Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of KA and another) v Secretary of State for the Home Department (ending of Kumar arrangements) [2018] UKUT 00201 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

On 22 May 2018

Before

MR JUSTICE LANE, PRESIDENT

MR C M G OCKELTON, VICE PRESIDENT

UPPER TRIBUNAL JUDGE DAWSON

Between

THE QUEEN ON THE APPLICATION OF

(1) KA

(2) OMOTADE OYEBOLA AWOFADEJU

Applicants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appearances :

For KA: Ms L Hooper, Counsel, instructed by Duncan Lewis Solicitors

For Mr Awofadeju: Mr D Ball, Counsel, instructed by Hackney Law Centre

For the Respondent: Mr C Thomann, Counsel, instructed by the Government Legal Department

(1) In R (on the application of Kumar) v Secretary of State for the Home Department (acknowledgment of service: tribunal arrangements) IJR [2014] UKUT 00104 (IAC), the Upper Tribunal stated that it would not generally consider “on the papers” an application for permission to bring immigration judicial review proceedings until after six weeks from the filing of that application. As a result, it was not considered necessary for the Secretary of State to file an application for an extension of the 21 day time limit for filing an acknowledgment of service, as provided in rule 29(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (unless the Secretary of State was unable to file within six weeks of being provided with a copy of the judicial review application). Certain consequential arrangements were also made.

(2) The arrangements described in Kumar will not have effect in respect of any application for permission to bring judicial review proceedings which is filed with the Upper Tribunal after 1 January 2019.

DECISION

1. The Kumar arrangements

1.
The main proceedings in these judicial reviews were severed by the Upper Tribunal from the present ones, which now provide the Tribunal with the opportunity of revisiting the arrangements contained in R (on the application of Kumar) v Secretary of State for the Home Department (Acknowledgement of service: Tribunal arrangements) IJR [2014] UKUT 00104 (IAC) " Kumar ". In this regard, we have been greatly assisted by the submissions of Ms Hooper, Mr Ball and Mr Thomann and by the written statements and other material compiled by those respectively instructing them.

2.
The following synopsis of the arrangements in Kumar is drawn from the applicants' joint statement of case:

(a)
The Tribunal will not generally consider "on the papers" an application for permission to bring judicial review proceedings until after six weeks from the filing of that application.

(b)
The Tribunal will not consider it necessary for the Secretary of State to file an application for an extension of the 21 day time limit for filing an acknowledgement of service (rule 29(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008), unless the Secretary of State is unable to file an AoS within six weeks of being provided by the applicant with a copy of the judicial review application. There is an expectation that the Secretary of State will continue to try to file the AoS within 21 days but an AoS that is before a judge when he or she comes to consider the "paper" application will be read, whether or not filed outside any relevant time limit.

(c)
Judicial review applications will be considered within six weeks if a separate application for urgent consideration (on Form T483) is made by the applicant; or in response to a request by the Secretary of State for expedition, pursuant to arrangements between the Secretary of State and the Tribunal.

(d)
An applicant who is not seeking a stay on removal or other injunctive relief who wishes to advance reasons for earlier consideration of his or her claim can do so by writing to the Tribunal (copying to the Secretary of State), rather than by way of a fee-paid application.

(e)
Any such letter will be placed before a judge, who will determine whether the application to bring judicial review proceedings requires earlier consideration than it would otherwise receive.

3.
Rule 29 provides as follows:-

" **Acknowledgment of service**

29. – (1) A person who is sent or provided with a copy of an application for permission under rule 28(8) (application for permission to bring judicial review proceedings) or rule 28A(2)(a) (special provision for immigration judicial review proceedings) and wishes to take part in the proceedings must provide 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, or in immigration judicial review proceedings the applicant provided, 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 support or oppose the application for permission;

(b) their grounds for any support or opposition under sub-paragraph (a), or any other submission or information which 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 acknowledgment considers to be an interested party.

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

4.
The need for the arrangements in Kumar arose because of the inability of the Secretary of State to file an AoS in immigration judicial review proceedings within the 21 day time limit contained in rule 29(1). The difficulties faced by the Secretary of State had been examined by Hickinbottom J (as he then was) in R (on the application of Singh and Others) v Secretary of State for the Home Department [2013] EWHC 2873 (Admin) " Singh ".

5.
Although Singh concerned the position in the High Court, where proceedings are governed by the Civil Procedure Rules ("CPR"), the reasons put forward by the Secretary of State for being unable to comply with the 21 day time limit in rule 29(1) for filing an acknowledgement of service in Upper Tribunal were the same as those which led to the Secretary of State's failure to comply with the corresponding 21 day requirement in CPR 54.8. They involved what Daniel Hobbs, then Director of UK Visas and Immigration, described as the "rapid and unprecedented rise in challenges to asylum and immigration decisions, which were some 69% higher in July 2013 than in July 2012" (Kumar : paragraph 13).

6.
At paragraph 70 of Kumar , it was said:-

“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.”

2. The legal status of the arrangements

7.
Before reviewing the arrangements, it is necessary to address a submission made in the applicants’ skeleton argument concerning their legal status. Ms Hooper and Mr Ball contend that it is not possible for the Tribunal to grant a party a general dispensation from compliance with the Upper Tribunal Procedure Rules. That, however, is what they say the Tribunal did in Kumar and, as a result, the arrangements are ultra vires.

8.
Ms Hooper and Mr Ball pray in aid a passage in the report of the Independent Chief Inspector of Borders and Immigration entitled “An Inspection of the Home Office’s Mechanisms for Learning from Immigration Litigation” (April - July 2017). We shall have more to say about this report in due course. In advancing their vires argument, Ms Hooper and Mr Ball draw attention to footnote 62 of the report, which reads:-

“ R (on the application of Kumar and Another) v Secretary of State for the Home Department (acknowledgement of service: Tribunal arrangements) IJR [2014] UKUT 104 (IAC) permits lodgement within 42 days except for urgent claims.”

9.
Counsel might also have mentioned paragraph 3.7 of the summary conclusions in the report. This states:-

“Originally, the deadline imposed by HMCTS for AoS responses was 21 days. This was extended to 42 days for non-urgent immigration-related cases in 2014.”

10.
The relevant legislative framework is contained in the Tribunals, Courts and Enforcement Act 2007. Section 22 makes provision for Tribunal Procedure Rules. These Rules are made by the Tribunal Procedure Committee, which is established by section 22 and Schedule 5. The Act also makes provision in section 23 for practice directions. These may be made either by the Senior President of Tribunals or by a Chamber President. In the former case, the approval of the Lord Chancellor is required whilst, in the latter, approval must come from both the Lord Chancellor and the Senior President of Tribunals. Paragraph 7 of Schedule 4 requires a Chamber President “to make arrangements for the issuing of guidance on changes in the law and practice as they relate to the functions allocated to the chamber”. Pursuant to paragraph 7, the President of the Immigration and Asylum Chamber of the Upper Tribunal has issued several sets of guidance.

11.
Against this background, Ms Hooper and Mr Ball submit that there is no scope for the Tribunal, when speaking as it did in Kumar , to grant a general dispensation from the requirements of the Tribunal Procedure Rules.

12.
At the hearing on 22 May 2018, it was common ground between the parties that a relevant authority on this matter is the judgment of the Court of Appeal in Bovale Ltd v the Secretary of State for

Communities and Local Government and Another [2009] EWCA Civ 171. In that case, the Court of Appeal held that Collins J had no power to disapply or vary the CPR, as they applied to challenges brought under section 288 of the Town and Country Planning Act 1990. Under the CPR, a defendant to a claim brought pursuant to section 288 had to serve an acknowledgment of service; but there was no requirement in the Rules either to indicate the grounds of resistance or to serve a defence. Collins J considered this was wrong. He made directions, which were intended to be followed in the generality of cases, requiring grounds of resistance to be served within a period of ten weeks, set by reference to the time limit for the filing of evidence by a defendant.

13.
As Mr Thomann pointed out, this arrangement was intended by Collins J to be permanent, in the sense that it would continue unless and until the Procedure Rules Committee made specific provision regarding the matter.

14.
There are significant differences between the judgment of Collins J in Bovale and that of the Tribunal in Kumar . As the applicants' own statement of case acknowledges, the expectation in Kumar was that the Secretary of State would continue to try to file an acknowledgement of service within the period prescribed by rule 29(1).

15.
It is instructive to step back and look at what rule 29 does and does not do. So far as rule 29(1) is concerned, the consequence of failing to meet the time limit is that, unless the Tribunal expressly extends the 21 day period (by a direction under rule 5), a person who does not file an acknowledgement of service within 21 days runs a risk that the Tribunal will determine the application for permission to bring judicial review, without knowing if the person who made the challenged decision is seeking to defend it and, if so, on what basis. That is not a sanction. Rather, it informs when the next stage of the procedural process will start. Rule 29(3), however, does contain a sanction, which we describe in paragraph 17 below.

16.
It was made clear in paragraph 34 of Kumar that "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". This informed the approach that the Tribunal would normally regard an AoS filed within six weeks as falling for consideration. As a result, during the currency of the Kumar arrangements, the Secretary of State would be aware that the risk of consideration without regard to his position would not, in practice, arise in the period between 21 and 42 days after service on him of the application. But that awareness cannot properly be said to equate to a purported amendment by the Tribunal of rule 29(1), so as to substitute "42 days" for "21 days". Nor can Kumar be regarded as creating a general relief from sanction in respect of a failure to comply with rule 29(1). As is plain from what we have said in paragraph 15 above, there is no sanction to relieve.

17.
There is, however, a sanction in rule 29(3) for those who do not provide an acknowledgement of service. It is of a limited ambit. In order to understand this ambit, it is necessary to compare rule 29(3) with CPR 54.9. This reads as follows:

" **Failure to file acknowledgement of service**

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

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

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

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

(ii) any written evidence,

may take part in the hearing of the judicial review.

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

18.
Unlike CPR 54.9, rule 29(3) does not, in terms, apply where an acknowledgement of service has in fact been filed, albeit outside the 21 day period set by paragraph (1). The words "acknowledgement of service" in rule 29(3) are unqualified. In CPR 54.9(1), by contrast, the words "acknowledgement of service" are followed by "in accordance with rule 54.8".

19.
We consider that if the drafters of rule 29(3) had intended to mirror the position in the CPR, then some such words as "in accordance with rule 29" or "in accordance with rule 29(1) and (2)" would have been inserted in rule 29(3).

20.
But be that as it may, there is nothing in Kumar which can be construed as amounting to a purported general relief from the sanction that is contained in rule 29(3), whereby a person who has not filed an AoS may not take part in the application for permission, unless allowed to do so by the Tribunal. It is still for the Tribunal to decide, in such a scenario, whether to allow the respondent to take part. Just as in the High Court, the Tribunal will decide, in all the circumstances, whether to allow such participation by a respondent at a hearing of the application for permission.

21.
At paragraph 56 of Kumar , the Tribunal considered the position where, although an AoS is filed late, it is filed before a judge comes to consider the judicial review application. The context here is consideration "on the papers". In this situation, counsel for the applicants in Kumar "accepted that the interests of justice require the judge to have regard to "the AoS and summary grounds" (Kumar : paragraph 56).

22.
Ms Hooper submitted that there might be circumstances in which it would not be right for the Tribunal to consider the AoS and grounds. When pressed, however, she was unable to identify an example where the lateness of the grounds (as opposed to their contents) might entitle or require the Tribunal to ignore them.

23.

Strikingly, there is nothing in the CPR that precludes the High Court from considering an AoS and grounds, on a consideration “on the papers”, even though these have been filed late. As can be seen, CPR 54.9(1) is confined to the situation where there is a hearing (such as a “renewed” permission hearing).

24.
As the Tribunal pointed out in argument, it is by no means the case that applicants who obtain permission to bring judicial review proceedings thereby unequivocally gain a material advantage, where a perusal of the AoS and grounds would have made it plain to the judge that permission should not, in fact, have been granted. Although some applicants may welcome an extension of time in the United Kingdom, occasioned by the grant of permission, an applicant who, in truth, has an unarguable case, faces the prospect of being made liable for substantial costs, if the case proceeds to a full hearing.

25.
Applicants who are represented can expect to be warned by their legal advisers, following receipt of detailed grounds of defence, that their claims are unlikely to succeed, and to withdraw their applications before the full hearing takes place. Unrepresented applicants, however, may not appreciate the position. There is, therefore, a real danger that they will end up being materially disadvantaged by a grant of permission that could have been avoided if the AoS and grounds had been considered.

26.
In short, the lateness of an AoS cannot amount to a valid reason for a judge to ignore it and its summary grounds, when these are before him or her at the time of considering the application for permission to bring judicial review proceedings.

27.
Our conclusion on legal status is that we are satisfied the Upper Tribunal had power to make the Kumar arrangements. They did not amount to a purported amendment of the Tribunal Procedure Rules or any practice directions made under the 2007 Act. The arrangements did not provide any general relief from sanction under rule 29.

3. Should the arrangements be ended?

28.
The real question, therefore, is whether the time has come to end the arrangements.

29.
In their statement of case, the applicants make the point that, following Kumar , the Court of Appeal has reinforced the importance of adherence to rules of procedure and made it plain that these rules apply to public authorities, just as they do to others. In Hysaj v Secretary of State for the Home Department [2014] EWCA Civ 166, Moore-Bick LJ said:-

“42. … I am unable to accept that the court can construct special rules for public authorities. I am well aware that the resources of many public authorities are stretched to breaking point, but in my view they have the responsibility to adhere to the rules just as much as any other litigants … .”

30.
At the time of Kumar , the pressures facing the Upper Tribunal had a bearing on the arrangements that were made in that case. However, the fact that the Tribunal continues to face similar pressures is

not a sufficient reason to continue the arrangements. It is important to stress that it was the Secretary of State's chronic inability to comply with the 21 day time limit that necessitated the Kumar arrangements.

31.
We therefore need to look at the Secretary of State's situation as it is in 2018. The witness statement of Mark Davidson, Head of Litigation Operations within the Appeals, Litigation and Subject Access Requirements Directorate of the UK Visas and Immigration, contains a detailed and helpful analysis of the way in which the Secretary of State deals with immigration judicial review cases and how the position has changed since 2014.

32.
At the time of Kumar, the Treasury Solicitor (now the Government Legal Department) was experiencing delays in obtaining instructions from the Home Office officials on how to respond to an application for judicial review. Mr Davidson's statement explains how this problem has been ameliorated by ring-fencing the operational resources for dealing with litigation from more general operational activities, such as immigration decision-making and c ase work. This has been possible as a result of a creation in 2013 of a unit called Litigation Operations ("LO"), which deals with the vast majority of immigration and asylum judicial review claims issued in both the Upper Tribunal and the Administrative Court. Prior to the creation of the LO, operational teams had to balance decision-making and case work with providing instructions to the GLD and its predecessor.

33.
Mr Davidson says:-

"18. The new process enables the allocated LO caseworker to undertake an initial consideration of the claim and to provide instructions to GLD at an earlier stage that they would have been able to previously. This allows the LO caseworker to provide other relevant information and documents (such as Tribunal determinations and decision letters) to GLD where they are not included in a judicial review claim bundle. Previously, GLD would not have the complete picture before commencing their work in such cases. This resulted in time being wasted when the GLD lawyer advising on a claim did not have all the relevant information to hand."

34.
A further development has been the introduction of new litigation management software, bearing the acronym JIRA, which went live in April 2016. JIRA allows pre-action letters and judicial reviews to be tracked as they progress through the litigation system. JIRA now plays an important part in helping LO staff to manage litigations.

35.
Mr Davidson's statement also deals with current compliance levels:-

"24. GLD management information shows that there were 2,323 cases where an AoS was due to be filed between January and March 2018. This figure includes cases issued in the Administrative Court and the Upper Tribunal taking the 21 day deadline as a point of reference. Of that number:

A. GLD have AoS filing data on 1,924 cases where an AoS was due between January and March 2018. Of those 1,924 cases, SSHD and GLD met the 21 day deadline in 635 cases (33.0%). The average filing times for these 1,924 cases are 31.5 days overall, 32 days in the Upper Tribunal (1,772 of 1,924 cases) and 26.8 days in Administrative Court (152 of 1,924 cases).

B. Of the 1,772 Upper Tribunal cases where AoS filing data was available, cumulatively 541 were filed by day 21 (30.5% of cases where an AoS was filed), 772 by day 28 (43.6% of cases where an AoS was filed), 981 by day 35 (55.4% of cases where an AoS was filed) and 1,591 by day 42 (89.8% of cases where an AoS was filed).

C. Of the 152 Administrative Court cases, 94 had AoSs filed by day 21 (61.8% of cases where an AoS was filed). 110 had been filed by day 28 (72.4% of cases where an AoS was filed) and 137 by day 42 (90.1% of cases where an AoS was filed).

D. 64 cases had been struck out or permission had been refused before an AoS had been filed.

E. There was insufficient information at the time this statement was prepared in relation to the remaining 335 cases in which the AoS was outstanding. This could be for a variety of reasons, including the fact that an AoS may be filed at a later date, or that settlement is ongoing."

36.
Mr Davidson acknowledges – as he must - that in a significant number of cases, the 21 day deadline is not being met. This is said to be due to finite resources, together with continuing difficulties (notwithstanding the improvements mentioned earlier) sometimes faced by LO in providing instructions to the GLD in certain cases.

37.
Importantly, the Secretary of State recognises the importance of moving to the position where the Kumar arrangements can be ended. Thereafter, the Secretary of State would need to apply for an extension of time, if he was unable to meet the 21 day time limit for filing an AoS and grounds.

38.
Mr Davidson's statement contains proposals for changing what is currently commonly provided by way of summary grounds of defence. We shall return to that matter later. His statement ends by proposing that, instead of a "wholesale and immediate move away from the Kumar principle" there should be a "staggered reduction of the time available for [the Secretary of State] to file and serve an AoS with the respective reductions taking place as follows:

• For all claims issued between 30 June 2018 and 30 January 2019 the AoS deadline would be 35 days.

• For all claims issued between 31 January 2019 and 31 May 2019 the AoS deadline would be 28 days.

• From 1 June 2019 the AoS deadline would be 21 days".

39.
The applicants welcome the Secretary of State's proposal to move to the position where the Kumar arrangements are no longer required. Ms Hooper and Mr Ball, however, stressed the importance of doing so as early as possible.

40.
As a general matter, it is plainly important for parties to make every effort to comply with relevant procedure rules. The overriding objective of the Upper Tribunal Rules is "to enable the Upper Tribunal to deal with cases fairly and justly" (rule 2). This is not confined to any particular case but to the overall caseload of the Tribunal. If one person's appeal or application absorbs a disproportionate amount of judicial time and resources, other cases waiting in the system may suffer. A system of procedure rules enables a party to know what is expected of them and what is expected of the opposing party.

41.
A recent high-level pronouncement on this issue is to be found in the judgment of Singh LJ in Talpada v Secretary of State for the Home Department [2018] EWCA Civ 841:

“67. I turn finally to the question of procedural rigour in public law litigation. In my view, it cannot be emphasised enough that public law litigation must be conducted with an appropriate degree of procedural rigour. I recognise that public law litigation cannot necessarily be regarded in the same way as ordinary civil litigation between private parties. This is because it is not only the private interests of the parties which are involved. There is clearly an important public interest which must not be overlooked or undermined. In particular procedure must not become the master of substance where, for example, an abuse of power needs to be corrected by the court. However, both fairness and the orderly management of litigation require that there must be an appropriate degree of formality and predictability in the conduct of public law litigation as in other forms of civil litigation.”

42.
Ms Hooper, in her oral submissions, also made the significant point that, quite apart from what we have just said, there is a material advantage in requiring the Secretary of State, as a general matter, to do his best to comply with the 21 day time limit in rule 29(1).

43.
The advantage derives from the fact that – whether or not the Tribunal can generally process applications as soon as the 21 day time limit has ended - the existence of the time limit means the Secretary of State is required within that timeframe to turn his mind to the nature of the challenge to his decision. The sooner he does so, the sooner he can act to remedy what the application for judicial review may persuade him is a piece of problematic decision-making on his part.

44.
Mr Thomann submitted that any such turning of the mind would, in any event, occur at the stage where the Secretary of State is faced with a pre-action protocol (“PAP”) letter from the applicant or the applicant’s advisers. We do not consider that is a complete answer. It is well-known that the Secretary of State does change his stance, when faced with a judicial review, notwithstanding what might have been said in the PAP letter.

45.
We have already recorded that part of the arrangements in Kumar involve the ability of an applicant to write (without making a formal application requiring a fee) to the Upper Tribunal in a case where, although urgent consideration is not sought, the applicant nevertheless wishes to have his or her application put before a judge before the period of six weeks from filing of the application.

46.
Ms Hooper emphasised the difficulties that can be faced by applicants within this category. Ms Awofadeju is a case in point. The decision under challenge in her case comprised a restriction on access to public funds. As a result, she and her children faced serious financial hardship, including problems with her council tax benefit. KA, the second of the present applicants, is a child whose application for indefinite leave to remain has been outstanding since 19 June 2014. The fact that she was only granted twelve months’ discretionary leave is said to have affected her participation in school activities; but her main concern and those of her foster parents involves the worry and anxiety caused by her lack of immigration status.

47.

For all these reasons, it is necessary to dispense with the Kumar arrangements. The question is how to do so in a way that is fair to applicants and the respondent.

4. Ending the arrangements

48.
The applicants oppose the Secretary of State's proposal for a phased return, as described by Mr Davidson. In his witness statement, Trevor Hatton, Director of Public Law of Duncan Lewis, has this to say:-

"34. A timetable for phased compliance, particularly one contained in a court judgment rather than the relevant Tribunal Rules, will inevitably prove problematic for busy practitioners and time-pressed duty judges alike, as implementation will entail calculating varying deadlines based upon precisely when a Judicial Review claim was originally lodged.

35. I am additionally concerned that litigants in person will find it far harder to navigate, let alone monitor, the Respondent's compliance with a phased compliance timetable, especially as litigants in person will look to the Rules and correspondence from the Upper Tribunal, for guidance on how their cases will be handled, as opposed to jurisprudence of which they are unlikely to be aware."

49.
There is force in this. We do not consider that a phased return is appropriate. We have concluded that the Kumar arrangements should cease altogether on a particular date.

50.
That date should, however, be fixed so as to give the Secretary of State a reasonable opportunity of making the necessary arrangements to ensure that, as from that date, he will be in a position to meet the 21 day requirement in the majority of cases, and that, in those cases where he cannot, applications for extensions of time under rule 5 can be duly made.

51.
In all the circumstances, we consider that the appropriate period should be approximately six months from the date of this decision. Given that this would fall shortly before Christmas 2018, it makes sense to make the date 1 January 2019.

52.
Accordingly, the Kumar arrangements will not have effect in respect of any application for permission to bring judicial review proceedings which is filed with the Tribunal after 1 January 2019.

53.
At the hearing, there was discussion as to whether any alteration to the arrangements would be necessary, in the intervening period. Attention focused on paragraphs 36 and 37 of Kumar . These paragraphs concern the making of a written request for consideration (in effect) between the 21 and 42 day period. Mr Ball submitted that, provided that what is stated in those paragraphs is applied, in particular, that no fee is to be charged, as it would be for a formal application, then no interim arrangements would be needed. We agree.

5. The contents of summary grounds of defence

54.
Finally, we return to the issue of the contents of the summary grounds of defence. In his witness statement, Mr Davidson says the Secretary of State intends to "move away from the traditional

approach of filing full summary grounds of defence in most cases which were contested". Mr Davidson points out that:-

"As an expert tribunal, the Upper Tribunal will benefit less from summary grounds of defence which set out that the settled law in cases challenging decisions under, for example, section 94(1) of the Nationality, Immigration and Asylum Act 2002 (clearly unfounded cases) or paragraph 353 of the Immigration Rules (fresh claims)."

55.
In this regard, it is worth reminding ourselves of what Hickinbottom J said in Singh :-

"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 acknowledgement of services. In other cases it would be helpful to draw attention to any "not quite finite point" or procedural bars, or the practical or financial consequences for other parties (which may, for example, be relevant to directions for expedition)."

56.
Mr Thomann submitted that, particularly in unrepresented cases, it may be necessary for the summary grounds of defence to set out what the Secretary of State considers to be the applicant's grounds of challenge. This would be where the grounds are, in their own terms, hard to follow.

57.
Without wishing to be overly prescriptive, the Tribunal considers that it is possible to say the following.

58.
First, a full chronology, setting out the applicant's immigration history as it appears to the Secretary of State, including details of the outcome of any appeal or previous judicial review, is extremely important and should continue to feature in the summary grounds.

59.
Second, we agree with Mr Thomann that, in appropriate cases, the grounds should set out what the Secretary of State considers to be the nature of the applicant's complaint. In some cases, this may not be readily apparent. Although it will, of course, be for the judge considering the application to take his or her own view, the Secretary of State's understanding will nevertheless be helpful.

60.
Third, as Mr Davidson says, recitations of well-established case law on matters such as certification under section 94 or consideration of Article 8 within and outside the Immigration Rules is unnecessary.

61.
Fourth, in all cases, what the considering judge wants to understand from the summary grounds is the Secretary of State's response to the grounds of challenge. The judge wishes to know whether and, if so, why the Secretary of State thinks the applicant's challenge is unarguable.

62.

Fifth, in particular, where the challenge concerns a decision under the Immigration Rules, the relevant rule (including the version which the Secretary of State considers was in force at the date of the decision) should be set out, along with the succinct reason or reasons why (if it be the case) the Secretary of State takes the view that the requirements of the rule or rules have unarguably not been satisfied.

Signed:

Mr Justice Lane, President

Dated: **13 June 2018**