R (on the application of SN) v Secretary of State for the Home Department (striking out – principles) IJR [2015] UKUT 00227(IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

SN

Applicant

v

Secretary of State for the Home Department

Respondent

On the application of the Applicant
for permission to apply for judicial review

Having heard the parties' respective counsel, instructed by CK Law Solicitors and the Government Legal Department respectively, at hearings at Field House, London on 06 January and 16 March 2015

(i) *Rule 7(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 empowers the Upper Tribunal to take such action as it considers just, which may include striking out a party's case under rule 8, where there has been a failure to comply with a requirement of the rules, a practice direction or a tribunal direction.*

(ii) *Under rule 8 proceedings are <u>automatically</u> struck out in the event of failure to comply with an order or direction which specifies that non-compliance will attract this sanction, viz an "unless" order. In other cases the power to strike out is discretionary.*

(iii) *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. Further, the interests of the administration of justice will be weighed and applied.

(iv) *In addition, 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. In asylum and humanitarian protection claims, particular care must be taken to ensure that appeals are not frustrated by a failure on the part of a party's legal representative to comply with time limits.*

(v) *In considering the exercise of its discretionary strike out power under rule 8, the Tribunal will be mindful of the draconian nature of such orders 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.*

(vi) *In an application under rule 8(5) to reinstate a struck out case, the main factors to be considered are the reason for the failure which gave rise to the strike out order, whether there has been any undue delay in applying for reinstatement and whether reinstatement would prejudice the other party.*

(vii) *The values of efficiency and expedition will be promoted and due observance of the overriding objective will be enhanced by adherence to the principles and standards of pleading rehearsed in [28] – [32].*

(viii) *In judicial review cases, applications to amend so as to enable a new or later decision to be challenged must be made proactively and timeously. Such applications will be determined on their merits and giving effect to the overriding objective.*

Decision of The Honourable Mr Justice McCloskey,
President of the Upper Tribunal

Prologue

This judgment addresses the following issues:

(i) The exercise of the Upper Tribunal's power to strike out a case under rule 8(3) of the Tribunals Procedure (Upper Tribunals) Rules 2008.: [1] - [24]

(ii) The exercise of the Upper Tribunal's power under rule 8(5) to reinstate a case which has been struck out: [25] - [27]

(iii) Pleadings in judicial review proceedings: [28] - [32]

(iv) The amendment of judicial review claims: [33] – [36]

(v) The exercise of the Upper Tribunal's power to make a wasted costs order: [37] – [38]

ANONYMITY

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) the Upper Tribunal makes an Anonymity Order. Unless the Upper Tribunal or competent court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

The Matrix of These Proceedings

1. The Applicant is a national of Sri Lanka, aged 32 years.

2. This is a renewed application for permission to apply for judicial review. While the history is moderately protracted, I shall endeavour to reduce it to the following salient summary:

   (a) The Applicant was lawfully present in the United Kingdom as a Tier 4 Student from 11 April 2010. Her leave expired on 06 September 2011.

   (b) She was an unlawful "overstayer" thereafter.

   (c) Subsequently, the Applicant made a claim for asylum which was the subject of an interview on 25 November 2013. Her case was assigned to the "Detained Fast Track" (DFT) process.

   (d) On 05 December 2013 her claim for asylum was refused.

   (e) On 17 December 2013, her appeal against this decision was dismissed by the First-tier Tribunal (the "*FtT*").

   (f) On 23 December 2013, her application for permission to appeal to the Upper Tribunal was refused.

   (g) On 24 January 2014, the Applicant's solicitors submitted further representations on her behalf to the Respondent.

   (h) On 28 January 2014, the Applicant initiated her first judicial review proceedings, challenging the Respondent's alleged failure to consider her further representations and to defer removal.

   (i) By successive orders dated 29 and 31 January 2014 respectively, the first on paper and the second following an oral renewal hearing, Upper Tribunal Judges Kekic and Gleeson refused to grant permission.

   (j) On 01 February 2014, the Respondent decided that the Applicant's further representations did not constitute a fresh asylum, humanitarian protection or human rights claim, applying paragraph 353 of the Immigration Rules.

   (k) By order of the Administrative Court of the same date, the Applicant's

imminent removal from the United Kingdom was stayed for a period of 72 hours.

(l) This was followed by further representations on behalf of the Applicant and the maintenance of the Respondent's decision that the representations did not constitute a fresh claim.

(m) On 22 May 2014, the Applicant's application for permission to apply for judicial review was refused, by order of Upper Tribunal Judge Warr.

(n) This was followed by a request for an oral hearing, dated 29 May 2014.

(o) The subsequent issue of new removal directions by the Respondent stimulated still further representations, dated 20 June 2014, from the Applicant's solicitors.

(p) By a further decision dated 25 June 2014, the Respondent determined that these did not constitute a fresh claim.

(q) Undeterred, the Applicant's solicitors made further written representations, dated 01 July 2014 based on a witness statement of the Director of the organisation "Act Now" purporting to support the Applicant's claim that she had been the victim of sexual violence in Sri Lanka due to her association with LTTE, together with a public statement of the United Kingdom Government's Foreign Secretary bearing on this subject generally.

(r) On 03 July 2014, the Applicant submitted still further representations to the Respondent.

(s) The application for an order staying the removal of the Applicant from the United Kingdom was refused by order of Upper Tribunal Judge King, dated 04 July 2014.

(t) The Applicant was removed from the United Kingdom to Sri Lanka on the same date.

3. Accordingly, the Applicant was removed from the United Kingdom to her country of origin, Sri Lanka, some nine months ago. At the time of her removal there remained extant her application, dated 29 May 2014, to renew orally her application for permission to apply for judicial review which had been refused by order dated 22 May 2014. The Applicant's removal to her country of origin on 04 July 2014 signalled the beginning of a period which was marked by a series of substantial defaults on the part of her legal representatives.

4. Next, the Applicant's oral renewal hearing was listed before two senior Upper Tribunal Judges on 20 August 2014. This was a specially convened panel. Without prior notice to either the Tribunal or the Respondent, the Applicant's representatives intimated their desire to amend the claim so as to challenge the legality of their client's removal from the United Kingdom to Sri Lanka on 04 July 2014. The amended grounds of challenge bear the date of this hearing, 20 August 2014. The effect of this development was to

cause this hearing to be aborted. The order made by the Tribunal on this date recited:

> "***Permission granted to Applicant to amend the claim form*** *to also include a challenge to the third decision letter dated 25 June 2014 and a challenge to the lawfulness of the Applicant's removal to Sri Lanka. The following directions shall apply:*
>
> *(i) The Applicant shall file and serve fully pleaded amended grounds of claim setting out in detail the nature of the claim, evidence relied upon, relevant legal principles and the relief sought* ***no later than 21 days from the date of the posting of this order to her****. The pleadings shall be accompanied by a bundle containing all documentary evidence the Applicant relies upon in support of the claim.*
>
> *(ii) The Respondent shall have leave to file and serve an amended Defence no later than 21 days after receipt of the Applicant's amended pleading and bundle of documents.*
>
> (iii) *The permission application shall be relisted on the first available date after 08 September 2014.*"
>
> [Emphasis added.]

5. It is evident that an initial draft of the Applicant's amended grounds was before the Tribunal on 20 August 2014. As of today, this draft amended pleading remains unchanged. It contains the following passages:

> "*It is submitted that the Applicant's removal to Sri Lanka on 04 July 2014 was unlawful …..*
>
> *It is submitted that the Secretary of State erred in failing to treat the psychological report …. dated 02 February 2014 as giving rise to a fresh asylum claim pursuant to paragraph 353 of the Immigration Rules ….*
>
> *The decision to remove the Applicant was in breach of a legitimate expectation that the Applicant's case would be reviewed by the Secretary of State in light of William Hague's publicly stated commitment following an international conference on sexual violence held in the UK to reconsider the claims of victims of sexual violence facing deportation …..*
>
> *It is submitted that the decision to refuse the fresh claim and removal were unlawful in the light of …… Detention Action v SSHD [2014] EWHC 2245 (Admin). Had the Applicant not been subject to the exigencies of the fast track scheme she would have been able to obtain an MLR which would have had a significant impact on the assessment of credibility. ……..*"
>
> ["*MLR*" denotes medico-legal report.]

The Applicant was also relying on the grant of permission to appeal to the Court of Appeal in PP (Sri Lanka) v SSHD [Appeal No C5/2014/0162].

6. The order of the Tribunal dated 20 August 2014 required the Applicant's legal representatives to take the following steps:

   (a) To amend the Claim Form.

   (b) To file and serve fully pleaded amended grounds of claim, in the terms directed.

   (c) To serve a bundle in the terms directed.

   All of the above steps were to be taken within 21 days. **None of these steps was taken subsequently, timeously or at all.**

7. Notwithstanding the abysmal failure of the Applicant's legal representatives to obey the Tribunal's order of 20 August 2014 the Respondent's representatives, to their credit, proceeded to serve and file a pleading entitled "Additional Summary Grounds of Defence". This is dated 26 September 2014.

8. A period of some four months then elapsed. Upon the re-listing of the oral renewal application on 06 January 2015, again before another specially convened panel of two Judges, we drew attention to the Judicial Review Claim Form [T480], dated 03 February 2014, which had two stand out features. The first was that the Applicant was still challenging the Respondent's decision dated 01 February 2014 that her further representations, served on 21 January 2014, did not constitute a fresh asylum, humanitarian protection or human rights claim. The second was that the remedy sought by the Applicant was an order quashing this decision, coupled with a mandatory order requiring the decision to be re-made in a manner favourable to her. The Tribunal further pointed out the abject failure of the Applicant's legal representatives to comply with its earlier order of 20 August 2014. Furthermore, we observed that at the stage of the aborted hearing on 20 August 2014 the Applicant was aspiring, by amendment, to challenge three successive decisions of the Respondent.

9. On behalf of the Respondent, counsel submitted that, given this failure, the Respondent remained in the dark as regards the key elements of the Applicant's reconfigured challenge and was significantly prejudiced accordingly. The initial submission of Counsel for the Applicant was that, notwithstanding the outright failure to obey the Tribunal's earlier order and despite the Respondent's submission, the hearing should proceed. No explanation for ignoring the earlier order in its totality or applying for its variation was proffered. No apology was tendered. The Applicant's stance was one of defiance. As exchanges with Counsel for the Applicant progressed, the following emerged:

   (a) The Applicant wished to rely on a judgment given in the Court of Appeal in mid-December 2014. This judgment was not available, for reasons which were not explained. On probing, the Tribunal discovered that it had not been bespoken by the Applicant's representatives.

   (b) The Applicant also wished to rely on a solicitor's witness statement which was not available.

(c) The Applicant further desired to rely on Home Office Guidance dating from August 2014 which was not produced until an advanced stage of the hearing.

(d) The Applicant's representatives had not yet provided a signed and dated copy of a solicitor's statement which was in the bundle and was evidently of several months vintage.

(e) The copy of the consultant psychiatrist's report in the bundle was unsigned.

10. The series of discoveries and defaults listed above emerged only following questions put by the Tribunal to counsel for the Applicant. The upshot was a belated and unapologetic application on behalf of the Applicant to adjourn the hearing. The Tribunal considered this a frankly lamentable state of affairs given the history of these proceedings and expressed itself accordingly, in trenchant terms. The Tribunal further described the argument of counsel for the Applicant that the outright disobedience of the Tribunal's order of 20 August 2014 was a merely technical or procedural irregularity as sadly misconceived.

11. The Tribunal adjourned the hearing of 06 January 2015 with the greatest reluctance and made the following directions:-

(i) The Claim Form will be amended and will be accompanied by properly particularised and clearly formulated grounds of challenge, by 16 January 2015.

(ii) All additional evidence on which the Applicant wishes to rely will be assembled in a supplementary bundle, to include properly signed and dated reports and witness statements, to be served and lodged by the same date.

(iii) The Applicant's skeleton argument will also be served by the 16 January 2015.

(iv) The Respondent's reply and skeleton argument will be served by 26 January 2015.

(v) The case will be re-listed on 29 January 2015.

(vi) Costs reserved.

12. Subsequently, **none of the steps required of the Applicant's legal representatives by the aforementioned order was taken, timeously or at all**. Outright disobedience of the order, in common with the earlier order of 20 August 2014, ensued. In the event, the scheduled hearing on 29 January 2015 did not proceed as the Tribunal was unexpectedly unavailable. This was notified to both parties representatives in advance. A new hearing date of 16 March 2015 was arranged. This was notified to the parties' representatives by notices dated 04 February 2015. As of 16 March 2015, the Applicant's representatives had not complied with any of the provisions of the two aforementioned orders. Nor had they made any application to vary their terms. All of this notwithstanding the windfall which

had occurred with the vacating of the hearing date of 29 January 2015.

13. At the outset of the hearing on (Monday) 16 March 2015, counsel for the Applicant informed the Tribunal that an amended claim form, accompanied by the requisite fee, had been filed in the Tribunal at 16.40hrs on (Friday) 13 March 2015. This was not on the Tribunal's file. Nor had it been served on the Respondent. Remarkably, counsel for the Applicant was unable to provide a hard copy of either document. Counsel frankly accepted personal responsibility for this woeful state of affairs. It was also represented that a pro bono brief is more difficult to return than a conventional one. When the Tribunal probed this representation, it emerged that no attempt had been made to engage alternative counsel. Finally, there was no letter to the Tribunal or witness statement from the Applicant's solicitors.

The Strike Out Application

14. Counsel for the Respondent invited the Tribunal to strike out the Applicant's case. This application engages rules 7 and 8 of the Tribunals Procedure (Upper Tribunal) Rules 2008. Rule 7(2) provides, in material part:

> "*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)……*"

Under the rule 8 regime, proceedings are automatically struck out in the event of failure to comply with an order or direction which specifies that non-compliance will attract this sanction viz an "unless" order: see rule 8(1). It is further provided in rule 8(3):

> "*The Upper Tribunal may strike out the whole or a part of the proceedings if –*
>
> *(a) the Appellant or Applicant has failed to comply with a direction which stated that failure by the Appellant or Applicant to comply with the direction could lead to the striking out of the proceedings or part of them;*
>
> *(b) the Appellant or Applicant has failed to co-operate with the Upper Tribunal to such an extent that the Upper Tribunal cannot deal with the proceedings fairly and justly; or*
>
> *(c) in proceedings which are not an appeal from the decision of another Tribunal or judicial review proceedings, the Upper Tribunal considers there is no reasonable prospect of the Appellant's or the Applicant's case, or part of it, succeeding.*"

By rule 8(1A), rule 8(3) does not apply to immigration or asylum appeals. However, this exclusion does not extend to immigration or asylum judicial

reviews. Rule 8(4) continues:

> "*The Upper Tribunal may not strike out the whole or a part of the proceedings under paragraph (2) or (3)(b) or (c) without first giving the Appellant or Applicant an opportunity to make representations in relation to the proposed striking out.*"

The effect of these provisions of the Rules in the present case is that the outright failure by the Appellant's legal representatives to comply with two successive orders of the Tribunal engages a discretionary power to strike out the appeal.

15. In her submissions to the Tribunal, counsel for the Applicant did not rely on any decided case. On behalf of the Respondent, counsel drew attention to the recent decision of the Court of Appeal in R (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 16633. In that case there were three conjoined appeals, listed together for the purpose of giving guidance on the correct approach to applications for extensions of time for filing a notice of appeal. Following its earlier decision in Mitchell v News Group Newspapers [2013] EWCA Civ 1537, the Court decided that such applications should be considered in the same way as applications for relief from sanctions under CPR3.9, which begins with the following words:

> "*On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or Court order …..*"

There follows an instruction that the Court must consider all the circumstances, including a menu of specified factors. At this juncture, I interpose the Mitchell principles, which are fourfold:

(i) If the failure to comply with the relevant rule, practice direction or court order can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly.

(ii) If the failure is not trivial, the burden is on the defaulting party to persuade the Court to grant relief.

(iii) The reasons why the default occurred should be considered. Where good reason is demonstrated, the prospects of the court granting relief will be favourable. Merely overlooking a deadline is unlikely to be considered a good reason.

(iv) While all the circumstances of the case must be considered, particular weight is to be given to the factors listed in rule 3.9.

Notably, the Court of Appeal emphasised that greater weight should be given to the twin considerations that it is necessary for litigation to be conducted efficiently and at appropriate cost and for compliance with the rules to be enforced. While a debilitating accident or illness might provide a good reason for a default, excessive pressure of work, much less mere oversight, would not.

16. I reproduce at this juncture the CPR rule 3.9 factors:

(a) The interests of the administration of justice.

(b) Whether the application for relief has been made promptly.

(c) Whether the failure to comply was intentional.

(d) Whether there is a good explanation for the failure.

(e) The extent to which the party in default has complied with other rules, practice directions and court orders and any relevant pre-action protocol.

(f) Whether the failure to comply was caused by the party or his legal representative.

(g) Whether the trial date or the likely date can still be met if relief is granted.

(h) The effect which the failure to comply had on each party.

(i) The effect which the granting of relief would have on each party.

I also draw attention to rule 3.9(2):

"*An application for relief must be supported by evidence.*"

17. The decision in Mitchell was followed quickly by another decision of the Court of Appeal, Denton v White [2014] EWCA Civ 906, which concerned an application to extend time in the wake of a failure to file a notice of appeal within the time prescribed by CPR52.4(2). In its judgment the Court stated, at [24]:

> "*A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages.*
>
> *The second stage is to consider why the default occurred.*
>
> *The third stage is to evaluate 'all the circumstances of the case, so as to enable the court to deal justly with the application including [factors (a) and (b)]'.*"

In the latter part of this passage the court was quoting from one element of CPR rule 3.9.

18. Returning to Hysaj, the most recent contribution to the jurisprudence on this subject, the Court of Appeal augmented its earlier guidance. I distil from its judgment the following principles:

(i) The court can properly take into account the importance of the issues to the public at large, where appropriate. Subject thereto, public law cases are no different in principle from private law cases.

(iI) Public authorities are to be treated in the same manner as private litigants.

(iii) "*…. In the case of a solicitor, having too much work will rarely be a good reason for failing to comply with the rules.*"

(Reiterating what was said in Mitchell)

(iv) "….*There are certain kinds of public law proceedings,* ***for example, appeals concerning claims for asylum and humanitarian protection****, in which particular care needs to be taken to ensure that appeals are not frustrated by a failure on the part of a party's legal representatives to comply with time limits.*"

[Emphasis added.]

(v) "… *it cannot be emphasised too strongly that the principle of reasonable co-operation …… is of general application*".

(vi) "*…. In the modern world the inability to pay for legal representation cannot be regarded as providing a good reason for delay.*"

(vii) The fact that a party is unrepresented is of no significance at the first stage of the enquiry when the court is assessing the seriousness and significance of the failure to comply with the rules. The more important question is whether this amounts to a good reason for the failure which has occurred. The court should not accept that the mere factor of being unrepresented provides a good reason for not adhering to the rules: "*…. If proceedings are not to become a free for all, the court must insist on litigants of all kinds following the rules.*"

(viii) "*In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process.*" In thus holding, the court noted the statement of Lord Neuberger in HRH Prince Abdulaziz v Apex Global Management [2014] UKSC 64, at [29] and [30]:

> "*In my view, the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues of the sort which were the subject matter of the decisions of* (successive High Court judges)*…. The one possible exception could be where a party has a case whose strength would entitle him to summary judgment …..*
>
> *It would be thoroughly undesirable if every time the court was considering the imposition or enforcement of a sanction it could be faced with the exercise of assessing the strength of the parties' respective cases. It would lead to such applications costing much more and taking up much more court time than they already do. It would thus be inherently*

undesirable and contrary to the aim of the Woolf and Jackson reforms."

Lord Neuberger added that the merits of a party's claim or defence are relevant, in this context, only when they are so strong that there is no real answer to them. He continued, at [39]:

"*…. When it comes to case management decisions and application of the CPR, just as the Court of Appeal is generally reluctant to interfere with trial judge's decisions so should the Supreme Court be very diffident about interfering with guidance given or principles laid down by the Court of Appeal.*"

Finally, at [40], Lord Neuberger emphasised that nothing he had written was intended to impinge on the decisions in Mitchell and Denton.

19. I consider that the principles rehearsed in the authorities set out above apply fully to the exercise of the Upper Tribunal's discretionary power to strike out the whole or a part of proceedings under rule 8(3) of the 2008 Rules. I would add the following. The exercise of this power will also, in every case, be governed by the overriding objective enshrined in rule 2. It will, further, be informed by rule 2(4) which provides:

"*Parties must –*

(a) help the Upper Tribunal to further the overriding objective; and

(b) co-operate with the Upper Tribunal generally."

The Tribunal will also be mindful of the draconian nature of an order striking out an appeal. It spells the end of the proceedings, subject only to an application to reinstate under rule 8(5). Self evidently, the gravity of the default under consideration and the consequences thereof will be relevant considerations. Furthermore, the extent to which the proceedings have been obstructed or delayed by the relevant default will be taken into account. Prejudice to the other parties will also be a material factor. The scope for making a wasted costs order under rule 10(3) and the question of whether this would be an appropriate and adequate sanction will also be weighed. Repeated defaults will almost invariably be considered more serious than a single act of non-compliance. Finally, the Tribunal will in every case consider the question of whether its process is being misused.

20. I turn to consider briefly the factor of *pro bono* representation. In its written decision following the aborted hearing on 06 January 2015, this Tribunal stated:

"*It is commendable that the Applicant's legal representatives are providing their services pro bono in the present case. They did not, properly, advance this as a justification for any of the defaults which occurred. They were right not to do so. The same professional standards and requirements apply to all representatives.*"

I consider that the correctness of this statement has been confirmed by the

decision of the Court of Appeal in Hysaj. If lawyers are not willing, able and equipped to adhere to normal professional standards and requirements, their ethical duty is not to accept the client's instructions.

Strike Out: Decision

21. Giving effect to the three stage approach espoused by the Court of Appeal in Denton (*supra*), I consider firstly the seriousness and significance of the failure to comply with the Upper Tribunal's orders of 20 August 2014 and 06 January 2015. I consider that these failures were not less than egregious, on account of the extensive periods during which they endured, the failure to request that either order be varied, the failure to request an extension of time for compliance, the absolute and outright nature of the disobedience of both orders, the abject lack of communication with both the Upper Tribunal and the other party's representatives during the periods in question, the failure to take advantage of belated and unexpected opportunities to comply and, finally, permitting three successive hearings to be arranged in circumstances where the Applicant's representatives were fully aware that the pre-requisites to any of the hearings proceeding had not been satisfied. I consider that, in the events which have occurred, the Applicant's representatives have misused the process of the Tribunal. The seriousness of the defaults is exacerbated by the gross waste of the time of senior Judges and the consideration that a special panel of two Judges was convened on successive occasions. Furthermore, this has impacted adversely on other cases in the Upper Tribunal system, of which there are several thousand, awaiting a hearing date.

22. Next, I turn to consider why these successive defaults occurred. No explanation of any kind has been advanced for the failure to comply with the first of the Tribunal's orders. As regards the second order, as I have recorded in [13] above, Counsel for the Applicant asserted personal problems and represented that a pro bono brief is more difficult to return than a conventional one. As I have observed, no attempt to engage alternative Counsel was made. As regards the Applicant's solicitors, no explanation of any kind for the outright disobedience of the two successive orders has been provided. I consider that the more egregious a breach of a court or tribunal's order, the more compelling any explanation will have to be if it is to reach the level of acceptability. The same applies to repeated and successive breaches. I consider that nothing approaching a reasonable or acceptable explanation has been provided.

23. Thirdly and finally, I consider all the circumstances of the case. I take into account all that is rehearsed in [21] and [22] above. I also have regard to the consideration that, throughout the period December 2013 to the summer of 2014, the Applicant's successive challenges were found to lack merit and substance by a total of five specialist Judges. She has enjoyed access to judicial adjudication and her challenges have been found wanting. There is no evidence that she has suffered any persecution or proscribed treatment since returning to her country of origin. If her reconfigured judicial review challenge had been formulated by her representatives in accordance with the orders made, it appears that she would have sought to rely on the decision in Detention Action (*supra*). This decision was promulgated by the Court of Appeal one year following the dismissal of the Applicant's appeal by the FtT. The latter appeal was decided in accordance with the law prevailing. It is difficult to conceive of how a later appellate Court decision

could undermine the legality of subsequent successive decisions by the Respondent that the Applicant's further representations did not constitute a fresh human rights or asylum claim. The second ingredient is the statement of the Government's Foreign Secretary relating to cases of alleged sexual violence in Sri Lanka. It is particularly difficult to envisage any Court or Tribunal holding that this had the quality or characteristics necessary to engender in law a substantive legitimate expectation. Giving effect to the Prince Abdulaziz principle, it cannot reasonably be said that the merits of the reconfigured claim which the Applicant would seek to make are so strong as to be unanswerable: quite the reverse, in my estimation.

24. All of the considerations rehearsed above must be considered in the round, in tandem with the factors and principles outlined in [15] – [20] above. The stand out feature in the lamentable history of these proceedings is the successive defiant disobedience of the Tribunal by the Applicant's representatives. The failure to comply with the Tribunal's orders is about as egregious as one could imagine. There is no redeeming or mitigating factor. Time and cost have been blithely and repeatedly wasted. Both the letter and the spirit of the overriding objective have been infringed. There has been a grave breach of the duty enshrined in rule 2(4) of the 2008 Rules to assist the Upper Tribunal to further the overriding objective and to co-operate with the Upper Tribunal generally. The rule of law depends upon respect for the authority of courts and tribunals. Sadly, the main hallmark of these proceedings is that of grave disrespect for the Upper Tribunal. I consider that there is no other way of addressing the egregious defaults. A wasted costs order, to which I give further consideration *infra*, would be manifestly insufficient in these circumstances. See Fairclough Homes v Summers [2012] 1 WLR 2004 at [49] and [51] especially. I consider the case in favour of a strike out order overwhelming. Accordingly, I order that the Applicant's judicial review claim be struck out under rule 8(3)(a) and (b) of the 2008 Rules.

Reinstatement Application

25. At the conclusion of the hearing on 16 March 2015 I gave a very brief *ex tempore* judgment, stating that my detailed reasons would follow in the written decision. I also directed that the Applicant's representatives should, within two days, show cause in writing why a wasted costs order should not be made against them under rule 10(3) of the 2008 Rules. Remarkably – or, given the disturbing history recited above, perhaps predictably - the Applicant's solicitors have not complied with this direction, timeously or at all. The next development was that a paper prepared by counsel for the Applicant containing a request for reinstatement of the case under rule 8(5) was received. I shall assume, without deciding, that this was, procedurally, a valid application.

26. I consider that the principles enunciated by the Privy Council in Gaydamak v UBS Bahamas Limited [2006] 1 WLR 1097, while formulated in a particular litigation context, are of general application. Three factors to be considered are the reason for the failure which resulted in the case being struck out, whether there has been any undue delay in applying for reinstatement and whether reinstatement would prejudice the other party. I consider it clear from the opinion of Lord Scott, at [14] and [15] especially, that these questions are not exhaustive. Their Lordships, in thus holding, expressly approved the approach in Grimshaw v Dunbar [1953] 1 QB 408, in which

Jenkins LJ stated that these are "***some*** *of the* ***main*** *considerations*" (page 414, my emphasis).

27. As regards the second and third considerations, the reinstatement application has been made promptly and, bearing in mind the nature of the underlying proceedings, I consider that the Secretary of State can lay claim to no special prejudice. This flows from the public law character of judicial review proceedings, the absence of any *lis inter-partes* and the contrast between the Secretary of State and a defendant in private law litigation who has secured a strike out order. I give effect to the exhortation of the Upper Tribunal in Synergy Child Services v Ofsted [2009] UKUT 125 (AAC), at [13], to consider the broad justice of the case in the light of all the circumstances prevailing as of now.

28. The reinstatement application contains no new evidence, raises no new consideration and advances no new argument. Properly analysed, it is simply a restatement, slightly fuller, of the submissions made to the Tribunal on 16 March 2015. It contains no belated statement by the representatives concerned that, despite all that has occurred, the authority of the Tribunal will be fully recognised and respected henceforth, in this case and others. It does not articulate any (even more belated) suggestion that there will be full obedience of the two previous orders and no timetable is proposed. It contains no hint of regret, much less any apology. It fails to recognise the impact of the successive and serial defaults on, and grave disrespect for, the Respondent. It contains not the slightest indication of realisation of the damage to the rule of law which the offending conduct has caused. Furthermore, I consider that it does not identify any arguable error of law in the strike out decision. There is nothing attractive or persuasive in the application. Bearing in mind all of the principles rehearsed in this judgment, I refuse the reinstatement application.

Pleadings In Judicial Review

29. Having regard to events in the present case, it is appropriate to emphasise the importance of the written pleading in all judicial review cases. Further, I venture to highlight the main standards and principles to be observed.

30. Every application for judicial review consists of four basic, interlocking elements:

(i) The impugned act or omission of the Respondent.

(ii) The public law grounds on which this is challenged by the Applicant.

(iii) The remedy sought.

(iv) The asserted facts, to include all material documentary evidence and, where appropriate, witness statements.

In the Judicial Review Claim Form (T480) and any attachment each of these elements should be formulated with appropriate clarity and particularity. The pleading should be such that it is possible to identify on a relatively quick perusal the target of the Applicant's challenge, the public law misdemeanour/s said to have been committed by the Respondent, the core elements of the latter and the remedy claimed.

31. It is good practice, in every case, to list the public law misdemeanour/s said to contaminate the target of the Applicant's challenge in a single paragraph, divided into subparagraphs where appropriate. In this format, the public law misdemeanour/s asserted should be succinctly stated. Next, the author should be satisfied that the grounds as a whole contain adequate particulars and sufficient supporting evidence. A clear distinction must be made at all times between the alleged facts (on the one hand) and the asserted public law misdemeanours, duly particularised (on the other). The claim must be formulated with the duty of candour owed to the court foremost in the minds of the practitioners and litigant.

32. Where, for example, it is contended that the impugned decision is unlawful by virtue of having taken into account certain immaterial considerations, these should be succinctly expressed. *Ditto* where it is contended that there was a failure to take into account some obligatory fact or factor. Where the ground of challenge is illegality, the relevant legal rule or rules in play and the asserted breach or breaches thereof should be crisply expressed. A bare pleading that the impugned decision is unlawful, unreasonable and irrational, or one framed in comparable terms, is never acceptable. The judge should not have to forage, dig and mine in order to identify the essentials of the Applicant's case. The mischief of prolixity is strongly discouraged. Attention should be paid to the overriding objective from the outset of the proceedings

33. As regards the Acknowledgement of Service and summary grounds of defence, the main duty imposed upon the Respondent in every case can be encapsulated in a sentence. These must always be framed so as to convey clearly and with sufficient particularity the grounds upon which it is contended that the Applicant's case should not succeed. Care must be taken to ensure that, in the discharge of the Respondent's duty of candour to the court, all relevant documentary evidence is provided. Increasingly, this may include the paper form or manifestation of electronic or on line materials which are not routinely generated in decision making processes or for hard/paper filing purposes but are capable of being reproduced from computer systems.

34. I would highlight one particular feature of asylum and immigration cases, familiar to all. It is not uncommon that a decision is followed by a later decision. This frequently alters the target, as the later decision often supersedes the first. In some contexts, there may be several successive decisions. In some cases, this phenomenon occurs subsequent to the initiation of judicial review proceedings. In these circumstances, the Applicant's representatives must always be alert to the consequences of such developments and, in particular, the need to seek amendment of the judicial review application in appropriate cases. I would caution that the perpetuation of a challenge to a superseded, historic decision is rarely appropriate.

35. Where amendment is pursued, it normally takes the form of substituting the later decision as the new target of the Applicant's challenge. Amendment of the grounds will also be necessary, to reflect the advent of this new fact and to incorporate any appropriate additional facts. Furthermore, there will inevitably be supplementary evidence in the form of the new decision and, possibly, other materials, such as correspondence and written

representations bearing on the new decision made. The Respondent's consent to amend and the Court's permission to amend must be sought proactively and timeously in every case. It should only rarely be necessary to convene an interlocutory or case management hearing for this purpose.

36. The Upper Tribunal recognises that, in the real world of contemporary litigation, events and developments such as those described above may render compliance with directions difficult or impossible to achieve. Where this occurs, the Respondent's consent to and the Tribunal's authorisation of a revised timetable should be sought proactively and timeously. Inertia will be unacceptable.

37. It is appropriate to add that, whatever the reasons and circumstances, the outcome of an application to amend a judicial review claim should never be taken for granted by the moving party. Every such application will be considered and determined on its particular merits and giving effect to the overriding objective. I refer to the decisions in R v SSHD, ex parte Turgut [2001] 1 All ER 719, Schiemann LJ considered that where the Respondent is given permission to adduce evidence that a new decision has been made, it will generally be convenient to substitute the subsequent decision as the target of the Applicant's challenge. However, in that case, the new decision of the Respondent was based on evidence filed by the Claimant in the proceedings and it simply reaffirmed the original decision. This issue was considered more fully in Rathakrishnan [2011] EWHC 1406 (Admin) where, following a successful renewed application for permission, the Secretary of State withdrew the decision under challenge and made a fresh decision purporting to address the issues stimulating the grant of permission, together with some further evidence. In refusing the Claimant's application to amend in order to challenge the fresh decision, Ouseley J confined the decision in Turgut, stating at [9]:

> "*It would be a wholly exceptional case in which a Claimant could postpone the effective quashing of the decision which he sought to have quashed in order that he might at some later stage bring a different challenge in respect of a different decision based on different evidence without having to go through the necessary applications including the payment of fees for the purpose of challenging that further decision and should thereby evade the filter mechanism and simply take his place on a seemingly adjourned renewal application …….*
>
> *It is too often that these cases have come before the Court at a point where the hearing is no more than an interruption in the process of the exchange of correspondence between the Secretary of State and the Claimant. This makes for a wholly unsatisfactory process of litigation.*"

While the Court of Appeal decision in R v SSHD, ex parte Al Abi [1997] WL 11059, may suggest a more *laissez-faire* approach, my analysis of it is that it does not have the status of binding precedent. Furthermore, in any event it belongs to an earlier era, preceding the major civil justice reforms and the advent of the overriding objective. Finally, as the above passage makes clear, while every claimant is under a duty to initiate proceedings promptly, the improper invocation, that is to say misuse, of the process of the Upper Tribunal must be studiously avoided.

Wasted Costs

38. The approach to be adopted by both the FtT and the Upper Tribunal in exercising their respective powers to make either a wasted costs order under section 29(4) of the Tribunals, Courts and Enforcement Act 2007 (the "*2007 Act*"), or (in the case of the Upper Tribunal) rule 10(3)(d) of the 2008 Rules has been set out *in extenso* in the recently reported decision in Cancino (Costs – First-Tier Tribunal – New Powers) [2015] UKFTT 59 (IAC). Wasted costs are defined as costs incurred by a party as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative. Neither misconduct nor gross neglect has to be demonstrated. The power is discretionary and the overriding objective must be considered. It is not a disciplinary power. It is compensatory rather than punitive. I refer to, without repeating, the principles rehearsed in Cancino.

39. I refer to the chronology in [2] – [13] above, together with the analysis and conclusions in [21] – [28]. Having regard to the facts, assessments and conclusions contained in those passages, I consider this to be a paradigm case for the making of a wasted costs order against the Applicant's representatives. It is difficult to conceive of a more compelling case for the exercise of this discretionary power. I repeat: there is no redeeming or mitigating factor of any kind. I make no distinction between the Applicant's solicitors and counsel. The order is made against both. It encompasses all of the costs wasted by the aborted hearings on 20 August 2014, 06 January 2015 and 16 March 2015. The Tribunal will measure these costs in default of agreement.

ORDER

40. Giving effect to the above conclusions:

    (a) The Applicant's case is struck out under rule 8(3) of the 2008 Rules.

    (b) The Applicant's reinstatement application under rule 8(5) is refused.

    (c) I make a wasted costs order against the Applicant's representatives, solicitors and counsel in the terms set out in [39] above, under section 29(4) of the 2007 Act and rule 10(3)(c) of the 2008 Rules.

    (d) Giving effect to the general rule, the balance of the Respondent's costs will be paid by the Applicant.

    (e) The costs payable under (c) and (d) above will be measured by the Tribunal in default of agreement between the parties within 28 days hereof.

Epilogue

41. The rule of law depends crucially on mutual trust and respect between courts and tribunals (on the one hand) and litigants and their representatives (on the other). The Upper Tribunal does much to foster this ethos. It is a matter of great sadness to be driven to the extremes of making the orders set out above.

Signed:

The Honourable Mr Justice McCloskey
President of the Upper Tribunal

Dated: 27 March 2015