30TH JUNE 2017 *BY KATE NEWMAN*

Test cases on automatic strike out of claims lead to changes at the Upper Tribunal

Many immigration practitioners will have fallen foul of the surprisingly strict approach the Upper Tribunal ("UT") has, until recently, taken when it comes to the provision of form T485 (the UT equivalent of the Administrative Court's Certificate of Service) within nine days of issuing a claim for judicial review in the UT, as required by Rule 28A (2)(b) of the *Tribunal Procedure (Upper Tribunal) Rules 2008* as amended ("the UT Rules").

The Administrative Court has a practice of writing to a Claimant querying the lack of a Certificate of Service before taking any steps leading to the dismissal of a claim. Provided that the Claimant had actually served the Defendant within the requisite time, that Court is content to allow the claim to proceed once the Certificate of Service is provided. This approach does not seem to lead to any difficulties in practice.

It is therefore hard to see why the UT, where more litigants are unrepresented and where *"avoiding unnecessary formality and seeking flexibility in the proceedings"* is written into the overriding objective (Rule 2 (2)(b) of the UT Rules), should have found it necessary to introduce a practice of

(a) automatically striking out claims for want of provision of the T485 within nine days,

(b) requiring a formal application for reinstatement and a fee to remedy the defect, and

(c) even sometimes refusing to reinstate the claim on the basis that there was no 'good reason' for the failure to supply the T485, even where the Applicant had in fact served the Respondent in the time allowed under the rules.

This begs the question of what the actual purpose of the requirement to provide the T485 is.

Duncan Lewis **has appealed a refusal to reinstate an application for judicial review which had been automatically struck out for this reason to the Court of Appeal. When we were granted permission to appeal, we wrote to the UT warning that we considered that the practice of automatically striking out for breach of UT Rule 28A (2)(b) was unlawful and disproportionate and that a claim would follow if the practice was not amended.**

Duncan Lewis **has subsequently brought two judicial reviews in the Administrative Court on behalf of two clients who had claims in the UT struck out for breaches of UT Rule 28A (2)(b). For one Applicant the course of events indicated that the T485 had in fact been posted and had been lost by Royal Mail but would have otherwise arrived in time; for the second, the T485 explained that the bundle had been served on the Government Legal Department (GLD) rather than the Secretary of State for the Home Department (SSHD) following receipt of a letter from the SSHD informing us that all future correspondence in that claim should be sent to the GLD.**

In both cases the claims were automatically struck out under Rule 8(1)(b) of the UT Rules.

Until recently, both the letter routinely provided to applicants when issuing a judicial review claim in the UT and form T485 itself set out the requirement for the provision of a T485 within nine days of issuing the claim and purported to inform the applicant that the consequence of non-compliance was automatic strike out.

The Claimants have submitted that the blanket practice of automatically striking out such claims for failure to follow these strictures is itself unlawful. The Rules do not specify this sanction. We submitted that for the UT to adopt this sanction as a blanket practice amounted to the UT rewriting the Rules, which by the ***Tribunals, Court and Enforcement Act*** **2007 s.22 is the purview of the Tribunal Rules Committee.**

The Claimants' High Court cases are ongoing and a final outcome is not yet known. However, it is telling that already, before the test cases are finalised, the UT has altered its practice.

Astute practitioners may have noticed that recently the wording on both the letter provided when issuing a claim and form T485 has altered. The requirement to provide the UT with an effective T485 remains in place (the Claimants are not arguing that Rule 28A is itself unlawful) but the consequence of automatic strike out is no longer stated. In its place are words that in effect say failure to provide form T485 may result in the claim being struck out. The draconian practice of automatically striking out judicial reviews for these reasons appears to have gone. This will be a particular boon to litigants in person where the judicial review is the barrier preventing removal, who previously were at risk of removal while the reinstatement application was under consideration.

Kate Newman and James Packer of Duncan Lewis represent the litigants in the Administrative Court claim against the Upper Tribunal. James Packer is also instructed in the Court of Appeal matter.

In each case Tim Buley of Landmark Chambers is the instructed counsel. We extend him our thanks for his assistance with these matters.

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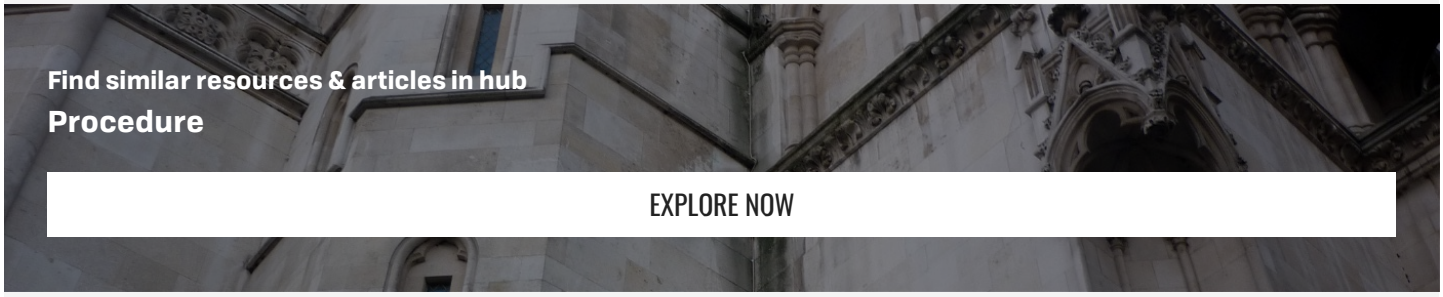
KATE NEWMAN

Kate joined Duncan Lewis's Public Law department after training at Veale Wasbrough Vizards. Kate has conduct of a variety of immigration and asylum matters, has extensive experience in handling judicial review matters in the human rights context in the senior courts. Kate has worked on a number of successful judicial reviews challenging: trafficking decisions, certifications of immigration decisions and associated removal decisions as well as unlawful detention claims.



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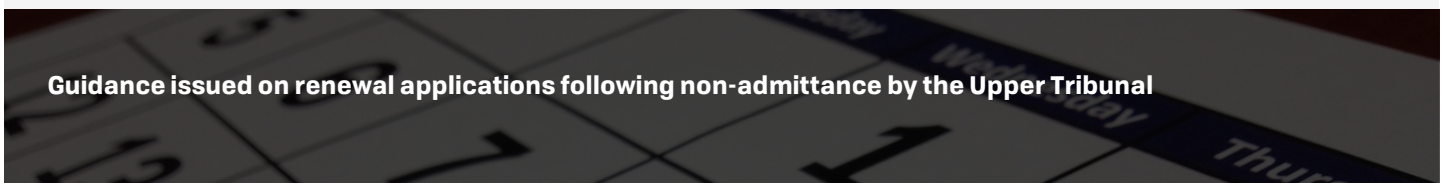

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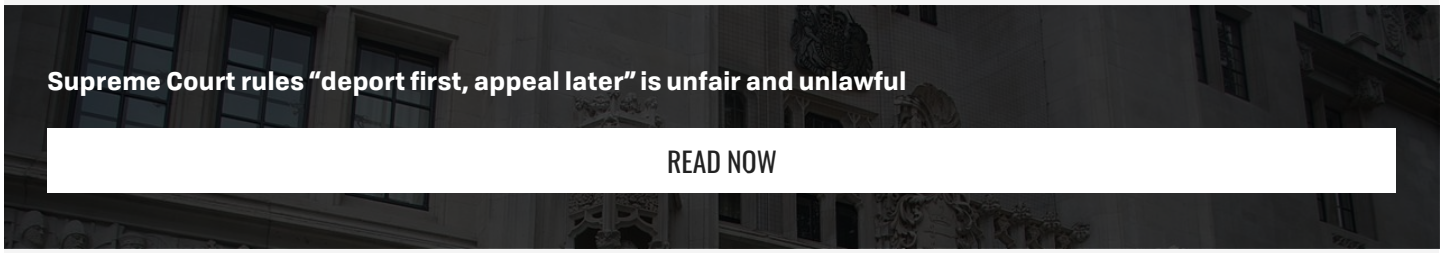

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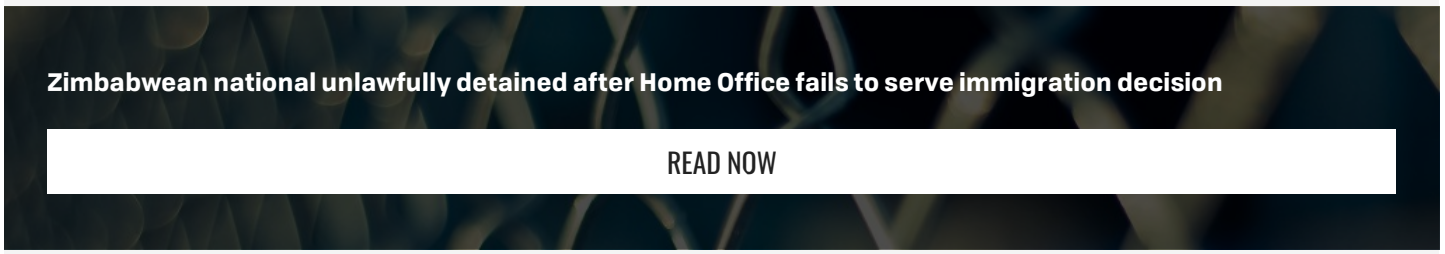

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