R (on the application of Sutharsan) v Secretary of State for the Home Department (UT rule 29(1): time limit) [2019] UKUT 00217 (IAC)

In the Upper Tribunal
Immigration and Asylum Chamber
Judicial Review

Notice of Decision

The Queen on the application of

NADARAJAH SUTHARSAN

Applicant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

The 21-day time limit in rule 29(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 for filing an acknowledgment of service in immigration judicial review proceedings begins to run on the day after the person concerned is provided with a copy of the application for judicial review, not on the day it was sent. A copy that is sent by post will be deemed to have been provided on the second business day after it was posted, unless the contrary is proved.

Decision of the Honourable Mr Justice Lane

Following consideration of all documents filed, including the letter dated 21 June 2019 from the applicant's representatives, the Tamil Welfare Association (Newham) UK.

The respondent's acknowledgment of service, filed on 20 June 2019, was filed within the period of 21 days specified in rule 29(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Reasons:

1. The applicant contends that the respondent's acknowledgment of service, filed on 20 June 2019, was filed outside the period of 21 days specified in rule 29(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008. The respondent asserts that it was served within that period. If the applicant is

correct, it is common ground that the respondent has not made an application, accompanied by the requisite fee, for time to be extended.

2. So far as relevant, rule 29(1) provides that:-

> "A person who is sent or provided with a copy of an application for permission" [to bring judicial review proceedings and who wishes to take part in them] "must provide to the Upper Tribunal an acknowledgment of service so that it is received no later than no later than 21 days after the date on which the Upper Tribunal sent, or in immigration judicial review proceedings the applicant provided a copy of the application to that person".

3. The applicant says that a copy is provided to the person concerned on the date it is sent to that person. This means the 21-day period begins to run on the day after it was sent, whether or not the person to whom it was sent has received it.

3. The applicant's position necessarily involves the proposition that sending and providing amount to the same thing. It is, however, evident from rule 29(1) that the legislature regards sending and providing as different. Otherwise, there would have been no purpose in SI 2011/2343 inserting the words in square brackets, which occurred on 17 October 2011, when UTIAC acquired jurisdiction to decide "fresh claim" judicial reviews.

4. Any doubt as to this is dispelled by reading the consultation paper and annexes, which the Tribunal Procedure Committee (TPC) published in 2011, concerning proposed changes to the 2008 Rules, consequent upon the assumption by the Upper Tribunal of jurisdiction in "fresh claim" judicial reviews (FCJRs)[1]. The annex attached to the TPC's consultation paper reveals that the original proposed wording of rule 29 read:

> "… so that it is received no later than 21 days after the date on which the Upper Tribunal or in fresh claim judicial review proceedings the applicant sent a copy of the application to that person".

5. The consultation paper, however, made reference to:

> "CPR 58.8(2), which allows a total of 23 days for lodging an acknowledgment of service (2 days for postal service and 21 days from receipt of the application). Rule 29(1) allows 21 days for this to be done. The Committee is considering whether to make special provision for FCJRs that would maintain the 23 day time limit or to specify a shorter time limit given the nature of FCJRs"

6. The TPC published a reply to the consultation responses, in which we find the following:

> "The majority of respondents suggested that the CPR should be replicated in order to avoid having different rules depending on the venue". The conclusion of the TPC was that it "agreed that it was appropriate to replicate the CPR time limit".

[1] https://webarchive.nationalarchives.gov.uk/20140714112832tf_/https://www.justice.gov.uk/about/tribunal-procedure-committee/ts-committee-closed-consultations

7. The amendments to rule 29(1) that were eventually made in 2011 were, therefore, intended to reflect CPR 54.8(2)(a), which governs applications for judicial review in the High Court. CPR 54.8(2)(a) prescribes a period of 21 days "after service of the claim form" on the person concerned. The fact that service may not be effected until that person is put in possession of the claim form is made clear by CPR 6.14, which provides that a claim form is deemed to be served on the second business day after completion of what is termed the relevant step under rule 7.5(1). For posting by first class post, the relevant step is "posting".

8. This legislative background makes it plain that the references to providing in the amended rule 29(1) were used in order to keep fresh claim judicial review (and, now, immigration judicial review) in step with the relevant High Court time limit. The applicant's interpretation, however, would entirely defeat this purpose.

9. In Bhavsar (late application for PTA: procedure) [2019] UKUT 00196 (IAC), the Upper Tribunal examined the effect of amendments made by SI 2018/511 to rule 33 (Application for permission to appeal to the Upper Tribunal) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. The amendments replaced the references in rule 33 to "provided" with references to "sent". As the Upper Tribunal noted at paragraph 26 of its decision, the Explanatory Note to SI 2018/511 stated that the replacement of the references was done "in order to clarify that the time period for an application to be sent to the Tribunal is calculated by reference to the date on which the written reasons for the decision are sent to the party making the application".

10. At paragraph 28 of Bhavsar, the Upper Tribunal said:

> "Despite the implication in the Explanatory Note to SI 2018/511 that the substitution of "sent" for "provided" had been made merely in order "to clarify" the position, it is, in our view, clear that a substantive change had in fact been made. As a matter of ordinary language, a person is "provided" with a physical thing when he or she receives or takes possession of it. In the present case, that was on 22 June 2018, when the appellant's solicitors received the First-tier Tribunal's decision, along with form IA60. The fourteen-day time limit, accordingly, would have expired on 5 July 2018, but for the amendment to rule 33 made by SI 2018/511."

11. The account in paragraphs 3 to 7 above of how rule 29(1) came to be amended in 2011 underscores the correctness of what was said in Bhavsar. Serving and providing are not synonymous (see also: R (Javed) v Secretary of State for the Home Department [2014] EWHC 4426 (Admin)).

12. It is undoubtedly the fact that something can be provided to a person in a variety of ways, which involve not only sending the thing via an intermediary, such as the Royal Mail, but also providing the thing directly by hand. If the applicant were correct in his assertion that sending a thing amounts to providing it on the date of sending, the applicant could unilaterally shorten the period of 21 days in rule 29(1) by choosing to send the copy application, rather than effecting personal service at the office of the respondent's legal representative, the Government Legal Department. Such an outcome cannot be correct.

13. The references to providing in rule 29(1) are, nevertheless, not free from difficulty, in that the 2008 Rules contain no express provision like CPR 6.14, making it clear that a document sent by post by one party to someone other than the Tribunal is deemed to be served/received on the second business day after posting. In this regard, it does not appear that section 7 of the Interpretation Act 1978 applies (see Syed (curtailment of leave – notice) [2013] UKUT 00144 (IAC)). It is plainly in the interests of the overriding objective in rule 2 to interpret the references to providing in rule 29(1) as including the position that a copy application which is sent by post is deemed to have been provided on the second business day after it was posted, unless the contrary is proved. Pursuant to rule 2(3)(b), that is how the references will be interpreted by the Tribunal.

14. In the application with which I am concerned, the applicant sent a copy of the application to the respondent on 29 May 2019. There is no dispute it was received by the respondent on 30 May 2019 and so deemed service does not arise. In view of what I have said above, it was on 30 May that the respondent was provided with the relevant document for the purposes of rule 29(1). The 21-day period therefore began to run on 31 May and ended on 20 June, which was the day that the acknowledgment of service was received by the Upper Tribunal.

Signed:

Dated: 1 July 2019