Equality of arms—current challenges in immigration judicial reviews

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Immigration analysis: Sonia Lenegan, immigration solicitor at Hackney Community Law Centre looks at current challenges in immigration and asylum judicial reviews relating to the conduct of litigation by the Government Legal Department (GLD) and the Home Office.

Original news

Upper Tribunal (Immigration and Asylum Chamber) (new judicial review decisions: 15 September 2017, LNB News 15/09/2017 25

The Upper Tribunal (Immigration and Asylum Chamber) has issued new judicial review decisions in R (on the application of Islam and Pathan) v Secretary of State for the Home Department (Tier 2 licence-revocation-consequences) [2017] UKUT 00369 (IAC) and R (on the application of AM and others) v Secretary of State for the Home Department (liberty to apply— scope—discharging mandatory orders) [2017] UKUT 00372 (IAC).

What challenges are practitioners currently facing in relation to the conduct of litigation by the Home Office and the GLD in immigration and asylum matters?

Compliance with directions and orders

One of the main challenges at present is the GLD and Secretary of State for the Home Department's (SSHD) consistent failure to comply with court orders and deadlines. For example, I have a case which was lodged in October 2016. The GLD wrote and stated that it would be filing its Acknowledgment of Service (AoS) late and would make an application for an extension of time—presumably to include an explanation for the delay. The AoS was filed in February 2017 without an application for an extension of time.

In the same case, the following three other orders have been breached (to file a witness statement, to provide disclosure, and to provide detailed grounds). At a hearing in June 2017, the judge commented in relation to the failure to comply with the order for disclosure that the GLD was very busy—the implication being that it was therefore excused from the need for compliance. The fact that this conduct is, in general, indulged by the court or tribunal makes litigation extremely difficult for applicants and claimants, as there is an inequality of arms.

Provision of disclosure

As mentioned above, obtaining disclosure is a further challenge, as in my experience the SSHD will not provide disclosure when requested at the early stages of litigation, instead she will insist on a subject access request being made (also see para [5] of *R (on the application of Babbage) v Secretary of State for the Home Department* [2016] EWHC 148 (Admin) All ER (D) 22 (Feb). The practice of insisting on subject access requests to obtain disclosure has not changed since this case. These requests are routinely refused if the request is not submitted in the exact format required by the SSHD (the requirements for which in my view are well over and above those contained in the Data Protection Act 1998). If the request is accepted, it will be processed well in excess of the 40-day limit—12 months is certainly not unheard of—and often only IT records will be produced, despite the whole file of papers having been requested. This then means that a further request has to be made, which then results in yet further delay in obtaining the disclosure which is essential to being able to conduct litigation effectively.

Has the situation deteriorated in recent months?

Failure to agree consent orders

Yes, one recent tendency of the GLD and SSHD in litigation is to refuse to agree consent orders in matters where they have conceded. I have a case where on filing the AoS, the SSHD withdrew the decision under challenge, and stated that she would provide a new decision within three months. She also agreed to pay the applicant's costs of the judicial review.

The AoS stated that, 'In these circumstances this application for permission is entirely academic and the respondent requests that permission is refused'. Previously in these circumstances the SSHD would also provide a consent order providing for the judicial review application to be withdrawn in light of the concession.

I believe that it was late 2016 when the SSHD and the GLD started to refuse to consent to judicial review consent orders. The practice is not consistent across all cases. In my case, I wrote to them proposing a consent order, stating that it was a more efficient use of resources for the matter to be withdrawn by consent. They refused to agree to a consent order, stating that their proposed course of conduct was the most efficient and least time-consuming way to deal with the matter.

In my opinion, this approach to litigation is clearly in breach of the overriding objective. Further, there is case law which supports the position that their position is a misuse of process, *R (on the application of Bilal Mahmood) v Secretary of State for the Home Department* (candour, reassessment duties: ETS—alternative remedy) IJR [2014] UKUT 00439 (IAC), which states in the headnote that:

- if the AoS renders the challenge unsustainable, appropriate withdrawal steps must be initiated promptly, and
- unjustifiable delays in the finalising and execution of proposed consent orders and lack of communication with the Upper Tribunal (Immigration and Asylum Chamber) in this context are unacceptable

Although this case was targeted at applicants, there is no reason that it should not apply equally to the respondents.

I am aware that this has become a widespread issue and concern among immigration practitioners. Several practitioners raised concerns about this on a message board in April 2017 and I have had others speak to me about it happening on their cases since then. The GLD has explicitly stated in correspondence that this is a procedure which has been in place since 2016. The matter has been raised in at least three UT meetings, and I have written to the President of the UT directly, asking for guidance on how the tribunal wishes us to proceed in cases where the SSHD has conceded, yet refuses to consent the matter out—thus far no guidance has been forthcoming.

In the example I have given above, it took over three months for the tribunal to then refuse permission and award costs to the applicant. It is also noteworthy that the SSHD did not comply with the three-month deadline given in the AoS to make a new decision, and a pre-action letter has been sent in respect of that failure, giving rise to the possibility of a second judicial review proving necessary in this case, as per *R (on the application of MMK) v Secretary of State for the Home Department* [2017] (consent orders—legal effect—enforcement) UKUT 00198 (IAC). It is difficult to see any advantage to the parties in conducting litigation in this manner, in the circumstances, an increasingly plausible explanation, is that the SSHD and the GLD are seeking to massage tribunal statistics, as the outcome of the case I have detailed above will be recorded as a refusal of permission, rather than settled.

What does the case of R (AM) v SSHD (liberty to apply—scope—discharging mandatory) have to say about any of these issues?

As with the *MMK* case, *R (AM) v SSHD* (liberty to apply—scope—discharging mandatory) [2017] UKUT 00372 (IAC) is a decision of the President of the UTIAC, the Honourable Mr Justice McCloskey.

In this case, the applicants applied to the tribunal asking for a declaration that the SSHD had not complied with the part of the order, made by the tribunal following a rolled-up hearing, relating to the need to make a fresh lawful decision. The tribunal made an order for the SSHD to provide a response and also listed the matter for an expedited hearing. The SSHD did not comply with the order to provide a response and instead applied to have the tribunal's order set aside on the basis that the applicants should commence fresh judicial review proceedings (presumably in reliance on the *MMK* case).

The tribunal concluded that the SSHD's conduct of the cases had been inappropriate, made a declaration that the SSHD had unlawfully failed to comply with para 2 of the tribunal's order and that she should pay the applicants' costs of the application.

While highly critical of the SSHD's conduct, it is noteworthy that indemnity costs were not awarded in this matter, despite having been envisaged at para [34] of the *MMK case*.

What can you do if the Home Office fails to comply with a court or tribunal order or otherwise fails to conduct litigation in an appropriate way?

The only option in these circumstances is to seek assistance from the court or tribunal, however as you can see from the above examples it can be difficult to get them to take any action. Another example of a failed attempt to have the tribunal enforce compliance can be seen in *R (on the application of Kumar & Anor) v Secretary of State for the Home Department* (acknowledgement of service and tribunal arrangements) (IJR) [2014] UKUT 104 (IAC). The deadline for the AoS to be filed is three weeks, however since this case, the SSHD is allowed an additional three weeks for which they do not even need to apply or provide an explanation.

The tribunal or court could sanction the SSHD by ordering indemnity costs to be paid (as did happen recently in the case of *R (on the application of YA) v Secretary of State for the Home Department* (2017) All ER (D) 91 (Aug)) (unreported). I had a case a few years ago where indemnity costs were awarded against the SSHD, however in my view this is still a remedy which is not used often enough by the court or tribunal. Certainly, in light of what appears to be a marked increase in non-compliance, the time for them to act is now.

Interviewed by Devon Marshall.

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