R (on the application of Spahiu and another) v Secretary of State for the Home Department (Judicial review – amendment – principles) IJR [2016] UKUT 00230 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review

Notice of Decision/Order/Directions

The Queen on the application of
Emiljano Spahiu and Kamran Salehi

Applicants

v

Secretary of State for the Home Department

Respondent

(i) *The amendment of a judicial review claim form preceding the lodgement of the Acknowledgement of Service does not require the permission of the Tribunal. Such permission is required in all other instances.*

(ii) *In deciding whether to exercise its discretionary power to permit amendment, the Tribunal will have regard to the overriding objective, fairness, reasonableness and the public law character of the proceedings. The Tribunal will also be alert to any possible subversion or misuse of its processes.*

(iii) *Every application to amend should be made formally, in writing, on notice to all other parties and paying the appropriate fee which, with effect from 21 March 2016, is £255.*

(iv) *Where an amendment is permitted in the course of a hearing the Tribunal may, within its discretion, not require compliance with the aforementioned requirements.*

(v) *There is a sharp distinction between an application to amend grounds and an application to amend the Respondent's decision under challenge: R (HM) v Secretary of State for the Home Department (JR – Scope – Evidence) IJR [2015] UKUT 437 (IAC) applied.*

Applications to Amend: Decision of The Honourable Mr Justice McCloskey, President

Introduction

(1) These two cases have been selected for the purpose of giving guidance on the correct approach to be adopted in applications to amend the grounds in judicial review proceedings.

Guidance

(2) The starting point is that the Upper Tribunal has a discretion to permit judicial review grounds to be amended: see Rule 5 (3) (c) and Rule 32 of the Tribunal Procedure (Upper Tribunal) Rules 2014. This discretion, in common with every discretion, must be exercised fairly, reasonably, taking into account all material factors and giving effect to the overriding objective enshrined in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008. In most cases the main question for the Tribunal will be whether the proposed amendment discloses an arguable ground. If yes, it will normally be appropriate to permit the amendment. However, there may be cases where one or more of the considerations enshrined in the concepts of fairness, reasonableness and the overriding objective point to a refusal. Furthermore, the Tribunal must be satisfied that its procedures are not being subverted and that its process is not being misused. Thus, for example, any pleading of a scandalous, frivolous or vexatious nature will not be permitted. Any issue of delay must also be identified and considered.

(3) The general approach outlined above is consistent with the established principle that such amendments as may be required to ensure that the issues really in dispute between the parties secure adjudication should normally be permitted. This is a well recognised formula found in the procedural rules of both courts and tribunals and noted in, for example R (P) v Essex County Council and Another [2004] EWHC 2027 (Admin), at [35].

(4) The exercise of the discretion to amend should also take into account the public law character of the proceedings. Thus, where relevant, one of the factors to be weighed may be the broader importance of any significant issue of law - for example, an important and recurring question of statutory construction – raised by the proposed amendment.

(5) From the moment of initial lodgement, the tribunal exercises full control over the content of the claim form and grounds. However, it is open to an applicant to subsequently lodge a claim form containing amended grounds, serving same on the respondent, without making a formal application for permission to amend, provided that this precedes the lodgement of the respondent's Acknowledgement of Service ("AOS"). From this date, the only mechanism for amending the grounds is a formal application to amend the claim form or grounds which must be made formally in writing and paying the appropriate fee. By virtue of the Upper Tribunal (Immigration and Asylum Chamber) (Judicial Review) (England and Wales) Fees Order 2011, the prescribed fee (formerly £80.00) is £255.00, with effect from 21 March 2016: see the Civil Proceedings, Family Proceedings and Upper Tribunal Fees (Amendment) Order 2016. This is the fee prescribed for applications on notice. This is the appropriate fee because, save as outlined in [6] below, every application to amend the grounds in a claim form must be made on notice to the respondent.

(6) It is appropriate to consider certain other scenarios. One is where an order granting permission to apply for judicial review contains a provision requiring the applicant to amend the grounds. In such a case, the necessary judicial supervision and act having occurred, a formal application to amend is not required, absent any judicial direction to the contrary. Another scenario is that of an amendment approved and ordered by the tribunal in the course of a hearing, for example an oral renewal hearing or a substantive hearing. Unless otherwise directed by the Judge, no formal application to amend will be required in such a case. However, if such application is directed, the appropriate practice will normally be to direct a without notice application to amend, since the respondent's representations relating to any proposed amendment will usually have been made at the hearing. This is of some significance, since a without notice application incurs a substantially smaller fee, namely £100. This does not exclude the possibility that an on notice application (requiring the higher fee of £255) may be directed in some cases.

(7) It is appropriate to highlight one discrete situation, namely the effect of an order which grants permission on limited grounds only. It is possible for the excluded grounds to be revived, in whole or in part, by a later application to amend. Where an application of this kind materialises it will be determined by reference to the general principles rehearsed in [2] – [4] above. Such an application does not, in principle, differ from an oral renewal application consequent upon an outright refusal to grant permission to apply for judicial review. According to the guidance provided in R (Smith) v Parole Board [2003] 1 WLR 2548, where an application of this species is made, there is a broad judicial discretion in deciding whether there is good reason to take a different view from the initial Judge. Where the initial judge heard detailed argument, however, it is suggested that "*significant justification*" would be required before taking a different view: see [16]. Notably, in Smith, there had been some three hours of oral argument before the Judge at the permission stage.

(8) There is a sharp distinction between an application to amend a ground or grounds of challenge and an application to amend the respondent's decision under challenge. The most detailed treatment of this issue is found in R (Rathakrishnan) v Secretary of State for the Home Department [2011] EWHC 1406 (Admin). The substance of what Ouseley J decided is that where the respondent has agreed to reconsider the decision under challenge it is not appropriate, save in exceptional circumstances, to stay proceedings for judicial review of the original decision rather than conclude them.

(9) I consider that this applies *a fortiori* in circumstances where the respondent has agreed to the quashing of the impugned decision: see R v Secretary of State for the Home Department, ex parte Al Abi [Unreported, 1997/WL/1105932]. This is akin to what has become known as the "Salem" principle, considered by this Tribunal recently in R (Raza) v Secretary of State for the Home Department (Bail - Conditions – Variation – Article 9 ECHR) IJR [2016] UKUT 132 (IAC), at [3] – [4] especially.

(10) It is also appropriate to record what this tribunal said in R (HN) v Secretary of State for the Home Department (JR – Scope – Evidence) IJR [2015] UKUT 437 (IAC), in Chapter (iii) under the rubric "Application to Amend". It was held, *inter alia* (per the headnote) :

(i) It is intrinsically undesirable that judicial review proceedings be transacted in circumstances where material evidence on which the applicants seek to rely has not been considered by the primary decision maker.

(ii) There is a strong general prohibition in contemporary litigation against rolling review by the Upper Tribunal in judicial review proceedings.

(iii) Where a judicial review applicant is proposing to make further representations to the Secretary of State in circumstances where a new decision will foreseeably be induced, it will normally be appropriate to refuse permission or to dismiss the application substantively on the ground that it will be rendered moot and/or an alternative remedy remains inexhausted and/or giving effect to the prohibition against rolling review.

The last of these three principles will bite on certain kinds of applications to amend. HN was upheld by the Court of Appeal: see R (on the application of HN and SA) (Afghanistan) v Secretary of State for the Home Department [2016] EWCA Civ 123.

(11) Finally, judges should be alert to the possibility that, in some cases, the respondent may incur costs in consequence of an amendment being permitted. This could arise, for example, where to permit an amendment results in a hearing date being vacated and/or requires the preparation of a substantially amended pleading. Thus the price of securing an amendment may sometimes involve the payment of costs consequently incurred by the respondent. Of course, in any case where the price of permitting an amendment of an applicant's grounds is likely to be a hearing date being vacated, fairness, reasonableness and the overriding objective may combine to defeat the application. Every case will be unavoidably fact sensitive.

DECISION

(12) In the first of these two cases [Spahiu] the initial judicial decision embodied a refusal of permission to apply for judicial review and a refusal to permit amendment of the grounds. As the analysis in [5] above makes clear, this latter aspect of the Judge's order was superfluous. The Applicant has now made an application for an oral renewal hearing and seeks to rely on the proposed amended grounds. Giving effect to the general rule noted in [5] above, I consider that the Applicant should be permitted to rely on the additional grounds. They effectively formed part of the application as lodged since they were added prior to the first judicial adjudication. Furthermore, no significant issue of delay or prejudice is identifiable. Finally, no further fee is payable.

(13) In the second application [Salehi] the Applicant, having been granted permission to apply for judicial review, now applies for permission to introduce a new ground of challenge. The Applicant is challenging a decision of the Secretary of State proposing to remove him to Hungary under the terms of the Dublin Regulation. Two comparable challenges in the Administrative Court have been selected and listed together for the purpose of giving guidance on returns to Hungary generally. Other cases have been stayed in the meantime. Given these considerations and having regard to the overriding objective, I consider the appropriate course to be to defer adjudication of the amendment application until the Administrative Court decisions become available.

(14) I would merely add that experience shows that in cases of this kind the advent of post-decision material and associated litigation activity, sometimes relatively frenzied, is a not unfamiliar phenomenon: see for example HN and SA.

FINALLY

(15) The attention of judges and practitioners is drawn to the updated Fees Table attached as Appendix 1.

Signed: _____

The President, The Honourable Mr Justice McCloskey

Dated: **18 April 2016**

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:

APPENDIX 1

This document sets out the full list of fees applicable to Judicial Review processes in the Immigration and Asylum Chamber of the Upper Tribunal as of 21 March 2016[1]

No.	Description	Fee	*Explanatory note – added by UTIAC*
	Starting proceedings		
1.1	Permission to apply for judicial review	£140	
1.1(a)	On a request to reconsider at a hearing a decision on permission	£350	*Where permission has been refused or application not admitted*
	Where the Tribunal has made an order giving permission to proceed with an application for judicial review, there is payable by the applicant within 7 days of service on the applicant of that order:-		
1.2	If the judicial review procedure has been started Where fee 1.1(a) has been paid and permission is granted at a hearing, the amount payable under fee 1.2 is £350	£700	*Where permission has been granted on paper or at a hearing [other than following 1.1(a)] and the case is to progress to a substantive hearing, the full fee of £700 is required.* *Where permission has been granted at a hearing following 1.1(a), the amount payable to progress to a substantive hearing is £350*
1.3	Permission to proceed (claim not started by the JR procedure).	£140	
	Other Fees charged		
2.1	On an application on notice where no other fee is specified	£255	
2.2	On an application by consent or without notice where no other fee is specified Fee 2.2 is not payable in relation to an application by consent for an adjournment of a hearing where the application is received by the Tribunal at least 14 days before the date set for that hearing	£100	
2.3	On an application for a summons or order for a witness to attend the Tribunal	£50	
	Copy Documents		
3.1	On a request for a copy of a document filed for the purposes of immigration judicial review proceedings in the Tribunal (other than where fee 3.2 applies) the fee payable under fee 3.1 includes: • where the Tribunal allows a party to fax to the Tribunal for the use of that party a document that has not been requested by the Tribunal and is not intended to be placed on the Tribunal's file; • where a party requests that the Tribunal fax a copy of a document from the Tribunal's file; • the Tribunal provides a subsequent copy of a document which it has previously provided (a) for ten pages or less; (b) for each subsequent page.	 £10 50p	
3.2	On a request for a copy of a document on a computer disk or in other electronic form, for each such copy.	£10	

[1] Fees have been taken from The Upper Tribunal (Immigration and Asylum Chamber) (Judicial Review) (England and Wales) Fees Order 2011 as amended by SI/2013/2069, SI/2013/2302, SI/2014/878 and the 2016 Order.
To find the legal documents containing the most recent amendments refer to http://www.legislation.gov.uk/