Upper Tribunal
(Immigration and Asylum Chamber)

R(on the application of Kumar and Another) v Secretary of State for the Home Department (acknowledgement of service; Tribunal arrangements) IJR [2014] UKUT 00104 (IAC)

Heard at Field House

On 20 January 2014

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Before

MR C M G OCKELTON, VICE PRESIDENT OF THE IMMIGRATION AND ASYLUM CHAMBER OF THE UPPER TRIBUNAL

UPPER TRIBUNAL JUDGE PETER LANE

Between

THE QUEEN ON THE APPLICATION OF

(1) RAJEEV KUMAR

(2) CHRISTOPHER YEBOAH

Applicants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appearances :

For the Applicants: Mr D O'Callaghan, Counsel, instructed by Duncan Lewis Solicitors

For the Respondent: Ms C Patry, Counsel, instructed by the Treasury Solicitor

In the light of the continuing inability of the Secretary of State to file acknowledgements of service in immigration judicial review proceedings within the time limit contained in the Tribunal Procedure (Upper Tribunal) Rules 2008 and in the light of the general guidance given by the High Court in R (on the application of Singh and Others) v Secretary of State for the Home Department [2013] EWHC 2873 (Admin), the following general arrangements (which will be kept under review) apply in the Immigration and Asylum Chamber of the Upper Tribunal.

(1) The Tribunal will, in immigration judicial reviews, regard an Acknowledgement of Service filed within six weeks of service of the claim on the Secretary of State as falling routinely for consideration

and will not undertake an initial consideration of the judicial review application before the end of that six week period.

(2) The Tribunal will undertake a consideration of that application earlier than the end of the period mentioned in paragraph (1) above ("the six week period"):-

(a) where the Tribunal considers it appropriate to do so, in response to:-

(i) an application for urgent consideration filed by the applicant (on Form T483); or

(ii) a notice in writing from the applicant, copied to the Secretary of State, which states the need for urgency and the proposed timescale for considering the application; and

(b) in response to a request by the Secretary of State for expedition, pursuant to an arrangement between her and the Chamber President.

(3) Where a stay on removal or other form of interim injunctive relief is sought, an application for urgent consideration on Form T483 must be made, complying with Practice Directions 11 and 12 and accompanied by any requisite fee.

(4) In view of paragraphs (1) and (2) above, the Tribunal will not consider it necessary for the Secretary of State to apply for an extension of the 21 day time limit in rule 29(1), unless she considers she is unable to file an AoS and summary grounds before the expiry of the six week period. In such a case, the Secretary of State must make an application for extension of time, on 72 hours notice to the applicant, which satisfies the requirements set out by Hickinbottom J at [25] of Singh; that is to say, there must be compelling reasons specific to the case as to why further time is needed, together with a firm promise as to when the AoS and summary grounds will be filed. The application should include the judicial review applicant's response (or lack of response) to the application for extension of time.

(5) The Secretary of State should not make an application for an extension of time for filing an AoS, which she knows cannot satisfy the ' Singh ' requirements.

(6) In every case, not later than the end of the six week period, the Secretary of State will be expected to file with the Tribunal (and serve on the applicant) either a copy of the written response of the Secretary of State to the applicant's pre-action protocol letter or written confirmation that no such written response was sent to the applicant. This requirement does not absolve the Secretary of State from filing an AoS and summary grounds, where she wishes to take part in the proceedings.

(7) Except as provided in paragraph (2) above or where time is extended in response to an application by the Secretary of State for extension of time, the parties can expect the Tribunal to consider the judicial review application at any time after the expiry of the six week period. This will be so, whether or not an AoS and summary grounds have been filed, unless the judge considering the application is of the view that there are particular reasons (such as potentially significant factual matters) why the Secretary of State should be specifically directed to file an AoS and summary grounds.

(8) As a general matter, the Secretary of State will be vulnerable to an application for costs in respect of an oral hearing held pursuant to rule 30(4) made by an unsuccessful judicial review applicant, where:-

(a) the application to bring judicial review proceedings was refused on the papers without the benefit of an AoS and summary grounds; and

(b) the Tribunal considers that, had those grounds then been available, the application would have been recorded as being totally without merit.

(9) Where permission was granted without the benefit of an AoS and summary grounds, the Secretary of State will ordinarily be liable to pay the applicant's costs, up to the point when the Secretary of State's detailed grounds are filed, regardless of the ultimate fate of the judicial review application.

DECISION

1. Introduction

1. On 1 November 2013, the Immigration and Asylum Chamber of the Upper Tribunal assumed jurisdiction in respect of a wide range of applications for judicial review of immigration and related decisions taken (for the most part) by the Secretary of State for the Home Department [1] . Pursuant to the Tribunals, Courts and Enforcement Act 2007 and various enactments and instruments made under it, the Chamber has "original" judicial review jurisdiction in those classes of case falling within the direction made by the Lord Chief Justice on 21 August 2013. In addition, any application for judicial review falling within those classes must, if filed with the High Court, be transferred by that Court to the Upper Tribunal (section 31A(2) of the Senior Courts Act 1981). The effect of the direction was such that, on 1 November 2013, a large number of applications, originally made to the High Court, were transferred to this Chamber.

2. On 17 September 2013, Hickinbottom J gave judgment in R (on the application of Singh and Others) v Secretary of State for the Home Department [2013] EWHC 2873 (Admin) (" Singh "). In that judgment, general guidance was given as to the approach the Administrative Court could be expected to adopt where, in an immigration judicial review, the respondent Secretary of State has not filed an acknowledgment of service (AoS), accompanied by summary grounds of defence ("summary grounds"), within 21 days of being served with a claim for judicial review. CPR 54.8(1) provides that a defendant or other person wishing to take part in a judicial review "must file an acknowledgment of service …" and CPR 54.8(2)(a) requires this to be done "not more than 21 days after service of the claim form".

3. The need for guidance in Singh arose because, by the summer of 2013, it had become apparent that the Secretary of State was, in practice, unable in very many instances to serve an AoS within the required time limit, even though she wished to oppose the judicial review application. This, in turn, had led judges and deputy judges of the High Court to respond in various ways, including granting the respondent's applications for extensions of time to serve the AoS, determining the judicial review application without the AoS and adjourning such applications into open court.

4. The problems described in Singh have, since 1 November 2013, been routinely faced by this Chamber. Both of the cases before us are ones where the respondent was unable to serve an AoS, either within 21 days of service of the judicial review application on her or for a considerable period thereafter. The cases were considered to be suitable for hearing argument on the general approach to be adopted where an AoS is not filed within the 21 day period, which is also the period specified in rule 29(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Upper Tribunal Rules") for filing an AoS (see paragraph 6 below).

5. On 20 January 2014, we heard submissions on these matters from Mr O'Callaghan, on behalf of the applicants, and Ms Patry, on behalf of the respondent (hereafter the Secretary of State). We wish to record our gratitude to Counsel and to those respectively instructing them for assisting the Tribunal, both in written and oral submissions. In the event, nothing specific requires to be said in this decision about the cases of Mr Kumar or Mr Yeboah, save that each application will hereafter be considered on the papers by an Upper Tribunal judge.

2. The relevant Upper Tribunal Rules

6. For our purposes, the following provisions of the Upper Tribunal Rules are relevant:-

“ **1. Citation, commencement, application and interpretation**

…

“applicant” means 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 Tribunals, Courts and Enforcement Act 2007; 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.

…

“party” means a person who is … an applicant, a respondent or an interested party in proceedings before 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;

…

2. Overriding objective and parties’ obligation to co-operate with the Upper Tribunal

(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.

…

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.

(2) The Upper Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(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.

(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;

…

(d) … restricting a party’s participation in the proceedings.

…

28. Applications for permission to bring judicial review proceedings

(1) A person seeking permission to bring judicial review proceedings before the Upper Tribunal under section 16 of the 2007 Act must make a written application to the Upper Tribunal for such permission.

(2) Subject to paragraph (3), an application under paragraph (1) must be made promptly and, unless any other enactment specifies a shorter time limit, must be sent or delivered to the Upper Tribunal so that it is received no later than 3 months after the date of the decision to which the application relates.

…

(4) The application must state—

(a) the name and address of the applicant, the respondent and any other person whom the applicant considers to be an interested party;

(b) the name and address of the applicant's representative (if any);

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

(d) details of the decision challenged (including the date, the full reference and the identity of the decision maker);

(e) that the application is for permission to bring judicial review proceedings;

(f) the outcome that the applicant is seeking; and

(g) the facts and grounds on which the applicant relies.

…

(6) The applicant must send with the application—

(a) a copy of any written record of the decision in the applicant's possession or control; and

(b) copies of any other documents in the applicant's possession or control on which the applicant intends to rely.

(7) If the applicant provides the application to the Upper Tribunal later than the time required by paragraph (2) or (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.

…

28A. Special provisions for immigration judicial review proceedings

…

(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

(b) the Upper Tribunal with a written statement of when and how this was done."

29. Acknowledgment of service

(1) A person who is sent 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 send or deliver to the Upper Tribunal an acknowledgment of service so that it is received no later than 21 days after the date on which the Upper Tribunal sent a copy of the application to that person.

(2) An acknowledgment of service under paragraph (1) must be in writing and state—

(a) whether the person intends to oppose the application for permission;

(b) their grounds for any support or opposition under sub-paragraph (a), or any other submission or information which they consider 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.

(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).

(3) A person who is sent a copy of an application for permission under rule 28(8) but does not provide an acknowledgment of service may not take part in the application for permission, but may take part in the subsequent proceedings if the application is successful.

30. Decision on permission or summary dismissal, and reconsideration of permission or summary dismissal at a hearing

…

(3) Paragraph (4) applies where the Upper Tribunal, without a hearing—

(a) determines an application for permission to bring judicial review proceedings and either refuses permission, or gives permission on limited grounds or subject to conditions; or

(b) in proceedings transferred from the Court of Session, summarily dismisses part or all of the proceedings, or imposes any limitations or conditions on the continuation of such proceedings.

(4) Subject to paragraph (4A), in the circumstances specified in paragraph (3) the applicant may apply for the decision to be reconsidered at a hearing.

(4A) Where the Upper Tribunal refuses permission to bring immigration judicial review proceedings and considers the application to be totally without merit, it shall record that fact in its decision notice

and in those circumstances the applicant may not request the decision to be reconsidered at a hearing.

…

33. Right to make representations

Each party and, with the permission of the Upper Tribunal, any other person, may—

(a) submit evidence, except at the hearing of an application for permission;

(b) make representations at any hearing which they are entitled to attend; and

(c) make written representations in relation to a decision to be made without a hearing."

3. The importance of an Acknowledgment of Service and summary grounds of defence

7. In formulating a response to what is, as we shall see, the Secretary of State's continuing inability to meet the 21 day time limit in a large number of immigration judicial reviews, it is necessary to appreciate the function of an AoS and, in particular, the summary grounds which are required to accompany it. The origin and purpose of the AoS were summarised by the Court of Appeal in R (on the application of Ewing) v Office of the Deputy Prime Minister [2006] 1 WLR 1260 as follows:-

"15. The provisions for service on, and response by, the other parties were an innovation. Formerly the rules allowed the application for permission to be made without notice to the other parties. There was no formal provision for a response at the permission stage, although it was not uncommon for the court to seek the written assistance of the respondent authority, or to direct an oral hearing on notice. The change followed the publication in March 2000 of A Review of the Crown Office List by a review team headed by Sir Jeffery Bowman ("the Bowman Report"). Para 24 of the report contained this recommendation:

'If the defendant indicates that he intends to contest the claim, then he must, in his acknowledgment, also set out an outline of the grounds of defence. There are two reasons for this. Firstly, it requires the defendant to address his mind to the issues in the claim and his response. Secondly, his outline grounds of defence will assist the judge at the permission stage by providing a fuller understanding of the issues and arguments. We do not expect the defendant to incur substantial expense at this stage.'

…

43. The purpose of the 'summary of grounds' is not to provide the basis for full argument of the substantive merits, but rather … to assist the judge in deciding whether to grant permission, and if so on what terms … If a party's position is sufficiently apparent from the protocol response, it may be appropriate simply to refer to that letter in the acknowledgment of service. In other cases it will be helpful to draw attention to any 'knock-out point' or procedural bars, or the practical or financial consequences for other parties (which may, for example, be relevant to directions for expedition). As the Bowman Report advised, it should be possible to do what is required without incurring 'substantial expense at this stage'."

8. In R (on the application of Mount Cook Land Ltd) v Westminster City Council [2003] EWCA Civ 1346, Auld LJ summarised the purpose of the AoS:-

"71. The objects of the obligation on a defendant to file an acknowledgment of service setting out where appropriate his case are: 1) to assist claimants with a speedy and relatively inexpensive

determination by the court of the arguability of their claim; and 2) to prompt defendants – public authorities – to give early consideration to and, where appropriate, to fulfil their public duties …"

9. In Singh , Hickinbottom J considered the primary purpose of summary grounds as being:-

"to assist the court when a judge comes to consider the application for permission to proceed, not (as the Rules, literally read, might suggest) as to the basis for resisting the substantive claim (which, if necessary, is the role of the detailed grounds, in due course); but as to the basis for resisting the application for permission to proceed and/or limited scope in terms of any permission granted … that focused role is reflected in CPR R54.9, which prohibits a Defendant from taking part in a permission process if he has not filed summary grounds in accordance with R54.8; although, if he proceeds thereafter to file detailed grounds under CPR R54.14, he may take part in the substantive hearing" [4].

Hickinbottom J described the significance of the AoS and summary grounds as follows:-

"5. The acknowledgment of service incorporating the defendant's summary grounds is therefore a procedural document which is vitally important to the court when it considers permission; and there is a heavy procedural obligation on a defendant to file it promptly to assist the court in that task.

6. The obligation is imposed for good practical reason. At the permission stage it is crucial that the court is placed in a properly informed position to decide the issue of arguability. With the retreat of legal aid, an increasing proportion of public law claimants are acting in person. Through no fault of their own, the immigration history that they are able to portray in their claim, and the issues to which that history has given rise, are often inaccurate. That of course may also apply to cases where the claimant relates that history to a legal representative who prepares the procedural documents, but generally to a much lesser extent. A well-drafted, succinct acknowledgment of service, including a clear history and brief reasons as to why the decision-maker came to the relevant decision and why that decision is not unlawful, is of invaluable help to a judge considering an application for permission, particularly on the papers. The rules recognise that practical value. That is why the heavy obligation to file summary grounds promptly is imposed."

4. Differences between the Civil Procedure Rules and the Upper Tribunal Rules

(a) Extending time

10. Before proceeding, it is convenient to notice certain differences between the High Court procedure, as set out in the CPR, and that of the Upper Tribunal, as contained in the Upper Tribunal Rules. First, the absence from the Upper Tribunal Rules of a provision equivalent to CPR 54.8(3), which prohibits extensions of time by consent, is not to be taken as indicating that, in judicial review proceedings in the Upper Tribunal, the parties can extend the time for filing an AoS or, indeed, make an application under rule 28. In the Upper Tribunal there is no general rule or practice whereby parties may, unless specifically prohibited, extend time limits in the Rules by agreement, without recourse to the Tribunal. By rule 5(3)(a) the power to extend time is given to the Tribunal alone. Whilst, in practice, bearing in mind the overriding objective in rule 2, the Tribunal may well have regard to the view of the parties in deciding whether to extend time, any such view is only one of what is likely to be a number of factors. In the context of judicial review, particularly in the immigration field where there will often be a strong public interest in the prompt resolution of claims, the fact that an applicant may consent to the Secretary of State's request to extend time for serving the AoS is unlikely to be determinative of the Tribunal's response to that application.

(b) Detailed grounds of defence

11. The second point of difference concerns the consequences of not filing an AoS. Under both regimes, a respondent who fails to do so may not take part in the application for permission (although Upper Tribunal rule 29(3) expressly provides for the Tribunal, nevertheless, to permit that to happen). CPR 54.14 enables a respondent to take part after a grant of permission provided he or she files detailed grounds. The Upper Tribunal Rules, by contrast, make no express provision for filing detailed grounds, following the grant of permission. This is because the questions of whether and, if so, how and when such grounds are filed are subsumed in the Tribunal's general case management functions pursuant to rule 5. We will return to the matter of detailed grounds in due course.

5. The High Court's approach in Singh

12. At [12] of his judgment, Hickinbottom J referred to the various different responses in the High Court to the Secretary of State's failure to file an AoS and summary grounds (see paragraph 3 above). Hickinbottom J regarded none of the courses as being "entirely satisfactory" [13].

13. In his statement of 16 September 2013 filed in connection with the proceedings in Singh , Mr Daniel Hobbs, the Director of UK Visas and Immigration (and thus the official with overall responsibility for litigation case working and appeals operations for the Secretary of State) described the "rapid and unprecedented rise in challenges to asylum and immigration decisions made by the Secretary of State", which was some 69% higher in July 2013 than in July 2012. In particular, there had been a steep rise in challenges to "temporary migration decisions, which include applications for limited leave under the new family Rules and under the points-system, for example students": [14].

14. At the heart of the systemic problems faced by the Secretary of State is the inability of the Home Office case workers in the Litigation Operations Team (North) to give timeous instructions to the Treasury Solicitor in a large number of temporary migration judicial reviews. As Hickinbottom J noted:-

"… every claim, whether it be in the form of a pre-action protocol letter or action in this court, of course has to be allocated to a case worker, investigated and a response prepared. Mr Hobbs frankly accepts that his teams have simply been unable to keep up: [14] … Mr Hobbs accepts that the Secretary of State's response time to claims is currently unacceptable: [16]"

15. In Singh , the judge was told about:

"The positive steps taken to improve the position … these include the short-term use of very junior members of the bar, the employment and training of 60 additional full-time caseworking staff, the prioritisation of the cases, the basing of some Home Office staff at the Treasury Solicitors to ensure earlier instructions can be given in more cases, the identification of cases which raise identical or very similar issues which can be dealt with by standard summary grounds, and procedures for ensuring that staff comply with guideline judgments and Tribunal and courts quickly. In addition, Ms Patry says that staff have been employed over weekends to try and deal with the backlog: [16]"

16. At [20] Hickinbottom J noted that, in addition to possible adverse consequences for claimants (such as being denied permission to work in the United Kingdom), "in the field of public law there is also a very substantial public interest in the finality of administrative decisions", which needed to be determined "with reasonable promptness". By the end of the calendar year 2013, the Secretary of State hoped that AoSs "will be filed within the prescribed 21 days": [21].

17. Having set out the nature of the problem and the steps being taken by the Secretary of State to ameliorate it, the Court gave its views as follows:-

“22. I cannot lay down any general guidelines. Of course, each case must turn on its own facts. Some complex cases may well warrant a longer time than 21 days, even to make an initial summary response. But in my view, even with the challenges the Secretary of State faces, such cases should be few. There should be very few cases indeed which require more than six weeks in which to lodge a summary response. In respect of those cases, there needs to be some very compelling reason demonstrated for the requirement for additional time. In the cases before me, there has been and is no such reason. In my view, the Secretary of State simply cannot pray in aid a lack of resources or foresight to justify an extension of time that, even in standard cases, more than doubles the time allowed by the rules. Miss Patry, for the Secretary of State, does not suggest otherwise.

23. As I have stressed, there will always be exceptional cases. But without laying down rigid guidelines, it seems to me that, as she accepts, the Secretary of State must aim, within a reasonable period of time, generally to comply with the requirement of the rules that a summary response to the claim is filed within 21 days.

24. Nevertheless, certainly in the period whilst the benefits of the positive measures that are being taken are achieved and assessed, in my view, unless a claimant identifies some good reason why such an extension would be particularly prejudicial, the first application in any claim for an extension of time of up to three weeks need not be supported by any detailed evidence or grounds, and such an application should be treated generously by the court.

25. However, subsequent applications must be supported by a full explanation for the delay in compliance and a firm promise to the court as to when the acknowledgement of service and summary grounds will be filed. Repeat applications with barely aspirational dates, such as have been made in the past, are to be deprecated. On second and subsequent applications, the court should scrutinise the reasons for the delay rigorously; and the Secretary of State should be prepared for such applications to fail unless she has produced compelling reasons specific to the case as to why further time is needed.

26. Where a matter appears reasonably capable of compromise – for example, where the Secretary of State has agreed to reconsider a challenged decision – then, the summary grounds can be short, setting out why that belief is held and a realistic date for lodging a consent order or substantive grounds if, contrary to the hope and expectation, compromise is not reached. Mr Hobbs has indicated that cases will be prioritised; and it is to be hoped that cases where such a compromise is possible will be prioritised to enable them to be disposed of promptly.

27. The court must remain in control of the management of each case, and should not hesitate to impose sanctions on the Secretary of State, including costs sanctions, if good reason for delay is not made out on second or subsequent applications. Where the time and effort of parties and the court are wasted because of a failure on the Secretary of State's part to comply with a reasonable procedural timetable, then severe sanctions can be expected. In this, of course the court must be even-handed. Whilst the cases before me now concern defaults on the part of the defendant Secretary of State, the same principles apply to claimants. Although its manifestation may be different, the spirit of the Jackson reforms apply to public law cases as much as to private law claims.

…

29. Every extension (whether the first or subsequent) must of course be sought by way of an application, which will require the appropriate fee. Before making the application, the Secretary of State should seek the views of the claimant with regard to the proposed extension, and file any response received with the application.

30. I have of course been considering the position with regard to acknowledgments of service in asylum and immigration claims on the basis of the evidence and submissions before me. Mr Hobbs has set out the steps the Secretary of State has taken to ensure that she fulfils her obligations to the court; and has expressed confidence that they will produce immediate results and that, within a reasonable time (say, by the end of the this year), the Secretary of State will be in a position generally to comply with the 21 days time limit imposed by the rules. If the position changes – if, for example, the tide of claims continues to rise so that Mr Hobbs' expectations are frustrated – then it is incumbent on the Secretary of State promptly to inform the President of the Queen's Bench Division and the Lead Judge of the Administrative Court as to the new problems that have arisen, the steps being taken to address them and the proposed timetable for ensuring that the position is rectified."

18. Following delivery of the judgment in Singh , the general approach of this Chamber has been essentially the same as that outlined by Hickinbottom J. Initial applications by the Secretary of State for extensions of time of up to 21 days for filing the AoS and summary grounds have routinely been granted, mainly by Upper Tribunal lawyers, acting under delegated powers. In the case of subsequent applications, the Tribunal has rigorously scrutinised the reasons for the requests. The great majority of such subsequent extension applications have been purely formulaic. They have accordingly been refused, as non compliant with the Singh principles, with the Tribunal indicating that a decision on the judicial review application would be taken by a judge at any time after the expiration of eight days from the refusal of the extension application.

6. The position following Singh

19. In his letter of 20 September 2013 to the President of the Queen's Bench Division, written in the immediate aftermath of the judgment in Singh , Mr Hobbs said:

"Unfortunately I anticipate that in relation to many temporary migration and family migration judicial reviews submitted in the last three months the Home Office will continue to face difficulties in meeting with AoS deadlines in the short term. It is likely therefore that we will continue to seek extensions in the majority of cases and for a number of cases it is likely that we may have to seek third extensions in the short term.

For other judicial reviews – including asylum, deportation, international, criminal and enforcement cases – I am able to report that our operations are currently working well, but at present I do not expect that the position on temporary migration and family cases, which account for over 50% of current immigration and asylum judicial reviews, to change in the short term."

20. In October and November 2013 there was correspondence between Master Gidden of the High Court and the Treasury Solicitor, concerning the content of second and subsequent applications by the Secretary of State for extensions of time for filing the AoS. In particular, Master Gidden expressed concern that the application letters which the High Court was seeing were, in general, entirely generic in nature, citing pressure at work and difficulties in obtaining instructions from the relevant Home Office officials. Master Gidden pointed out that such letters did not meet the standard envisaged by Hickinbottom J and were, accordingly, likely to be refused.

21. The Treasury Solicitor responded on 6 November 2013 by saying that the reasons advanced, albeit generic in nature, were nevertheless the reasons why the Secretary of State had been unable to file her AoS within the requisite time (as extended by 21 days). Since the inherent problem was the absence of instructions, there was, in effect, no more that the Treasury Solicitor could say. The Treasury Solicitor's letter of 6 November also touched on a number of other matters, to which we shall return shortly.

22. On 17 January 2014, Mr Hobbs wrote to the office of the Chamber President, in connection with the hearing due on 20 January. In this letter it was made clear that the difficulties facing the Secretary of State had far from disappeared:-

"Since my letter of 20 September, case numbers have not abated (as no doubt the Tribunal itself will have appreciated). Indeed, in October, we saw the highest number of judicial reviews recorded (1957) and that number was not significantly lower in either November and December (1580 and approximately 1400 respectively)."

23. Hickinbottom J had referred in his judgment to particular problems arising from an upsurge in challenges to decisions concerned with temporary and family migration. Those judicial reviews are handled by the Secretary of State's staff in Sheffield, comprising a team with the acronym TMOS (Temporary Migration Operations). According to Ms Patry:-

"18. TMOS deal with challenges to refusals of leave to remain following temporary migration applications, not asylum or settlement claims. For example, this team deals with applications for limited leave under the new family rules and applications under the points-based system, such as student applications. During 2013, the Home Office increased their decision making capabilities, to clear a backlog of temporary migration applications and as such the Home Office have been concluding initial applications at an increased rate. Furthermore, the new paragraph 276ADE and Appendix FM of the Immigration Rules had also led to litigation exploring their interpretation and their interrelation with the Article 8 case law."

24. As well as temporary and family migration cases, it appears that the Treasury Solicitor is having similar difficulties obtaining instructions from her Older Live Cases Unit (OLCU), based in Liverpool. This unit deals with challenges which raise "legacy" issues, as well as challenges concerning delays in making decisions.

25. Hickinbottom J was told about various steps being taken by the Secretary of State to improve the process of her staff giving the necessary instructions to the Treasury Solicitor. A number of Home Office staff had been assigned to work at the Treasury Solicitor's offices, in order to provide the Treasury Solicitor with early instructions in certain categories of TMOS cases. Where a perusal of the claim indicates that, so far as the Secretary of State is concerned, the claim lacks any merit, standard summary grounds are being produced to accompany the AoS. At the other end of the spectrum, it appears that cases which it is considered should be conceded by her are also being sifted out at an early stage, and AoSs produced, in conjunction with draft consent orders.

26. Apart from these two categories, however, the position remains that the Treasury Solicitor cannot take any substantive step on behalf of the Secretary of State, including making a second or subsequent AoS extension application that is likely to be " Singh " compliant, unless and until a caseworker in Liverpool or Sheffield has been allocated to the judicial review and has given the Treasury Solicitor instructions.

7. Discussion

(a) Secretary of State's applications for second and subsequent extensions of time

27. That, then, is the background to the "generic" applications for extensions of time for filing the AoS, which both the High Court and the Tribunal is still seeing on a very regular basis.

28. On 20 th January, the Tribunal explored with Mr O'Callaghan and Ms Patry the question first posed last autumn by Master Gidden (paragraph 20 above): namely, whether, in such cases, there is any point in the Secretary of State making an application for a subsequent extension of time. Apart from requiring payment of the requisite fee, such an application requires a judicial response. Albeit that the time needed for such a response is, individually, not great, the sheer number of applications means a significant amount of judicial and administrative time of the Chamber is being devoted to dealing with second and subsequent applications for extension of time.

29. In his letter of 17 January 2014, Mr Hobbs plainly acknowledges the difficulties with the present stance:-

" TSol has been placed in the unenviable position of having to continue to seek extensions beyond the first extension using only the generic reasons for the backlog of unallocated cases. We are proposing to ease this position by suggesting in appropriate cases that if the Tribunal or Court is not minded to grant a second or further extension, then we would be content for the matter to be put before a Judge to consider the permission application without our input (provided of course that the application is considered on its merits and not simply on the basis that permission should be granted due to the SSHD's failure to submit an AoS). If the Judge considering the case is of the opinion that an AoS is needed either to assist the Tribunal or the Court as to the facts or to set out the SSHD's position and directs that an AoS be filed by a particular date, we will of course do our best to meet that deadline (provided that does not happen in every single case). Alternatively, Judges have in some cases directed an oral permission hearing which will also advance the matter. We have though seen many instances where Judges have been prepared to make a decision on the permission application without our input which at least moves the matter forward even if the outcome is not in SSHD's favour ."

30. At present, if the Tribunal refuses a second or subsequent AoS extension application, it indicates that the judicial review application will be placed before a judge for decision, on or after eight days from the refusal decision. Ms Patry informed us that this eight day period was, in practice, of no material benefit to the Secretary of State. There was no realistic chance of the Treasury Solicitor's lack of instructions being remedied within so short a period, so as to enable an AoS and summary grounds to be filed before its expiry. We accept this may be so; but, as explained at the hearing, the eight day period assists the Tribunal and its staff in sending notice of its decision on the extension application and in consequent file-handling matters.

31. For the future, the Secretary of State should make application **s** for second or subsequent extension **s** of time, only where she is in a position to do so by reference to the factors identified in Singh as necessary for such applications. Where she is not in such a position, the Tribunal will not regard it as discourteous for her to say nothing and merely allow the time for filing an AoS to expire **.**

(b) First applications for extension of time

32. What, then, of the first application for extension of time? As we have seen, Hickinbottom J considered that these need not be supported by any detailed evidence or grounds, and indicated that

such an application would be treated generously by the Court. As we have said, that has been the position in this Chamber, following the judgment in Singh .

33. In the situations with which we are concerned, just as it may be doubted whether there is any purpose in making a formal application which is effectively bound to fail, the question arises whether there is any utility in making an application which is effectively bound to succeed. We remind ourselves that the overriding objective in rule 2 of the Upper Tribunal Rules emphasises dealing with a case proportionately, as well as "avoiding unnecessary formality and seeking flexibility" and "avoiding delay". The resources of the Chamber (including its lawyers) are finite and it may well be thought that their time is best spent dealing with issues that are not, in practice, foregone conclusions.

(c) The "six weeks" proposal

34. The Tribunal therefore invited oral submissions from the parties on the following proposal: although the 21 day requirement in rule 29(1) would stand, the Tribunal would, in immigration judicial reviews, regard an AoS filed within six weeks of service of the claim on the Secretary of State as falling routinely for consideration and would therefore not undertake an initial (i.e. "paper stage") consideration of the judicial review application before the end of that six week period. Such a proposal would not, in practice, involve any further delay. Just as was the position in the High Court, the burden of immigration judicial review work in the Tribunal is currently such that an application which is not treated as urgent will not routinely be considered earlier than six weeks after service on the Secretary of State.

(d) Application for urgent consideration

35. Any such general approach would, of course, require to be subject to the important exception that an applicant for judicial review who has reasons to request the Tribunal to undertake an earlier consideration of that application (whether before the end of the rule 29(1) period or the additional three weeks which the above proposal would entail) can make an application for urgent consideration. Provision for such urgent applications is found in Practice Direction 12 of the Senior President's Practice Directions: Immigration and Judicial Review in the Immigration and Asylum Chamber of the Upper Tribunal ("the IJR Practice Directions") and Form T483 exists for this purpose. Although mainly used when a judicial review applicant faces the threat of imminent removal from the United Kingdom, the procedure is not confined to such cases. It is for an Upper Tribunal judge to decide whether and, if so, how to give effect to a request for urgent consideration. This could include directing the Secretary of State to file an AoS with summary grounds, not later than a specified date, following the expiry of which the Tribunal would proceed to determine the application, whether or not those materials had been filed.

36. An application for urgent consideration made contemporaneously with the application for judicial review attracts no additional fee. However, a person who does not apply for urgent consideration contemporaneously with filing the application for judicial review but who subsequently wishes to advance reasons why that application should be considered earlier than six weeks from service on the Secretary of State, **is** required to pay a fee for that discrete application. But, since the proposal described in paragraph 34 above, if implemented, will dispense the Secretary of State from the necessity of making an application extending the rule 29(1) period by a further 21 days (colloquially known as "first Singh applications"), we consider that, for so long **as** that proposal is being implemented, it would be sufficient for a judicial review applicant who wishes to advance reasons why that application should be considered earlier than the expiry of the six week period (but who is not

seeking a stay on removal or other interim injunctive relief), to give those reasons by means of a letter sent to the Tribunal and copied to the Secretary of State.

37. The letter should include two basic requirements of Practice Direction 11; namely, the need for urgency and the proposed timescale for considering the application. Any letter that fails to do this is unlikely to achieve its desired result. The letter and file will be placed before a judge, who will decide if the judicial review application requires earlier consideration than it would otherwise receive. The Tribunal would not treat such a letter as requiring payment of a fee. The Tribunal will not, however, ordinarily inform the applicant of its response to the request made in the letter. If the proposed timescale passes without a decision on the application being forthcoming (or without a specific direction to the Secretary of State to file an AoS: see paragraphs 50 to 54 below), then the applicant can assume the request for urgent consideration has been unsuccessful.

38. It is important to emphasise that where a stay on removal or other form of interim injunctive relief is sought, an application for urgent consideration must be made, using Form T483 **,** complying with IJR Practice Directions 11 and 12 and accompanied by any requisite fee. The same is true where the applicant wishes to have a discrete response, one way or the other, to a request for urgent consideration.

39. A further exception to the “six week” proposal concerns cases that the Chamber agrees to expedite, at the request of the respondent. By arrangement with the Chamber President, the Secretary of State is able to request a specified number of immigration judicial review applications to be dealt with on an expedited basis. (There is a corresponding arrangement in place in the High Court.) In such expedited cases, the Tribunal would, of course, expect her to have filed her AoS and summary grounds.

(e) Scope of the proposal

40. On 20 January, neither of the representatives indicated any principled objection to the proposal, including the exceptions we have just mentioned. Ms Patry confirmed that the Secretary of State would not regard the proposal, if implemented, as dispensing with her obligation to serve the AoS as soon as she can do so, wherever possible within the rule 29(1) period. Indeed, given the Secretary of State’s asserted ability, as noted earlier, to be coping well with certain categories of judicial review applications, the Tribunal would expect to see significant numbers of AoSs filed within the 21 days provided by the Upper Tribunal Rules.

41. It is, however, important to emphasise that any practice of not undertaking consideration of a judicial review application until six weeks from service on the Secretary of State would apply (subject to the above exceptions) to all immigration judicial reviews and not merely those that are being handled by TMOS in Sheffield or OLCU in Liverpool. Whilst the need for special arrangements concerning filing of an AoS is driven by the problems currently faced by those units, the Tribunal cannot be expected to differentiate in advance on the basis of which particular group of caseworkers might be dealing with a particular judicial review application. By the same token, judicial review applicants need, as a general matter, to know where they stand. Therefore, as in the case of Singh , any practice the Tribunal adopts needs to be by reference to the general category of immigration judicial reviews.

(f) Conclusion

42. It appears to us that, instead of the present practice whereby the Secretary of State applies for and is invariably granted a "first Singh extension" of 21 days of the 21 day time limit in the Upper Tribunal Rules, the parties to an immigration judicial review should, henceforth, assume that, subject to the exceptions we have discussed, initial judicial consideration of an application for judicial review will not occur before the expiry of six weeks from the date on which the Secretary of State was served with a copy of the application and accompanying documents.

43. Any application by the Secretary of State for permission to file her AoS later than the end of that six week period will need to satisfy the requirements set out by Hickinbottom J at [25] of Singh ; that is to say, there must be "compelling reasons specific to the case as to why further time is needed", together with "a firm promise... as to when the Acknowledgment of Service and summary grounds will be filed". The Secretary of State should assume that the Tribunal will not regard generally occurring failures to give the Treasury Solicitor instructions, as detailed above, as constituting such compelling specific reasons.

44. Any application for extension made by the Secretary of State must be made on giving 72 hours' notice to the applicant, so that the application made to the Tribunal should include information as to whether the applicant has agreed or objected to the application, or simply not responded. As previously indicated, whilst the applicant's views may be of relevance, the parties should not assume that the applicant's consent will be determinative of the application for extension.

8. Addressing the difficulty of deciding a judicial review application in the absence of an AoS and summary grounds

45. Where no application for extension is made within the six week period, or where an application is refused, the Tribunal will consider whether permission to bring judicial proceedings should be granted or refused. On the basis of Mr Hobbs' letter of 17 January 2014 and the information provided by Ms Patry, it is plain that the Tribunal will be faced with determining a very significant number of judicial review applications on or after the end of the six week period, where the Secretary of State has not filed an AoS and summary grounds. Accordingly, at the hearing on 20 January, the Tribunal explored with Counsel possible ways in which that unsatisfactory state of affairs might be ameliorated.

(a) Response to pre-action protocol letter

46. It is a feature of judicial review proceedings generally that, before an application for judicial review is filed, the person aggrieved by a public law decision (or failure to make a decision) makes known the nature of the complaint, by sending to the person or body concerned what is known as a pre-action protocol (PAP) letter. The decision-maker thereby has an opportunity to give its reaction to the threatened challenge, before the potential applicant decides whether to file a judicial review application with the Court or Upper Tribunal.

47. We have seen above how at [43] of Ewing, the Court of Appeal specifically acknowledged that, where a party's position is sufficiently apparent from the response to the PAP letter, it may be appropriate simply to refer to that response in the AoS. In other words, the PAP response would serve as the summary grounds. There is, of course, no reason why the Secretary of State in an immigration judicial review should do more than rely on the PAP response, where she deems that appropriate. But, again, in the areas of temporary/family migration/legacy etc, unless the case is being conceded or is one where a caseworker based at the Treasury Solicitor's offices instructs that a short or standard form of summary grounds will serve, the Treasury Solicitor will be without instructions from the

Secretary of State and will not know whether the latter wishes to do more than rely on any PAP response she has sent the applicant. Nevertheless, in the hypothetical position with which we are presently concerned, where the Tribunal is faced with deciding a judicial review application without an AoS and summary grounds, it may well be useful for the judge determining the application to know what, if anything, the Secretary of State has said by way of her response to the PAP letter.

48. We explored with Counsel how the existence and contents of a PAP response could be brought to the attention of the Tribunal. In many cases, particularly where an applicant is professionally represented, the PAP response is included in the application bundle. However, unless the applicant is asserting that the PAP response forms part of the decision challenged in the judicial review, or is a document on which the applicant intends to rely, rule 28 of the Upper Tribunal Rules does not formally require an applicant to include the PAP response in the materials accompanying his or her application.

49. Accordingly, the Tribunal asked Ms Patry whether the Secretary of State could, within the six week period, provide the Tribunal with any PAP response made in respect of the case in question. Having taken instructions, Ms Patry informed us that, whilst the Secretary of State's and Treasury Solicitor's systems did not currently enable this to be done, changes to those systems could be made so as to make it possible.

50. The Tribunal considers that, in the light of the problems arising from the Secretary of State's current systemic inability to file AoSs within the required time limit, it is essential that arrangements are put in hand so that the Treasury Solicitor can, in every case, file with the Tribunal a copy of any PAP response letter relating to the judicial review application sent by the Secretary of State to the applicant. Where no response letter was sent prior to the making of the judicial review application, that fact should be communicated in writing to the Tribunal. We would emphasise that, by doing this, the Secretary of State would not absolve herself of the obligation to file an AoS, where she intends to contest the application for judicial review. In particular, in cases where, following the receipt of instructions from the caseworker, the Treasury Solicitor proposes on behalf of the Secretary of State to rely on the PAP response as constituting the summary grounds, that would need to be done by filing an actual AoS and grounds, stating as much.

(b) Immigration Factual Summary

51. Both Mr O'Callaghan and Ms Patry acknowledged that some immigration judicial reviews may turn on issues of fact, about which the Secretary of State has detailed knowledge. In cases where the Secretary of State has made directions for the removal of the person concerned from the United Kingdom, she is able to provide the High Court and the Tribunal with an Immigration Factual Summary (IFS). We enquired whether, as with PAP response letters, the Treasury Solicitor could file an IFS with the Tribunal in every case, since this might, in certain circumstances, assist the Tribunal in considering the arguability of challenges involving an alleged factual state of affairs. Having taken instructions, Ms Patry informed us that this would not be possible for technological and operational reasons.

(c) Specific direction to file AoS and summary grounds

52. In the light of those instructions, we need to go back to a matter contained in Mr Hobbs' letter of 17 January 2014 (paragraph 29 above); namely, that the Secretary of State acknowledges an Upper Tribunal Judge may direct her to file an AoS and summary grounds and that she would "of course do our best to meet that deadline (provided that does not happen in every single case)." It is, accordingly,

necessary to make some general observations regarding the circumstances in which a judge seeking to determine a permission application without the benefit of an AoS and summary grounds might be expected to give a specific direction to the Secretary of State to file these by a specified date.

53. The first and obvious point is that there is no practical utility in doing so on a general basis. As with the eight day period discussed earlier, any wholesale practice of making such directions for compliance within a short timescale is likely to involve the Secretary of State's non-compliance, for the simple reason that the Treasury Solicitor will still be without instructions. If, on the other hand, a generous time limit is set, the rationale underlying Singh and, we would add, the arrangements we envisage would be undermined. It is, accordingly, important for parties to have a general indication of the circumstances in which a judge may decide to give specific directions concerning the filing of an AoS in a particular case.

54. Our general expectation is that the only circumstances in which it is likely a judge would give such a direction is where the judicial review application is based on an asserted factual position, which it appears the Secretary of State is in a position to confirm or deny. One example would be where the applicant contends that he or she had extant leave to remain in the United Kingdom at the time of making an application for variation of that leave. In such a case, it would be appropriate to direct the filing of an AoS and summary grounds dealing with that issue within, say, fourteen days.

55. In the light of the submissions we heard, we do not consider that, as a general matter, any wider use of such specific direction powers is likely to be productive. In particular, we acknowledge that the Secretary of State would, at present, simply be unable to cope with specific directions to file an AoS in all cases where, in the absence of the AoS and summary grounds, the judge is unable to categorise a judicial review application as being totally without merit.

(d) Relevance of an AoS filed late

56. The final point to mention under this general heading concerns the status of an AoS and summary grounds, filed after the expiry of the rule 29(1) time limit or any specific extension by the Tribunal of that time limit. It is plainly an essential element of the "six week" process described above that the Upper Tribunal should engage with any AoS and summary grounds filed before the end of that six week period. Where an AoS and summary grounds are filed after that time but before a judge comes to consider the judicial review application, Mr O'Callaghan very properly accepted that the interests of justice require the judge to have regard to those documents. Whether the Secretary of State should be entitled to the costs of preparing an AoS and summary grounds that are out of time, in cases where permission is refused, it is, however, one of a number of costs issues that arise in the situations with which we are concerned. We shall deal with the issue of costs as a general matter later in this decision (see paragraphs 60-67).

9. Deciding an immigration judicial review application in the absence of an AoS and summary grounds

57. How should an Upper Tribunal judge approach the issue of whether to grant permission to bring judicial review proceedings, where there is no AoS or summary grounds? The first thing to say is that it would be inappropriate to grant permission merely because of the absence of those documents, whether by way of "punishing" that failure, or otherwise. The judge must engage with the issue on the basis of such materials he or she has, including any PAP response letter (see above). The rationale underpinning the decision effectively to transfer from the High Court to the Upper Tribunal the great majority of immigration judicial reviews is that this Chamber's judiciary has relevant expertise. This

means the parties should expect the Tribunal to apply its specialist knowledge of the relevant legislation, policies and case law.

58. We have seen from the judgment in Singh that, amongst the responses of High Court judges and deputies to the Secretary of State's failure to serve an AoS, had been to adjourn the permission application to be decided at a hearing. So far as this Chamber is concerned, we do not consider that, absent exceptional circumstances, such a course would be appropriate merely because the Secretary of State has failed to file an AoS. It is important to bear in mind that the judge, at this stage, is dealing only with the arguability of the judicial review application. The grant of permission is not a final determination of the legality of the decision under challenge. Notwithstanding what we have said about the Tribunal's expertise, it must be recognised that the absence of an AoS and summary grounds may result in permission to bring judicial review proceedings being granted when, had those grounds been available, permission would have been refused. Similarly, a judge refusing permission in the absence of an AoS and summary grounds may decline to categorise the judicial review application as being totally without merit (thereby precluding the possibility of oral renewal: see rule 30(4A)), when the availability of summary grounds would have persuaded the judge that the application totally lacked merit.

59. We have noted earlier the absence from the Upper Tribunal Rules of a specific requirement, following grant, for the respondent to serve detailed grounds of defence. In practice, following a grant of permission, the Tribunal invariably makes directions under rule 5, which include the filing of what are, in practice, detailed grounds. The normal time period for filing such grounds is 35 days, which the parties before us on 20 January were agreed was satisfactory. As in the High Court, an applicant who has been granted permission would be expected to reconsider whether to continue with the judicial review, following receipt of detailed grounds from the respondent.

10. Costs issues

60. As can be seen from what we have just said, the Secretary of State's failure to comply with the Upper Tribunal Rules regarding filing of the AoS and summary grounds raises various questions concerning the issue of costs. Three particular situations arise:-

(a) Permission to bring judicial review proceedings is refused on the papers but not recorded as "totally without merit". The permission application is renewed pursuant to rule 30(4) but the Tribunal, at the resulting hearing, finds that, had the arguments advanced by the Secretary of State at that hearing been put in summary grounds of defence, the application would have been refused as being totally without merit;

(b) Permission to bring judicial review proceedings is granted but, in the light of the Secretary of State's detailed grounds, it is evident that – had those grounds found expression in summary grounds of defence – permission would not have been granted; and

(c) Whether, in any event, the Secretary of State should be entitled to the whole or part of her costs in preparing an AoS and summary grounds, which are served late.

61. Ms Patry rightly accepted that, in the case of situation (a) above, the Secretary of State would, as a general matter, be vulnerable to an application by the unsuccessful judicial review applicant for reimbursement of his or her costs in connection with the oral renewal hearing. Whilst the decision would, of course, be for the judge conducting the hearing, one can readily see that, save where the

judicial review application was particularly egregious, the Secretary of State's failure to file an AoS may well have such adverse costs implications for her.

62. As regards situation (b), Ms Patry, again in our view rightly, accepted that the applicant's costs, incurred up to the point at which the Secretary of State's detailed grounds were filed, would ordinarily be payable by the Secretary of State.

63. So far as situation (c) is concerned, we have already stated that the interests of justice require the Tribunal to consider an AoS and summary grounds, albeit served late, if they are filed before the judge makes a decision on permission to bring judicial review proceedings. Ordinarily, the Secretary of State could expect to be the beneficiary of an order from the Tribunal, pursuant to rule 10, that she should receive from an unsuccessful applicant the reasonable costs of preparing the AoS and accompanying documentation. Should the position be different where the Secretary of State has failed to serve the AoS etc. within the period of six weeks from the date of service on her (and thus outside the rule 29(1) time limit)?

64. Mr O'Callaghan's submissions were to the effect that the Tribunal should adopt a "robust approach" to the issue of costs, in the wake of the so-called Jackson reforms to the CPR [2] , as evidenced in the judgments of the Court of Appeal in Mitchell v News Group Newspapers Limited [2013] EWCA Civ 1537. In effect, Mr O'Callaghan's submissions were that, as happened in Mitchell , the costs which a party would normally expect to receive should be withheld as punishment for failing to comply with the relevant Rules; in our case, the rule relating to filing an AoS and summary grounds.

65. Whilst the matter is, of course, one for individual judges to decide in the exercise of their discretion, we are not for our part persuaded by Mr O'Callaghan's submissions on this issue. We say this despite Hickinbottom J's observation at [27] of Singh that "the spirit of the Jackson reforms apply to public law cases as much as to private law claims". Those reforms do not, however, extend to the costs regime in the Upper Tribunal, whose rules are framed in terms unlike those found in the CPR, and where even the principle of "costs shifting" is in no sense universal.

66. In any event, it is not apparent why, having accepted the reality of the Secretary of State's current inability to meet relevant time limits in a significant proportion of immigration judicial reviews and having acknowledged the steps being taken by her to deal with that state of affairs, the Tribunal should then routinely penalise the Secretary of State in costs, where the result of her failure has not been either to cause a permission hearing to be held, which would otherwise have been unnecessary (situation (a) above) or to cause permission to be granted, when it would not otherwise have been (situation (b) above).

67. Accordingly, as a general matter, we would not regard either a failure to file an AoS within the 21 days allowed by rule 29(1) or, indeed, a failure to file within the six week period discussed above as itself constituting a reason to refuse to make an order that the reasonable costs of preparing the AoS etc. should be recoverable by the Secretary of State from the unsuccessful applicant. Where, however, situation (a) or (b) above has arisen, the costs of the AoS etc. will be subsumed in the wider issues we have discussed in paragraphs 61 and 62 above.

11. Summary of new general arrangements

68. We summarise the new general arrangements as follows:

(1) The Tribunal will, in immigration judicial reviews, regard an Acknowledgement of Service filed within six weeks of service of the claim on the Secretary of State as falling routinely for consideration and will not undertake an initial consideration of the judicial review application before the end of that six week period.

(2) The Tribunal will undertake a consideration of that application earlier than the end of the period mentioned in paragraph (1) above ("the six week period"):-

(a) where the Tribunal considers it appropriate to do so, in response to:-

(i) an application for urgent consideration filed by the applicant (on Form T483); or

(ii) a notice in writing from the applicant, copied to the Secretary of State, which states the need for urgency and the proposed timescale for considering the application; and

(b) in response to a request by the Secretary of State for expedition, pursuant to an arrangement between her and the Chamber President.

(3) Where a stay on removal or other form of interim injunctive relief is sought, an application for urgent consideration on Form T483 must be made, complying with Practice Directions 11 and 12 and accompanied by any requisite fee.

(4) In view of paragraphs (1) and (2) above, the Tribunal will not consider it necessary for the Secretary of State to apply for an extension of the 21 day time limit in rule 29(1), unless she considers she is unable to file an AoS and summary grounds before the expiry of the six week period. In such a case, the Secretary of State must make an application for extension of time, on 72 hours notice to the applicant, which satisfies the requirements set out by Hickinbottom J at [25] of Singh; that is to say, there must be compelling reasons specific to the case as to why further time is needed, together with a firm promise as to when the AoS and summary grounds will be filed. The application should include the judicial review applicant's response (or lack of response) to the application for extension of time.

(5) The Secretary of State should not make an application for an extension of time for filing an AoS, which she knows cannot satisfy the ' Singh ' requirements.

(6) In every case, not later than the end of the six week period, the Secretary of State will be expected to file with the Tribunal (and serve on the applicant) either a copy of the written response of the Secretary of State to the applicant's pre-action protocol letter or written confirmation that no such written response was sent to the applicant. This requirement does not absolve the Secretary of State from filing an AoS and summary grounds, where she wishes to take part in the proceedings.

(7) Except as provided in paragraph (2) above or where time is extended in response to an application by the Secretary of State for extension of time, the parties can expect the Tribunal to consider the judicial review application at any time after the expiry of the six week period. This will be so, whether or not an AoS and summary grounds have been filed, unless the judge considering the application is of the view that there are particular reasons (such as potentially significant factual matters) why the Secretary of State should be specifically directed to file an AoS and summary grounds.

(8) As a general matter, the Secretary of State will be vulnerable to an application for costs in respect of an oral hearing held pursuant to rule 30(4) made by an unsuccessful judicial review applicant, where:-

(a) the application to bring judicial review proceedings was refused on the papers without the benefit of an AoS and summary grounds; and

(b) the Tribunal considers that, had those grounds then been available, the application would have been recorded as being totally without merit.

(9) Where permission was granted without the benefit of an AoS and summary grounds, the Secretary of State will ordinarily be liable to pay the applicant's costs, up to the point when the Secretary of State's detailed grounds are filed, regardless of the ultimate fate of the judicial review application.

12. Commencement and duration of new general arrangements

69. As from 6 March 2014, the Chamber will apply the new general arrangements in the following proceedings:

(a) all immigration judicial review applications made to the Upper Tribunal on or after that date: and

(b) all immigration judicial review applications made to the High Court on or after that date, which are transferred to the Upper Tribunal pursuant to section 31A of the Senior Courts Act 1981.

70. The Chamber will keep these arrangements under regular review. They are intended to be a temporary response to what has been presented by the Secretary of State as a temporary systemic problem affecting her ability to comply with the relevant requirements of the Rules. The Secretary of State will be expected to keep the Chamber President informed of any developments or other changes in the situation. By the same token, those acting for applicants should make the President aware of any relevant issues concerning the new general arrangements.

Signed

Upper Tribunal Judge Peter Lane

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[1] From 17 October 2011 to 31 October 2013, the Upper Tribunal had jurisdiction to decide certain immigration judicial reviews involving fresh claims (paragraph 353 of the Immigration Rules).

[2] See Review of Civil Litigation Costs: Final Report (December 2009).