



Neutral Citation Number: [2021] EWCA Civ 1040

Case No: C2/2018/2479

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM**  
**CHAMBER)**

**Lane J, President, Mr C.M. G. Ockleton, Vice-President, and Upper Tribunal Judge**  
**Dawson**  
**JR/10591/2017**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 09/07/2021

**Before:**

**SIR KEITH LINDBLOM, SENIOR PRESIDENT OF TRIBUNALS**  
**LORD JUSTICE LEWIS**  
and  
**SIR NIGEL DAVIS**

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**Between:**

**THE QUEEN (on the application of KA)** **Appellant**  
- and -  
**THE SECRETARY OF STATE FOR THE HOME** **Respondent**  
**DEPARTMENT**

**THE LORD CHANCELLOR** **Interested Party**

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**Sonali Naik QC and Louise Hooper** (instructed by **Duncan Lewis**) for the **appellant**.  
**Colin Thomann** (instructed by **Government Legal Department**) for the **respondent**.  
**The Lord Chancellor** did not appear and was not represented.

Hearing date: 24 June 2021

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**Approved Judgment**

*Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 9<sup>th</sup> July 2021.*

## Lord Justice Lewis:

### INTRODUCTION

1. This appeal concerns the process by which defendants provide acknowledgments of service in claims for judicial review brought in the Upper Tribunal. Rule 29(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (“the Rules”) provides that a defendant who wishes to take part in proceedings for judicial review must provide the Upper Tribunal with an acknowledgment of service so that it is received within 21 days after the date on which the claim form was sent to the defendant. Such acknowledgements must indicate whether a defendant is contesting the claim, set out the grounds upon which the claim is resisted and provide any other information that may assist the Upper Tribunal: see rule 29(2) of the Rules.
2. The acknowledgement of service usually will greatly assist the Upper Tribunal in considering whether permission to apply for judicial review should be granted or refused. It may identify reasons why the grounds of claim are unarguable or it may identify a bar to judicial review, such as delay in bringing the claim or the availability of an alternative remedy. It may also provide information about the existence of other interested parties who should be notified of the claim, or of the need for expedition, or other information relevant to the management of the claim if permission is granted. The provision of an acknowledgement of service may therefore, benefit the Upper Tribunal, the claimant or the defendant or both, and will serve the wider interest in the efficient administration of justice.
3. Two issues arise in this case. The first concerns the proper interpretation of rule 29 of the Rules in circumstances where a defendant does not provide an acknowledgment of service within the 21 day period prescribed by rule 29(1) of the Rules. The appellant, KA, contends that a defendant must file an acknowledgement of service within 21 days and if he does not do so, he must either obtain an extension of time for doing so or the Upper Tribunal must make a case management decision to admit the acknowledgement of service before the Upper Tribunal can consider it. The respondent contends that the Upper Tribunal may consider an acknowledgement of service which has in fact been provided before the decision on whether to grant permission is taken, even if it is provided after the 21 day time limit set by rule 29 of the Rules.
4. The second issue concerns arrangements put in place in the case of R (*Kumar and another*) v *Secretary of State for the Home Department* [2014] UKUT 00104 (IAC) to enable the respondent to provide acknowledgements of service within 42 days rather than 21 days. They became known as the *Kumar* arrangements. The appellant seeks a declaration that the *Kumar* arrangements were unlawful as, in effect, they involved amendments to rule 29 of the Rules and the Upper Tribunal had no power to make such amendments. The respondent contends that the *Kumar* arrangements were lawful. The respondent further contends that both issues are academic and therefore the Court ought not to deal with either issue.

### THE LEGAL FRAMEWORK

#### *The Statutory Framework*

5. The Upper Tribunal was created by section 3 of the Tribunals, Courts and Enforcement Act 2007 (“the Act”). Sections 15 and 16 the Act provide for applications to be made to the Upper Tribunal in certain cases for the remedies available in claims for judicial reviews. A Consolidated Direction was made by the Lord Chief Justice on 24 October 2013 that certain classes of claim for judicial review were to be heard by the Upper Tribunal. They included, subject to certain exceptions, challenges to decisions made under the Immigration Acts which were designated as immigration matters.
6. The rules governing the procedure for dealing with judicial review claims in the Upper Tribunal are contained in the Rules made under section 22 of the Act. They are made by the Tribunal Procedure Committee in accordance with the process set out in Schedule 5 to the Act. Practice Directions may be made by the Senior President of Tribunals (with the approval of the Lord Chancellor) or Chamber Presidents (with the approval of the Senior President of Tribunals) pursuant to section 23 of the Act. There is also provision for Chamber Presidents to issue guidance on changes in law and practice: see paragraph 7 of Schedule 4 to the Act.

### ***The Rules***

7. Rule 2 of the Rules provides that the Upper Tribunal must give effect to the overriding objective of dealing with cases fairly and justly when exercising its powers under the Rules or interpreting any rule or practice direction. That rule also provides that parties must help the Upper Tribunal to further the overriding objective. Rule 7, so far as material, provides that:

“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 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)

(b) waiving the requirement.....”.

8. Rule 28 deals with applications for permission to bring judicial review proceedings. Rule 28A deals with immigration judicial reviews (i.e. those designated as immigration matters by the Consolidated Direction). Rule 29 deals with acknowledgments of service and provides as follows:

“29.— **Acknowledgment of service**

(1) A person who is sent or provided with a copy of an application for permission under rule 28(8) (application for permission to bring judicial review proceedings) or rule 28A(2)(a) (special provisions for immigration judicial review proceedings) and wishes to take part in the proceedings must provide to the Upper Tribunal an 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 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 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.”

9. Rule 30 provides for the Upper Tribunal to notify the parties and certain others of the decision on permission. If permission is refused without a hearing, the claimant may apply for the refusal to be reconsidered at an oral hearing. Rule 31 provides for the provision of detailed grounds and evidence if permission to apply for judicial review is granted.

### ***The Kumar Arrangements***

10. In 2013 and 2014, the Secretary of State for the Home Department was routinely unable to provide acknowledgements of service within 21 days in judicial reviews involving immigration cases - partly, it seems, due to an increased volume of such claims. At the same time, the Upper Tribunal itself faced increasing volumes of claims. Consequently, applications for permission to apply for judicial review were unlikely to be placed before a judge for consideration until 6 weeks after the claim for judicial review was filed.
11. In January 2014, the Upper Tribunal outlined arrangements for dealing with the provision of acknowledgements of service. In essence, the Upper Tribunal indicated

that applications for permission would not be considered for six weeks after being filed. An acknowledgement of service provided within that six week period would be considered by the Upper Tribunal judge when deciding whether to grant permission without the defendant having to apply for an extension of time for providing the acknowledgment of service. Arrangements were also made whereby the Upper Tribunal would consider certain applications within six weeks, if it considered it was appropriate to do so, on the written request of the claimant.

## **THE FACTS**

### ***The First Judicial Review Claim***

12. The appellant, KA, is a national of Nigeria born on either 17 July 2001 or 17 July 2003. There is no record of her entry into the United Kingdom but it is thought that she came to this country with her mother. She was eventually abandoned by her family and, in 2013, became the subject of an interim care order placing her in the care of Southwark London Borough Council. In 2012, the competent authority decided that there were reasonable grounds for believing that she was a victim of human trafficking. KA was given discretionary leave to remain but that expired in 2013. In 2014, an application for indefinite leave to remain was made on her behalf. The respondent failed to deal with that application for many years. By a decision of 4 December 2017, the respondent granted KA discretionary leave to remain for one year but failed to deal with the application for indefinite leave to remain. On 21 December 2017, a claim for judicial review was issued contending that the respondent had unlawfully failed to determine the appellant's application for indefinite leave to remain.
13. At that stage, the *Kumar* arrangements applied and the respondent provided an acknowledgment of service on 1 February 2018, that is outside the 21 day limit prescribed by the Rules but within the 42 days envisaged under the *Kumar* arrangements.
14. On 23 February 2018, the Upper Tribunal ordered that what it described as the *Kumar* issue be severed and decided separately from the substance of the appellant's claim for judicial review
15. On 4 April 2018, the parties agreed a consent order under which the appellant withdrew the claim for judicial review on the respondent agreeing to take a new decision within 2 months which would consider whether indefinite leave or discretionary leave would be granted.

### ***The Upper Tribunal Decision***

16. On 13 June 2018, the Upper Tribunal gave its decision on the *Kumar* arrangements. In the course of its decision, it considered the proper interpretation of rule 29 of the Rules. It dealt with rule 29(1) at paragraph 15 of its decision and stated that:

“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.”

17. The Upper Tribunal considered that 29(3) of the Rules did not apply where an acknowledgment of service had in fact been provided, albeit outside the 21 day time period provided for by the Rules. Rather, rule 29(3) only applied to a situation where a defendant had failed to provide an acknowledgment of service at all. In those circumstances, a defendant could not take part in an application for permission unless allowed to do so by the Upper Tribunal.
18. The position arising where a defendant had provided an acknowledgment of service, albeit outside the 21 day time limit, was that there was nothing in the Rules to prevent the Upper Tribunal from considering the acknowledgment of service when deciding whether to grant permission. The Upper Tribunal said at paragraph 26 of its decision that:

“26 In short, the lateness of an [Acknowledgment of Service] 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.”
19. The Upper Tribunal then considered whether the *Kumar* arrangements were lawful and concluded that they were. Applications for judicial review were not routinely being considered earlier than six weeks after they were filed. The *Kumar* arrangements simply informed the parties of the approach that the Upper Tribunal would take to acknowledgments of service provided within that six week period: they would normally fall to be considered when the Upper Tribunal came to consider the application for permission. It noted at paragraph 36 of its decision that:

“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”.
20. The Upper Tribunal went on to consider that the time had come to end the *Kumar* arrangements (even though at that stage, we were told, the Upper Tribunal was still unable to process applications for permission within six weeks). It concluded that it would be appropriate to do so after a reasonable opportunity was given to the respondent to make the necessary arrangements to ensure that acknowledgments of service were provided within 21 days. It concluded, therefore, that the *Kumar* arrangements would not have effect in respect of any application for permission to bring judicial review proceedings filed after 1 January 2019.
21. By a document dated 13 June 2018 and headed Notice and Direction, the Upper Tribunal ended the *Kumar* arrangements with effect from 1 January 2019.

22. By order dated 25 September 2018, the Vice President of the Upper Tribunal ordered the respondent to pay the reasonable costs of the appellant and refused permission to appeal.

### ***The Second Judicial Review***

23. Following the consent order made on 4 April 2018, the respondent reconsidered the appellant's application for indefinite leave to remain in the United Kingdom. By letter dated 18 May 2018, the respondent indicated that a senior decision maker had considered the case and decided to grant the appellant indefinite leave to remain. That decision was said to be in the process of being implemented and the relevant documentation would be issued shortly. In fact, the respondent on 14 June 2018 granted the appellant discretionary leave for one year, not indefinite leave to remain.
24. A second claim for judicial review was then issued on 7 September 2018 challenging the failure to grant indefinite leave. Although the *Kumar* arrangements were still in place, the Upper Tribunal directed on 9 October 2018 that the respondent provide an acknowledgment of service within 7 days of service of that order. The respondent did not comply with that direction. The respondent twice applied for, and was granted, extensions of time to file an acknowledgment of service, first, until 23 October 2018 and secondly until 6 November 2018. The respondent filed an acknowledgment of service on 5 November 2018.
25. Ultimately, the respondent did provide the relevant immigration document confirming that the appellant had indefinite leave to remain. By a consent order sealed on 20 December 2018, the appellant withdrew the second claim for judicial review and the respondent was ordered to pay the appellant's costs.

### **THE APPEAL AND THE ISSUES**

26. Permission to appeal was granted by Singh LJ who noted, in the order granting permission, that there was an argument that the issues had become academic.
27. In the light of the grounds of appeal, and the written and oral submissions, the following issues arise:
- (1) what is the proper interpretation of rule 29 of the Rules and, in particular, may the Upper Tribunal have regard to an acknowledgment of service provided after the expiry of 21 day period provided for in rule 29(1) but before the decision to grant permission was taken (grounds 4(i) and (ii) and (iv) and (v))?;
  - (2) were the *Kumar* arrangements unlawful (ground 4(iii))?; and
  - (3) are either of those issues academic and, if so, should the Court exercise its discretion to deal with either or both of the issues?

### **THE FIRST ISSUE – THE PROPER INTERPRETATION OF RULE 29 OF**

#### **THE RULES**

##### ***Submissions***

28. Ms Naik Q.C. with Ms Hooper, for the appellant, submitted that rule 29(1) of the Rules imposed a mandatory requirement on a defendant to provide an acknowledgment of service within 21 days if the defendant was to be able to take part in the judicial review proceedings. A defendant who failed to do so had to apply for, and be granted, an extension of time before he or she could take part in proceedings and before an Upper Tribunal judge was able to consider an acknowledgement of service provided outside the 21 day limit. Alternatively, the Upper Tribunal had to make a case management decision to admit the acknowledgment of service. Absent a successful application for an extension of time (or other case management decision to admit the acknowledgement of service) the Upper Tribunal had to determine the application for permission without consideration of what the defendant said in any acknowledgment of service provided outside the time limit. That issue was not academic, or in any event, the Court should deal with it as the matter involved an interpretation of a provision of the Rules which was likely to be important in future cases.
29. Mr Thomann, for the respondent, submitted that the Upper Tribunal was correct in its interpretation of rule 29 for the reasons it gave. First, he submitted that rule 29(1) requires the defendant to provide an acknowledgement of service within 21 days if he or she wishes to take part in proceedings. Rule 29(1) does not itself prescribe the consequences of failing to provide an acknowledgment of service at all, or of providing one after the end of the 21 period. The only consequence is a practical one, namely that the Upper Tribunal may proceed to determine the application for permission after the end of the 21 day period without the defendant in fact having provided an acknowledgment of service. Secondly, rule 29(3) only applies in a situation where the defendant has failed to provide an acknowledgement of service at all. In those circumstances, the defendant may not take part in the proceedings unless the Upper Tribunal allows him to do so. Thirdly, and consequently, in a case where the defendant has provided an acknowledgment of service but done so outside the 21 day period, there is nothing in the Rules providing that the defendant cannot take part in proceedings and nothing to prohibit the Upper Tribunal from considering an acknowledgment of service that has been filed late. Alternatively, if that were wrong, Mr Thomann submitted that the Upper Tribunal could in any event waive the 21 day requirement, under the power conferred by rule 7(2)(a) of the Rules. Mr Thomann further submitted that, in any event, the issue was academic as far as the Appellant was concerned as her judicial review claim had now been concluded.

### ***Discussion***

30. The first question is whether this issue is academic and, if so, whether the Court should adjudicate on the proper interpretation of rule 29 of the Rules. The position is set out by Lord Slynn, with whom the other members of the House of Lords agreed, in *R v Secretary of State for the Home Department ex p. Salem* [1999] 1 A.C. 450 at 456-457 in the following terms:

“ My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se. The decisions in the *Sun Life* case and *Ainsbury v. Millington* (and the reference to the latter in



rule 42 of the Practice Directions applicable to Civil Appeals (January 1996) of your Lordships' House) must be read accordingly as limited to disputes concerning private law rights between the parties to the case.

The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.”

31. The issue in the present case is academic as between the parties. Both claims for judicial review have been withdrawn by consent. The appellant has obtained the result she was seeking, namely a determination of her claim for indefinite leave. There is no substantive issue in existence between the parties. Nonetheless, this is one of the cases where there is a good reason in the public interest for resolving the issue as to the proper interpretation of rule 29 of the Rules. It involves a discrete point of interpretation, the proper interpretation of rule 29 of the Rules, which may arise in future judicial review claims in the Upper Tribunal. It does not depend on a detailed consideration of facts but, in any event, the judicial review claim brought by the claimant provides a concrete factual context in which to test the different potential interpretations of rule 29. Further, as the respondent accepted, there has been full argument on the issue, and there is no other material needed in order to deal with the issue. Finally, there is in existence the current decision of the Upper Tribunal on the interpretation of rule 29, which is likely to be followed by tribunals in other cases even if not strictly binding on them. If the reasoning, or the conclusion, of the Upper Tribunal were flawed, it would be appropriate to correct it. For those reasons, I consider that this is one of the relatively rare cases where it is appropriate to deal with an issue even though it is now academic as between the parties to this claim.
32. I turn then to the proper interpretation of rule 29. The rule operates in the following way. First, if a defendant wishes to take part in judicial review proceedings, he or she must provide the Upper Tribunal with an acknowledgment of service so that it is received by it no later than 21 days after the date on which the claim form was sent or provided to him. The clear implication in the Rules is that the Upper Tribunal will not determine the application for permission before the expiry of that 21 day period.
33. Secondly, rule 29(3) applies where a defendant fails to provide an acknowledgment of service either within 21 days or at all. In either of those situations, a defendant can only take part in an application for permission (whether at the stage of consideration of permission on the papers, or where permission is considered at an oral hearing) if allowed to do so by the Upper Tribunal.
34. Thirdly, a defendant who does not provide an acknowledgment of service within the prescribed 21 day period runs the risk that the Upper Tribunal will consider the application for permission, and reach a decision, without the benefit of an acknowledgment of service and without knowing if the defendant opposes the grant of permission and if so, the grounds for doing so. If a defendant knows that he or she is not going to be in a position to provide an acknowledgment of service within 21 days,

but wishes to be sure that the Upper Tribunal will not consider the application for permission without the defendant first providing an acknowledgment of service, then the defendant will have to make an application for an extension of time to provide the acknowledgment of service. If that extension is granted, the Upper Tribunal would not consider the application for permission until the period, as extended, has expired.

35. I do not, therefore, accept the appellant's submission that a defendant who fails to provide an acknowledgment of service within 21 days must make an application for an extension of time and, unless that is granted, an Upper Tribunal cannot even consider an acknowledgment of service provided late when deciding whether to grant permission to apply for judicial. There is nothing in the words of rule 29(3) of the Rules to indicate that that is what is intended. Indeed, as Ms Naik accepted, it would in effect require reading in words into rule 29(3) to the effect that a defendant may only be allowed to take part "upon determination of an application for an extension of time". I do not see any justifiable basis for reading in a qualification of that sort into rule 29(3) of the Rules. Similarly, I do not see any justifiable basis for saying that there needs to be something which can be described as a case management decision before the Upper Tribunal can consider an acknowledgment of service provided late. All that is necessary under rule 29(3) is that the Upper Tribunal allows the defendant take part in the proceeding. It does that by deciding whether to consider the defendant's acknowledgment of service if provided late.
36. Nor would the interpretation placed on rule 29 by the appellant be consistent with the underlying purpose for allowing defendants to provide acknowledgments of service. They may assist the Upper Tribunal to determine whether or not to grant permission. They may contain factual information not known to the claimant, or may draw attention to legal provisions or arguments of which a claimant (who may be a litigant in person) or his representatives may be unaware. The acknowledgment of service may include other information, for example, the identity of other interested parties or the need for expedition, which may assist the Upper Tribunal to manage the claim if permission is granted. The interpretation placed on rule 29(3) by the appellant would therefore be inconsistent with the efficient administration of justice, and, potentially, with the interests of the claimant and the defendant.
37. In this respect, however, I do not fully accept the reasoning of the Upper Tribunal. In particular, I do not accept that rule 29(3) only applies to a situation where a defendant fails to provide an acknowledgment of service at all and does not apply where an acknowledgment of service is provided outside the prescribed 21 day period. First, rule 29 must be read as a whole. The reference in rule 29(3) to failing to provide an acknowledgment of service is to be taken as referring back to rule 29(1). That requires that a defendant who wishes to take part in proceedings must provide an acknowledgment of service to the Upper Tribunal so that it reaches the tribunal within 21 days of the claim form being sent to the defendant. The defendant will not have complied with that rule if he either fails to provide an acknowledgment of service at all or if he provides one but not so that it is received by the Upper Tribunal within the 21 day period. The clear intention of rule 29(3) is to deal with all such failures to comply with rule 29(1). It does so by providing that the defendant may not take part in the application for permission unless allowed to do so.
38. Secondly, the language used reflects that interpretation of the rule. The defendant cannot "take part" in the application for permission "unless allowed to do so". The

way that a defendant would normally “take part” in the application process at the paper stage is by the provision of an acknowledgment of service (although it is possible that he could seek to do so by the provision of a witness statement or other document setting out submissions). The use of the language therefore anticipates that the power conferred by the rule may be used (certainly at the stage of considering an application for permission on the papers) by allowing the defendant to take part by having his acknowledgment of service considered before a decision on permission is granted.

39. Thirdly, there is no rational basis for seeking to distinguish between a situation where an acknowledgment of service is not provided at all and one where it is provided late, with the former situation being dealt with by rule 29(3) but the latter situation not being dealt with at all by the Rules. A more natural interpretation of rule 29(3) is that it caters for the situation where the acknowledgment of service has not been provided as contemplated by rule 29(1) (i.e. provided late or not at all). In such circumstances, the Upper Tribunal may allow the defendant to take part in the application for permission by, for example, considering an acknowledgment of service, albeit provided outside the time prescribed, when deciding whether to grant permission. If late provision of the acknowledgment of service results in additional costs being incurred by a claimant, the Upper Tribunal has power to deal with that matter.
40. The primary reason why the Upper Tribunal reached the conclusion that it did on the interpretation of rule 29(3) seems to have been the difference between that rule and Civil Procedure Rules Part 54.9 which deals with the consequences of a failure to file an acknowledgment of service in judicial review proceedings in the High Court. CPR 54.8(1)-(3) provide that:
- “(1) Any person served with the claim form who wishes to take part in the judicial review must file an acknowledgment of service in the relevant practice form in accordance with the following provisions of this rule.
- (2) Any acknowledgment of service must be –
- (a) filed within 21 days after service of the claim form; and
- (b) served on-
- (i) the claimant; and
- (ii) subject to any direction under rule 54.7(b) any other person named in the claim form
- as soon as practicable and, in any event, not later than 7 days after it is filed.
- (3) The time limits under this rule may not be extended by agreement between the parties.”
41. The consequences of a failure to do are dealt within CPR 54.9(1) which provides that:

**“54.9**

(1) Where a person served with the claim form has failed to file an acknowledgment 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.”

42. The Upper Tribunal attached considerable significance to the fact that CPR 54.9 referred to a failure to file an acknowledgment of service “in accordance with rule 54.8” (which rule includes the requirement to file within 21 days after service of the claim form) whereas rule 29(3) of the Rules referred to a person who does not “provide an acknowledgment of service” but does not refer to the provisions of rule 29(1) requiring that it be received within 21 days. The Upper Tribunal considered that if the drafters of rule 29(3) had meant to reflect the position in the CPR, then words such as “in accordance with rule 29” or “in accordance with rule 29(1) and (2)” would have appeared in rule 29(3) of the Rules.
43. I consider that the Upper Tribunal has placed too much significance on a comparison between the provisions of the Rules and the CPR. The Rules are to be interpreted having regard to the words used and the context in which they appear, and having regard to the purpose underlying the Rules. The Rules are a self-contained, free standing procedural code for tribunals. It may sometimes be the case that consideration of other provisions, such as the CPR, may assist in considering the meaning of the Rules or it may be that it is apparent that the purpose underlying particular provisions of the Rule in question is to achieve what the CPR does. A close textual comparison with the provisions of CPR is, however, usually unlikely to assist in interpreting the provisions of the Rules.
44. In the present case, the wording and the structure of the Rules are different from the CPR. The provisions governing acknowledgments of service are contained in one rule, rule 29, of the Rules. For the reasons given above, it is natural to read rule 29(3) as referring back to rule 29(1) and as encompassing the situation where an acknowledgment of service has not been provided in the way envisaged by rule 29(1) (or at all). The CPR is structured differently, so that the rule dealing with filing an acknowledgment of service is contained in CPR 54.8 (and is differently worded from rule 29(1) of the Rules). The provision dealing with the consequences of failure to serve an acknowledgment of service is dealt with in CPR 54.9. It is not surprising that CPR 54.9 refers to a failure to provide an acknowledgment of service in accordance with rule 54.8 as it wishes to refer to that earlier, different rule which deals with acknowledgments of service. Further, there are other differences between the Rules and CPR 54. The Rules deal with allowing a defendant to take part in an application for permission. That includes the consideration of permission on the papers and, if

permission is refused, an oral hearing dealing with a request for that refusal to be reconsidered (or any other oral hearing at which permission is considered). CPR 54.9 only deals expressly with the consequences of a failure to provide an acknowledgment of service on the ability of a defendant to take part in a hearing to determine whether permission should be given. It is, therefore, not possible to treat the precise wording of a particular, more limited, provision of the CPR as a clear indication of the meaning of the words used in rule 29(3) of the Rules.

45. There is nothing in the approach of Hickinbottom J, as he then was, in *R (Singh) v Secretary of State for the Home Department* [2013] EWHC 2873 which is inconsistent with the interpretation of rule 29(3) that I consider to be correct. There, the judge was dealing with the provisions of the CPR, not the Rules. He was dealing with a situation where there had been applications for an extension of time to file acknowledgements of service after the end of the 21 day period but before the decision on permission had been taken. Indeed, in all but one of the 20 cases in issue, extensions of time had already been granted (the other case had been stayed and no acknowledgment was due). The decision needs to be read in that context. It was not dealing with the different situation of whether a judge should consider an acknowledgment of service provided late but before the decision on permission was taken.
46. On a proper interpretation, therefore, rule 29(3) of the Rules applies where a defendant has failed to provide an acknowledgment of service at all or has failed to do so within the 21 day period prescribed by rule 29(1). The Upper Tribunal may allow a defendant to take part in the application for permission, and may thus consider an acknowledgment of service provided outside the 21 day time limit but before it takes a decision on whether to grant permission to apply for judicial review.

## **THE SECOND ISSUE – THE VALIDITY OF THE KUMAR ARRANGEMENTS**

### ***Submissions***

47. Ms Naik submitted that the Upper Tribunal acted in a way that was *ultra vires* when it adopted the *Kumar* arrangements as those arrangements amended the time-limit provided for by Rule 29 and replaced them with a six week-period for providing an acknowledgment of service. Ms Naik submitted that the Upper Tribunal had no power to amend the Rules, which were made by the Tribunal Procedure Committee under section 22 of the Act. She relied in particular on the decision of the Court of Appeal in *Bovale Ltd.v Secretary of State for Communities and Local Government and another* [2009] 1 W.L.R. 349. Ms Naik accepted that the issue was academic in the sense that there was no live issue between the appellant and the respondent, and no one who had had permission refused in accordance with the *Kumar* arrangements would be able to appeal now (save that Ms Naik left open the possibility of a claimant having been adversely affected if ordered to pay the respondent's costs of providing an acknowledgment of service). Nevertheless, she submitted there was a good reason to entertain the claim as it involved identifying whether there was a legal power for the Upper Tribunal to make such amendments which could be relevant if the Upper Tribunal sought to make similar arrangements in future.
48. Mr Thomann submitted that the issue was academic and the Court ought not to entertain the issue. Further, he submitted that the Upper Tribunal had not amended the

Rules governing acknowledgement of service but had simply set out what would happen in the event that an acknowledgment of service was provided late.

### *Discussion*

49. This issue is academic and there is no good reason for entertaining the appeal on this issue. It is academic as there is no live issue between the appellant and the respondent. The appellant's claims for judicial review have been withdrawn. The substantive dispute has been resolved. There is no good reason for dealing with this issue as a matter of discretion. The issue is not one that is likely to arise in the future or need resolution, as the *Kumar* arrangements were discontinued with effect from 1 January 2019. Claims for judicial review issued after that date have not been dealt with in accordance with those arrangements. There is no prospect that anyone whose claim for judicial review was dealt with prior to that date would be able now to bring any appeal against any decision refusing or granting permission to apply for judicial review where the judge considered an acknowledgement of service provided late or indeed any decision relating to the costs of providing such an acknowledgment of service. First, any appeal would be out of time. Secondly, any decision would have been based on the substance of the acknowledgement of service. Any issue as to the time of providing it would not be a material error for the purposes of the decision on whether to grant permission. Thirdly, it is unlikely that the fact that the acknowledgment of service was provided late would of itself justify refusing to order the claimant to pay the respondent's cost of providing it if, in fact, the claimant was refused permission as a result of its contents. Finally, in any event, rule 7(1) of the Rules provides that any irregularity arising from a failure to comply with any requirement in the Rules (here, compliance with rule 29(1) due to the *Kumar* arrangements) "does not of itself render void the proceedings or any step taken in the proceedings".
50. It is not necessary in those circumstances to express a concluded view on the legality of the arrangements put in place. I would point out, however, that the situation here is different from that in *Bovale*. There, the relevant Civil Procedure Rule (CPR 8.9) provided that a defence did not need to be filed in response to certain planning claims. The Administrative Court held that, in future cases, a defence should be served within 10 weeks of the service of the claim form. In that case, therefore, the High Court adopted a general practice which contradicted a specific provision of the CPR. In that context, the Court of Appeal held that a court could not indicate that it intended in future cases generally to disapply, or vary the CPR. That is not the position in the present case.

### **CONCLUSION**

51. I would dismiss this appeal. On a proper interpretation of rule 29(3) of the Rules, the Upper Tribunal may allow a defendant to take part in the application for permission, and may consider an acknowledgment of service provided outside the 21 day time limit but before it takes a decision on whether to grant permission to apply for judicial review. The issue concerning the lawfulness of the *Kumar* arrangements is academic.

### **Sir Nigel Davis:**

52. I agree.

### **The Senior President of Tribunals:**

53. I agree that the appeal must be dismissed for the reasons lucidly given by Lewis L.J.. I add these short observations to what he has said only for the sake of emphasis.
54. First, it must be stressed that the Rules are rules, which should be complied with and not casually or routinely ignored. This applies no less to rule 29 than to others in similar mandatory terms. And it applies no less to this self-contained procedural scheme for the tribunals than it does to the parallel regime for the courts in the CPR. The Rules are intended to be conducive to consistency and efficiency in the conduct of proceedings in the tribunals and a means of promoting the interests of justice. This is especially so in a jurisdiction such as that of the Upper Tribunal (Immigration and Asylum Chamber), where the volume and complexity of its work impose great pressures on judges and staff alike. Compliance with procedural requirements, including the timely filing of acknowledgments of service in claims for judicial review, is essential. Nothing said below or in the judgments in this court should be thought to suggest otherwise.
55. Secondly, I agree with Lewis L.J.'s understanding of rule 29 and what he has said about its implications and effect. Reading the rule as a whole and its individual provisions in context, I think its meaning is perfectly clear. No gloss is required. The rule can and should be read as enabling justice to be done in all proceedings for judicial review in the Upper Tribunal, and not to impede it.
56. In my view, therefore, it is right to reject Ms Naik's submission that a defendant who fails to file an acknowledgment of service no later than 21 days after the date on which the claim form was sent or provided to him must make an application for an extension of time to enable the Upper Tribunal to consider an acknowledgment of service filed late. It is inappropriate to read words into rule 29(3) to give it that effect. The rule must be read as it is drafted, without the qualification for which Ms Naik contends.
57. I also agree with the conclusion that rule 29(3), read together with rule 29(1), applies not only in a case where the defendant has entirely omitted to file an acknowledgment of service, but also where an acknowledgment of service has been filed, but outside the 21-day period for doing so. Again, there is no need for additional words.
58. And thirdly, the "*Kumar* arrangements", now long since withdrawn, did not authorise breaches of rule 29. They did not purport to disapply or vary the rule itself. The rule remained effective throughout the period when those arrangements were in place. As Lewis L.J. has explained, though the issue is entirely academic, this case is not akin to *Bovale*.