R (on the application of Zia and Hossan) v Secretary of State for the Home Department (Strike out – Reinstatement refused – Appeal) [2017] UKUT 00123 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of Saqib Zia and Mohammad Ahmad Hossan

Applicant

v

Secretary of State for the Home Department

Respondent

Before

The Hon. Mr Justice McCloskey, President

Application for judicial review: substantive decision

Having considered all papers lodged and having heard the submissions of Mrs T Choudry, Advocate, of A O Solicitors, on behalf of the Applicant Mohammad Hossan, the other Applicant being unrepresented, together with the submissions of Mr C Thomann (of Counsel), instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 23 November 2016.

(i) *A decision of the Upper Tribunal refusing to exercise its power to reinstate a judicial review claim which has been struck out may be the subject of an application for permission to appeal to the Court of Appeal.*

(ii) *Such a decision, given its nature and consequences, is not to be equated with a mere case management decision.*

(iii) *Every decision upon an application to reinstate must give effect to the overriding objective.*

(iv) *Rule 8 of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides the only mechanism for challenging a strike out order. Rule 43 has no application in this context.*

McCloskey P

History of Proceedings

(1) These two cases were conjoined for the purpose of providing guidance on practice and procedure. The main issue raised is whether an application may be made to the Upper Tribunal for permission to appeal to the Court of Appeal against an order refusing to reinstate a judicial review claim which has been struck out.

The Zia Case

(2) In this case the sequence is the following:

(a) The application for permission to apply for judicial review was lodged on 25 November 2014.

(b) The Respondent's acknowledgement of service and summary grounds of defence were lodged on 09 January 2015.

(c) On 14 August 2015 certain case management directions were issued by the Tribunal. These required, *inter alia*, that any application to amend the Applicant's judicial review grounds must be made within seven days, viz. by 14 August 2015.

(d) No such application having been made, on 22 August 2015 the judicial review application was automatically struck out.

(e) On 08 September 2015, the Applicant's representatives lodged an application to amend the judicial review grounds.

(f) On 04 April 2016 notice of change of solicitor, on behalf of the Applicant, was lodged.

(g) By order of the Upper Tribunal dated 29 June 2016, the application to amend the grounds and reinstate the claim was refused.

(h) On 05 July 2016 the Applicant's representatives lodged an application for *"oral consideration of application for permission to apply for judicial review after refusal on papers or decision not to admit"*.

(i) On 16 September 2016, the Applicants' representatives lodged a further application in the following terms:

> "*To reinstate the Applicants' application for permission to seek judicial review on the grounds that the Applicant's out of country right of appeal is unlawful or inadequate ….*
>
> *To reinstate the proceedings for the reasons mentioned in the amended grounds …*
>
> *To reinstate the application and list it for an oral hearing*"

(3) I am now seized of the two last mentioned applications. In substance and reality, it is the second of these applications which is the operative one, given the misconception evident in its predecessor application of 05 July 2016: permission to apply for judicial review had not been refused on the papers, nor had there been any decision not to admit the application. In the events which have occurred, the merits of the judicial review permission application have not yet been determined.

The Upper Tribunal's Directions of 14 August 2015

(4) This is a *soi-disant* "ETS/TOEIC" case. It is one of a large number in which the Secretary of State has taken action against students suspected of having procured their English language proficiency qualifications by cheating. During a period of some three years' litigation there have been periodic landmark decisions of this Tribunal, the Administrative Court and the Court of Appeal. The processing and listing of cases of this kind have been influenced by developments in the ever expanding case law.

(5) This is one of a substantial number of Upper Tribunal cases in which the same Notice of Directions was issued, in this case on 14 August 2015. The Notice was in the following terms:

> **"Directions of the Lawyer of the Upper Tribunal**
>
> Your case has been reviewed following the decision of the Court of Appeal in *Sheraz Mehmood & Shahbaz Ali v SSHD [2015] EWCA Civ 744* and the following directions are made:
>
> (1) If the applicant considers that his claim has merit, he is to lodge within 7 days from the date this order is sent amended grounds (with application fee) presenting his claim in the light of the authorities binding on the Tribunal;
>
> (2) Failure to comply with paragraph (1) will have the effect that this claim will be struck out automatically under Rule 8(1) (a);

(3) Costs reserved.

Please note that the Tribunal will <u>not</u> consider it discourteous if you do not send in any reply to this direction, in order to allow paragraph (2) above to take its course."

It was considered that, in light of certain recent Court of Appeal decisions, this Applicant (and many others) should be given the opportunity to apply to amend their grounds of challenge. This was designed to assist the Upper Tribunal in its task of giving effect to the then extant jurisprudence in determining whether permission to apply for judicial review should be granted. As appears from the chronology above, at the stage when this Applicant's representatives made their belated response with an application to amend the grounds an Order striking out the claim had been made.

<u>The Upper Tribunal's Order dated 29 June 2016</u>

(6) In refusing the last mentioned application, the Tribunal stated its order dated 29 June 2016:

> *"The Applicant knew of an unless order and failed to comply with it. No other justification is advanced. In any event the amendment has no merit. It is not arguable that the Applicant's out of country appeal is unlawful or inadequate".*

The order continues:

> *"Hence, I refuse the application to reinstate as there is no adequate explanation for the delay. Had the application to amend been in time, I would have refused it because the grounds are unarguable. Had I been required to consider permission to seek judicial review, I would have refused it for like reasons".*

Accordingly, the order automatically striking out the Applicant's judicial review claim, which included provision for the Respondent's costs of £320, was affirmed.

<u>The Hossan Case</u>

(7) The sequence of material events is as follows:

(i) The application for permission to apply for judicial review was lodged on 04 February 2016. The Applicant, a national of Bangladesh, was challenging a decision of the Secretary of State whereby his application for further leave to remain in the United Kingdom on compassionate grounds had been refused, on 05 October 2015.

(ii) In contravention of rule 28A (2) of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Applicant failed to serve the judicial review application on the Respondent.

(iii) As a result, on 19 February 2016, the judicial review application was struck out automatically, for non-service by operation of rule 28A (2).

(iv) On 07 April 2016, an application to reinstate was lodged.

(v) By order dated 04 May 2016, a Judge of the Upper Tribunal refused this application on the ground that there was no evidence that the permission application had been served on the Respondent and noting that in any event the permission application was both out of time and lacking in merit.

(vi) On 30 August 2016, the Applicant applied for permission to appeal to the Court of Appeal against the last mentioned order.

Relevant Procedural Rules

(8) The procedural framework applying to this application is found in the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules"). I begin with the overriding objective, enshrined in Rule 2:

> ***"Overriding objective and parties' obligation to co-operate with the Upper Tribunal***
>
> *2.1-(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."

(9) Rule 8, which is concerned with the process of automatic strike out, provides:

"Striking out a party's case

8.(1A) Except for paragraph (2) this rule does not apply to an asylum case or an immigration case.

(1) The proceedings, or the appropriate part of them, will automatically be struck out –

(a) if the appellant or applicant has failed to comply with a direction that stated that failure by the appellant or applicant to comply with the direction would lead to the striking out of the proceedings or part of them; or

(b) in immigration judicial review proceedings, when a fee has not been paid, as required, in respect of an application under rule 30(4) or upon the grant of permission.

(2) The Upper Tribunal must strike out the whole or a part of the proceedings if the Upper Tribunal –

(a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(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.

(4) 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.

(5) If the proceedings have been struck out under paragraph (1) or (3)(a), the appellant or applicant may apply for the proceedings, or part of them, to be reinstated.

(6) An application under paragraph (5) must be made in writing and received by the Upper Tribunal within 1 month after the date on which the Upper Tribunal sent notification of the striking out to the appellant or applicant.

(7) This rule applies to a respondent or an interested party as it applies to an appellant or applicant except that –

(a) a reference to the striking out of the proceedings is to be read as a reference to the barring of the respondent or an interested party from taking further part in the proceedings; and

(b) a reference to an application for the reinstatement of proceedings which have been struck out is to be read as a reference to an application for the lifting of the bar on the respondent or an interested party taking further part in the proceedings.

(8) If a respondent or interested party has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Upper Tribunal need not consider any response or other submission made by that respondent or interested party, and may summarily determine any or all issues against that respondent or interested party"

[The underlining is mine]

(10) Rule 43 makes provision for setting aside a decision which disposes of proceedings. It states:

"Setting aside a decision which disposes of proceedings

43.(1) The Upper Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if –

(a) the Upper Tribunal considers that it is in the interests of justice to do so; and

(b) one or more of the conditions in paragraph (2) are satisfied.

(2) The conditions are –

(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;

(b) a document relating to the proceedings was not sent to the Upper Tribunal at an appropriate time;

(c) a party, or a party's representative, was not present at a hearing related to the proceedings; or

(d) there has been some other procedural irregularity in the proceedings.

[…]

(3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Upper Tribunal so that it is received no later than 1 month after the date on which the Upper Tribunal sent notice of the decision to the party."

(11) At this juncture it is necessary to consider the Upper Tribunal's powers of review. These derive from Section 10 of the Tribunals, Courts and Enforcement Act 2007 (the "2007 Act"). This provides:

"10 Review of decision of Upper Tribunal

(1) The Upper Tribunal may review a decision made by it on a matter in a case, other than a decision that is an excluded decision for the purposes of section 13(1) (but see subsection (7)).

(2) The Upper Tribunal's power under subsection (1) in relation to a decision is exercisable–

(a) of its own initiative, or

(b) on application by a person who for the purposes of section 13(2) has a right of appeal in respect of the decision.

(3) Tribunal Procedure Rules may–

(a) provide that the Upper Tribunal may not under subsection (1) review (whether of its own initiative or on application under subsection (2)(b)) a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules;

(b) provide that the Upper Tribunal's power under subsection (1) to review a decision of a description specified for the purposes of this paragraph in

Tribunal Procedure Rules is exercisable only of the tribunal's own initiative;

(c) provide that an application under subsection (2)(b) that is of a description specified for the purposes of this paragraph in Tribunal Procedure Rules may be made only on grounds specified for the purposes of this paragraph in Tribunal Procedure Rules;

(d) provide, in relation to a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules, that the Upper Tribunal's power under subsection (1) to review the decision of its own initiative is exercisable only on grounds specified for the purposes of this paragraph in Tribunal Procedure Rules.

(4) Where the Upper Tribunal has under subsection (1) reviewed a decision, the Upper Tribunal may in the light of the review do any of the following–

(a) correct accidental errors in the decision or in a record of the decision;
(b) amend reasons given for the decision;
(c) set the decision aside.

(5) Where under subsection (4)(c) the Upper Tribunal sets a decision aside, the Upper Tribunal must re-decide the matter concerned.

(6) Where the Upper Tribunal is acting under subsection (5), it may make such findings of fact as it considers appropriate.

(7) This section has effect as if a decision under subsection (4)(c) to set aside an earlier decision were not an excluded decision for the purposes of section 13(1), but the Upper Tribunal's only power in the light of a review under subsection (1) of a decision under subsection (4)(c) is the power under subsection (4)(a).

(8) A decision of the Upper Tribunal may not be reviewed under subsection (1) more than once, and once the Upper Tribunal has decided that an earlier decision should not be reviewed under subsection (1) it may not then decide to review that earlier decision under that subsection.

(9) Where under this section a decision is set aside and the matter concerned is then re-decided, the decision set aside and the decision made in re-deciding the matter are for the purposes of subsection (8) to be taken to be different decisions."

(12) Section 10(3) of the 2007 Act can be linked to Rule 46, which provides:

"46.(1) The Upper Tribunal may only undertake a review of a decision –

(a) pursuant to rule 45(1) (review on an application for permission to appeal); or

(b) pursuant to rule 47 (reviews of decisions in proceedings under the Forfeiture Act 1982).

(2) The Upper Tribunal must notify the parties in writing of the outcome of any review and of any rights of review or appeal in relation to the outcome.

(3) If the Upper Tribunal decides to take any action in relation to a decision following a review without first giving every party an opportunity to make representations, the notice under paragraph (2) must state that any party that did not have an opportunity to make representations may apply for such action to be set aside and for the decision to be reviewed again."

(13) Appeals are governed by section 13 of the 2007 Act, which provides:

"(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the relevant appellate court on any point of law arising from a decision made by the Upper Tribunal other than an excluded decision.

(2) Any party to a case has a right of appeal, subject to subsection (14).

(3) That right may be exercised only with permission (or, in Northern Ireland, leave).

(4) Permission (or leave) may be given by–

(a) the Upper Tribunal, or
(b) the relevant appellate court,
on an application by the party.

(5) 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.

[...]

(7) An application falls within this subsection if the application is for permission (or leave) to appeal from any decision of the Upper Tribunal on an appeal under section 11.

(8) For the purposes of subsection (1), an "excluded decision" is–

[...]

(c) any decision of the Upper Tribunal on an application under section 11(4)(b) (application for permission or leave to appeal),

(d) a decision of the Upper Tribunal under section 10–
(i) to review, or not to review, an earlier decision of the tribunal,
(ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal, or
(iii) to set aside an earlier decision of the tribunal,

(e) a decision of the Upper Tribunal that is set aside under section 10 (including a decision set aside after proceedings on an appeal under this section have been begun), or

(f) any decision of the Upper Tribunal that is of a description specified in an order made by the Lord Chancellor.

[...]

(11) Before the Upper Tribunal decides an application made to it under subsection (4), the Upper Tribunal must specify the court that is to be the relevant appellate court as respects the proposed appeal.

(12) The court to be specified under subsection (11) in relation to a proposed appeal is whichever of the following courts appears to the Upper Tribunal to be the most appropriate–

(a) the Court of Appeal in England and Wales;
(b) the Court of Session;
(c) the Court of Appeal in Northern Ireland.

(13) In this section except subsection (11), "the relevant appellate court", as respects an appeal, means the court specified as respects that appeal by the Upper Tribunal under subsection (11).

(14) The Lord Chancellor may by order make provision for a person to be treated as being, or to be treated as not being, a party to a case for the purposes of subsection (2).

(15) Rules of court may make provision as to the time within which an application under subsection (4) to the relevant appellate court must be made."

(14) Applications for permission to appeal are regulated by Rule 45. This provides:

"45 (1) On receiving an application for permission to appeal the Upper Tribunal may review the decision in accordance with rule 46 (review of a decision), but may only do so if –

(a) when making the decision the Upper Tribunal overlooked a legislative provision or binding authority which could have had a material effect on the decision; or

(b) since the Upper Tribunal's decision, a court has made a decision which is binding on the Upper Tribunal and which, had it been made before the Upper Tribunal's decision, could have had a material effect on the decision.

(2) If the Upper Tribunal decides not to review the decision, or reviews the decision and decides to take no action in relation to the decision or part of it, the Upper Tribunal must consider whether to give permission to appeal in relation to the decision or that part of it.

(3) The Upper Tribunal must provide a record of its decision to the parties as soon as practicable.

(4) If the Upper Tribunal refuses permission to appeal it must provide with the record of its decision –

(a) a statement of its reasons for such refusal; and

(b) notification of the right to make an application to the relevant appellate court for permission to appeal and the time within which, and the method by which, such application must be made.

(5) The Upper Tribunal may give permission to appeal on limited grounds, but must comply with paragraph (4) in relation to any grounds on which it has refused permission."

(15) By virtue of Article 3 of the Appeals (Excluded Decisions) Order 2009, "excluded decision" is the subject of an extensive definition which has 13 components. The first twelve of these are plainly of no application to the present context. I draw attention to the thirteenth– Article 3(m) - which is in these terms:

> *"Any procedural, ancillary or preliminary decision made in relation to an appeal against a decision under …….* [specified enactments]."

This is clearly not apt to embrace a decision finally disposing of proceedings under the Upper Tribunal's judicial review jurisdiction.

The Decided Cases

(16) Some guidance can be distilled from the decided cases. In Patel & Ors v The Secretary of State for the Home Department (Rev 1) [2015] EWCA Civ 1175, the

following guidance was given as regards the scope of the term "review" in section 10:

(i) The plain and ordinary meaning of "*review*" embraces any revision, variation or reversal of an extant "*decision*".

(ii) "*Review*" considered in its full section 10 context, qualifies for a broad construction.

(iii) By virtue of section 10(1) the power of review does not extend to an "*excluded decision*".

(iv) Consistent with (ii), the exercise of the power to review entitles the Upper Tribunal to correct accidental errors in its decision, to alter the reasons given for a decision or to set a decision aside, in which case the original decision must be remade.

(per Aikens LJ at [48]).

(17) The next question to be considered is that of relief from sanctions. There is clear authority on this topic. In Denton v TH White Ltd [2014] 1 WLR 3926 the following guidance was given in respect of relief from sanctions applications made under the Civil Procedure Rules (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)]"*

(18) The Upper Tribunal had occasion to consider the decision in Denton v White in R (SN) v Secretary of State for the Home Department (striking out – principles) IJR [2015] UKUT 227 (IAC). Having considered this decision, together with the other decisions of the Court of Appeal in Mitchell v News Group Newspapers [2013] EWCA Civ 1537 and R (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1633 I stated, at [18]:

> *"(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 can think of no good reason why the above code of principles should not apply to the present context. Some further guidance is provided in SN, at [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) There is more than one species of "unless" order. The context is all important. In every case reference must be made to the applicable provisions of the procedural rules and the terms in which the order is couched. In certain contexts an unless

order requires a further order for the purpose of taking effect. In other contexts, an unless order takes effect without any further order: Marcan Shipping (London) Ltd v Kefalas [2007] EWCA Civ 463 at [34] per Moore-Bick LJ). This has the consequence that any successful reinstatement application will have the effect of the original order being set aside.

(21) I accept the submission of Mr Thomann that there is a clear distinction of principle between an application seeking to review the original order and an application directed to seeking relief from that sanction. The distinction lies in the consideration that the latter species of application does not involve reviewing the justification or proportionality of the original unless order made. I emphasize, in this context, that every case will be unavoidably fact sensitive.

(22) Under the regime of the CPR, the power to make an unless order is provided for under CPR 3.5(1). A party dissatisfied with the decision to make such an order is able to bring a conventional appeal under CPR Part 52 on the basis that the decision to impose the unless order was wrong, or unjust because of a serious procedural irregularity (CPR Part 52.11(3)). Any application of this kind relief is governed by CPR Part 3.9.

(23) The jurisprudence under the CPR draws a clear distinction between a challenge to the correctness of the initial order and any subsequent application for relief from sanction (see Marcan Shipping, *supra* at [35]). It is assumed, at the latter stage, that the sanction embodied in the order was in principle correct and proportionate (Marcan Shipping [36] and see Mitchell v News Group Newspapers Ltd (Practice Note) [2014] 1 WLR 795).

(24) Rule 8 of the Upper Tribunal Rules (*supra*) similarly distinguishes between the original unless order jurisdiction under Rules 8(1) - 8(3) and an application for relief from sanction under Rule 8(5). As Mr Thomann submitted, an application to reinstate is conceptually distinct from an application seeking the exercise of a power to correct errors contained in rules 43 and 45 of the Upper Tribunal Rules. I consider that a reinstatement application does not repose within the narrow compass of section 10(4) of the 2007 Act. It does not seek to correct an accidental error in the decision or in a record of the decision, to amend the reasons given or to set aside the original decision to impose the sanction. It is, rather, a horse of a different colour.

General Conclusions

(25) I can identify nothing in the statutory matrix considered above to warrant any conclusion other than that the decision to refuse reinstatement is, in principle, appealable. The correctness of this conclusion was acknowledged by Mr Thomann on behalf of the Secretary of State.

(26) Mr Thomann was anxious to establish the proposition that any appeal against a reinstatement refusal decision must be of intrinsically limited scope. This raises the question of the threshold for the grant of permission to appeal against such decisions. In support of his argument, Mr Thomann drew attention to the statement of Lewison LJ in Broughton v Kop Football (Cayman) Ltd (Permission to Appeal) [2012] EWCA Civ 1743, at [51]:

> *"Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained."*

For my part, I would be reluctant to categorise a reinstatement refusal decision as a (mere) case management direction or decision. It partakes of rather more than simply "managing" the proceedings. Its effect is to affirm a previous decision or order sounding the death knell for the Applicant's claim. However, having highlighted this distinction, I would not dissent from the second part of the passage, beginning with the words "*It can interfere with ….*". It seems likely that, in practice, the grant of permission to appeal against decisions of this *genre* will be rare. To this I would add that disapproving decisions of the Court of Appeal will probably be rarer still.

(27) For the avoidance of doubt I would emphasise: rule 8 of the procedural rules provides the only mechanism for challenging a strike out order. Rule 43 has no application in this context.

Conclusion: The Zia Case

(28) Giving effect to the various principles, tests and criteria rehearsed exhaustively above, the conclusion that this application is quite hopeless is readily made. Applying the Denton template, the default in question was substantial (though not egregious), it was highly significant because it resulted in the automatic strike out of the Applicant's judicial review application, no good reason or explanation or mitigation has been put forward and there is no redeeming factor (such as the risk of infringing a fundamental human right) in the broader framework of the litigation. I refuse this application to reinstate accordingly.

Conclusion: The Hossan Case

(29) The decision in this case is not quite as straightforward. This is so on account of the provision of certain new documentary evidence at the hearing by Mrs Choudry, who represents this Applicant. I am disposed to accept Mrs Choudry's explanation for the lateness of this development which was that her firm had been instructed late in the day. While I acknowledge the force of Mr Thomann's submission that this evidence should have been adduced through the medium of a suitable witness statement, taking into account particularly the Draconian character of a strike out and refusal to reinstate decisions I am inclined to forgive this omission in the circumstances. Mr Thomann was correct to advance his objection in suitably measured terms

(30) I am satisfied, firstly, that the three pieces of documentary evidence adduced in this admittedly unsatisfactory fashion are authentic. Collectively, they establish, first, that the judicial review proceedings were commenced, accompanied by payment of the appropriate fee, on 04 February 2016. I would add that this chimes with the Upper Tribunal's computer records. Second, these documents confirm that a further application, again accompanied by the appropriate fee, was lodged with the Upper Tribunal on 06 April 2016. Third, objectively and fairly construed, these documents suggest strongly that the judicial review application was served on the Respondent on 06 February 2016.

(31) None of the aforementioned evidence was available when this Tribunal's previous orders and decisions were made. Having accepted it as authentic, I must pose the final question, namely whether permission to appeal to the Court of Appeal against the order of the Upper Tribunal dated 04 May 2016, refusing to reinstate this judicial review application should be granted. While I take into account the comment in the aforesaid order that the judicial review permission application was made out of time and had no arguable merit, I am bound to weigh these observations as essentially *obiter* and less than fully informed, given that the Upper Tribunal judge concerned was not directly seized of either of these issues. Moreover, more fundamentally, the central reason proffered by the judge for refusing the reinstatement application is now confounded by the new evidence adduced.

(32) Based on the foregoing, I exercise my discretion to grant permission to appeal to the Court of Appeal. Bearing in mind the overriding objective, the Respondent's representatives may well consider it appropriate not to contest the appeal and to consent to an order remitting this case to the Upper Tribunal for the purpose of determining the judicial review permission application, which exercise will include an evaluation and determination of the discrete time issue.

Order

(33) Thus I order:

(i) The application for permission to appeal to the Court of Appeal against the reinstatement refusal decision in the case of Zia is properly made, but is refused.

(ii) The application for permission to appeal to the Court of Appeal in the case of Hossan is also properly made and is granted.

Costs

(34) The parties and their representatives were invited to provide brief written submissions on the issue of costs. In the case of Zia, the Secretary of State is entitled to an order for costs against the Applicant. In the case of Hossan, the Applicant has succeeded. In principle, this engages the general rule that the Applicant's costs be paid by the Secretary of State, to be assessed in default of agreement. However, having considered the further submissions provided I conclude that having regard to this Applicant's defaults in the conduct of these proceedings there should be no order as to costs *inter-partes.* In short, these proceedings were pre-eminently avoidable by the exercise of basic diligence on the part of this Applicant and his representatives.

Signed: _____

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

Dated: 30 January 2017 [revised 07 March 2017]