No. CO/235/2021

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

DIVISIONAL COURT

[2021] EWHC 1895 (Admin)

Royal Courts of Justice

Wednesday, 26 May 2021

Before:

LORD JUSTICE LEWIS
MR JUSTICE SWIFT

IN THE MATTER OF THE COURT'S EXERCISE OF THE *HAMID* JURISDICTION:

RE: AN APPLICATION FOR JUDICIAL REVIEW

MS M. CARSS-FRISK QC (of Blackstone Chambers) appeared on behalf of the respondent.

J U D G M E N T

LORD JUSTICE LEWIS:

1 This hearing follows from an order made by Tipples J on 31 March 2021 that leading counsel attend court to address concerns raised in connection with an application for urgent consideration made in the case in which counsel was instructed.

2 In brief, a claim was issued on 21 January 2021 seeking permission to apply for judicial review of certain regulations. In the normal course of events and in accordance with CPR Part 54, the defendant would have a period of 21 days – that is until 11 February 2021 – to file an acknowledgement of service indicating if he intended to contest the claim and, if so, setting out summary grounds for resisting the claim.

3 Also on 21 January 2021, an application for urgent consideration was made on Form N463. That application stated that it had to be considered within 48 hours. The application was accompanied by a draft order which provided that, amongst other things, the claimant would have a right to file a reply before 4 p.m. on 18 February 2021 and a judge would consider the application for permission to apply for judicial review on the papers on or before 25 February 2021. In other words, an urgent application was made on 21 January 2021 asking the court to consider the matter within 48 hours to make an order that would not be effective for another four weeks.

4 The importance of the proper use of the urgent applications procedure in the Administrative Court was considered recently in *R (on the application of DVP) v Secretary of State for the Home Department* [2021] EWHC 606 (Admin). The judgment in that case had been given after the events that occurred in this case. The Divisional Court said this at paras.6 and 7:

> "6. The Administrative Court often deals with urgent applications. This is a very important part of its work in the public interest, and a High Court judge is always available to hear such applications. Thus, a High Court judge is always available in the Administrative Court during court hours in the week, to deal only with urgent applications. Cases which are so urgent that they need to be dealt with out of normal court hours, including weekends, public holidays and vacation, are dealt with by the High Court judge on 'out of hours' duty.
>
> 7. It is of the utmost importance that this limited resource is not abused, and over the years, the courts have developed rules to ensure this does not occur. If cases that are not truly urgent displace those that are, this will have serious consequences for litigants who have a good reason for applying for urgent relief. Two things flow from this. First, those seeking to make use of the 'urgents' procedures are under a duty to the court to satisfy themselves that the application they are considering really is urgent and to adhere, to the letter, to the rules of court which protect the procedure from abuse. This has always been the case. The fact that case papers can now be filed electronically, has not altered the position. Secondly, any abuse of the 'urgents' procedures will not be tolerated by the court and will be met with appropriate sanction."

5 In this case, the application for urgent consideration was considered within the requested 48 hours. By an order made on 22 January 2021, Swift J refused the application and ordered that the matter be referred for consideration under the court's *Hamid* jurisdiction to determine whether any further action should be taken. The reasons were that: the application was an abuse of the urgent applications procedure; the claimant was not seeking

any interim relief; and no application was made to abridge the time for filing and serving an acknowledgement of service and summary grounds of defence. The reasons noted that the application for expedition could and should have been included in the claim form; the reason further noted that the urgent applications procedure was a limited resource and should only be used in conditions of necessity. They noted that the claimant had asked the court to consider the application within 48 hours, but there was nothing that was capable of explaining or justifying that request. The application only served to divert limited judicial resources away from cases that did require urgent attention.

6 By way of explanation, the reference to the *Hamid* procedure is a reference to the procedure recognised in the case of *R (on the application of Hamid) v Secretary of State for the Home Department* [2013] CP Rep 6 where the court seeks to ensure that its processes are not abused. A legal representative – that is a solicitor or counsel – may be asked to show cause why the conduct of the legal representative should not be considered for referral to the relevant regulatory body or why the representative should not be admonished, see *R (on the application of Sathivel) v Secretary of State for the Home Department* [2018] 4 WLR 89.

7 By a letter dated 29 January 2021, solicitors and leading and junior counsel were asked to address the matters identified in the reasons given for Swift J's order and to show cause why they should not be brought to court to explain them. In particular, the letter indicated that two matters required explanation: why an application was made requiring the judge to consider the matter within 48 hours when the matter was not urgent, and why the application for expedition was not made in the claim form. Solicitors and counsel each make detailed witness statements. As leading counsel fairly and creditably accepted in his witness statement, he was primarily responsible for the advice that led to the application for urgent consideration being made. No further steps were taken thereafter in relation to the solicitors or junior counsel.

8 The order of Tipples J required leading counsel to attend court to address the concerns identified in the order of Swift J on 22 January 2021 and to give reasons why he should not be reported to the Bar Standards Board. There is no doubt that the counsel was given very clear notice of the matters that the court were concerned about and which he needed to address. A hearing took place today and written and oral representations were made on his behalf. A second witness statement was also provided by the counsel concerned.

9 I can state my conclusions on the matter immediately. First, the use of the urgent applications procedure in this case <u>was</u> inappropriate. There was no proper or justifiable basis for using the urgent applications procedure in this case, still less was there any proper basis for insisting that the urgent application itself be considered within 48 hours. Secondly, counsel's advice that this was a permissible and indeed, in his view, the only proper course involved a serious error of judgment on his part. Thirdly, I accept that leading counsel acted in good faith at all times and genuinely believed that the use of the urgent applications procedure was appropriate.

10 In the light of this hearing, the position in relation to the proper use of the urgent applications procedure has been clarified. Legal representatives will be required to act in accordance with the principles that will be described shortly in this judgment and, from 31 May 2021, in accordance with the new practice direction on these matters. In those circumstances, we do not consider that it is necessary to refer the matter to the Bar Standards Board for them to consider whether or not any action needs to be taken by them. This was an error of judgment on the part of counsel, but one made in good faith. Counsel has expressed regret and confirmed that he will follow a different course in the future. We

regard this judgment as providing a sufficient expression of the court's disapproval of the course of action that was taken in this case.

11 I will set out my reasons for that conclusion. That will require setting out a summary of the claim, the use made of the urgent applications procedure in this case, counsel's reasons for contending that that is a proper course of action, and my reasons for considering that counsel is wrong on this point.

12 It is appropriate, first, to summarise the process of judicial review. Usually, a claimant sends a pre-action protocol letter to the proposed defendant setting out the reasons why the claimant considers that the proposed defendant is or is proposing to act unlawfully. If that letter does not resolve matters, a claimant may issue a claim for judicial review. The process for seeking judicial review is governed by s.31 of the Senior Courts Act 1981 and the Civil Procedure Rules and Practice Directions, including Part 8 as modified in particular by CPR Part 54. It is a two-stage process. First, the claimant must obtain permission to apply for judicial review. That involves the issuing of the claim form and service of that form on the defendant and any interested parties. They then have 21 days in which to file an acknowledgement of service and a summary of the grounds for resisting the claim. Secondly, if permission is granted, there will be an opportunity for the defendant to serve evidence and there will then be a full hearing of the arguments and consideration of the evidence in the case. The Rules provide for a period of 35 days for the defendant to serve evidence.

13 In the present case, the claim was a challenge to regulations made on 4 December 2020 by the relevant Secretary of State under s.8 of the European Union (Withdrawal) Act 2018. The claimant is a company limited by guarantee and is a not-for-profit organisation. In a witness statement prepared for the judicial review proceedings, its director explained that its concern was what he described as "the constitutional issue of the limits on the use of the powers conferred by s.8 of the 2018 Act". A pre-action protocol letter was sent to the defendant on 23 December 2020. A reply was received on 6 January 2021.

14 On 21 January 2021 a claim for judicial review was issued challenging the lawfulness of the regulations on one ground only, namely, that they were outside the powers conferred by s.8 of the 2018 Act. The claim form dealt with procedural issues. It noted that the claimant had made an application for urgent consideration and referred to the details of that application. It asked that, on consideration of the application for permission to apply for judicial review, the court order expedition so that the substantive hearing would take place by 31 March 2021.

15 Also on 21 January 2021, an application for urgent consideration was made on Form N463. That form is headed, "Judicial Review Application for urgent consideration". The text under the heading says:

> "This form must be completed by the Claimant or the Claimant's advocate if exceptional urgency is being claimed and the application needs to be determined within a certain time scale."

The form says sections 1 to 5 must be completed. Section 1 requires the claimant to give the reasons for urgency. Section 2 is headed, "Proposed timetable". Section 2.1 asks, "How quickly do you require the application (form N463) to be considered?" and explains: "This will determine the time within which your application is referred for consideration." Two options are given and the claimant must tick the applicable box. The options are expressed in the following terms:

(a) immediately: "**within three days** indicate in hours (eg. 2 hours, 24 hours, etc.)". There is then a box for completion with the word "hours" after it;
(b) urgently: "**over three days** indicate in days (eg. 4 days, 6 days, etc.)". Again, a box is there to be completed and after that box is the word "days".

16 Section 2.2 says, "Please specify the nature and timeframe of consideration sought." Four matters are listed. They are:

(a) "Interim relief is sought and … should be considered within", and a box is given for completion with the words "hours/days" after it;
(b) "Abridgment of time for AOS is sought and should be considered within" – a box is there for completion and after it the words "hours/days";
(c) "The N461 application for permission should be considered within" – again, a box is given for completion and, again, after that is written "hours/days";
(d) "If permission for judicial review is granted, a substantive hearing is sought by" – there is a box for completion with the word "date" given after it.

17 Section 3 is a section of the form dealing with the justification for immediate consideration that requires a claimant to state the "date and time when it was first appreciated that an immediate application might be necessary" and requires an explanation for any delays in making that application. Section 4 deals with interim relief and section 5 deals with details for service.

18 As I have said, in the present case on 21 January 2021, an application for urgent consideration was made on the advice of leading counsel. In s.2.1, "How quickly do you require the application (form N463) to be considered?", Box (a) was ticked, that is the application should be considered immediately, within three days, and the box was completed with the number "48", the word "hours" appearing after it. In s.2.2, "the nature and timeframe of consideration sought", that was completed in the following way: (c) was ticked, saying that the N463 application for permission should be considered within, then the words "7 days of our reply" was put into the box which has the words "hours/days" after it. Option (d) was also ticked: "If permission for judicial review is granted, a substantive hearing is sought by" and the date "31 March 2021" was inserted.

19 A draft order accompanied the application for consideration. That provided for the defendant to file an acknowledgment of service and summary of grounds by 4 p.m. on 11 February 2021. That in fact was already provided for by CPR 54.8. The claimant was not seeking to abridge or reduce the time provided for by the CPR. No application for this part of the order was necessary. Paragraph 2 provided for the claimant to file a reply, if so advised, by 4 p.m. on 18 February 2021. A reply is not a document provided for by the CPR Part 54. Providing for a reply would add a further week to the process of assembling the documents necessary for the court to consider the application for permission. It would delay, not expedite, matters. Thirdly, and most significantly, the draft order provided for the court to consider the applications for permission and for the giving of directions for an expedited hearing on or before 25 February 2021. That is the key provision in many ways of the order sought on the application for urgent consideration. What counsel was seeking to do on 21 January 2021 was to get the court to rule, within 48 hours, that a court would consider the application for permission within a timescale of four to five weeks later. It was said in counsel's witness statement that this was the only – or at least a permissible – procedure for ensuring that the application for permission was considered immediately after the time for filing the acknowledgement of service and the reply by the claimant had passed.

20 I have no doubt that the use of the urgent applications process for that purpose was inappropriate. It was not in accordance with the arrangement for the consideration of urgent applications. Indeed, it ran counter to the clear purpose underlying the process. First, it is appropriate to bear in mind the context in which the urgent applications procedure was introduced. The Civil Procedure Rule introduced for the first time a requirement that a defendant to a claim for judicial review be given 21 days to file an acknowledgement of service and summary grounds for resisting the claim. There were cases where interim relief may be needed, or where there was some proper and legitimate reason to shorten that timescale, and to ensure that applications for permission were dealt with before the expiry of the 21-day period contemplated by the CPR. That appears from the Practice Statement set out at [2002] 1 WLR 810, which introduced the process. That Practice Statement noted that:

> "CPR 54 made no express provision for urgent applications for permission to apply for judicial review to be made orally. As a result of users' concerns, the then judge in charge of the Administrative Court stated that he was issuing guidance on the appropriate procedure to be used for urgent applications and for interim injunctions."

The context therefore was a possible need for urgent applications before the expiry of the 21-day time limit for serving and acknowledgement of service.

21 Secondly, the whole tenor of the N463 form is geared towards a situation of urgency where there is a need for an urgent decision. The text on the front of the form, in its present incarnation, states that it is to be used "if exceptional urgency is being claimed and the application needs to be determined within a certain time scale" [emphasis added]. The timetables for consideration of the application for urgent consideration reinforce that. There are two options for requiring the application form N463 to be considered: immediate, "within three days", and the applicant is asked to complete the box to show the number of hours within which it is to be considered; or urgent, over three days, and again with a box to complete to show the number of days within which it must be considered.

22 Furthermore, s.2.2 deals with the nature and timeframe of the consideration sought. Section 2.2(b) deals with abridgement of time for the acknowledgement of service. That is normally 21 days but the application for urgent consideration would require it to be considered in less than that, and the applicant is asked to complete a box with the words "hours/days" after it. Similarly, "The N461 application for permission should be considered within" and the box is there for the claimant to complete with the words "hours/days". The claimant is not asked to indicate that the N461 application for permission should be considered within a matter of weeks. It is contrary to the whole thrust of the urgent applications process and the terms of the N463 form itself to regard the form as a means of obtaining a decision within 48 hours about what must happen four or five weeks hence.

23 Counsel has set out in a detailed witness statement why he considered that the urgent applications process should be used to fix the date many weeks later by which determination of the application for permission should be considered. First, counsel said that the N463 form itself says at 2.2(c) that one option is that "N461 application for permission should be considered within a specific timescale". With respect to counsel, that overlooks the context in which such applications are to be made, the need for there to be exceptional urgency and the fact that s.2.2(a), (b) and (c) are expressed in terms that an application needs to be considered in days (not weeks). Counsel is simply confusing case management for the future with an urgent applications process dealing with situations of exceptional urgency that must be dealt with quickly.

24 Secondly, counsel says that the form deals with situations within which the court ought to act more quickly than it would otherwise do and that the reference to "exceptional urgency" means circumstances justifying a determination other than that within the ordinary timeframe. By "ordinary timeframe", he did not mean a timeframe prescribed by the rules. He meant the expectation of how long it might take after the period for the acknowledgement of service had expired. That is a misinterpretation of the words "exceptional urgency".

25 Thirdly, counsel noted that Form N461 does not itself specifically deal with expedition. He conceded that it was possible that the scope for making further applications in section 8 could possibly be used for making an application for expedition, but he would understand it as being for matters to be considered alongside consideration of permission, rather than an order providing for the time at which a permission application is to be considered. He submits that, since N463 expressly deals with the time for considering the application for permission, and N461 does not, he regarded the use of N463 as preferable and indeed, in his view, mandatory. That, again, is a misunderstanding of the N461 and N463 forms. An application for consideration of the application for permission by a particular time can, and should normally, be included within section 8 of the N461 form. What was not necessary and what resulted in a misuse of court time was an urgent application made on 21 January 2021 seeking immediate consideration of an application for an order as to something that was to happen weeks hence.

26 The reality is that counsel here was seeking to set a timetable for the future progress of the case. In addition to the usual 21 days for provision of an acknowledgement of service, counsel wanted: (a) a decision on whether he would be permitted to file a reply, and (b) a longstop date by which application for permission to apply for judicial review would be considered on the papers. Those are matters for case management, not the urgent applications procedure. The appropriate place for that application was in section 8 of the N461, together with a covering letter or email to the Court Office, drawing attention to the need to determine those parts of the application form before the end of the 21-day period for the filing of an acknowledgement of service. If counsel had had any real doubt about whether the Administrative Court Office would take steps to ensure that the papers were put before a judge within that timescale, he could have made an application on notice using Form N244. That would ensure that the application was considered during the 21-day period for service of an acknowledgement of service and did not require the use of the urgent applications procedure and did not require a decision within 48 hours. The use of that form, N244, is referred to in the listing policy at p.120 of the Administrative Court Judicial Review Guide 2020. It is also referred to in a section dealing with applications for case management orders, including orders fixing a timetable and controlling the progress of the case, see paras.12.1.3.7 and para.12.7 of the Administrative Court Judicial Review Guide 2020.

27 The second concern in relation to the application for urgent consideration is why, on 21 January 2021, it was considered necessary to request that the N463 form itself be considered within 48 hours. In his first witness statement, counsel accepts – having reflected on the matter and with the benefit of hindsight – that it was unnecessary to ask the court to consider the application within 48 hours. He apologised in his first witness statement to the court for that error in relation to this matter.

28 For the reasons that I have given, I consider that counsel was wrong to seek to use the urgent applications procedure in this case and was wrong to ask that it be considered within 48 hours.

29 Turning then to the question of further action, I would not consider it necessary to take any further steps. Counsel is an experienced lawyer with at least 19 years' experience of public law practice. He has never previously been involved in conduct which has been called into question. He fairly and creditably took responsibility at the outset for what occurred, thereby sparing his junior and solicitors the anguish of having to deal with these matters. He accepted that it was not necessary to ask that the matter be considered within 48 hours, and he apologised for that. He acted throughout in good faith. He thought that what he was doing was acceptable. It was not. He has said in his recent second witness statement that he will abide by the court's view of the appropriate use of the urgent applications process in the future. This morning, he said through counsel that if in fact he was wrong in his interpretation of the urgent applications procedure, then he was very sorry.

30 I accept that he has found this whole process stressful. The giving of this judgment and the reminder to him and other practitioners of the need to give very careful consideration to the appropriateness of using the urgent applications procedure is sufficient. No further action is called for in this case, nor is it necessary to identify the counsel concerned. Given that this is a case of an error of judgment, not misconduct, it is neither necessary nor right to identify him.

MR JUSTICE SWIFT:

31 I agree and I have nothing to add.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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