IN THE UPPER TRIBUNAL

R (on the application of Jowanski Muwonge) v Secretary of State for the Home Department(consent orders: costs: guidance)IJR [2014] UKUT 00514(IAC)

Field House
Breams Buildings
London

Friday, 10 October 2014

BEFORE

MR JUSTICE McCLOSKEY, PRESIDENT
UPPER TRIBUNAL JUDGE RINTOUL

Between

JOWANSKI MUWONGE

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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For the Applicant: Mr Muwonge in person.

For the Respondent: Miss C V Overdijk (of Counsel), instructed by the Treasury Solicitor.

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APPLICATION FOR PERMISSION
JUDGMENT

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THE PRESIDENT, MR JUSTICE McCLOSKEY

(i) *There appears to be a practice, relatively entrenched, whereby an AOS which contains a concession, with or without an accompanying draft consent order, incorporates a claim for costs,*

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liquidated or otherwise. In most cases, the claim for costs has no justification.

(ii) *There may be cases, likely to be small in number, where an AOS which embodies a concession on behalf of the Secretary of State, with or without an accompanying draft consent order, justifiably and reasonably incorporates a claim for costs. In such cases, good practice dictates that the AOS should state, briefly, the justification for such claim.*

(iii) *Where a draft consent order is tabled, both parties should proactively take all necessary and appropriate steps designed to achieve consensual resolution within a period of (at most) three weeks.*

(iv) *Where consensual resolution is not achieved within the timescale recommended above, this should operate as a bilateral incentive to redouble efforts to do so.*

(v) *In every case possessing the factor of an unexecuted draft consent order, it is essential to provide the Upper Tribunal with each party's explanation, brief and focussed, for non-execution. This explanation should be provided by both parties, in writing:*

(a) *Within four weeks of the date of the AOS or, if different, the date of receipt of the draft consent order.*

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(b) *Where a case is listed, not later than five clear working days in advance of the listing date.*

(c) *In cases where there is any material alteration or evolution in the terms of the explanation, not later than two clear days in advance of the listing date.*

(vi) *It is recognised that, exceptionally, there may be cases in which <u>for good and sustainable reasons</u> a consent order cannot be reasonably executed until a very late stage indeed, postdating the periods and landmarks noted above. However, the experience of the Upper Tribunal to date is that consent orders are very frequently not executed and presented to the Tribunal for approval until the last moment, frequently late on the day before the scheduled hearing <u>and</u> that no good reason is proffered for the parties' failure to do so at an earlier stage. This practice is unacceptable.*

(vii) *The practice whereby executed consent orders materialise during the period of 48 hours prior to the listing date is unsatisfactory and unacceptable in the great majority of cases. The Upper Tribunal recognises that there may be a small number of cases where, exceptionally, this is unavoidable.*

(viii) *In matters of this kind, parties and their representatives are strongly encouraged to communicate <u>electronically</u> with the Tribunal and, further, to seek confirmation that important*

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communications and/or attachments have been received.

(ix) *In determining issues of costs, Upper Tribunal Judges will take into account the extent to which the recommendations and exhortations tabulated above have been observed and will scrutinise closely every explanation and justification proffered for non-compliance.*

Prologue

[1] "*Rightly to be great is not to stir without great argument, but greatly to find quarrel in a straw when honour's at the stake*".

[Hamlet, Prince of Denmark, Act IV, Scene(v)]

The Prince of Denmark, the great procrastinator, who, with plentiful motive to avenge his father's murder by the honour killing of the murderer, King Claudius, but had consistently vacillated, was in awe and admiration of a Norwegian prince. Fortinbras assembled a mighty army and marched on the kingdom of Poland, the purpose being "*to gain a little patch of ground that hath in it no profit but the name*". This passage in one of the great Shakespearean soliloquies resonates and reverberates in the events which unfolded in the present proceedings. The tale which follows also confirms the adage that truth is indeed stranger than fiction.

The Plot

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[2] Mr Jowanski Muwonge, the Applicant in these proceedings, is a Ugandan national and the father of two Ugandan national children. Being dissatisfied with a decision on the part of the Secretary of State for the Home Department (the "*Secretary of State*") to refuse him leave to remain in the United Kingdom and the unappealable nature of the decision to remove him to his country of origin, Mr Muwonge brought judicial review proceedings. He did so expeditiously and without a lawyer. He was an unrepresented litigant from beginning to end. He began proceedings, in the Administrative Court, in September 2013. An automatic transfer to the Upper Tribunal occurred, in November 2013.

[3] In March 2014, in a substantially delayed Acknowledgement of Service ("AOS"), a draft Consent Order was appended, in the following terms:

> "**Upon the Defendant** *within three months of the date of the sealed order agreeing to reconsider the Claimant's case; and*
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> **Upon the Defendant** *agreeing that if following such consideration the Defendant maintains her decision that the Claimant should not be granted any form of leave to remain she will issue the Claimant with a notice to remove the Claimant, thereby giving rise to a right of appeal.*
>
> **By consent, it is ordered***:*
>
> *1. The Claimant do have leave to withdraw this judicial review application; and*

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2. *The Claimant to pay the Defendant's costs of filing her Acknowledgement of Service (in the sum of £90.00) based on one hour at £90.00 per hour".*

This draft consent order is linked to the following passage in the AOS:

> *"The Claimant has not sent a PAP letter but now indicates with their grounds for judicial review that they should be issued with a Notice of Removal/ granted a right of appeal. The Defendant …… is satisfied that her policy applies to the Claimant and that the Claimant falls into one of the categories in which she has agreed to issue a removal. Therefore the Defendant hereby agrees that she will within three months of the date of the sealed order consider, or reconsider, any relevant factors, including Article 8 ECHR and Section 55 of the Borders, Citizenship and Immigration Act 2009 (if relevant) ……".*

The remainder of this passage essentially repeats the draft consent order attached. It is appropriate to interpose at this stage that, at the hearing, it was accepted on behalf of the Secretary of State that, contrary to the assertion in the AOS, a "PAP" letter had indeed been transmitted by the Applicant before initiating proceedings.

[4] The AOS contains an acknowledgement that a relevant policy of the Secretary of State applies to the Applicant who, by virtue of his membership of a particular category, was one of those persons entitled to receive an appealable removal decision. The policy in question is contained in the Home Office publication "Requests for Removal Decisions", the current version whereof has been operative since 20 October

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2014. The earlier version of this policy which applied to the Applicant is dated 13 February 2012. As its contents make clear, the publication is a combination of a published government policy relating to removal decisions and guidance to case workers and decision makers. The Applicant's case satisfied the first of the five additional qualifying criteria viz "*the refused application for leave to remain included a dependant child under 18 resident in the UK for 3 years or more*". The Applicant is the father of two children, also Ugandan nationals. It was accepted at the hearing that this qualifying criterion was satisfied, as the following extract from Ms Overdijk's skeleton argument confirms:

> "*The SSHD accepts that the* [Applicant] *meets the criteria set out in this policy as:*
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> *(i) he has made a valid but out of time application for leave to remain that has been refused;*
>
> *(ii) he has not received a removal decision when the application for leave was refused;*
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> *(iii) he has failed to leave the UK voluntarily; and*
>
> *(iv) he has requested in a PAP, or letter before action, that a removal decision is made"*

This confirmed the acceptance already enshrined in the AOS.

[5] During the intervening seven months, following service of the AOS, the case progressed and had to be processed by a variety of actors – Mr Muwonge, the Secretary of State's legal team, the Upper Tribunal administration and an Upper

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Tribunal Judge who, in July 2014, made an order containing the following ingredients:

(a) the permission application was adjourned to be listed for an oral *inter-partes* hearing, with a time estimate of 30 minutes.

(b) the Applicant was required to lodge and file a skeleton argument at least seven days in advance of the hearing.

(c) the Respondent was required to do likewise at least three days before the hearing.

There was no further pre-hearing order.

[6] In the course of the same period, some two months before the listing, an exchange of correspondence between Mr Muwonge and the Treasury Solicitor's Department established that the former had two enduring concerns. First, he queried why, given the extensive elapse of time which had occurred already, the reconsideration of the impugned decision would be delayed for a further period of three months. Second, he questioned why, in the circumstances which had materialised, he should have to pay the Secretary of State legal costs of £90.00. In doing so he, pertinently, drew attention to the decision of the Court of Appeal in M v Croydon [2012] EWCA Civ 595. He contended, in terms, that by reason of the AOS and draft consent order he had been wholly successful and, therefore, should not have to account for any of the

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Respondent's costs. Regrettably, this letter received no response. Thus the Secretary of State was maintaining the stance adopted in the AOS and draft order, as reiterated in an earlier letter dated 30 July 2014 which had enclosed a further copy of the draft consent order and sternly warned:

"Should you choose not to agree to withdraw the proceedings, instead allowing the matter to proceed to a permission hearing …… then the Secretary of State will seek to recover her costs at the hearing".

The Applicant rejoined, in the terms summarised above. His carefully and thoughtfully composed letter was either not considered worthy of a response or was overlooked.

[7] Seven months following service of the AOS, their differences unresolved, these two litigants, veritable latter day incarnations of the biblical figures David and Goliath, presented themselves to the Upper Tribunal. Theirs was one of nine cases initially listed for hearing on the date in question, 10 October 2014. It was listed as a permission application which had been adjourned into Court by a Judge following consideration of the papers.

The Hearing

[8] Thereafter, the case was given a listing and Counsel was instructed to represent the Secretary of State. Having regard to the Upper Tribunal's order, skeleton arguments from both parties had to be prepared and these were duly exchanged and lodged. The hearing ensued, on 10 October 2014. Mr Muwonge attended in person, accompanied by a

"McKenzie" friend. In attendance on behalf of the Secretary of State were solicitor and Counsel, Ms Overdijk.

[9] On any rational analysis, Mr Muwonge could not have expected that he would, literally, have to pay a price for exercising his constitutional right of access to a court and securing a surrender by the Secretary of State. Nor could he have anticipated incurring the wrath and might of the State to the extent that he was driven into court in order to secure judicial adjudication of the Secretary of State's entitlement to levy the financial charge in question. By the date of judicial adjudication, the plot had thickened with a further twist. In consequence of the Secretary of State's engagement of Counsel, the price had risen steeply, from £90.00 to £600.00, to reflect the cost of Counsel's skeleton argument and attendance. At the hearing, the Tribunal was requested on behalf of the Secretary of State to make an order dismissing Mr Muwonge's application for judicial review and ordering that he pay the Secretary of State's legal costs of £610.00. We observe that an order in these terms would neither mention nor annex the AOS or its accompanying draft consent order. It would have left Mr Muwonge exposed and unprotected.

[10] Having considered the representations of both parties, we were able to pronounce our decision and make an immediate order disposing of the proceedings. This took the form of the Tribunal approving a revised version of the draft consent order which the Acknowledgement of Service had attached. The Tribunal proactively initiated, and completed, the process of developing the Secretary of State's draft order in two modest respects, having considered the representations of both parties. In doing so, it exercised its powers under Rules 17 and 39 of the

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Tribunal Procedure (Upper Tribunal) Rules 2008 and gave the fullest effect possible to the overriding objective, enshrined in rule 2. The two modest modifications of the Secretary of State's draft order consisted of reducing to four weeks from three months the reconsideration period, time to run from the date of the hearing and, secondly, making no order as to costs *inter-partes*.

Commentary

[11] To summarise, Mr Muwonge, having had the courage and enterprise to bring legal proceedings, unrepresented and bereft of legal training or qualifications, exposed an unlawful decision by the Secretary of State impacting adversely on him. The illegality of the impugned decision consisted of a failure by the Secretary of State to make an appealable removal decision in accordance with the policy rehearsed above. We consider this analysis unassailable. Moreover, the illegality of the decision was formally acknowledged on behalf of the Secretary of State in the AOS. This acknowledgement was made in substance by a commitment that the unlawful decision would be voluntarily rescinded and, following reconsideration, made afresh, coupled with an undertaking to make a new, appealable decision in the event of the earlier one being unchanged. We consider the only tenable analysis to be that Mr Muwonge was, in substance, the victor.

[12] How this case reached the stage of a substantive listing defies both logic and reason. There was a concession in Secretary of State's AOS. We consider that the effect of this concession was that the Applicant's act of initiating proceedings was fully vindicated. Notwithstanding Ms Overdijk's courageous submission to the contrary, no other

analysis, sensibly or realistically, is possible. Properly analysed, the terms of the concession were that having regard to her policy the Secretary of State had acted unlawfully in making an unappealable decision to refuse leave for Mr Muwonge to remain in the United Kingdom. The effect of her policy was that the Secretary of State was, rather, required to make an appealable decision. She failed to do so and acted unlawfully in consequence. She was now proposing a means of rectification and atonement.

[13] Following upon the lodgement of the overdue AOS, the Secretary of State maintained the stance expressed therein and in the accompanying draft order. This resulted in a steadfast refusal to take the glaringly obvious step of withdrawing the totally unjustified demand that in consideration of the commitment to reconsider the impugned decision and the remainder of the package proposed, the Applicant pay her £90.00. This has resulted in a quite extraordinary state of affairs, as outlined above.

[14] As appears from [5] above, the outcome of the permission hearing was a revised consent order, in the terms indicated. We make clear that if the revised consent order had not materialised we would not have acceded to the Secretary of State's application for an order dismissing Mr Muwonge's application for permission. If the mechanism of a revised consent order had not eventuated, for whatever reason, our order, reflecting the particular circumstances of this case, would have been a grant of permission to apply for judicial review, with accompanying directions designed to ensure a swift final disposal. The second element of the Secretary of State's application to the Tribunal was, as noted above, an application for costs against the Applicant. We consider this application for

costs utterly hopeless. Some might describe it as audacious. We are unable to conceive of a less meritorious claim for costs. If Mr Muwonge had been legally represented, we would, without hesitation, have ordered the Secretary of State to pay his legal costs and outlays in full. We would also have given serious consideration to ordering that such costs be paid on an indemnity basis.

[15] We received no argument on the issue of whether an order can be made requiring a Respondent to pay the costs of an unrepresented applicant in judicial review proceedings. We would, however, draw attention to the decision of the Northern Ireland High Court in Morrow – v – Chief Constable of Strathclyde Police [2011] NIQB 6 in which, having referred to the relevant local rules and the English CPR48.6, the Court stated:

> "*It would be unsurprising if a majority of practitioners and courts have little or no familiarity with* [this rule]*. There may well be a perception abroad that personal litigants do not incur – and, therefore, are not entitled to recover – legal costs, for the simple reason that they have no legal representation. They elect, rather, to represent themselves. If such perception exists, it is incorrect …..*
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> *The English rule is the same: see CPR48.6(2) above. In Cook on Costs 2010, it is noted that a personal litigant can recover, for example, the cost arising out of engaging a properly instructed expert witness (see paragraph 38.7). It may also be possible to recover the costs of solicitors and/or Counsel properly instructed at an earlier stage."*

This judgment also notes the distinction between disbursements and a solicitor's professional fees. We confine ourselves to drawing attention to this issue and express no concluded view thereon.

[16] Miss Overdijk is entirely blameless in this remarkable and regrettable saga. It was apparent to us that she was instructed only recently and she has confirmed this. We have derived much assistance not only from her skeleton argument but also from her candid and professionally correct engagement with the court.

Guidance

[17] Upon the first anniversary of the landmark extension of the Upper Tribunal's jurisdiction to incorporate the vast majority of all immigration and asylum judicial reviews previously within the remit of the Administrative Court, it is timely to take stock. In our newly conferred judicial review jurisdiction, Judges of this Tribunal have been alert to detect recurring unsatisfactory practices and trends. Some of these are typified in the present case. We take this opportunity to promulgate the following general guidance:

(i) There appears to be a practice, relatively entrenched, whereby an AOS which contains a concession, with or without an accompanying draft consent order, incorporates a claim for costs, liquidated or otherwise. This occurs typically in cases of the present kind. Other cases in which it commonly occurs are those in which a failure to acknowledge, or consider, a relevant child or

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children, in contravention of section 55 of the Borders, Citizens and Immigration Act 2009, is conceded. In most cases, the claim for costs has no justification. The consistent experience of this Tribunal is that this practice obstructs and delays and, sometimes, prevents consensual resolution of the parties' differences. It promotes the so-called unholy trinity of elevated costs, unnecessary complexity and avoidable delay. Simultaneously, it is antithetical to the overriding objective. I consider this a highly unsatisfactory practice and urge its swift reconsideration and abandonment.

(ii) There may be cases, likely to be small in number, where an AOS which embodies a concession on behalf of the Secretary of State, with or without an accompanying draft consent order, justifiably and reasonably incorporates a claim for costs. In such cases, good practice dictates that the AOS should state, briefly, the justification for such claim.

(iii) The practice, also well entrenched, whereby draft consent orders fester and gather dust in the offices of the parties and their representatives is to be deprecated. Where a draft consent order is tabled, both parties should proactively take all necessary and appropriate steps designed to achieve consensual resolution within a period of three weeks. This period will, of necessity, be considerably shorter in certain contexts.

(iv) Where consensual resolution is not achieved within the timescale recommended above, this should

operate as a bilateral incentive to redouble efforts to do so.

(v) In every case possessing the factor of an unexecuted draft consent order, it is essential to provide the Upper Tribunal with each party's explanation, brief and focussed, for non-execution. This explanation should be provided by both parties, in writing:

(a) Within four weeks of the date of the AOS or, if different, the date of receipt of the draft consent order.

(b) Where a case is listed, not later than five clear working days in advance of the listing date.

(c) In cases where there is any material alteration or evolution in the terms of the explanation, not later than two clear days in advance of the listing date.

(vi) It is recognised that, exceptionally, there may be cases in which for good and sustainable reasons a consent order cannot be reasonably executed until a very late stage indeed, postdating the periods and landmarks noted above. However, the experience of the Upper Tribunal to date is that consent orders are very frequently not executed and presented to the Tribunal for approval until the last moment, frequently late on the day before the scheduled hearing and that no good reason is proffered for

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the parties' failure to do so at an earlier stage. This practice is unacceptable.

(vii) The practice whereby executed consent orders materialise during the period of 48 hours prior to the listing date is unsatisfactory and unacceptable in the great majority of cases. The Upper Tribunal recognises that there may be a small number of cases where, exceptionally, this is unavoidable. In all such cases, it is essential that the communication of the executed consent order to the Tribunal incorporate a brief explanation of the timing. Parties must realise henceforth that, almost invariably, the increasingly beleaguered and threatened resource of judicial preparation time, in advance of a judicial review list typically containing nine cases, will have been irrevocably expended prior to the beginning of the 48 hour period immediately preceding the listing date.

(viii) In matters of this kind, parties and their representatives are strongly encouraged to communicate electronically with the Tribunal and, further, to seek confirmation that important communications and/or attachments have been received. Additionally, where the parties are aware of the identity of the designated Judge (for example, in an adjourned or part heard case), communications with the Tribunal must highlight this.

(ix) In determining issues of costs, Upper Tribunal Judges will take into account the extent to which the recommendations and exhortations tabulated

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above have been observed and will scrutinise closely every explanation and justification proffered for non-compliance.

[18] We are confident that adherence to the practices described above will promote the values of efficiency, expedition and reducing expense and will, thereby, be of utility to litigants and practitioners.

[19] Practitioners will be familiar with the Administrative Court Guidance entitled "*How the Parties should assist the Court when Applications for Costs are made following Settlement of Claims for Judicial Review*", promulgated in December 2013 and applicable to all consent orders submitted for approval by the Court after 13 January 2014. We endorse the exhortation in [4] that "*efficiency and co-operation from the parties*" are required in every case. We further endorse the following three paragraphs:

> "*[5] The onus lies on the parties to reach agreement on costs wherever possible and in advance of asking the Court to resolve the issues, in order to support the overriding objective and ensure that sufficient use is made of judicial time. See M – v – Croydon Borough Council [2012] EWCA Civ 595, [75] – [77].*
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> *[6] The parties should not make submissions to the Court on costs following a compromise of the proceedings without seeking to agree the allocation of costs through reasoned negotiation, applying these principles, mindful of the overriding objective in the CPR and the amount of costs actually at stake. This should give them a clear*

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understanding of the basis upon which they have failed to reach agreement, so as to focus their submissions to the Court on the points in dispute.

[7] Liability for costs between the parties will depend on the specific facts in each case but the principles are set out in M – v – Croydon [59] – [63]."

[20] A proliferation of unresolved costs disputes has the potential to generate a highly undesirable cottage industry. This furthers no identifiable interest of any kind. Notwithstanding, the Upper Tribunal will, of course, adjudicate on costs disputes – which should, in practice, be rare – in those cases where the principles, practices and standards outlined above, conscientiously observed, have failed to achieve consensual resolution.

Epilogue

[21] The Prince of Denmark drew inspiration from the event unfolding before his fascinated gaze. It was a cause of admiration approaching awe. At this point, however, the comparison with this litigation ends abruptly. There is a world of difference between the cabbage patch in 13th century Poland and the spiralling events in the present case. There is nothing to admire in the tale told above. Every battle generates causalities. Mr Muwonge undoubtedly attracts this appellation, given the delays, frustration and wasted resources which he has suffered notwithstanding the early surrender he secured, to no practical avail and his ultimate success. However, and sadly, the major casualties in this litigation are the overriding objective,

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which was truly bruised and battered and the principle of proportionality, which has emerged wilting and shaken, bloodied but unbowed. Lessons must be learned.

Order

[22] We reject the Secretary of State's application for an order to dismiss. We conclude that the fair, just and reasonable disposal of these proceedings is to approve the draft consent order, duly revised so as to incorporate the following terms:

(i) The Secretary of State hereby rescinds the decision under challenge and will, within four weeks of 10 October 2014, make a fresh decision. In the event of the Secretary of State maintaining the impugned decision, the Applicant will be served with removal directions, thereby generating a right of appeal.

(ii) There is no order as to costs *inter – partes*.

(iii) Liberty to apply, in writing and on notice to the other party.