R (on the application of MMK) v Secretary of State for the Home Department (consent orders – legal effect – enforcement) [2017] UKUT 00198 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review

Notice of Decision

The Queen on the application of MMK

Applicant

v

Secretary of State for the Home Department

Respondent

Before The Honourable Mr Justice McCloskey, President

Having considered all papers lodged and having heard the submissions of Mr D O'Callaghan, of counsel, instructed by Duncan Lewis Solicitors, on behalf of the Applicant, and Mr J Eadie QC and Miss E Wilsdon, of counsel, instructed by the Government Legal Department, on behalf of the Respondent, at hearings at Field House, London on 07 March and 21 April 2017.

(i) The commonly used forms of consent order do not expose either party to possible contempt action or other sanction.

(ii) The remedy for non – compliance with a consent order will normally be the initiation of a fresh judicial review claim

McCloskey P

Introduction

1. In the events which have occurred this judicial review challenge has become academic in the practical sense. At this juncture and bearing in mind the context there is no practical and effective public law remedy which could be granted to the Applicant. This is the extant state of affairs by virtue of the Secretary of State, in the wake of anterior judicial review proceedings, having made a fresh decision which is now the subject of a statutory appeal by the Applicant. However, these are public law proceedings and, for reasons which will become apparent, I give effect to the principle enunciated by the House of Lords in R v Secretary of State for the Home Department, ex parte Salem [1999] 1 AC 450 at 453 per Lord Slynn, namely that where there is no longer a live *lis inter-partes* there is a judicial discretion whether to proceed, the governing criterion being that of the public interest, in the following way.

2. This case raises certain questions, of both substantive and procedural law, relating to the void which is created in circumstances where judicial review proceedings are settled by an approved consent order pursuant to which the Secretary of State is required to make a fresh decision subject to a time limit which expires subsequently without the further decision having been made. This I considered to be in an issue of sufficient moment to warrant the perpetuation of these proceedings so as to receive oral and written argument with a view to promulgating guidance within reasonable limits. I record and acknowledge the cooperation and assistance provided by the parties' representatives in this exercise.

The Litigation Framework

3. The occasion for considering these issues arises in the context of a judicial review challenge brought by MMK ("the Applicant") against the Secretary of State for the Home Department ("the Secretary of State"). The Applicant's challenge was not untypical. It was directed to a decision of the Secretary of State refusing to consider certain submissions as a fresh asylum, humanitarian protection or human rights claim, applying paragraph 353 of the Immigration Rules. Permission to apply for judicial review not having been determined, the outcome was fairly routine. It entailed a concession on behalf of the Secretary of State at the Acknowledgement of Service ("AOS") stage giving rise to a consent order which the Tribunal duly approved.

4. The terms of the consent order will be readily recognised by practitioners and Judges alike:

"UPON THE RESPONDENT *agreeing to withdraw the decision letter of 6 October 2015 refusing to consider the Applicant's further submissions received on 14 March 2012, 5*

November 2014 and 25 February 2015 as a fresh asylum, humanitarian protection or human rights claim;

AND UPON THE APPLICANT *agreeing within 21 days of the sealing of this order, to submit further material in support of his application for leave to remain in the United Kingdom or notifying the Respondent that he does not intend to submit any further material;*

AND UPON THE RESPONDENT *agreeing to make a new decision on the Applicant's application for leave to remain, including consideration of the material submitted by the Applicant during the course of these proceedings within 3 months of receipt of the further material or notification that no further material is to be submitted.*

BY CONSENT, IT IS ORDERED THAT:

1. *The Applicant do have leave to withdraw the claim for judicial review;.*

2. *The Applicant's reasonable costs to be paid by the Respondent, to be assessed if not agreed; and*

3. *There be a detailed assessment of the Applicant's Legal Aid Agency costs."*

This order was sealed by the Tribunal. In short, the Secretary of State agreed to make a new decision based upon, in its totality, all extant material and any further material provided within three months of receipt of the latter. Any further material emanating from the Applicant was to be provided within 21 days of the sealing of the order viz by 05 May 2016.

5. Thereafter the Applicant's solicitors made further representations, attaching new material, in the following two *tranches*:

   (a) under cover of a letter dated 05 May 2016 containing quite detailed representations relating to the alleged previous threat concerning the Applicant in Iran on account of his political opinion and his sur place activities in the United Kingdom and enclosing a letter from a pastor describing the commitment of the Applicant and his spouse to the pastor's church during the previous year; and

   (b) under cover of a further letter dated 13 July 2016 which attached, and made representations relating to, a consultant psychiatrist's report.

This was followed by a reminder letter dated 31 August 2016 and a more detailed letter of the same date, both emanating from the Applicant's solicitors. The longer letter (which airbrushes the second *tranche* of representations and evidence – see above) contains the following material passages:

> *"The Respondent has failed to act in accordance with the Order of 14 April 2016. No application has been made by the Respondent to amend the Order so as to extend time …*
>
> *An Order of the Upper Tribunal has been intentionally breached by one of the parties to the proceedings …*
>
> *We request that a decision be made within fourteen days … otherwise the Applicant will return to the Upper Tribunal and seek to very the present final Order so as to incorporate a specified date by when a decision is to be issued and a further Order which may indicate what might happen if there is any further failure to comply …"*

Another reminder letter dated 13 September 2016 followed.

6. The first response on behalf of the Secretary of State was made in the form of a letter dated 26 September 2016. This conveyed an intention to interview the Applicant on account of his asserted religious conversion and proposed that a written reply from the identified pastor to validate his letter of support (part of the new material submitted) be provided. This was duly received within three days, on 29 September 2016. The interview was ultimately held on 27 January 2017. On behalf of the Secretary of State, a fresh decision was then made, being contained in a letter dated 22 February 2017. While the Applicant did not, by this decision, secure the substantive relief he was seeking this was nevertheless an appealable decision and, at this juncture, a hearing before the First-tier Tribunal is pending.

7. Thus, to summarise:

   (i) Further representations and evidence were provided on behalf of the Applicant within the period specified in the Consent Order.

   (ii) Still further representations and evidence were provided on behalf of the Applicant some ten weeks after the specified period had expired.

   (iii) The time limit within which the Secretary of State was to make a new decision was not met, on any showing.

   (iv) The further evidence requested by the Secretary of State was provided.

   (v) The (previously unscheduled) Home Office further interview of the Applicant was duly held, some nine months following the Consent Oder.

   (vi) The Secretary of State's fresh decision followed just under a month later.

Procedural Developments

8. On 13 November 2016 the Applicant's solicitors took the following step. They lodged with the UT an application for an order in the following terms:

> *"The Applicant seeks to enforce the terms of the Order of the Upper Tribunal sealed on 14 April 2016 that was consented to by both parties. On 5 May 2016 the Applicant served further material on the Respondent within 21 days of the sealing of the order in accordance with the terms of the Order. The Respondent had until 6 August 2016 to make a decision. No application has been made by the Respondent to amend the terms of the sealed Order so as to extend time in which to make the required decision. The Respondent has not sought agreement with the Applicant as to the filing of a draft consent order so as to extend time in which to make a decision on a specified date.*
>
> *The Applicant seeks a variation of the Order, namely that the Respondent issue a decision by a stated dated and for the requirement of personal attendance by an agent or servant of the Respondent to be added to the Order in case of further non-compliance."*

This elicited the following Order of the UT:

> *"(1) As the letter of application dated 28th November 2016 from Duncan Lewis indicates the proceedings were disposed of by way of Consent Order dated 6th April 2016 in an order approved by the Upper Tribunal on 14th April 2016. There is a timeframe within the order.*
>
> *(2) It is open to the Applicant to commence fresh judicial review proceedings for an order of mandamus in relation to the failure of the Secretary of State to issue a new decision and seeks costs."*

9. Undeterred, on 30 December 2016 the Applicant's solicitors issued a further Application Notice, in the following terms:

> *"The Applicant seeks to enforce the terms of the Order sealed on 14 April 2016 by seeking to reinstate the claim and to vary the order so as to provide a time frame within which the Respondent is to issue a decision and the issue of costs.*
>
> *On 14 December 2016 Upper Tribunal Judge [ ] refused the application for a variation of the order without considering the application to reinstate the proceedings. The Applicant requests an oral consideration of (i) his application to reinstate the claim and (ii) his application to vary the sealed Order of 14 April 2015 so as to extend time in which the Respondent is to make the required decision and an order for costs."*

This was accompanied by a Draft Order in the following terms:

*"**IT IS ORDERED THAT***

1. *The application to be placed before a Judge of the Upper Tribunal within 24 hours.*

2. *The application to be listed for an oral hearing on the first available date on or after 5 January 2017 before the President of the Upper Tribunal.*

3. *The issue of costs and wasted costs to be considered at the hearing."*

This gave rise to a listing before me on 07 March 2017. While this was a substantive listing it metamorphosed into a CMR and I gave certain directions with which the parties' representatives have dutifully complied.

The Legal Framework of Contempt

10. By virtue of section 3(5) of the Tribunals, Courts and Enforcement Act 2007 (the "2007 Act"), the UT is a superior court of record. Section 25, under the rubric of "Supplementary powers of Upper Tribunal", provides:

> "*(1) In relation to the matters mentioned in subsection (2), the Upper Tribunal–*
>
> *(a) has, in England and Wales or in Northern Ireland, the same powers, rights, privileges and authority as the High Court, and*
>
> *(b) has, in Scotland, the same powers, rights, privileges and authority as the Court of Session.*
>
> *(2) The matters are–*
>
> *(a) the attendance and examination of witnesses,*
>
> *(b the production and inspection of documents, and*
>
> ***(c) all other matters incidental to the Upper Tribunal's functions.***
>
> [my emphasis]
>
> *(3) Sub-Section (1) shall not be taken–*
>
> *(a) to limit any power to make Tribunal Procedure Rules;*
>
> *(b) to be limited by anything in Tribunal Procedure Rules other than an express limitation."*

The key statutory words are "*all other matters incidental to the Upper Tribunal's*

functions".

11. The definition of "*court*" in Section 19 of the Contempt of Court Act 1981 ("the 1981 Act") is –

> "……*includes any tribunal or body exercising the judicial power of the State*".

The definition of "superior court" is:

> "…….*the Supreme Court, the Court of Appeal, the High Court, the Crown Court, the [Court Martial Appeal Court] , the Employment Appeal Tribunal and any other court exercising in relation to its proceedings powers equivalent to those of the High Court.*"

This clearly embraces the UT, by virtue of its judicial review jurisdiction.

12. Also to be noted is section 11 of the 1981 Act. This provides:

> *"In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."*

Finally, by section 14 of the 1981 Act contempt is punishable by a maximum term of two years imprisonment or payment of a maximum fine of £2,500.

14.— Proceedings in England and Wales.

> *(1) In any case where a court has power to commit a person to prison for contempt of court and (apart from this provision) no limitation applies to the period of committal, the committal shall (without prejudice to the power of the court to order his earlier discharge) be for a fixed term, and that term shall not on any occasion exceed two years in the case of committal by a superior court, or one month in the case of committal by an inferior court.*
>
> *(2) In any case where an inferior court has power to fine a person for contempt of court and (apart from this provision) no limit applies to the amount of the fine, the fine shall not on any occasion exceed [£2,500].*
>
> *[(2A) In the exercise of jurisdiction to commit for contempt of court or any kindred offence the court shall not deal with the offender by making an order under [section 60 of the Powers of Criminal Courts (Sentencing) Act 2000] (an attendance centre order) if it appears to the court, after considering any available evidence, that he is under 17 years of age.*
>
> *[(2A) A fine imposed under subsection (2) above shall be deemed, for the purposes of any enactment, to be a sum adjudged to be paid by a conviction.*

(4) Each of the superior courts shall have the like power to make a hospital order or guardianship order under [section 37 of the Mental Health Act 1983] [or an interim hospital order under] [section 38 of that Act] in the case of a person suffering from [mental disorder within the meaning of that Act] who could otherwise be committed to prison for contempt of court as the Crown Court has under that section in the case of a person convicted of an offence.

[(4A) Each of the superior courts shall have the like power to make an order under [section 35 of the said Act of 1983] (remand for report on accused's mental condition) where there is reason to suspect that a person who could be committed to prison for contempt of court is suffering from [mental disorder within the meaning of that Act] as the Crown Court has under that section in the case of an accused person within the meaning of that section.

[(4A) For the purposes of the preceding provisions of this section [the county court shall be treated as a superior court and not as an inferior court.

[(4B) The preceding provisions of this section do not apply to the family court, but –

(a) this is without prejudice to the operation of section 31E(1)(a) of the Matrimonial and Family Proceedings Act 1984 (family court has High Court's powers) in relation to the powers of the High Court that are limited or conferred by those provisions of this section, and

(b) section 31E(1)(b) of that Act (family court has county court's powers) does not apply in relation to the powers of the county court that are limited or conferred by those provisions of this section.

13. In R (Cart) v Upper Tribunal and Another [2011] QB 120 at first instance, Laws LJ expressed the view that any superior court of record - which includes the Upper Tribunal, per section 3(5) - has the power, *inter alia*, to punish for contempt: see [75]. There is no disapproval of this suggestion in the decision of the Court of Appeal. And see also Pickering v Liverpool Daily Post [1991] 2 AC 370, which held that the law of contempt applies to the Mental Health Review Tribunal.

14. The contempt jurisdiction of the Upper Tribunal was exercised in AA (Involuntary Returns to Zimbabwe) [2005] UKAIT 144 in preventing the disclosure of the identities of certain information in a country guidance decision: see especially [33]. Another illustration is provided by CB v Suffolk County Council [2010] UKUT 413 (AAC) where the UT fined a witness £500 for failing to attend a hearing in the First-Tier Tribunal (the "FtT") in defiance of a witness summons. This particular decision is a rare illustration of a reference made by the FtT to the UT under section 25 of the 2007 Act, a provision which reflects the status of the FtT as an inferior court. A

similar illustration is provided by AP v Her Majesty's Revenue and Customs (TC-Enforcement Reference) [2014] UKUT 182 (AAT).

15. There is a long-established distinction between civil contempt and criminal contempt. This is highlighted in, for example, Lord Saville of Newdigate v Harnden [2003] NI 239 and [2003] NICA 6. It seems clear that the powers of the UT belong to the realm of civil contempt. While the misdemeanour of civil contempt can, in principle, take various forms one of its most typical incarnations is disobedience by a party to a civil action, or a witness, of a specific order of the court or tribunal concerned: see Attorney General v Times Newspapers [1974] AC 273 at 307-8, per Lord Diplock. Merely declaratory orders are most unlikely to generate a finding of civil contempt. This arises from the fundamental distinction between a mandatory order and a declaration. This distinction is discussed in Family Reunification and Judicial Review Remedies in UTIAC, Vol 2 JR [2017]. See also Webster v Southwark LBC [1983] QB 698.

16. A further well established principle is that the Crown is immune from contempt. However, this does not extend to a Minister or official of the Crown or a Government Department: see M v Home Office [1994] 1 AC 337 at 25 especially and Beggs v Scottish Ministers [2007] 1 WLR 455. Thus in principle the Secretary of State is vulnerable to a finding of contempt by the UT. In this context it is appropriate to highlight the heavy emphasis in Beggs on common law fairness and procedural protections for every respondent/defendant in contempt proceedings.

17. Much of the law of contempt in the United Kingdom is judge made, particularly prior to the advent of the 1981 Act. The strict standards of proof applicable are noteworthy. In cases of alleged civil contempt, the standard of proof is the criminal one of beyond reasonable doubt. One discrete offshoot of this principle is that service of the relevant judicial order on the alleged contemnor must also be proven beyond reasonable doubt: see Churchman v Joint Shop Stewards Committee of the Workers of the Port of London [1972] 1 WLR 1094, at 1098 per Lord Denning MR.

18. This last mentioned principle is a reflection of another well-established principle, namely that the contempt jurisdiction of any court or tribunal is to be exercised with the utmost caution. While this is expressed in, for example, Re Clements [1877] 46 LJ CH 375 per Jessel MR at 383, I would offer the observation that the concerns which exercised the Master of the Rolls so acutely viz committal for contempt being "*practically arbitrary and unlimited*" belong to a certain historical context and plainly have limited application to the world of contemporary litigation.

Procedural Considerations

19. The first procedural matter worthy of note is that in all chambers of the Upper Tribunal (the "UT") the withdrawal by a party of its case or any part thereof requires the approval of the Tribunal: see rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("*the Rules*"). I consider that rule 17 embraces both statutory appeals and

judicial review cases. This analysis, in my view, is unaffected by what the specially tailored judicial review regime in the Rules – in Part 4 - does, and does not, contain. Rule 17 coexists with Rule 39(1), which provides:

> "*The Upper Tribunal may, at the request of the parties* ***but only if it considers it appropriate****, make a consent order disposing of the proceedings and making such other appropriate provision as the parties have agreed.*"
>
> [My emphasis.]

Thus the UT is the arbiter of what every consent order contains. Its powers in this context extend to rejecting a draft consent order in part, approving same in part and revising the text. An exercise of this kind could in theory result in the case proceeding to a hearing if the order ultimately acceptable to the Tribunal is not to the parties' liking since, in such eventuality, the fundamental requirement of mutual consent would not be satisfied.

20. While the requirement of judicial approval of proposed withdrawals and draft consent orders is especially apposite in the public law world of the UT, it has also featured for many decades in the sphere of civil litigation: see RSC Order 21 and its less intrusive modern incarnation, CPR Part 38, the main purpose being to prevent a discontinuance which would unfairly prejudice the defendant. In the public law sphere this requirement is rooted in, *inter alia,* the educative and corrective functions of the court or tribunal concerned. It reserves to the tribunal the right to reject a proposed withdrawal in circumstances where, for example, there is an important point of law or principle or statutory construction deserving of judicial exposition and clarification: see by analogy the Judge made principle underlying the provision of this judgment, outlined in [1] above. It also provides an important layer of protection to the litigant, particularly in cases where there is no legal representation. Furthermore, it promotes procedural fairness and propriety and serves to expose and prevent possible misuses of the Tribunal's process.

21. These reflections on procedural issues expose the fact that the UT does not have anything comparable to the regime contained in CPR 81 and PD 81 or Family Procedural Rules Part 37 and PD 37. In passing, this elaborate procedural regime invites the observation that there is a substantial merger of the common law principles of contempt, the relevant statutory measures and the extant procedural rules. This perspective *per se* provides a valuable insight into the subject of contempt. It also invites the observation that the sparse coverage of this topic in the Rules and the extant Presidential Directions may profitably be addressed so as to incorporate a discrete contempt procedural regime.

22. It is stated in [25] of Presidential Guidance Note No 1/2013:

> *"Where an anonymity order has been made but a person with knowledge of the order has breached it by putting the information in the public domain, such conduct may be punishable as a contempt of court either by the Upper Tribunal exercising the powers of the High Court under section 25 (2) (c) of the Tribunals, Courts and Enforcement Act*

2007 or by any other court of competent jurisdiction."

This, in my estimation, is an accurate statement of the powers of the UT exercisable in the discrete sphere identified. However, it does not, correctly in my view, attempt to prescribe the procedure to be followed. Matters of procedure fall within the remit of the Tribunal Procedure Committee: see section 22 of and Schedule 5 to the Tribunals, Courts and Enforcement Act 2007.

23. It is also necessary to draw attention to the Direction of the Lord Chief Justice under Part 1 of Schedule 2 to the Constitutional Reform Act 2005 and section 18 of the Tribunals, Courts and Enforcement Act 2007. This prescribes the judicial review jurisdiction of this chamber of the UT. By paragraph 1:

> *"Subject to paragraphs 2 and 3 below, the Lord Chief Justice hereby specifies the following classes of case for the purposes of section 18(6) of the Tribunals, Courts and Enforcement Act 2007:*
>
> > *any application for permission to apply for judicial review and any application for judicial review (including any application for ancillary relief and costs in such applications) that calls into question:*
> >
> > *i. a decision made under the Immigration Acts (as defined in Schedule 1 to the Interpretation Act 1978) or any instrument having effect (whether wholly or partly) under an enactment within the Immigration Acts, or otherwise relating to leave to enter or remain in the United Kingdom outside the Immigration Rules."*

Paragraph 4 provides:

> *"In paragraphs 1 and 3 above, the references to a decision include references to any omission or failure to make a decision."*

These provisions are germane to the correctness of the UT Order noted in [8] above.

Conclusions

24. The dust having settled in the wake of the parties' responses to the Tribunal's most recent directions and via their admirably realistic and focussed oral submissions, the main value of this judgment lies in drawing attention to the general principles, statutory provisions and procedural issues addressed above and the provision of some focused guidance *infra.*

25. The starting point is that noted in [1] above: these proceedings are now academic. If the UT has any enduring jurisdiction in these proceedings viz if it is competent to make the order sought by the Applicant – see [9] above – there is plainly no basis for

doing so. The further decision which the Secretary of State was obliged by the Consent Order to make has now materialised. The Applicant can gain nothing from the perpetuation of these proceedings.

26. I consider, however, that there is a more fundamental obstacle in the Applicant's way. I can identify no legal principle or procedural rule supporting the contention that these proceedings have some enduring existence surviving the sealing of the Consent Order. The proceedings were withdrawn, with the approval of the UT. Both the verb "to withdraw" and its derivatives, adjectives and nouns alike, are unpretentious members of the English language, requiring no special construction within the realm of rule 17 of the 2008 Rules. They clearly convey and denote finality. An approved consent order could, in principle, incorporate either basic or elaborate "liberty to apply" provisions. This one has no such content. Furthermore, a consent order framed in the terms under scrutiny stands in clear contrast with executory orders belonging to the sphere of private law, in particular the Tomlin Order and the Mareva Order and the classic public law executory remedy viz a mandatory order.

27. Next it is necessary to analyse the terms of the Consent Order. These are divided into two sections. The first consists of three discrete paragraphs which employ the language of "Upon …" and "And Upon …". The second section begins with the words "By consent it is ordered that …. ", followed by three numbered paragraphs. I accept the correctness of the submission of Mr Eadie QC and Miss Wilsdon that the first three paragraphs of the order are properly characterised recitals, whereas the three succeeding numbered paragraphs contain the operative parts of the order. Mr O'Callaghan, correctly in my estimation, did not advance any alternative analysis. I elaborate on this as follows.

28. Neither the Applicant nor the Respondent was ordered by the UT to do anything with reference to the fresh decision making process contemplated. The only positive step ordered of the Secretary of State was to pay the Applicant's reasonable costs. I construe the first section of the order as containing a series of mutual commitments of an aspirational nature, all made presumptively in good faith.

29. The next feature of the Consent Order appropriately highlighted is that the commitments assumed by both parties in the recitals were expressed in relatively absolute terms and, in particular, made no provision for unforeseen eventualities or circumstances. In the event, both parties failed to honour their respectively undertaken commitments. I shall comment further on this *infra.*

30. It is also appropriate to emphasise that by the terms of the Consent Order neither party made any undertakings to the UT. In particular, the characterisation of undertakings does not apply to the recitals. The correct analysis of the recitals is that they record the factual basis of the operative provisions of the order; they inform and illuminate such provisions; and they give expression to the parties' *bona fide* intentions. The interesting question of whether recitals of this kind operate to engender a substantive legitimate expectation is an issue which may fall to be

determined in some future occasion. As a minimum they impose a burden of explanation on the defaulting party where a default eventuates. But they are neither undertakings to the Tribunal nor *inter-partes* contractual promises.

31. It follows from all of the foregoing that neither (a) the failure on the part of the Applicant to submit all new representations and evidence within the agreed time limit nor (b) the failure on the part of the Secretary of State to make a new decision within the agreed period of three months, beginning on the (implicitly extended) date of receipt of the second *tranche* of material noted in [5(b)] above rendered either party in breach of the Consent Order. While, ultimately, the Secretary of State's new decision was made some four months later, considerably later than agreed, this default did not entail any breach of the Consent Order.

32. What, then, are the options available to a litigant in circumstances where a void of this kind materialises? They are basically twofold. The first is the essentially prosaic one of pressing the Secretary of State's representatives (as the Applicant's solicitors properly did here) and seeking to agree a new timetable. In these circumstances there will be a powerful duty of both explanation and enhanced expedition on the Secretary of State. The second option is the initiation of fresh judicial review proceedings. I have reproduced in [23] above the relevant passages in the Lord Chief Justice's Direction. The correct analysis of the kind of void which arose in these proceedings is, in my view, an "*omission or failure to make a decision… under the Immigration Acts*" on the part of the Secretary of State. This analysis flows from a relatively straightforward exercise of construction. It follows that the correct forum for the initiation of any such further judicial review proceedings would be the UT.

33. Thus I concur with the order of Upper Tribunal Judge Rimington noted in [9] above.

34. If, in the circumstances under scrutiny, a litigant is driven to issuing fresh proceedings this would of course be highly regrettable. Fundamentally it would be inimical to the overriding objective. However, it is necessary to acknowledge the twin phenomena of unforeseen developments and human ineptitude. Where a second judicial review application is initiated in this way it will be open to the disappointed litigant to request expedition. As practitioners will be aware, in the UT requests of this kind are allocated to a Judge for expedited assessment normally within 48 hours. The UT exercises a wide discretion in relation to expedition. The Judge will consider in particular – and inexhaustively – the whole of the background period, the depth and extent of the default on the part of the Secretary of State, any default or contributory fault on the part of the litigant, the personal, family and economic circumstances of the litigant and the position of any affected children. The options of interim relief and "rolled up" hearings will be live. Furthermore, in cases of egregious and unjustified delay issues of indemnity costs could conceivably arise.

35. Mr O'Callaghan's submissions also draw attention to a procedural rule of the High Court, namely CPR 3.1(7). This is one of multiple provisions in a regime arranged under the rubric of "The Court's General Powers of Case Management". These

include powers to extend or abridge time, to consolidate cases and to receive evidence by telephone. Rule 3.1(7) provides:

> "*A power of the Court under these Rules to make an order includes a power to vary or revoke the order.*"

If one interprets this provision literally – and there is no apparent reason for any different interpretative approach – the formula of "liberty to apply", prevalent in the judicial review sphere of the UT's jurisdiction, may not strictly be necessary in a High Court order. What is important for present purposes is that the UT's Rules contain no provision equivalent to Rule 3.1(7). While acknowledging that this discrete issue may require more detailed argument on some future occasion, I rather doubt whether a power of this nature, given its intrusive effect and its departure from the *ut sit finis litium* principle, could be implied via the UT's general power to regulate its own procedure or to give directions "*in relation to the conduct or disposal of proceedings*": per Rule 5(1) and (2). Furthermore, one might question whether CPR 3.1(7) can properly be characterised a (mere) case management power.

36. Some brief comments on the "default matrix" of the present case may be helpful. Neither party can lay claim to the moral high ground in this respect. On the Applicant's side, the whole of the further representations and evidence were provided within some ten weeks, rather than the agreed three weeks. This had the effect of a significantly later commencement of the three month period available to the Secretary of State. However, on the evidence, the ensuing three months were characterised by protracted official inertia – with the single exception noted in [6] above – followed by an essentially unexplained hiatus of a further three months.

37. It is likely that the initiation of fresh judicial review proceedings at any stage after mid-October 2016 would have elicited a favourable response from the UT, particularly as regards expedition. As regards further judicial intervention, it is likely on the evidence that expedited mandatory relief and costs would have been ordered given the absence of any explanation of why a further asylum interview (itself unexceptional and *prima facie* justified) could not be held until six months after the beginning of the Secretary of State's voluntarily assumed three month period for a fresh decision. While the focus of the UT would have been mainly on the post-Consent Order phase, account would also have been taken of the antecedent period, which is of considerable longevity. Furthermore, at a general level, there would have been real concern about the adverse consequences of delay in the sphere of asylum and immigration decision making.

38. The Consent Order reproduced in [4] above is couched in terms familiar to practitioners and Judges alike. The parties' cooperative response to pre-hearing directions has confirmed my experience, shared by other judicial members of the Chamber, that there is a lack of uniformity in the models deployed. This exercise establishes that while the Consent Order in this case is frequently deployed, Judges are also familiar with the other versions contained in Appendices 1 - 3 to this judgment.

39. The Consent Order in this case invites the observation, made in [29] above, that it contains no "special circumstances" or "best endeavours" qualification. There will be cases where it is appropriate for the parties to agree an order in these terms and to secure judicial approval thereof. However, there will surely be other cases in which a qualification of the kind highlighted should sensibly and properly be incorporated. Furthermore, there may be cases in which it is appropriate for the Secretary of State to be ordered to take a specified course of action within a stipulated time limit. The parties' representatives (in the first place) and the Tribunal, when considering a proposed consent order in draft, should be alert to these variations.

40. Coincidentally, in this context, I have just given judgment in another case in which I stated the following:

> *"[27] In the exercise of my discretion, having regard to the egregious nature of the public law misdemeanours established, the extensive delay on the part of the Secretary of State, the factor of protracted family fragmentation, the involvement of four directly affected children of tender years and the lamentable history generally, I would have granted the following remedies:*
>
> *(a) an order quashing the refusals on behalf of the Secretary of State to examine each of the three outstanding family reunification applications on their facts and merits; and*
>
> *(b) a mandatory order requiring the Secretary of State to determine these applications on their facts and merits within 21 days maximum.*
>
> *[28] However, at the eleventh hour, the Tribunal was requested by the parties to approve a draft Consent Order, the material portions whereof are the following:*
>
> *"UPON THE RESPONDENT agreeing to accept for consideration the Applicant's wife and children's family reunion applications, to be submitted in person at the Visa Application Centre in Basra, Iraq;*
>
> *AND UPON THE RESPONDENT agreeing to use her best endeavours to issue a decision as soon as possible, and no later than the current published visa processing guidelines, absent special circumstances;*
>
> *BY CONSENT, it is ordered that:-*
>
> *1 . The hearing listed for 26 April 2016 be vacated;*
>
> *2. The Applicant do have leave to withdraw the above-numbered claim for judicial review.""*

(R (on the application of Al-Anizy) v Secretary of State for the Home Department (undocumented Bidoons – Home Office policy) [2017] UKUT 00197 (IAC), at [27] – [28].)

The draft consent order in Al-Anizy was not, of course, binding on the Tribunal. There are two fundamental reasons for this. First, in judicial review proceedings, it is not open to the parties to dictate the outcome. Rather, the twofold question of whether a remedy should be granted and, if so, in what terms, lies within the discretion of the court or tribunal. Second, the withdrawal of any case before the UT and the authorisation of every consent order requires the approval of the Tribunal, per Rules 17 and 39(1) of the 2008 Rules *(supra*).

41. In cases where the Secretary of State is willing to execute a consent order without qualification there will be no recitals/operative provisions dichotomy and, in principle, contempt proceedings could lie. An order of this particular *genre* will place the Applicant in a particularly strong position and the Secretary of State in a correspondingly vulnerable one in the event of contempt proceedings or a fresh judicial review claim.

42. The consent order is a mechanism of fundamental importance and utility in public law litigation. I endorse it unreservedly. The dichotomy of recitals (on the one hand) and operative provisions (on the other) promotes many of the ingredients of the overriding objective and should, therefore, continue. All such orders must, however, be couched in terms which respect and promote the essential values of transparency, clarity and certainty.

43. I take the opportunity of emphasising that the UT, in common with every court and tribunal, will not tolerate breaches of its orders. Miscreants and defaulters, whether citizen or public authority, are treated with absolute equality. As the standard orders and directions of this Chamber and several recent reported decisions emphasise, the sanctions available are not confined to contempt action. They extend also to adverse costs orders and referrals to professional regulatory bodies. See in particular Shabir Ahmed (Sanctions for Non-Compliance) [2016] UKUT 562 (IAC).

44. As I have repeatedly emphasised, in various contexts, the UT does not wish to be embroiled in enforcement measures. Furthermore, this discrete field of activity involves a highly regrettable, frankly deplorable, waste of scarce judicial and administrative resources. Happily the constructive and productive interaction which characterises the UTIAC Judges and Practitioners Forum make abundantly clear that all share the same goal.

Order

45. The Applicant's application for enforcement/reinstatement/variation in the terms set forth in [9] above is refused for the reasons given.

Costs

46. (i) The provisions for costs in the Tribunal's Order of 14 April 2016 remain operative.

(ii) All further costs incurred subsequently shall lie where they fall, via no order as to costs *inter-partes*.

Permission to appeal

47. Neither party seeks permission to appeal to the Court of Appeal.

Signed: _____

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

Dated: **27 April 2017**

APPENDIX 1

A commonly used form of Consent Order

Upon the Respondent agreeing to reconsider the Applicant's further submissions in support of his asylum claim within three months of this order being sealed, absent special circumstances –

BY CONSENT, IT IS ORDERED THAT:

1. The Applicant do have leave to withdraw the above numbered claim for judicial review.

2. There be no order as to costs.

APPENDIX 2

The following are the letter of concession, AOS and initial draft consent order in the present case:

Letter

I am pleased to inform you that my client has agreed to reconsider your client's further submissions within three months of the enclosed consent Order being sealed. If you agree with the terms of the draft Consent Order, please return a signed copy to this office.

AOS

The Respondent has now agreed to reconsider the Applicant's claim for asylum. On that basis the Applicant has been invited to withdraw his JR application and an open letter (copy attached) was sent to the Applicant [1] s solicitors on 22nd February 2016. A response is awaited. It is hoped that the parties shall agree a consent order to withdraw the JR application.

Draft Consent Order

UPON the Respondent agreeing to reconsider the Applicant's further submissions in support of his asylum claim within three months of this order being sealed, absent special circumstances,

BY CONSENT, it is ordered that:-

1. The Applicant do have leave to withdraw the above numbered claim for judicial review.

2. There be no order as to costs.

APPENDIX 3

Another variety of Consent Order

UPON THE RESPONDENT agreeing to accept for consideration the Applicant's wife and children's family reunion applications, to be submitted in person at the Visa Application Centre in Basra, Iraq;

AND UPON THE RESPONDENT agreeing to use her best endeavours to issue a decision as soon as possible, and no later than within the current published visa processing guidelines, absent special circumstances;

BY CONSENT, it is ordered that:-

1. The hearing listed for [DATE] be vacated.
2. The Applicant do have leave to withdraw the above-numbered claim for judicial review.
3. The Respondent do pay the Applicant's reasonable costs, to be assessed if not agreed.
4. There be a detailed assessment of the Applicant's publicly funded costs in accordance with the Civil Legal Aid (Costs) Regulations 2013.

APPENDIX 4

Another variety of Consent Order: The noteworthy feature of this Order is that it contains no “special circumstances” or “best endeavours” qualification.

UPON hearing counsel for both parties IT IS ORDERED BY CONSENT:

1. The Applicant has permission to withdraw his application for judicial review.
2. The Respondent will reconsider the application for an extension of stay made by the Applicant on the 21st of July 2014 contained in an FLR(AF) application form within three months of the date of this order.
3. The Respondent shall further treat the application as though it were made on an FLR(FP) form.
4. The matter of costs shall be decided on the papers
5. The Applicant shall file and serve written submissions on costs (limited to three A4 pages) within 14 days. The Respondent shall file and serve a written reply (limited to three A4 pages) within 14 days. Any response (limited to two A4 pages) from the Applicant shall be filed and served within 7 days thereafter.

APPENDIX 5

This is a classic “Tomlin” Order, to be contrasted with the Consent Order in the present case and above.

UPON THE PARTIES agreeing that the matter be concluded on the terms set out in the Schedule to this Order:

BY CONSENT, it is ordered that:-

1. The substantive hearing listed for 15 December 2014 be vacated.
2. The Claimant shall have leave to and shall withdraw these proceedings.
3. The Defendant shall pay the Claimant’s reasonable legal costs on the standard basis to be subject to detailed assessment if not agreed.
4. There shall be detailed assessment of the Claimant’s publicly funded costs in accordance with the Community Legal Services (Costs) Regulations 2000.

We the solicitors for the parties consent to an Order being made in the terms as set out above.

SCHEDULE

IT IS AGREED THAT

1. The Defendant shall pay the sum of £___ by way of a bank transfer in full and final settlement of the claim within 28 days of the signed order.
2. The sum referred to in paragraph 1 is paid and received in full and final settlement of all claims set out in the Claimant’s claim for judicial review (claim number ____).
3. The parties agree that the terms of this settlement are confidential and shall not be disclosed to any third party without consent, except to his legal advisors, relevant tax authorities, relevant bodies for the purpose of establishing entitlement to support and benefits, where required by law, or where necessary to discharge the Secretary of State’s duties and responsibilities or in any other circumstances where, in her opinion, the public interest merits disclosure.

4. Subject to the above, the parties agree not to make any public comment in relation to the agreed settlement offer.

Signed by the Solicitor for the Claimant

Signed by the Solicitor for the Defendant

Sent to the Applicant, Respondent and any interested party / the Applicant's, Respondent's and any interested party's solicitors on (date):
Home Office Ref: