Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

R (on the application of Soreefan and Others) v Secretary of State for the Home Department (judicial review – costs – Court of Appeal) [2015] UKUT 00594 (IAC)

The Queen on the application of

Bibi Sajeedah Khan Soreefan
Charles Anyamene
Nduduisi Callistus Nwanko

Applicants

v

Secretary of State for the Home Department

Respondent

Applications for Permission to Appeal to the Court of Appeal

Having considered all documents lodged and having further considered the oral and written submissions of Mr C Emezie (of Dylan, Conrad, Kreolle Solicitors) and Ms S Reeves, of Counsel, instructed by the Government Legal Department in the first two cases (only) at hearings at Field House, London on 22 July and 09 September 2015

Decision of The President, The Hon. Mr Justice McCloskey and Upper Tribunal Judge Lindsley: Applications Refused

(i) *An appeal lies to the Court of Appeal against a costs order of the Upper Tribunal made in immigration judicial review proceedings.*

(ii) *In determining cost issues the Upper Tribunal will apply M v London Borough of Croydon [2012] EWCA Civ 595.*

(iii) Provided that a costs decision of the Upper Tribunal is in harmony with established principles and has a tenable basis, permission to appeal to the Court of Appeal is unlikely to be granted because cost decisions involve a substantial measure of discretion dependent upon one particular factual matrix.

(iv) In judicial review proceedings where permission to appeal is not determined at a hearing, the time limit for applying to the Upper Tribunal for permission to appeal to the Court of Appeal is one calendar month, beginning on the date immediately following the day upon which the Tribunal's substantive decision was sent and ending on the corresponding date in the immediately succeeding month.

(v) This time limit is capable of being extended in accordance with established principles and giving effect to the overriding objective.

(vi) Every Permission to Appeal (PTA) application must be made in writing. There is no prescribed form.

(vii) In judicial review cases, the prescribed fee for an application for permission to appeal to the Court of Appeal is presently £45.00. Such applications do not require notice to the other parties.

(viii) The substantive requirements for every permission to appeal application are enshrined in rule 44(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and are of cardinal importance.

(ix) A failure to comply with rule 44(7) engages the Upper Tribunal's discretionary strike *out powers under rule 8. The Tribunal will assess in particular the nature and gravity of the non-compliance and will give effect to the principles in R (SN) v SSHD (striking out – principles) IJR [2015] UKUT 227 (IAC).*

Introduction

(1) This decision addresses certain issues relating to applications to the Upper Tribunal for permission to appeal to the Court of Appeal. These three cases have been selected for consideration together as they raise common issues upon which guidance is desirable.

Soreefan

(2) The framework of this case can be ascertained from the costs order of Upper Tribunal Judge Rintoul, dated 24 April 2015:

> "*I order that the Respondent do pay 20% of the Applicant's costs to be assessed if not agreed. I order that the Applicant pay the Respondent's costs in preparing costs submissions to be assessed if not agreed.*
>
> ***Reasons:***
>
> *While it is correct that the applicant sent the pre-action protocol letter to the respondent at an incorrect address, it is not said that the respondent did not*

receive it. Further, she resisted the application in the acknowledgement of service, and a consent order was apparently proposed only after permission was granted. That said, permission was granted on only one ground out of five. The applicant was, however, compelled to renew the application at some cost to her and the respondent has agreed to reconsider and if necessary take a decision giving rise to a right of appeal. That is effectively a substantial part of what was sought.

I do however, consider that the respondent is entitled to the costs of her costs submissions, given that the applicant has unreasonably sought her full costs."

(3) It is asserted by this Applicant's solicitors that the sequence of events thereafter was as follows:

(a) The above order was served on them on 28 April 2015.

(b) On 19 May 2015 the solicitors applied to the Court of Appeal for permission to appeal.

(c) On the same date, this application was rejected.

(d) On 20 May 2015, the Applicant's solicitors "applied", by letter, to the Upper Tribunal for permission to appeal and, on the same date, conversed by telephone with an Upper Tribunal Lawyer.

(e) There was a further such conversation on 08 June 2015.

(f) By a letter dated 01 July 2015 an Upper Tribunal Lawyer notified the Applicant's solicitors that their application for permission to appeal would be listed on 21 July 2015. The letter further stated:

> "*Can you kindly comply with Rule 44(7) of Tribunal Procedure (Upper Tribunal) Rules 2008 and supply further details including (i) reasons why the application is lodged out of time, (ii) identify the alleged error of law in the decision and (iii) state the result you are seeking ….*
>
> *In addition please provide your written submissions to the Tribunal as to whether a fee is payable in respect of your application for permission to appeal; such submissions to be received by the Tribunal not later than 14 July 2015.*"

(g) The Respondent's representative (hereinafter the "*GLD*") was notified of the hearing by letter dated 03 July 2015.

(4) The Applicant's solicitors did nothing in response to the notification/direction noted in (f) above. As a result, a wasted hearing materialised on 21 July 2015 and an adjournment ensued. The Tribunal ordered as follows:

[2] The hearing date of 21 July 2015 is vacated.

[3] There will be a re-listing before the same panel of judges at 10.00hrs on 09

September 2015. In making this direction the convenience of both parties' representatives has been specifically considered.

[4] The Respondent's skeleton argument will be filed and served by 14 August 2015. This will include the Respondent's representations concerning the costs thrown away by the adjournment on 21 July 2015 and any application for a wasted costs order against the Applicant's solicitors.

[5] The Applicant's solicitors will make any reply, in writing, by 28 August 2015.

[6] Costs are reserved.

(5) Subsequently, the "Applicant's Response to Application for a Wasted Costs Order" was lodged. Further, the Respondent's skeleton argument was received. The hearing giving rise to the decision in these conjoined cases was ultimately conducted on 09 September 2015.

Anyamene

(6) By order of Upper Tribunal Judge Hanson dated 17 April 2015 it was determined that there be no order as to costs *inter-partes*. The framework of this case is evident from the terms of the Judge's order:

[1] On the 25th April 2013 the applicant issued his challenge to the refusal to grant leave to remain dated 7th March 2013. The remedies sought are set out in section 6 of the claim form.

[2] Mr Justice Silber refused permission on the papers, and found the claim to be totally without merit, on 22nd October 2013. The renewed application came before Upper Tribunal Judge Latter on 15th July 2014 when permission was granted. The claim was compromised by a consent order sealed on 12th December 2014 granting permission to the applicant to withdraw the claim on the basis the respondent had agreed to reconsider the application for leave to remain and make a further decision within three months of the date of the consent order.

[3] Judge Latter found there to be an arguable case. It has not been found the impugned decision is unlawful. The respondent has adopted a pragmatic view leading to settlement. The respondent contends in a letter dated 7th January 2015 that the applicant failed to comply with the PAP and relied upon new material to achieve the grant of permission which was not before the decision maker.

[4] The terms of the consent order only provide an agreement to reconsider meaning the applicant has substantially failed to achieve the remedies sought in the claim.

[5] The appropriate award is for there to be no order as to costs.

The sequence of events was thereafter as in Soreefan.

Nwanko

(7) By order of Upper Tribunal Judge Rintoul dated 15 June 2015 it was determined

that there be no order as to costs *inter-partes*. The framework of this case emerges from the Judge's order:

> *[1] The respondent's submissions are out of time, but equally the applicant has not replied thereto as provided for by the consent order, nor indicated that he is prejudiced by the late service.*
>
> *[2] It is accepted that this is a case which falls into the first category identified in M v Croydon [2012] EWCA Civ 595 in that the applicant did obtain the remedy sought, but equally the pre-action protocol letter was sent to an incorrect address. Part of the claim was conceded in the response thereto of 19 February 2014. I consider that, given the failure to correspond with the respondent thereafter, and given that there would have been a right to challenge a continuing failure to review in the light of the response to the PAP, the commencement of proceedings was premature and not necessary; this was not a straightforward case given the previous findings of the First-tier Tribunal. In all the circumstances of this case, I am satisfied that the appropriate order is that there be no order for costs.*
>
> *[3] I make no award in respect of the respondent's costs submissions. These are out of time, and while I have admitted them, no evidence is produced to support the claim as to when the consent order was served on the respondent.*

(8) Thereafter, this Applicant's solicitors wrote to the Upper Tribunal, by letter dated 24th June 2015 stating:

> *"We continue to represent the above named Claimant in this Judicial Review matter.*
>
> *Further to the decisions of the Upper Tribunal Judge Rintoul, we write to seek permission from the Upper Tribunal to appeal to the Court of Appeal as we believe that there has been an error of Law in the manner which the learned Judge applied his discretion."*

Next, the solicitors requested an oral hearing by further letter dated 15th July 2015 and the matter was listed for hearing on 21st July 2015 in consequence.

Relevant statutory provisions

(9) S.13(1) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007") provides for a right of appeal from the Upper Tribunal "on any point of law arising from a decision made by the Upper Tribunal other than an excluded decision" to the relevant appellate court, which in this case is the Court of Appeal. Pursuant to s.13(3) TCEA 2007, the right of appeal may only be exercised with permission. Permission may be given by the Upper Tribunal or the Court of Appeal on application by the party, per s.13(4) of the TCEA 2007. S.13(5) TCEA 2007 prescribes that:

> *"An application may be made under subsection (4) to the relevant appellate court only if permission (or leave) has been refused by the Upper Tribunal."*

By virtue of S.13(6) of TCEA 2007, the criteria governing the grant of permission to appeal to the Court of Appeal are:

"(a) that the proposed appeal would raise practice, or some important point of principle or

(b) that there is some other compelling reason for the relevant appellate court to hear the appeal."

Further, the Appeals from the Upper Tribunal to the Court of Appeal Order 2008 (the "*2008 Order")* provides:

"Permission to appeal to the Court of Appeal in England and Wales or leave to appeal to the Court of Appeal in Northern Ireland shall not be granted unless the Upper Tribunal or, where the Upper Tribunal refuses permission, the relevant appellate court, considers that –

(a) the proposed appeal would raise some important point of principle or practice; or

(b) there is some other compelling reason for the relevant appellate court to hear the appeal".

Relevant procedural rules

(10) Part 7 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("*the Rules*") begins by cross referring to the 2007 Act, specifically sections 10 and 13 (per rule 41). Rule 44(1) provides:

"*A person seeking permission to appeal must make a written application to the Upper Tribunal for permission to appeal.*"

The governing time limits are regulated by the following provisions of rule 44:

"(3) Where this paragraph applies, the application must be sent or delivered to the Upper Tribunal so that it is received within 3 months after the date on which the Upper Tribunal sent to the person making the application –

(a) written notice of the decision;

(b) notification of amended reasons for, or correction of, the decision following a review; or

(c) notification that an application for the decision to be set aside has been unsuccessful.

(3A) An application under paragraph (1) in respect of a decision in an asylum case or an immigration case must be sent or delivered to the Upper Tribunal so that it is received within the appropriate period after the Upper Tribunal or, as the case may be in an asylum case, the Secretary of State for the Home Department, sent any of the documents in paragraph (3) to the party making the application.

(3B) The appropriate period referred to in paragraph (3A) is as follows –

(a) where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application is made –

(i) twelve working days; or
(ii) if the party making the application is in detention under the Immigration Acts, seven working days; and

(b) where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application is made, thirty eight days.

(3C) Where a notice of decision is sent electronically or delivered personally, the time limits in paragraph (3B) are –

(a) in sub-paragraph (a)(i), ten working days;
(b) in sub-paragraph (a)(ii), five working days; and
(c) in sub-paragraph (b), ten working days.

(4) Where paragraph (3), (3A), (3D) or (4C) does not apply, an application under paragraph (1) must be sent or delivered to the Upper Tribunal so that it is received within 1 month after the latest of the dates on which the Upper Tribunal sent to the person making the application –

(a) written reasons for the decision;
(b) notification of amended reasons for, or correction of, the decision following a review; or
(c) notification that an application for the decision to be set aside has been unsuccessful.

(5) The date in paragraph (3)(c) or (4)(c) applies only if the application for the decision to be set aside was made within the time stipulated in rule 43 (setting aside a decision which disposes of proceedings) or any extension of that time granted by the Upper Tribunal."

Rule 44(6) makes provision for extending time:

"If the person seeking permission to appeal provides the application to the Upper Tribunal later than the time required by paragraph (3), (3A), (3D) or (4), or by any extension of time 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 notice 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 refuse the application."

Finally, the content of an application for permission to appeal is governed by rule 44(7):

"An application under paragraph (1) or (4A)(a) must –

(a) identify the decision of the Upper Tribunal to which it relates;

(b) identify the alleged error or errors of law in the decision; and

(c) state the result the party making the application is seeking."

[The amended provisions of rule 44(4) are reproduced in [24], *infra*]

(11) Rule 45(1) confers on the Upper Tribunal a discretionary power to review the substantive decision under challenge in the limited circumstances specified in (a) and (b), upon receipt of an application for permission to appeal. Notably, the exercise of this power does not require a specific application or request on behalf of the would be appellant. Rather, this is very much an "own initiative" power. The review must be taken in accordance with rule 46. By virtue of rule 45(2), the Upper Tribunal has three options upon receipt of an application for permission to appeal:

(a) To decide not to review the substantive decision.

(b) To review the substantive decision and, effectively, affirm same, proceeding to determine the application for permission to appeal.

(c) To review the substantive decision and take some "*action in relation to the decision or part of it*".

Next, by rule 48:

"*The Tribunal may treat an application for a decision to be corrected, set aside or reviewed, or for permission to appeal against a decision, as an application for any one of those things.*"

(12) Receipt of an application for permission to appeal also triggers the Upper Tribunal's general powers under rule 5. In the present litigation context the most important of these is the power to extend time enshrined in rule 5(3). The general power to give directions under rule 5(2) and rule 6(1) is also engaged. Furthermore, certain of the provisions of rule 7 are applicable:

"*(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;

(b) requiring the failure to be remedied;

(c) exercising its power under rule 8 (striking out a party's case); or

(d) except in a mental health case, an asylum case or an immigration case, restricting a party's participation in the proceedings."

Last, but by no means least, the overriding objective permeates all of the provisions of the rules mentioned above. Per rule 2:

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

Appealing a costs order

(13) The first question to be addressed is whether an appeal to the Court of Appeal lies against a costs order of the Upper Tribunal. The principle that an appeal lies to a higher court or tribunal only if provided by statute is one of some antiquity: see for example Furtado v City of London Brewery Company [1914] KB 709 at 712. Thus this question is one of pure statutory construction.

(14) The relevant provisions of the 2007 Act are set out in [9] above. The "*right to appeal*" from the Upper Tribunal to the Court of Appeal is, as section 13 considered as a whole makes clear, a right to apply for permission to appeal. Such application must be made first to the Upper Tribunal, per section 13(5). An

appeal lies "*on any point of law arising from* ***a decision*** *made by the Upper Tribunal other than an excluded decision*" (our emphasis): per section 13(1). "*Decision"* is nowhere defined. However, there is an elaborate definition of "*excluded decision*", in section 13(8). This definition does not include any of the following: a substantive decision in judicial review proceedings, an interlocutory decision in judicial review proceedings or a costs decision in judicial review proceedings. Indeed neither the expression "*judicial review proceedings*" nor any equivalent thereof features in section 13. This theme is reinforced by the consideration that section 13 belongs to a composite group of provisions, beginning with section 11, which provides for an appeal to the Upper Tribunal from the First-tier Tribunal ("*FtT*"), followed by the Upper Tribunal's powers in the determination of such appeals in section 12, which is plainly concerned with appeals from the FtT. The final member of this discrete unit is section 14, which prescribes the powers exercisable by the Court of Appeal in the event of finding that the Upper Tribunal's decision involved the making of an error on a point of law.

(15) The statutory appeals/judicial review dichotomy in the statute is reinforced by the immediately succeeding group of provisions, namely sections 15 – 19, which are arranged under the rubric "Judicial Review" and relate exclusively to judicial review proceedings. Strikingly, as originally enacted, there is nothing within this discrete group making provision for appeal from the Upper Tribunal to the Court of Appeal in such proceedings.

(16) Based on this analysis of the statutory provisions we conclude that a costs decision of the Upper Tribunal may be the subject of an application for permission to appeal to the Court of Appeal. This is illustrated by R (TH (Iran)) v East Sussex County Court [2013] EWCA Civ 1027, which was an appeal to the Court of Appeal against the costs order of this Chamber in an age assessment judicial review case. The determination of such applications is governed by s13(6) of TCEA 2007 and the 2008 Order (*supra).* Thus the criterion to be applied is whether the appeal raises an important point of principle or practice or there is some other compelling reason warranting the grant of permission. In practice, it is to be expected that cases satisfying this criterion will be very small in number. The basic reason for this is that costs decisions involve a substantial measure of judicial discretion. Furthermore, they entail the application of well established principles to the individual litigation matrix.

(17) For present purposes, it suffices to draw attention to the general principles formulated by the Court of Appeal in M v London Borough of Croydon [2012] EWCA Civ 595, which relate to the payment of costs in circumstances where judicial review proceedings are settled following the grant of permission and prior to the substantive hearing. The Court promulgated the general rule that the successful party should recover its costs from the unsuccessful party. Simultaneously, it recognised that where a claimant succeeds on some issues and not others, the order may reflect this. Importantly, this was a departure from the Court's earlier decision in R (Bahta) v Secretary of State for the Home Department [2011] EWCA Civ 895 that any degree of success *prima facie* entitled the claimant to full costs. Indeed, the Court went further: even where a claimant has been wholly successful, there may be reasons for not ordering the recovery of all costs. Notably, at the conclusion of the guidance section of the judgment, Lord Neuberger MR said the following, at [66]:

> "*Having given such general guidance on costs in relation to Administrative Court cases which settle on all issues save costs, it is right to emphasise that, as in most cases involving judicial guidance on costs, each case turns on its own facts. A particular case may have an unusual feature which would, or at least could, justify departing from what would otherwise be the appropriate costs order.*"

The outcome of the appeal is noteworthy. The Court decided that having regard to two factors, namely (a) a change in the law between the initiation of proceedings and the grant of permission which significantly weakened the Defendant's defence and (b) the unreliability of the claimant's expert witness, the Defendant would be ordered to pay 50% of the claimant's costs to the date when permission was granted and 100% thereafter.

(18) We further consider it timely to draw attention to the following passage in M, at [44]:

> "*……. an appellate court should normally be very slow indeed to interfere with any decision on costs.*"

By way of general guidance, we consider that provided that a costs decision of the Upper Tribunal is in harmony with established principles and has a tenable basis for the course chosen by the Judge in the exercise of his discretion, it will be unassailable. Judges determining applications for permission to appeal against costs decisions should give effect to this general rule.

Prescribed form?

(19) In UTIAC proceedings, practitioners are required to identify the appropriate prescribed form by resort to the UTIAC website. This reflects the long established practice of this chamber. We believe it to be the practice of other chambers of the Upper Tribunal also.

(20) This prompts the question of whether there is a prescribed UTIAC form for this purpose. One of the features of UTIAC practice and procedure is that the 2008 Rules do not contain a comprehensive set of forms and notices. Nor is there any other instrument in which these are gathered together. One of the reflections which this prompts is that Tribunal proceedings have, traditionally, been less prescriptive and more informal than proceedings in Courts.

(21) We have given consideration to the question of whether Form T484 should be used for PTA applications. This is a general form, designed to be employed in applications for which no special form is prescribed. While we are satisfied that it could be used for PTA applications, we have been unable to identify any obligatory requirement in this respect. We are reinforced in this conclusion by paragraph 6.1 of the Senior President of Tribunal's Practice Directions relating to the Immigration and Asylum Chambers of the FtT and the Upper Tribunal. This, under the rubric of "Form of Notice of Appeal etc", provides, in material part:

> *"The form of notice approved for the purpose of …*
>
> *UT Rule 21 (Application to the Upper Tribunal for permission to appeal) …..*
>
> *is the appropriate form as displayed on the Tribunal's website at the time when the notice is given, or that form with any variations that circumstances may require."*

This provision of the Practice Directions is clearly focused on appeals to the Upper Tribunal from the FtT. It is not directed to judicial review proceedings. Moreover, there is nothing comparable in the Practice Directions of the Senior President of Tribunals relating to judicial review proceedings in this Chamber.

(22) Accordingly, the use of solicitors' letters for the purpose of making the PTA applications in the present cases did not infringe any procedural rule or other norm. The effect of our analysis is that PTA applications in judicial review proceedings are governed by no prescription other than that they be made in writing. In practice, they will normally take the form of a letter or Form T484, duly adapted. Such applications will not, of course, be in writing in cases where the issue of PTA to the Court of Appeal is determined orally at the conclusion of a hearing, which will normally mean a renewed application for permission to apply for judicial review or a substantive judicial review hearing.

The time limit for seeking permission to appeal

(23) The second issue requires us, firstly, to identify which of the time limit provisions in rule 44 applies to applications for permission to appeal ("PTA") to the Court of Appeal in judicial review proceedings. Such proceedings are to be distinguished from the other main component of the Chamber's jurisdiction, namely statutory appeals. The latter are described in the Rules as "*asylum case*" and "*immigration case*" respectively. The combined effect of rule 44(3A) and (3B) is that in such cases any PTA application must be received by the Upper Tribunal within twelve working days (reduced to seven, where the applicant is detained) of the date when the Tribunal's substantive decision was sent. The definitions in rule 1(3) make clear that "*asylum case*" and "*immigration case*" denote appeals to the Upper Tribunal under the relevant provisions of the Nationality, Immigration and Asylum Act 2002, the British Nationality Act 1981 and the Immigration (European Economic Area) Regulations 2006. Accordingly, these provisions do not apply to judicial review proceedings.

(24) Rule 44(4) was amended to coincide with the extension of this Chamber's jurisdiction to encompass immigration judicial review proceedings. By rule 44(4A):

> ***44.— Application for permission to appeal***
> *(4A) Where a decision that disposes of immigration judicial review proceedings is given at a hearing, a party may apply at that hearing for permission to appeal, and the Upper Tribunal must consider at the hearing whether to give or refuse permission to appeal.*

Rule 44(4B) provides:

> *(4B) Where a decision that disposes of immigration judicial review proceedings is given at a hearing and no application for permission to appeal is made at that hearing –*
>
> > *(a) the Upper Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal; and*
> >
> > *(b) if permission to appeal is given to a party, it shall be deemed for the purposes of section 13(4) of the 2007 Act to be given on application by that party.*

Rule 44(4C) provides:

> *(4C) Where a decision that disposes of immigration judicial review proceedings is given pursuant to rule 30 and the Upper Tribunal records under rule 30(4A) that the application is totally without merit, an application under paragraph (1) must be sent or delivered to the Upper Tribunal so that it is received within 7 days after the later of the dates on which the Upper Tribunal sent to the applicant –*
>
> > *(a) written reasons for the decision; or*
> >
> > *(b) notification of amended reasons for, or correction of, the decision following a review.*

While there is no specific mention of cost orders – whether subsumed in a composite final order or free standing - in these provisions of the Rules, we consider that such orders are plainly embraced.

(25) In some cases, the issue of costs may not be determined in the Tribunal's substantive order. This might occur, for example, where the unsuccessful party is, by the terms of such order, given the opportunity to make written representations about costs. We consider that the correct analysis must be that rule 44(4) applies to such cases. Thus, in such cases, any PTA application must be received by the Upper Tribunal within one month of the date when the Tribunal's substantive decision was sent. There is no mention anywhere in rule 44(4) of "*working days*". Giving effect to the definition contained in Schedule 1 to the Interpretation Act 1978, we construe "*one month*" as one calendar month. The word "*after*" conveys that the calculation of the one month period begins on the day immediately following the date of sending.

(26) While the definition of "month" provided by the Interpretation Act is "*calendar month*", it extends no further. The measurement of the one month period is

potentially complicated, given that the Roman Calendar does not have a uniform measurement of a month – the variations being 27, 28, 30 and 31 days. In this respect, we consider that the only provision of rule 12 ("**Calculating Time**") applicable to PTA applications in judicial review proceedings is paragraph (1), the effect where of is that the guillotine falls at 5pm on the last day of the period in question. In the absence of definition of "*calendar month*" in either the Interpretation Act or the 2008 Rules, judicial interpretation is required. Happily, resort to a well established principle is available. The principle which is hereby engaged is known as the "corresponding date" principle, which boasts both pedigree and antiquity. It was described in the decision of the House of Lords in Dodds v Walker [1981] 2 ALL ER 609, at page 610g, in these terms:

> "*It is equally well established …… that when the relevant period is a month or specified number of months after the giving of a notice, the general rule is that the period ends upon the corresponding date in the appropriate subsequent month, ie the day of that month that bears the same number as the day of the earlier month on which the notice was given.*"

Dilating on the practical outworkings of this principle, Lord Diplock continues:

> "*Because the number of days in five months of the year is less than in the seven others, the inevitable consequence of the corresponding date rule is that one month's notice given in a 30 day month is one day shorter than one month's notice given in a 31 day month and is three days shorter if it is given in February.*"

Their Lordships noted that this "*simple general rule*" can be traced to the decision of the Court of Appeal in Freeman v Read [1863] 1 BF 174, at 184.

(27) It follows that the time limit for applying to the Upper Tribunal for permission to appeal to the Court of Appeal in judicial review proceedings has the following elements:

(a) In cases where the issue of PTA to the Court of Appeal is decided at the conclusion of a hearing, no question of time limit arises.

(b) In other cases, the paradigm whereof will be a separate, subsequent decision on costs, the period begins on the day immediately following the date upon which the decision of the Tribunal was sent and ends on the date in the immediately succeeding month which corresponds with the aforementioned date.

(c) There is a power to extend time and, where appropriate, the PTA application must include a request for an extension of time and an explanation of the lateness (*infra*).

Extending time

(28) The power to extend time, contained in rule 5(3)(a), is one of the Upper Tribunal's express case management powers. It is discretionary in nature. While the discretion is not subject to any explicit conditions or constraints, it is to

be exercised in accordance with established principles and considerations. These have been formulated in various litigation spheres. Many of them are conveniently drawn together in Davis v Northern Ireland Carriers [1979] NI 19:

(i) An application made before expiry of the period will be more favourably received, if the reason is good.

(ii) Where time has expired, the extent of the default.

(iii) The effect on the other party and whether he can be compensated in costs.

(iv) Whether there has already been a hearing on the merits.

(v) Whether there is a point of substance which will not be determined if time is not extended.

(vi) Whether there is a point of general, not merely particular, importance.

(vii) The rules are to be observed.

This decision is to be considered in tandem with that of the English Court of Appeal in Costellow v Somerset CC [1993] 1 WLR 256, which enshrines the additional guidance that all of the circumstances will be considered and a satisfactory explanation for the delay is normally, though not invariably, required. See also Savill v Southend HA [1995] 1 WLR 1254.

(29) In R (SN) v SSHD (striking out - principles) IJR [2015] UKUT 227 (IAC), this Tribunal reviewed the leading decisions of the Court of Appeal on the topic of default generally: see [15] –[20]. Most recently, these principles were applied in SS (Congo) [2015] EWCA Civ 387.

(30) Two of the factors to be weighed are the apparent merits of the appeal and the importance of the issues which it raises. Judges will bear in mind that the criteria to be applied to an application for permission to appeal to the Court of Appeal are whether the proposed appeal raises some important point of principle or practice or whether there is some other compelling reason warranting the grant of permission: see section 13(6) TCEA 2007 and the 2008 Order. While bearing in mind the breadth of the discretion in play and the intensely fact sensitive nature of every case, judges may find it instructive to recall that the principal factors taken into account by Griffiths LJ in Van Stillevoldt BV v EL Carriers INC [1983] 1 WLR 207, at 212 – 213, were that the delay was of short dimensions; there were personal and professional reasons explaining the delay by the defaulting solicitor; there was an arguable case on appeal; and apart from having to defend the appeal the other party would not be prejudiced by an extension of time.

(31) Rule 44(6), duly nourished by good practice and the overriding objective in tandem, provides that where an application for permission to appeal to the Court of Appeal in judicial review proceedings is lodged out of time, it must incorporate a request to extend time and the grounds thereof. We consider that every such application should set out full particulars and, if appropriate, attach

any relevant documentary evidence. While a witness statement is likely to be unnecessary in the generality of cases, it may be highly desirable in some. A frank, comprehensive and proactive application to extend time in this way harmonises more readily with the explicit requirements of the rules and the philosophy of the overriding objective than a failure to do so and, hence, will normally have better prospects of a favourable outcome.

PTA applications: substantive requirements

(32) The requirements applicable to every application to the Upper Tribunal for permission to appeal are unambiguous. They are enshrined in rule 44(1) and (7). Pursuant to the first of these provisions, the application must be in writing. By virtue of rule 44(7), the application must:

(a) identify the decision of the Tribunal to which it relates.

(b) identify the alleged error or errors of law in the decision; and

(c) state the result the party making the application is seeking.

We draw attention to the presumptively mandatory "**must**".

(33) As demonstrated in [10] – [12] above, rule 44(7) does not exist in isolation. Rather, it is to be considered, and applied, in conjunction with, firstly, rule 7. Thus a failure to comply with any of the requirements of rule 44(7) may not be fatal. It would give rise to an "*irregularity*", thereby engaging the discretion conferred on the Upper Tribunal by rule 7(2). In accordance with this provision, the Tribunal "*may take such action as it considers just*". This is a self-evidently broad discretion, in no way emasculated by the inexhaustive menu of options which follows. Furthermore, effect must be given to the overriding objective – see [2] above – in considering what course should be taken in response to the irregularity flowing from a breach of rule 44(7).

(34) In such situations, the basic choice available to the Upper Tribunal is to forgive the irregularity or to decline to do so. If it is disinclined to exercise forgiveness, we consider that rule 7(2)(c), the terminology whereof is "*exercising its power under rule 8 (striking out a party's case*)", provides the proper course to take. It appears to us that the specific provision of rule 8 which is engaged is paragraph (3)(b), given that non-compliance with rule 44(7) is, in our estimation, a paradigm illustration of a litigant's failure to co-operate with the Upper Tribunal, considered in conjunction with rule 2(4).

(35) Where an application for permission to appeal does not satisfy any of the requirements in rule 44(7) it will be considered invalid. The starting point for the Upper Tribunal will be the nature and gravity of the non-compliance. The three requirements are listed in [32] above. As regards requirement (a), a failure to identify the substantive decision under challenge is likely to be viewed as egregious in most instances. On the other hand, where there is some doubt or obscurity arising out of the misspelling of a name or the manner in which a date or reference number is formulated, the Upper Tribunal Judge will be more inclined to exercise the power contained in rule 7(2)(b) by requiring the matter to

be remedied. A failure to comply with requirement (c) is, in principle, unlikely to be viewed with strong disapproval since, whether expressly stated or not, every application made under rule 44(1) seeks the "*result*" of securing permission to appeal to the Court of Appeal.

(36) In practice, in many caess, the main focus of attention is likely to be on requirement (b) viz the stipulation to "*identify the alleged error or errors of law in the decision*". Once again, the starting point will be the nature and gravity of the non-compliance. In the notional spectrum, the irregularity may range from minor to major. In assessing its gravity, the Judge will bear in mind the decision of the Upper Tribunal in Nixon (Permission to Appeal: Grounds) [2014] UKUT 368 (IAC). Though made in the different context of applications for permission to appeal to the Upper Tribunal, we consider that its philosophy applies fully to PTA applications under rule 44(1). The message in Nixon is uncompromising:

> "*[6] It is axiomatic that every application for permission to appeal to the Upper Tribunal should identify, clearly and with all necessary particulars, the error/s of law for which the moving party contends. This must be effected in terms which are recognisable and comprehensible. A properly compiled application for permission to appeal will convey at once to the Judge concerned the error/s of law said to have been committed. It should not be necessary for the permission Judge to hunt and mine in order to understand the basis and thrust of the application.*"

The Tribunal added:

> "*[9] Finally, representatives should be aware that grounds of appeal presented in formulaic terms, particularly when they reappear with frequency in a multiplicity of cases over time, are likely to be received with circumspection. …*
>
> *'Boiler plating' will be quickly recognised by permission Judges. Ditto make weights and embellishments.*"

(37) An application for permission to appeal assessed as belonging to the middle and upper levels of the notional default spectrum as regards requirement (b) is unlikely to secure the forgiving exercise of either of the powers enshrined in rule 7(2)(a) and (b) or any comparable or kindred relaxation. Moreover, self evidently, permission applications which are largely incoherent or unintelligible will, in the generality of cases, attract the sanction of being struck out. On the other hand, where the non-compliance with requirement (b) is assessed as belonging towards the lower end of the notional spectrum, some latitude may be appropriate. Furthermore, as observed in Nixon at [7], some adjustment may be appropriate in the case of an unrepresented party, taking into account UTIAC Guidance Note Number 1 of 2011, paragraph 10, albeit this does not apply to applications for permission to appeal to the Court of Appeal in judicial review proceedings.

(38) In all cases where there is non-compliance of any species with rule 44(7), thereby triggering the possible exercise of the strike out power in rule 8(3), Judges should be mindful of the guidance contained in R (SN) v Secretary of State for

the Home Department (striking out – principles) IJR [2015] UKUT 227 (IAC):

(i) In considering whether to exercise its discretionary strike out power under rule 8, the main factors which the Upper Tribunal will weigh are the interests of the administration of justice; whether there has been a prompt application for relief; whether the failure was intentional; whether there is a good explanation for the failure; the number and importance of multiple failures; whether the failure was caused by the party or his legal representative; whether the trial date will be jeopardised by the grant of relief; the effect on every party of the relevant failure; and the effect on every party of granting relief.

(39) The Tribunal will apply the following principles: public authorities and private litigants are to be treated alike; excessive work burdens will rarely excuse a defaulting solicitor; and the mere factor of a party being unrepresented does not constitute good reason.

(40) The Tribunal will be mindful of the draconian nature of a strike out order and will take into account the availability of any other appropriate and adequate sanction such as a wasted costs order under rule 10(3). Repeated defaults will almost invariably be considered more serious than a single act of non-compliance. In every case the Tribunal will consider the question of whether its process is being misused.

These principles require an important adjustment in rule 44(7) contexts, since the litigant concerned has already had a decision from the Upper Tribunal. Thus the litigant's "*case*" does not fall to be struck out. Rather, the target of a strike out order consequential upon a failure to comply with rule 44(7) is the application for permission to appeal to the Court of Appeal.

Fee payable?

(41) The payment of fees in judicial review proceedings in the Upper Tribunal is governed by the Upper Tribunal (Immigration and Asylum Chamber) (Judicial Review) (England and Wales) Fees Order 2011 ("the Fees Order"). This applies to "*immigration judicial review proceedings*" which, by Article 1(2), cross refer to the formal Direction of the Lord Chief Justice, paragraph 5 whereof includes the language "*and any proceedings relating thereto*" viz relating to an "*immigration matter*". The Fees Order is a measure of subordinate legislation made pursuant to section 42 of TCEA 2007, which empowers the Lord Chancellor to prescribe fees in respect of "*anything dealt with by the Upper Tribunal*", by order. Any such measure is preceded by obligatory consultation with the Senior President of Tribunals and the Administrative Justice and Tribunals Council. Section 42(7) is noteworthy:

> "*The Lord Chancellor must take such steps as are reasonably practicable to bring information about fees under subsection (1) to the attention of any person likely to have to pay them.*"

This duty is consonant with the long established character of Tribunal proceedings generally, in particular the focus on the litigant and the importance

of access to justice.

(42) The Fees Order, which has undergone periodic amendment, prescribes the amount payable by a litigant for certain steps and applications. It does so by the mechanism of a schedule which, in its first column, describes the step or application in respect whereof a fee is payable and, in its second column, specifies the amount. Each segment of the schedule is identifiable by a paragraph number. By paragraph 2.2 of Schedule 1 to the Fees Order, it is provided:

> "***Number and Description of Fee*** ***Amount of Fee***
>
> *On an application by consent or without notice where no other fee is specified.* *£ 45.00*"

We consider it clear that every PTA application, whether in judicial review proceedings, must be accompanied by the payment of a fee of £45.00. We are satisfied that the higher fee of £80.00, payable (per paragraph 2.1) for "*an application on notice where no other fee is specified*", does not apply since there is no provision in primary legislation or the 2008 Rules requiring PTA applications to be made on notice to the other party.

Conclusions

(43) We apply the principles and guidance outlined above to the present cases in the following way. In the first two cases the "application" for permission to appeal to the Court of Appeal against the Upper Tribunal's costs decision was made by a letter, couched in the following terms:

> "*We confirm that we seek permission to appeal to the Court of Appeal against the decision of Upper Tribunal Judge [ ] on the issue of costs. We have spoken to the Tribunal who have checked and confirmed that the case is closed as the issue in dispute is purely a costs issue and so the matter is closed in any event.*"

The two letters were labelled "**Very Urgent**"and each contained the following further sentence:

> "***With respect, we seek permission out of time to appeal the decision.***"

In the third case the letter simply requested permission to appeal. There was no request to extend time. While each of the letters identified the name of the Applicant and the judicial review reference number, none of them had any attachment or enclosure.

(44) Accordingly, in all three cases, the "application" for permission to appeal consisted of a bare letter, comprising seven lines and approximately 70 words. It is in this context that the sequence of events thereafter assumes importance. As noted in [2] – [6] above, the letters from the Applicants' solicitors in the first two cases were followed by a letter dated 01 July from a Lawyer of the Upper Tribunal, identifying a forthcoming hearing, (on 21 July 2015), and politely requesting compliance with rule 44(7), together with certain other particulars.

The Applicants' solicitors chose to ignore this letter. That a conscious choice was made is clear from their submissions at the hearing. The only further communication received from them was a letter dated 21 July 2015 suggesting that all three cases be listed together. This had already been arranged. The sustained failure of the Applicants' solicitors to comply with rule 44(7) resulted in the wasted hearing which materialised on 21 July 2015. At this hearing the Applicants' representative brazenly sought to justify the non-compliance with the rule, coupled with their failure to make any reply to the letter of 01 July 2015. It was argued that there was no need to comply with rule 44(7) or to respond to the aforementioned letter because they had earlier, in response to a direction issued by the Upper Tribunal Judge to both parties, provided a written submission on costs. This occurred in advance of the impugned costs decisions.

(45) It became clear at both the wasted hearing conducted on 21 July 2015 and the further hearing transacted on 09 September 2015 that the Applicants' solicitors had no insight into the inalienable and unambiguous obligation to comply with rule 44(7) and, more generally, to co-operate with the Upper Tribunal in compliance with the overriding objective. They consistently adopted a position of introspective righteousness and defiance. This attitude was manifest to the very end when, at the commencement of the second of the aforementioned hearings, their representative attempted to make a submission based on rule 45(1) which had not been notified previously to either the Respondent's representatives or the Tribunal. Sadly, our attempts to highlight the gravity and consequences of this discrete misdemeanour fell on deaf ears. Furthermore, notwithstanding the events on 21 July 2015, the default of the Applicants' solicitors in complying with rule 44(7)(b) endured thereafter. During the seven weeks which elapsed between the two hearing dates, they made no acceptable attempt to rectify same.

(46) The net result is that, in all three cases:

(a) The "applications" for permission to appeal have been made by letter and consist of a single sentence to this effect.

(b) There has been wholesale non-compliance with rule 44(7)(b).

(c) Repeated opportunities to rectify this default have been ignored.

(d) No grounds for an extension of time have ever been formulated.

(e) The clock has not stopped: rather, it continues to run against the Applicants.

(47) In the circumstances exhaustively outlined above, and given the facts and factors highlighted above, the applications have no discernible merit. We can identify nothing in their favour. The able written submissions of Ms Reeves on behalf of the Respondent contain, in relation to the first two cases, the following passage:

> "*… The application for permission to appeal was made out of time and … there has been wholesale non-compliance by/on behalf of the Applicant with the requirements of rule 44 and directions made by the Upper Tribunal on 01 July*

2015 ….."

We concur fully with this submission. No valid application for permission to appeal has been made in any of these cases, due to the egregious contravention of rule 44(7)(b). This is the fundamental default in all three applications. Furthermore, the mandatory requirement in rule 44(6)(a) to include a request for an extension of time and to specify the reasons for the lateness has been similarly neglected.

Wasted costs order

(48) This is the final issue to be addressed. The Respondent, in the case of Soreefan only, applies for a wasted costs order against the Applicant's solicitors in relation to the aborted hearing on 21 July 2015. The written submission of Ms Reeves accurately identifies the principal reasons for this aborted hearing in the following terms:

(a) The belatedly produced grounds of appeal and skeleton argument of the Applicants were not before the panel of Judges due to the failure to lodge them sooner than the afternoon of 20 July 2015.

(b) Wholesale non-compliance by the Applicant's solicitors with the direction of 01 July 2015 and, by extension, the requirements of rule 44(7)(b).

(c) The non-service of the grounds of appeal and skeleton argument on the Respondent until the afternoon of 20 July 2015.

We concur with Ms Reeves' submission that the adjournment granted in these circumstances constituted an indulgence to the Applicants and their representatives. The central pillar of the Respondent's costs application is the contention that, in the language of rule 10(3)(d) of the 2008 Rules, the Applicants' representatives have acted unreasonably in their conduct of the proceedings. The application is further founded on Cancino (Costs: First-tier Tribunal – New Powers) [2015] UK FTT 00059 (IAC), highlighting in particular the adoption, at [19], of the three stage test formulated by the Court of Appeal in Ridehalgh v Horsefield [1994] CH 205.

(49) These are forceful submissions. However, we must take into account the virtually universal practice, spanning various jurisdictions in the United Kingdom legal system, whereby applications for permission to appeal are determined *ex parte*, on paper. We must further recognise the well-established principle that a Respondent/Defendant who participates in the analogous context of a judicial review permission hearing does so at its own risk as regards costs. We balance these principles with two indelible facts. The first is that the Respondent's involvement in the determination of these three PTA applications was stimulated by the notification given by the Upper Tribunal. The second is that this notification, in turn, was prompted by the defaults of the Applicants' representatives highlighted above. We weigh these facts with the consideration that there is no previous decision of the Upper Tribunal warning that wasted costs could be awarded in these circumstances. We further make clear that there is no question of awarding wasted costs against the Applicants in circumstances

where the defaults are exclusively those of their legal representatives. Balancing all of these principles and factors, we conclude, by a narrow margin, that a wasted costs order is not appropriate. The Applicants' solicitors should consider themselves fortunate to escape this sanction.

(50) Had we considered a wasted cost order appropriate, we would have awarded the full amount claimed by the Secretary of State, namely £1078.40. We would add the admonition that having regard to the guidance promulgated in this decision, issues of wasted costs in analogous future cases may well be determined differently.

Omnibus conclusions

(51) To summarise:

(i) An appeal lies to the Court of Appeal against a costs order of the Upper Tribunal made in immigration judicial review proceedings.

(ii) In determining cost issues the Upper Tribunal will apply M v London Borough of Croydon [2012] EWCA Civ 595.

(iii) Provided that a costs decision of the Upper Tribunal is in harmony with established principles and has a tenable basis it will be unassailable.

(iv) In judicial review proceedings where permission to appeal is not determined at a hearing, the time limit for applying to the Upper Tribunal for permission to appeal to the Court of Appeal is one calendar month, beginning on the date immediately following the day upon which the Tribunal's substantive decision was sent and ending on the corresponding date in the immediately succeeding month.

(v) This time limit is capable of being extended in accordance with established principles and giving effect to the overriding objective.

(vi) Every PTA application should be made in writing. There is no prescribed form.

(vii) In judicial review cases, the prescribed fee for an application for permission to appeal to the Court of Appeal is presently £45.00. Such applications do not require notice to the other parties.

(viii) The substantive requirements for every permission to appeal application are enshrined in Rule 44(7) of the 2008 Rules and are of cardinal importance.

(ix) A failure to comply with Rule 44(7) engages the Upper Tribunal's discretionary strike out powers under Rule 8. The Tribunal will assess in particular the nature and gravity of the non-compliance and will give effect to the principles in R (SN) v SSHD (striking out – principles).

Disposal

(52) These applications for permission to appeal to the Court of Appeal are struck out pursuant to rule 7(2)(c) and rule 8 of the Rules accordingly. Insofar as the Upper Tribunal is seized of a valid application to extend time in any of the three cases, same is refused. We would add that the applications would have been refused on their merits in any event: see [17] – [18] above.

Signed: _____

The Honourable Mr Justice McCloskey
President of the Upper Tribunal, Immigration and Asylum Chamber

Dated: 13 **October 2015**