Neutral Citation Number: [2018] EWCA Civ 1183

Case No: C2/2016/4431

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM**
**The Upper Tribunal (Immigration and Asylum Chamber)**
**Upper Tribunal Judge Jacobs**
**Ref: JR/15686/2015**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2018

**Before :**

**LADY JUSTICE ARDEN**
and
**LORD JUSTICE HOLROYDE**

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**Between :**

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| **AL (Albania)** | **Appellant** |
| **- and -** | |
| **Secretary of State for the Home Department** | **Respondent** |

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**Greg Ó Ceallaigh** (instructed by **Duncan Lewis Solicitors**) for the **Appellant**
**Paul Joseph** (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates : 17 May 2018

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# Approved Judgment

## LADY JUSTICE ARDEN :

### *Issue for determination on this appeal*

1. The issue for determination on this appeal is whether the order of Upper Tribunal Judge Jacobs dated 25 July 2016, ordering that the appellant should pay the Secretary of State her costs of her summary grounds of defence filed in judicial review proceedings begun by the appellant for a decision on his asylum claim in the sum of £1,760, discloses any error of law.

2. Upper Tribunal Judge Jacobs gave brief reasons for his Order as follows:

> Having considered all documents lodged, I have decided that the Secretary of State should be awarded her costs. The simple fact is that the proceedings did not achieve anything for the applicant. The Secretary of State made a decision within the time promised and was entitled to take the time necessary in order to come to a rational and reasoned conclusion on a consideration of all the evidence obtainable.

### *Appellant's asylum claim and the judicial review proceedings*

3. The parties have agreed a helpful chronology which provides almost all the relevant background:

> **23 November 1997** – Appellant born in Tirana, Albania.
>
> **31 October 2012** – Appellant's older brother, ZL, claims asylum due to ongoing blood feud.
>
> **28 March 2013** – Respondent refuses ZL's asylum claim.
>
> **29 May 2013** – ZL's FTT appeal allowed.
>
> **22 July 2013** – ZL recognised as a Refugee by the United Kingdom.
>
> **23 December 2014** – Appellant enters United Kingdom.
>
> **24 December 2014** – Appellant claims asylum.
>
> **9 January 2015** – Appellant's case allocated to a caseworker.
>
> **13 January 2015** – Appellant's screening interview.
>
> **27 May 2015** – Substantive asylum interview is booked for the Appellant for 4 June 2015.
>
> **28 May 2015** – Respondent invites the Appellant to attend a substantive asylum interview.

**4 June 2015** – Appellant attends for interview which does not take place.

**16 June 2015** – Appellant's case flagged as "non-straightforward" and referred to a specialist team for enquiries to be made in Tirana.

**19 June 2015** – Appellant undergoes substantive asylum interview.

**23 June 2015** – Draft refusal letter prepared pending enquiries in Tirana.

**25 June 2015** – Police National Computer (PNC) checks completed.

**26 June 2015** – Appellant's representatives write to the Respondent providing additional clarification of information given in interview.

**29 July 2015** – the Respondent receives a response from [the Risk & Liaison Overseas Network] RALON.

**22 September 2015** – Respondent's draft decision updated to reflect enquiries from RALON.

**23 September 2015** – Draft asylum decision prepared, awaiting a final check from the SPoE (second pair of eyes) process.

**24 September 2015** – Error noted in draft decision letter, rectified.

**25 September 2015** – Decision is reviewed through the SPoE process. Appellant is not yet 18 and the Respondent is not satisfied that there are adequate reception facilities in Albania at this time. The decision is placed "on hold" and not to be served pending enquiries into his brother's asylum status.

**28 September 2015** – Appellant's representatives write to the Respondent asking for an explanation for the delay and that the processing of his asylum claim be expedited.

**2 October 2015** – Respondent receives further information from the British Embassy in Tirana.

**12 October 2015** – Respondent informs Appellant that she is making "further enquiries", and that these enquiries could take a further six months.

**9 November 2015** – Appellant's representatives send a letter before claim to the Respondent, by recorded delivery,

challenging the delay in reconsideration of his asylum claim and the failure to provide an explanation for it. Respondent is given 14 days from the date of the letter to respond.

**10 November 2015** – Appellant's letter before action is received by the Respondent.

**23 November 2015** – Appellant turns 18.

**24 November 2015** – Respondent replies to the Appellant's letter before action. Respondent states that the Appellant's case is being actively reviewed. Respondent refers to her letter of 12 October 2015 and repeats that, "it is anticipated that the process could take up to six months".

**21 December 2015** – Appellant lodges application for judicial review.

**4 January 2016** – Respondent confirms internally that no caseworker has been allocated to the consideration of ZL's case. Appellant's caseworker informed that it might be a further six months before a decision was made in respect of ZL.

**6 January 2016** – ZL's case is expedited.

**13 January 2016** – Time for service of the Respondent's Acknowledgement of Service expires.

**20 January 2016** – Upper Tribunal Judge Pitt decides that the claim should not be considered before 3 February 2016 and that the Respondent should be entitled to lodge an Acknowledgment of Service by that date, in accordance with the protocol in *R(Kumar) v SSHD* [2014] UKUT 00104 (IAC).

**20 January 2016** – Respondent informs Appellant that his case had been "expedited" and that enquiries are ongoing and have not been concluded. The Respondent agrees that a decision should be made as soon as possible and that "it is anticipated that it will take a further six months before a decision can be reached". The Respondent proposes a consent order in which she agrees to make a decision on the Appellant's asylum claim within 6 months of the sealing of such an order, absent special circumstances.

**20 January 2016** – Respondent files an Acknowledgement of Service.

**3 February 2016** – Appellant's representatives offer to withdraw the claim if the Respondent agrees to reach a decision on his asylum claim within 28 days and on the basis that the Respondent pays the Appellant's costs.

**10 February 2016** – Respondent informs the Appellant of the intention to revoke his brother's refugee status. Respondent asks the Upper Tribunal to grant her a further 21 days to provide Summary Grounds of Defence.

**12 February 2016** – Appellant writes to the Tribunal objecting to the request for more time to lodge Summary Grounds of Defence and asking for the application for Judicial Review to be placed before a Judge for consideration on the papers at the earliest available opportunity.

**17 February 2016** – Respondent applies to extend time for service of Summary Grounds of Defence to 2 March 2016.

**22 February 2016** – Appellant's representatives oppose the Respondent's application. Appellant's brother's representatives respond to the Respondent's letter of 9 February 2016.

**2 March 2016** – Respondent files Summary Grounds of Defence.

**3 March 2016** – Respondent seeks views of UNHCR on withdrawing ZL's Refugee status.

**11 March 2016** – Appellant's representatives file a Response to the Respondent's Summary Grounds of Defence.

**17 March 2016** – Respondent replies.

**22 March 2016** – Appellant's representatives ask for a decision by an Upper Tribunal Judge on the papers.

**1 April 2016** – Respondent notifies the Appellant that his asylum claim is refused. The reasons for the decision are set out in a letter dated 15 March 2016 which is sent under cover of a letter dated 1 April 2016.

**4 April 2016** – Appellant receives notification of the refusal of his asylum claim decision.

**5 April 2016** – Appellant's representatives request that the Upper Tribunal defers consideration of the Appellant's application for judicial review until further notice, following receipt of the asylum decision.

**22 April 2016** – Appellant's representatives write to the Respondent inviting settlement.

**6 May 2016** – Respondent accepts the Appellant's proposal to withdraw the claim but refuses to agree that she should pay the Appellant's costs. The Respondent invites the Appellant to agree that there should be no order as to costs. The

Respondent suggests that the parties submit written submissions on costs, if costs cannot be agreed between them.

**9 May 2016** – Appellant's representatives decline to agree that there should be no order as to costs and agree to written costs submissions.

**26 May 2016** – Order sealed by consent settling the matter subject to costs.

**9 June 2016** – Appellant submits his costs submissions.

**22 June 2016** – Respondent serves her costs submissions.

**29 June 2016** – Appellant responds to the Respondent's submissions.

**13 July 2016** – UNHCR informs Respondent that withdrawing ZL's Refugee status would not be appropriate.

**20 July 2016** – Upper Tribunal orders that the Appellant should pay the Respondent's costs in the sum of £1,760.

**24 August 2016** – Appellant lodges an appeal.

**17 October 2016** – Upper Tribunal Judge Gleeson grants the Appellant permission to appeal.

**30 November 2016** – Appellant lodges his Appellant's Notice.

**15 December 2016** – Respondent serves her Respondent's Notice.

**13 November 2017** – Respondent discloses UNHCR involvement in relation to ZL's Refugee status.

**13 January 2017** – Appellant serves his skeleton argument in support of his appeal.

**27 January 2017** – Respondent serves her skeleton argument opposing the appeal and in support of her Respondent's Notice.

4. By way of amplification, the letter dated 24 November 2015 summarised the Secretary of State's position as follows:

> 6.2 Your client's case is being actively reviewed. As stated in the SSHD's correspondence dated 12 October 2015, the SSHD is in the process of making further enquiries and upon the completion of these enquiries the SSHD will make a decision on your client's application. As set out in the correspondence to you dated 12 October 2015, it is anticipated that the process could take up to six months.

> The SSHD is aware that your client's brother has been granted refugee status; however each application is assessed on a case by case basis.
>
> 6.3 The SSHD is mindful of her duties to children under s55 of the Borders, Citizenship and Immigration Act 2009 and will endeavour to make a decision on your client's matter as early as possible.

5. The claim for judicial review provides the following summary of claim and claim for relief:

> Summary of Grounds
>
> 2. The Applicant complains that the delay of twelve months in the consideration of his application is unlawful, and that the corresponding failure of the Respondent to consider expediting the processing of his application and/or provide a reasonable timeframe for completing the processing of his application, is also unlawful.
>
> Relief sought
>
> 3. A seeks:
>
> i) a declaration that the delay by the SSHD in reaching a decision on the Applicant's outstanding application is unlawful;
>
> ii) a declaration that the SSHD's insistence upon considering A's asylum claim in isolation from A's brother's successful application for asylum is also unlawful;
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> iii) a decision on the Applicant's application within 28 days;
>
> iv) costs;
>
> v) such further relief as the Tribunal considers necessary.

6. The chronology shows that after the proceedings began both parties made offers to compromise the proceedings. In the course of correspondence during the judicial review proceedings the Secretary of State disclosed that it was her intention to revoke the refugee status which had been granted to the appellant's brother also arising out of a blood feud in Albania. On 16 February 2016 the Secretary of State applied for an extension of time to file her summary grounds of defence. These disclosed the provisional decisions made on 23 June, 22 September and 25 September 2015 pending internal review, or the outcome of RALON or other enquiries. In her summary grounds of defence, the Secretary of State referred to information from the British Embassy in Tirana or RALON being received as late as 2 October 2015 although this last date is not accepted by the appellant. Whether information was received on that date or not, the Secretary of State was certainly expecting to receive further information at that date about the appellant or his brother, whose claim was connected with that of the appellant.

7. When the asylum claim was refused, the Secretary of State's decision ran to 28 pages and stated among other things that it was not accepted that there was a blood feud between the appellant's family and the Lita family.

8. The parties filed two-page submissions on costs, as directed by the Upper Tribunal, and the appellant's submissions complained mainly about delay in dealing with his asylum claim.

***Legal Framework***

9. There are no specific time limits within which the Secretary of State must reach a decision on an asylum case. The Secretary of State's obligations about the time in which decisions must be made on asylum claims are to be found in Immigration Rule 333A, which provides:

> 333A. The Secretary of State shall ensure that a decision is taken on each application for asylum as soon as possible, without prejudice to an adequate and complete examination.
>
> Where a decision on an application for asylum cannot be taken within six months of the date it was recorded, the Secretary of State shall either:
>
> (a) inform the applicant of the delay; or
>
> (b) if the applicant has made a specific written request for it, provide information on the timeframe within which the decision on their application is to be expected. The provision of such information shall not oblige the Secretary of State to take a decision within the stipulated time-frame.

10. When proceedings are compromised, costs will be awarded on the following basis. Lord Neuberger MR explained this in *M v Croydon* [2012] I WLR 2607, where he held:

> 60 Thus in Administrative Court cases just as in other civil litigation, particularly where a claim has been settled, there is, in my view, a sharp difference between (i) a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement, and (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement, and (iii) a case where there has been some compromise which does not actually reflect the claimant's claims. While in every case the allocation of costs will depend on the specific facts, there are some points which can be made about these different types of case.
>
> 61 In case (i), it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary. Whether pursuant to judgment following a contested

> hearing, or by virtue of a settlement, the claimant can, at least absent special circumstances, say that he has been vindicated, and as the successful party that he should recover his costs. In the latter case the defendants can no doubt say that they were realistic in settling and should not be penalised in costs, but the answer to that point is that the defendants should on that basis have settled before the proceedings were issued: that is one of the main points of the pre-action protocols. Ultimately it seems to me that the *Bahta* case [2011] 5 Costs LR 857 was decided on this basis.
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> 62 In case (ii), when deciding how to allocate liability for costs after a trial, the court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim. Given that there will have been a hearing, the court will be in a reasonably good position to make findings on such questions. However, where there has been a settlement, the court will, at least normally, be in a significantly worse position to make findings on such issues than where the case has been fought out. In many such cases the court will be able to form a view as to the appropriate costs order based on such issues; in other cases it will be much more difficult. I would accept the argument that, where the parties have settled the claimant's substantive claims on the basis that he succeeds in part, but only in part, there is often much to be said for concluding that there is no order for costs. That I think was the approach adopted in the *Scott* case [2009] EWCA Civ 217. However, where there is not a clear winner, so much would depend on the particular facts. In some such cases it may help to consider who would have won if the matter had proceeded to trial as, if it is tolerably clear, it may for instance support or undermine the contention that one of the two claims was stronger than the other. The *Boxall* case 4 CCLR 258 appears to have been such case.

***Submissions***

11. Mr Ó Ceallaigh for the appellant, submits that there was confusion about the appellant's asylum claim. It made no sense to the appellant that it was taking so long. The Secretary of State's failure to grant asylum status, as she had done for the appellant's brother, called for an explanation. The simple fact was that the Secretary of State concealed from him that a decision had been made in this case but was not to be given to him pending enquiries into his brother's case.

12. Mr Ó Ceallaigh submits that, as a direct result of lodging the judicial review claim, the Secretary of State decided to expedite his brother's case and allocate a caseworker to it. Ultimately, the Secretary of State decided not to wait until the brother's claim was investigated before making a decision on the appellant's claim. The Secretary of State has not even now revoked the brother's asylum status.

13. Mr Ó Ceallaigh submits the decision of Upper Tribunal Judge Jacobs was irrational. The judge held that the appellant had not succeeded in his judicial review claim, but he had in fact achieved his aim of forcing the Secretary of State to make her decision (albeit an unfavourable one). So the case fell within category (i) in *M v Croydon* (paragraph 10 above). The Secretary of State intended to deal with the brother's case first but that process had not even started. Indeed, observes Mr Ó Ceallaigh, her estimate of six months was conservative as there has been no formal decision on revoking the appellant's brother's refugee status even now. Further, the appellant's case was expedited because of the judicial review proceedings. A caseworker was allocated to the brother's case. All this happened because of the judicial review claim. It was simply not open to the judge to hold that the appellant had achieved nothing. Six months in any event means more for an eighteen year old. It was a real achievement in the real world.

14. Mr Ó Ceallaigh submits there was no principled basis on which the Secretary of State could have been awarded any costs. The Secretary of State was awarded the costs of the summary grounds of defence even though the permission application had not even been considered. Mr Ó Ceallaigh submits that it is not clear that the Secretary of State would have been permitted to rely on those grounds of defence because she had been responsible for considerable delay in filing it.

15. Mr Ó Ceallaigh accepts that the Secretary of State was entitled to a reasonable time for completing her enquiries. But here the decision had already been reached and so no further time was required. Indeed the respondent's timetable shows that no further work was done on his claim. There was nothing to show that it was factually necessary to work on the brother's claim. In summary there was no possible basis for treating the Secretary of State as the successful party in the litigation. By virtue of the issue of the judicial review proceedings, the delay came to an end.

16. Mr Paul Joseph, for the Secretary of State, submits that it is not a question of delay, only of unacceptable delay. He cites the following passage from the judgment of Collins J in *R(FH) v Secretary of State* [2007] EWHC 1571 Admin at paragraph 11:

> 11 As was emphasised by Lord Bingham [in *Procurator Fiscal v Watson* [2002] 4 All ER 1], the question was whether delay produced a breach of Article 6(1) . Here the question is whether the delay was unlawful. It can only be regarded as unlawful if it fails the *Wednesbury* test and is shown to result from actions or inactions which can be regarded as irrational. Accordingly, I do not think that the approach should be different from that indicated as appropriate in considering an alleged breach of the reasonable time requirement in Article 6(1). What may be regarded as undesirable or a failure to reach the best standards is not unlawful. Resources can be taken into account in considering whether a decision has been made within a reasonable time, but (assuming the threshold has been crossed) the defendant must produce some material to show that the manner in which he has decided to deal with the relevant claims and the resources put into the exercise are reasonable. That does not mean that the court should determine for itself whether a different and perhaps better approach might have

> existed. That is not the court's function. But the court can and must consider whether what has produced the delay has resulted from a rational system. If unacceptable delays have resulted, they cannot be excused by a claim that sufficient resources were not available. But in deciding whether the delays are unacceptable, the court must recognise that resources are not infinite and that it is for the defendant and not for the court to determine how those resources should be applied to fund the various matters for which he is responsible.

17. Mr Joseph submits the Secretary of State must be able to make a provisional decision. It may be operationally efficient to make a provisional decision. It is clear that the provisional decisions were only that. There was nothing unlawful about the Secretary of State making a decision in principle subject to further enquiries.

18. This was not a simple case. Blood feuds in Albania are not straightforward matters to investigate. The chronology shows that information was being obtained from Tirana. Furthermore, Immigration Rule 333A which the appellant claims sets out an indicative timetable, says that any timetable is without prejudice to timeframes which the Secretary of State may stipulate.

19. The next point which Mr Joseph makes is that it was wrong to say that there would have been no permission for the Secretary of State to rely on the summary grounds. The extension of time was justified because the parties had been engaged in settlement negotiations and it would have been pointless to run up the costs of serving the summary grounds of defence if they were not being required.

20. Mr Joseph submits that the Upper Tribunal Judge read all the papers: see the opening words of his decision. Mr Joseph submits that there was no basis for the judicial review proceedings and the Secretary of State would have been the winner if they had run their full course. She said in October 2015 in correspondence that six months was required to finish the enquiries. And yet the appellant had decided to issue judicial review proceedings in January 2016.

21. Mr Joseph submits that *ZN (Aghanistan), KA (Iraq) v Secretary of State* [2018] EWCA Civ 1059 shows that public funding is not a trump card which entitled the court to depart from the usual principles applicable to making orders for costs. The question is whether there was a principled basis for departing from any applicable rule and until this happens, the court will not take into account the fact that a party is legally aided.

22. Mr Joseph submits that the decision was made in accordance with the six months' timetable given in October/November 2015. Therefore the proper inference was that the decision would have been made at the same time even if there had been no judicial review proceedings.

23. Mr Ó Ceallaigh submits in reply that it was not correct that the decision was going to take six months. The matter was not assigned to a caseworker until January 2016. The question was whether the appellant obtained the relief he sought and therefore whether he should have his costs. He accepts that a provisional decision is not a decision. But the respondent had decided what to do. There was no information

which led to any change. The decision was to all intents and purposes made a long time before the Secretary of State communicated her decision to the appellant. If the case had been heard, the Court might well have been concerned that the decision had been put wrongly on the back burner without consideration of the best interests of the child and that there had been no proper investigation.

*Discussion*

24. Mr Ó Ceallaigh contends that this case falls within category (i) described by Lord Neuberger MR in paragraph [60] in *M v Croydon* (paragraph 10 above). Accordingly the main issue is whether this claim succeeded or whether the appellant would have obtained the relief he sought if the matter had not been compromised. For this purpose he would have to show the Secretary of State had acted unreasonably in promising to make her decision only in six months' time (see her communications of 12 October 2015, 24 November 2015 and 20 January 2016, summarised in the chronology above) so that the issue and subsequent pursuit of proceedings was justified. The Secretary of State would have put in evidence that, as Upper Tribunal Jacobs said, she needed further time to consider all the evidence required to be considered. That evidence would be a good answer to any claim for judicial review.

25. Moreover, any estimate might change and so it makes no difference that the timetable was extended. If the Secretary of State had given no expected date for her decision, the position might have been different. As to the fact that the actual decision was probably given a little earlier than it would otherwise have been given, the acceleration was minor and likely to be treated as *de minimis*, that is, as having no legal consequence. Moreover, the fact that the appellant is publicly funded cannot make any difference at this stage of the analysis when I am solely concerned determining whether there is a principled basis for making an order as to costs. On that I accept Mr Joseph's submission.

26. A not dissimilar question about delay arose in a recent case in this Court, *R (o/a RSM) v Secretary of State* [2018] EWCA Civ 18 (Arden, Peter Jackson and Singh LJJ), where judicial review proceedings were commenced to force the Secretary of State to take action regarding RSM, an unaccompanied child asylum seeker then in Italy but with family links to refugees in this country. We held that on the facts there was no unacceptable delay on the part of the Secretary of State in dealing with RSM's case ([142], [168] and [169]). At the time the proceedings in that case were begun, the Italian authorities were progressing the child's claim. The Secretary of State had to carry out certain checks before arranging for the child to be brought to the UK.

27. In this case, the argument that the appellant had been a child was not pressed on the issue with which I am now concerned, and rightly so, as the appellant had ceased to be a child before the judicial review proceedings were instituted.

28. The Secretary of State responded to requests for information in general terms and without disclosing her actions in relation to the appellant's brother's claim, but the appellant was not entitled to be kept informed about every step that the Secretary of State takes in order to complete the inquiries which she considers she should make before making her decision.

29. The appellant argues that the Secretary of State made her first provisional decision as far back as June 2015, so the die was cast a long time before any decision was communicated. But, as Mr Joseph explains these provisional decisions were subject to internal review, or the outcome of RALON or other enquiries about the brother's related asylum claim, and so it was of no consequence that there might appear to have been no obvious work done on the appellant's file. Moreover, the change could have been favourable to the appellant, depending on the result of the inquiries being made about the appellant's brother's claim. It was clearly in the appellant's interests that the possibility of such a change should be preserved.

30. In my judgment, the claim in this case was obviously not simple. One simply has to look at the length of the decision letter (28 pages). The nature of the claim necessitated making oral enquires abroad in order to establish whether the claim was a credible one.

31. I also accept Mr Joseph's argument that there would have been no difficulty in obtaining permission to file the grounds of defence out of time in the judicial review proceedings. Delays were in part at least attributable to a desire to compromise the proceedings and to save costs.

32. Mr Ó Ceallaigh submits that as a matter of law the Secretary of State has to make a decision within a reasonable period. Even so, her actions are not judicially reviewable unless she acted irrationally in taking as long as she did. There is nothing to substantiate such an argument.

33. In those circumstances I would dismiss the appeal. It is therefore not necessary to deal with the further question, which would arise if the appeal succeeded, as to what order should have been made.

**LORD JUSTICE HOLROYDE:**

34. I agree.