which, under the heading of "Failure to File Acknowledgement of Service", provides:

"**54.9**
(*1) Where a person served with the claim form has failed to file an acknowledgement of service in accordance with rule 54.8, he –*

(a) may not take part in a hearing to decide whether permission should be given unless the court allows him to do so; but

(b) provided he complies with rule 54.14 or any other direction of the court regarding the filing and service of –

(i) detailed grounds for contesting the claim or supporting it on additional grounds; and

(ii) any written evidence,

may take part in the hearing of the judicial review.

(2) Where that person takes part in the hearing of the judicial review, the court may take his failure to file an acknowledgement of service into account when deciding what order to make about costs.

(3) Rule 8.4 does not apply."

The able submissions of Mr Byass also drew attention to the purpose and function of the AOS, with reference to the decision of the Upper Tribunal in R (Kumar) – v – Secretary of State for the Home Department [2014] UKUT 104 (IAC), at [7] – [9] especially.

10. To summarise, the Respondent's argument is that the discretionary sanction of disbarment from participation in the permission hearing applies only where there has been a failure to lodge an AOS with the Upper Tribunal, but des not extend to cases where there has been a failure to serve same on the Applicant.

11. The riposte of Mr Kumi on behalf of the Applicant resolves to the following central contentions:

(i) The Respondent failed to comply with the order of the Administrative Court dated 31 October 2013 which, retrospectively, extended time for the "*service*" thereof to 14 October 2013.

(ii) CPR 54(8) addresses both filing and service of the AOS.

(iii) In the Administrative Court, it is implicit that any Respondent or interested party who attends a permission hearing absent an explicit direction from the Court does so on the risk of bearing its own costs.

(iv) The Upper Tribunal should also give effect to CPR Practice Direction 54A, paragraph 8.6 whereof provides:

> "*Where a Defendant or any party does attend a permission hearing, the court will not generally make an order for costs against the Claimant.*"

12. It is convenient to address each of the Applicant's submissions, *seriatim*:

(i) In a context where the Respondent's AOS was, belatedly, merely filed in the Administrative Court, but was not served on the Applicant, we accept the argument of Mr Byass that the order of the Administrative Court, made 17 days after the date of belated filing, must be construed as extending time for filing, rather than service, of the AOS. This analysis is reinforced by the distinction in CPR 54.8 between the separate acts of filing an AOS and serving same, each of which is governed by separate time limits.

(ii) The second of the Applicant's submissions is correct: however, given our primary conclusion, this is of no avail to the Applicant.

(iii) *Ditto* the third of the Applicant's submissions.

(iv) By reason of our conclusion in [7] above, the invitation to this Tribunal to give effect to a CPR Practice Direction is misconceived. Furthermore, this submission does not sound directly on either of the questions formulated in [3] above. However, it does not follow that the Upper Tribunal will not be guided by such instruments in matters of practice and procedure in appropriate cases.

13. We consider that the answer to the second question depends mainly upon the proper construction of rule 29(3) of the 2008 Rules. We are mindful of our duty, under rule 2(2), to "*seek to give effect to*" the overriding objective when engaged in the interpretation of any of the Rules. The overriding objective is formulated in the following terms:

> "**2** *(1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly.*
> *(2) Dealing with a case fairly and justly includes—*
> *(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;*
> *(b) avoiding unnecessary formality and seeking flexibility in the proceedings;*
> *(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;*
> *(d) using any special expertise of the Upper Tribunal effectively; and*
> *(e) avoiding delay, so far as compatible with proper consideration of the issues.*
> *(3) The Upper Tribunal must seek to give effect to the overriding objective when it—*
> *(a) exercises any power under these Rules; or*
> *(b) interprets any rule or practice direction.*
> *(4) Parties must—*
> *(a) help the Upper Tribunal to further the overriding objective; and*
> *(b) co-operate with the Upper Tribunal generally."*

The factual framework within which we are obliged to construe the relevant provision of the Rules **and** to give effect to the overriding objective is one wherein the Respondent delayed for approximately 1 year in serving the AOS on the Applicant and, when service was belatedly effected, did so on the eve of the oral permission hearing. In these circumstances, the constituents elements of the overriding objective which are engaged are:

(a) the imperative to deal with each case fairly and justly; and

(b) the related imperative of ensuring, so far as practicable, that the parties are able to participate fully in the proceedings.

14. In our judgment, the question to be determined is the following: does the sanction of discretionary disbarment from participation in the permission application where an AOS is not lodged with the Upper Tribunal extend to cases where an AOS is lodged with the Upper Tribunal but not served on

the Applicant, as required by rule 29(2A) of the 2008 Rules?[1]

15. The argument of Mr Byass, on behalf of the Respondent, drew attention to certain passages in the decision of the Upper Tribunal in R (Kumar) – v – Secretary of State for the Home Department [2014] UKUT 104 (IAC), particularly in [3]. Therein the important role of the AOS and summary grounds of defence is emphasised. This requires no elaboration. The thrust of the argument appeared to be that provided that an AOS is lodged with the Tribunal, it matters not that it is not served on the Applicant. We consider this argument misconceived. The framework of the relevant provisions of the 2008 Rules, which reflects elementary common law principles, is not confined to simply requiring that an AOS be served on the Applicant. It is, rather, designed to give effect to the principle that every litigant is entitled to be notified of the opposing party's case and, in this way, to participate actively and effectively in all relevant hearings before the Court or Tribunal concerned.

16. By rule 29(1), the Respondent must lodge an AOS with the Upper Tribunal within 21 days of service of an immigration judicial review application. Within this requirement of the Rules, considered in conjunction with rule 28(8) and rule 28A(2)(a), there are two specific obligations, bilateral in nature. First, the Applicant must serve an application for judicial review in immigration judicial review proceedings on the Respondent within the period specified. Second, the Respondent must lodge with the Upper Tribunal an AOS within the specified period. A third, related obligation, consistent with and consequential upon the first two, is imposed by rule 29(2)A, namely the Respondent must serve the AOS on the Applicant. Pursuant to this provision of the Rules, the Respondent must also serve a copy of the AOS on the Applicant. Thus both parties are subject to the basic duties of opposing litigants to be found in any sphere of contemporary litigation: the party claiming must serve its claim on the party against whom the claim is made and the latter, in turn, must serve its defence on the former.

17. One grafts on to this uncontroversial construction of the Rules those requirements of the overriding objective highlighted above. True it is that rule 29(3), on its face, confines the sanction of discretionary disbarment to cases where the Respondent has (merely) failed to lodge its AOS with the Upper Tribunal. Construed superficially and literally, this sanction does not extend to cases where the Respondent has lodged its AOS with the Upper Tribunal but has failed to serve same on the Applicant. The 2008 Rules are a measure of subordinate legislation, to be construed in accordance with conventional principles. Applying this approach, a requirement, provision or consequence may be imported by reasonable implication. Equally, by well established principle, the Rules must be construed so as to avoid an anomalous, or absurd, result. Furthermore, by virtue of the overriding objective, the substantive provisions of the 2008 Rules do not exist in a vacuum. Rather, when the task of construing them arises, the requirement to give effect to the overriding objective is not a matter of choice: it is, rather, a duty.

18. Accordingly, we conclude that the discretionary sanction enshrined in rule 29(3) of the 2008 Rules is not confined to cases where an AOS has not

[1] 29(2A) In [immigration judicial review] proceedings, a person who provides an acknowledgement of service under paragraph (1) must also provide a copy to—
(a) the applicant; and
(b) any other person named in the application under rule 28(4)(a) or acknowledgement of service under paragraph (2)(c)
no later than the time specified in paragraph (1).

been lodged with the Upper Tribunal. Rather, applying a purposive construction duly infused with the overriding objective, we are satisfied that this discretionary sanction extends to cases where the AOS has been lodged with the Tribunal but has not been served on the Applicant.

19. If we are wrong in this, our primary, conclusion on the second question, we are satisfied that the discretionary sanction of disbarment from participation in the permission proceedings is conferred on the Upper Tribunal by rule 7 of the 2008 rules, which provides, insofar as material:

> "*(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Upper Tribunal may take such action as it considers just, which may include –*
>
> *(a) waiving the requirement;*
>
> *(b) requiring the failure to be remedied;*
>
> *(c) exercising its power under rule 8 (striking out a party's case); or*
>
> *(d) except in a mental health case, an asylum or an immigration case, restricting a party's participation in the proceedings.*"

In this context, we draw attention to the words "*the proceedings*", juxtaposing same with the words "*the application for permission*" and "*the subsequent proceedings*" in rule 29(3). We are satisfied that there is a clear distinction between the permission stage (on the one hand) and the substantive stage (on the other) of judicial review proceedings. Giving effect to those provisions of the overriding objective highlighted above, we conclude that the discretionary power invested in the Upper Tribunal to "*take such action as it considers just*" in circumstances where the Respondent's failure to comply with the Rules consists of a failure to serve its AOS on the Applicant, timeously or at all, incorporates a power to disbar the Respondent from participating in any aspects of the permission stage of the proceedings.

Omnibus Conclusions

20. We conclude as follows:

(i) The discretionary sanction enshrined in rule 29(3) of the 2008 Rules whereby the Upper Tribunal is empowered to disbar from participation in a hearing a respondent who has failed to lodge an AOS extends to cases where the Respondent's AOS has been lodged with the Tribunal but has not been served on the Applicant.

(ii) Further, or in the alternative, the Upper Tribunal is empowered to impose this sanction by rule 7 of the 2008 Rules.

Costs

21. As we have ruled on the preliminary issue in the Applicant's favour, we consider that the Respondent should pay the Applicant's costs of the wasted hearing on 10 October 2014 and the further associated and

consequential costs.

Relisting

22. The oral renewal hearing will be rescheduled as quickly as possible.

Signed *Bernard McCloskey*

APPENDIX

IN THE UPPER TRIBUNAL

JR/276/2014

Field House,
Breams Buildings
London
EC4A 1WR

Friday, 10 October 2014

BEFORE

MR JUSTICE McCLOSKEY, PRESIDENT
JUDGE RINTOUL, UPPER TRIBUNAL JUDGE

Between

ISAAC NGATIA KIMONDO

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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For the Applicant: Mr I Kumi (of Counsel), Whitworth & Green Solicitors.

For the Respondent: Mr A Byass(of Counsel), instructed by the Treasury Solicitor.

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APPLICATION FOR PERMISSION
JUDGMENT

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THE PRESIDENT, MR JUSTICE McCLOSKEY

1. From somewhat unpromising beginnings, this renewed permission application has raised two points of practice which are rather important. The first is: which procedural rules regime applies in the cohort of judicial review cases in the

Upper Tribunal which has been transferred from the Administrative Court? This case is one of the automatic November 2013 transfers, on account of its history.

2. The second question concerns the consequences to be attributed to a failure to serve the Acknowledgement of Service on the Claimant at the appropriate time. The fact of this failure in the present case is the only proper construction, it seems to us, of the second paragraph of the letter of 09 October 2014 from the Treasury Solicitor's office. This raises the issues of (a) costs and (b) the Secretary of State's right to be heard at the oral permission hearing. The second issue will be dictated by the first to the following extent. If the CPR applies then, of course, there are specific relevant rules. However, if the CPR does not apply then we will have to consider the Upper Tribunal Rules, together with considerations of good practice and the overriding objective.

3. While we are not happy about delaying the outcome of the oral renewal, our preferred course is to make a considered ruling on the aforementioned issues. To summarise, the two issues are:

(i) which procedural regime applies to transferred cases?

(ii) what right of audience, if any, does the Secretary of State have in circumstances where it is accepted that the Acknowledgement of Service was not served on the Applicant?

I recall that the second of these questions, albeit in slightly different terms, was considered in a decision of Mr Justice Ouseley some months ago. My recollection, far from infallible, is that the relevant CPR provisions are CPR 54 Rules 8 and 9

4. We direct both parties to file a written submission within seven days.

5. There is of course a risk that the Respondent may have to ultimately bear the costs for the obvious reason that it is conceded that the Acknowledgement of Service was not served until yesterday. While that may have some irresistible costs consequences, we are unable to form a final view at this stage.

6. The terms of our ruling on the above issues in due course will dictate the further course of the renewed permission application before the Tribunal. If any further directions are required they will be contained in the ruling. The aspiration of the Tribunal would be to bring this case back into its lists as quickly as possible.

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