Neutral Citation Number: [2021] EWCA Civ 1676

Case No: C4/2021/0585

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
IN THE MATTER OF AN APLICATION FOR JUDICIAL REVIEW
HHJ Worster
CO/639/2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/11/2021

Before :

LORD JUSTICE NEWEY
LORD JUSTICE DINGEMANS
and
LADY JUSTICE ELISABETH LAING

- -

Between :

MOSTAFA SHAHI	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Tim Buley QC and Raza Halim (instructed by **Duncan Lewis**) for the **Appellant**
Natasha Barnes (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 2 November 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 9.50am on Tuesday 16 November 2021.

Lady Justice Elisabeth Laing DBE:

Introduction

1. This is an appeal, with the permission of Simler LJ, against a decision of HHJ Worster, sitting as a Judge of the High Court ('the Judge'), to make no order for costs in this case. Simler LJ gave permission to appeal, not on the grounds that she was satisfied that the appeal had a realistic prospect of success, but because a different judge (Tipples J) had ordered the Secretary of State to pay the costs of a similar claim in another case. There was a compelling reason to hear the appeal, which was to decide whether a grant of interim relief amounted to success for costs purposes.

2. No order for anonymity has been made so far in this case, and none was sought at the hearing. Nevertheless, and for convenience only, I will in this judgment refer to the Appellant as 'MS'. MS was represented by Mr Buley QC and Mr Halim, and the Secretary of State by Ms Barnes. I thank counsel for their written and oral submissions.

The facts in outline

3. MS was born in Afghanistan on 27 November 1989. He left Afghanistan in '2002/2003'. He first came to the United Kingdom in '2004/2005'. He claimed asylum in 2006. The Secretary of State refused his claim. His appeal was dismissed on 21 February 2007. He was eventually removed to Afghanistan in 2012. At some unspecified point in 2015, he returned to the United Kingdom, after spending, on his own account, about a year in Turkey, and unspecified lengths of time in Greece, the Czech Republic and France. He was detained under immigration powers in February 2018. He made further submissions, based on his conversion to Christianity during the period after his return to Afghanistan (and on the risks associated with that), and on his mental health.

4. The Secretary of State recognised MS as a refugee on 3 January 2020. The Secretary of State sent a letter to MS dated 9 January 2020. MS was told that he would receive his biometric residence permit ('BRP') by courier within 10 working days. An attached leaflet gave him more information about the grant of asylum and the help available to him. A further leaflet from the Department of Work and Pensions ('the DWP') explained how the DWP could help him to find work and to claim benefits. Those leaflets were in the bundle of documents for this appeal. One of the leaflets, headed 'Urgent things you need to do', explained that asylum support would stop 28 days after receipt of the BRP. It also explained how to get an advance payment of benefits, how to open a bank account, and that MS's national insurance number would be endorsed on the back of his BRP.

5. The Secretary of State sent MS a further letter dated 11 January 2020. This letter told MS that, following the grant of refugee status, he would no longer qualify for support under 'section 98, or 95 or 4 of the Immigration and Asylum Act 1999' ('the 1999 Act'). His support would end on 19 February 2020. The Secretary of State, therefore, decided to stop providing MS with support some 40 days after the grant of refugee status, and about a calendar month after the latest date by which, according to the letter of 9 January 2020, it was expected that he would receive his BRP. The letter of 11 January added that MS would continue to receive £35.39 a week until 19 February

2020. His BRP, the letter continued, had been successfully issued on 10 January 2020 (a Friday). He would be allowed to stay in the accommodation allocated to him until 19 February 2020, when he would be expected to leave. The accommodation provider would contact him separately about that. He was now allowed to take employment and claim benefits. He should show the letter of 11 January and his BRP to the DWP if he needed help from the DWP. He would shortly be contacted by Migrant Help who would give him further information and support.

6. On 13 January 2020, Serco, who had provided MS with accommodation on behalf of the Secretary of State, sent MS a letter telling him that he must leave that accommodation no later than 12 noon on Wednesday 19 February 2020.

7. It appears that MS's solicitors received his BRP on 14 January 2020 (that is the date stamped on it as the date on which it was received by them). As one of the leaflets had foreshadowed, the BRP had MS's national insurance number endorsed on its back. For a reason which is not explained in the documents, MS did not get his BRP from his solicitors until 23 January 2020.

MS's pre-action protocol letter

8. On 29 January 2020, so over two weeks after MS's solicitors received the BRP, they wrote a pre-action protocol letter to the Secretary of State. Its purpose was said to be to avoid litigation by giving the Secretary of State 'the opportunity to rectify the Defendant's unlawful action'. If the Secretary of State continued to act unlawfully, the solicitors would have no option but to start a claim for judicial review on MS's behalf 'and recover the costs from you'. MS's solicitors considered that the dispute could be resolved quickly. They insisted on 'action being taken' in response to the letter by 4pm on 12 February 2020. They said they were challenging two things which were unlawful:
    i. 'The decision to stop providing [MS] with support…28 days after the granting of refugee status' and
    ii. 'The failure of the Defendant to amend Regulation 3 of the Asylum Support (Amendment) Regulations 2002 in order to provide a sufficient move-on or 'grace' period'.

9. The letter then described MS's account of his experiences, and described the letters he had received from the Secretary of State in January 2020. It said that MS's solicitors received the BRP on 14 January and that MS had received it on 23 January 2020. The letter said that MS had been to an appointment with the local housing authority on 17 January with his BRP (which seems inconsistent with the solicitors' earlier statement that MS did not receive the BRP from them until 23 January) and that he had been to an appointment to apply for Universal Credit ('UC') on 29 January, but had been told that he could not apply without a bank account number and sort code. The letter added that MS had now opened an account, but did not have an account number or sort code.

10. The letter then described two potential grounds of claim. Ground 1 was that the decision to cease support under section 95 of the 1999 Act was unlawful. The letter referred to government advice that it usually takes 35 days from the date when a person applied for UC until he received his first payment; and it could take longer.

MS had arranged another appointment for 30 January. If his claim was processed in 35 days, there would be a 15-day gap in support.

11. The letter acknowledged that it was possible to apply for an advance of UC. It was necessary to have a BRP and a bank account (both of which, I interpose, it seems to have been anticipated that MS would have had by 30 January). The letter also acknowledged that the local housing authority had a duty to provide temporary accommodation to people who are about to become homeless and not only where they were in priority need. The letter further acknowledged that MS was arguably a person who had a priority need for accommodation. That was a question for the local housing authority to decide. If the local housing authority decided that MS was not in priority need, its duty, instead, would be to help him secure accommodation within 56 days.

12. The decision to stop MS's support meant that 'there will be a gap in the provision of support for [MS] because [the Secretary of State] has no legislative power to extend that period'. The letter then asserted that regulation 2(2) of the Asylum Support Regulations 2000 ('the Regulations') 'gives rise to breaches of Articles 3 and 8 ECHR where their ordinary operation will cause [MS] to become destitute with no money to feed or look after himself'. The actions of the state had put MS in a position of vulnerability 'in this transition period'. The effects of his vulnerable status did not end as soon as he was granted asylum. The case cited by MS's solicitors, *R (JS) v Secretary of State for Work and Pensions* [2014] EWCA (Civ) 156; [2014] PTSR 619, shows that there was (at least in 2012) no case in which the European Court of Human Rights had held that article 8 imposes a positive duty on state to provide welfare benefits (paragraph 97). Nor was *JS* a case in which a domestic court recognised such a duty. MS's solicitors nevertheless contended that the Regulations were a breach of articles 3 and 8 of the European Convention on Human Rights ('the ECHR'), and thus, a breach of the Human Rights Act 1998 ('the HRA').

13. Ground 2 was an assertion that the Secretary of State's failure to amend the Regulations was unlawful. The Regulations gave no discretion to caseworkers to extend support beyond the 28-day period. There was a real risk that individuals could become destitute 'in breach of their human rights if their asylum support is ceased after 28 days because there are no provisions for them to access any other form of government support in this time frame'. The solicitors referred to reports describing 'an unacceptably high risk of destitution'. The Secretary of State was aware that the gap will result in a breach of section 6 of the HRA.

14. The letter ended by asking the Secretary of State to continue to provide support for MS until his 'application for [UC] has been determined and/or until he has been provided with accommodation from the local authority' and 'to confirm that [the Secretary of State] will amend [her] policy to ensure that there is a provision for the extension of support to refugees to ensure that they do not become destitute by reason of a gap in support'. The Secretary of State was asked to provide 'a detailed response' if she denied liability.

The Secretary of State's pre-action protocol response

15. The Secretary of State replied on 12 February 2020. The Secretary of State accurately summarised the grounds of claim, and the relief which MS sought, and then answered

each ground in turn. The Secretary of State made several points on the facts. She noted, for example, that there had been a delay of nine days between the date when MS received his BRP and when his solicitors had received it. UC is usually paid into bank accounts, but other arrangements for payment can be made. The response asserted that the Secretary of State did not have power to continue support for longer than 28 days. The Secretary of State referred to the relevant legislative provisions. The Secretary of State considered that the 28-day period was lawful. The lack of a bank account would not prevent an application for an advance payment within 28 days. MS had a BRP to prove his eligibility. Further, local housing authorities have duties to prevent or relieve homelessness, whether or not applicants were in priority need. The Secretary of State referred to Part 7 of the Housing Act 1996, the Homelessness Act 2002 and the Homelessness Reduction Act 2017. The system was designed to ensure that successful asylum applicants were not left destitute or homeless. The BRP enabled MS to prove that he was eligible for UC and housing. The Secretary of State had a limited role once asylum had been granted. Migrant Help was funded by the Secretary of State to help those in the asylum support system. Asylum support accommodation providers had a contractual duty to tell the relevant local housing authority that a person might need housing assistance. The Secretary of State had acted lawfully.

The claim form and application for urgent consideration

16. The claim form was issued on 18 February 2020, with a form N463 (an application for urgent consideration). The decision challenged was the decision dated '9 January 2020' to discontinue section 95 support. The remedy sought was described in the attached grounds. It was (see section C of the grounds)
    i. 'A declaration that [the Secretary of State's] refusal to extend [MS's] accommodation beyond 19 February 2020 was unlawful' and
    ii. 'A mandatory order that [the Secretary of State] do continue to provide financial support and accommodation until [MS's] application for permission is determined and/or he is in receipt of [UC] and/or local authority accommodation'
    iii. 'Any other order the court sees fit' and
    iv. 'Costs'.

17. It is clear from paragraph 7 of the claim form that there were at least 299 pages of documents in the bundle accompanying the claim form. The grounds of claim said that MS was a vulnerable refugee with precarious mental health. He had a history of self-harm. The grounds referred to the letter of 11 January and said that the Secretary of State's position was that she did not have power to extend MS's support. MS would become street homeless and destitute 'despite his best endeavours to obtain UC and LA accommodation'. Paragraph 3 described what MS had done to get accommodation and benefits. The grounds also referred to a medical report by a psychologist (dated 7 May 2019) which said MS needed stability and security to recover. He might otherwise make a further suicide attempt or have a psychotic breakdown. The grounds asserted that MS would 'fall between the gap in the system, simply because he is a refugee and by operation of the statutory scheme'.

18. In section 4, after answering 'No' to the question whether the claim had been issued in the region with which MS had the closest connection, the author of the claim form said

> 'The case is important and raises issues an issue [sic] which affects a wide class of persons, namely refugees who have recently acquired status and who face destitution. Counsel team…who have expertise across the three jurisdictions in this case, housing, social welfare and immigration law, are in London'.

19. Section B of the grounds was headed 'Interim relief'. Paragraph 7 said that, in another case, Lang J had made an order similar to the order sought by MS. Paragraph 8 referred to two authorities and said that the court should take 'whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong"…'. MS submitted that it was the 'lesser injustice' that he should not be made homeless and destitute 'whilst the issue in this case is determined and his applications for [UC] and local authority accommodation are determined'.

20. A draft order was supplied. It required the Secretary of State to continue to provide support 'until the determination of the permission application in this case, or further order'. It provided for MS to notify the Secretary of State if he was offered local authority housing and/or he received UC, for liberty to apply, and for costs to be reserved.

Johnson J's order

21. On 18 February 2021 Johnson J made an order in exactly the form of the draft. He observed, in his reasons for making the order, that MS was at immediate risk of being homeless and destitute. He then said

> '6. On the basis of the material before me, and in the absence of an Acknowledgement of Service, and without in any way binding the permission judge, I am satisfied that the claim is sufficiently arguable to merit a grant of interim relief. I am further satisfied that the balance of convenience favours the grant of interim relief which will have the effect of maintaining the status quo and avoiding [MS] from becoming homeless before this matter can come back before the Court for a decision on permission.'

The consent order

22. The claim was settled by a consent order dated 12 June 2020. The consent order provided for MS to have permission to withdraw his application for judicial review, for the interim order to be discharged and for the parties to make sequential costs submissions.

The parties' written submissions on costs

23. In his costs submissions dated 3 July 2020 MS argued that the Secretary of State's refusal to continue support 'compelled' MS to apply for interim relief. He received

his first payment of UC on 29 February 2020 and an offer of accommodation. He moved into the accommodation on 9 March. 'Having obtained all of the relief he sought, the application for Judicial Review became academic'. Costs should follow the event. MS's success should be measured by the remedies he obtained: *R (Bahta) v Secretary of State for the Home Department* [2011] EWCA (Civ) 895; [2011] CP Rep 43 at paragraph 59, *R (Dempsey) v Sutton London Borough Council* [2013] EWCA (Civ) 863 at paragraphs 22-24, and *Emezie v Secretary of State for the Home Department* [2013] EWCA (Civ) 733, paragraph 4. A claimant did not have to achieve all he sought, in order to be treated as the successful party; he has to obtain 'substantially' what he sought: *AL v Secretary of State for the Home Department* [2012] EWCA (Civ) 71; [2012] 1 WLR 2898 at 2911 E. MS had obtained 'the remedies he sought, "substantially" and in their entirety'.

24. The Secretary of State in submissions dated 14 July 2020 argued that MS was partly successful, because he obtained interim relief. That showed that the claim was arguable and that the balance of convenience favoured the grant of interim relief. The Secretary of State had made no admission that the discontinuance of support 'as mandated by legislation' was unlawful and 'there had been no indication that [MS] has or would have been substantively successful in his claim'.

25. The Secretary of State distinguished the four cases relied on by MS, including *Bahta* and *Emezie*. The Secretary of State submitted that those two cases were different because in those cases the Secretary of State had conceded the relief sought. In this case it was provided by an order of the court. The Secretary of State also referred to *M v Croydon London Borough Council* [2012] EWCA (Civ) 595 (paragraph 59). The Court of Appeal had made it clear that a claimant would ordinarily be entitled to his costs if he obtained all the relief he sought by consent or after a contested hearing. That approach did not apply where interim relief had been granted on the balance of convenience and in relation to a claim that was only found arguable at that stage. The interim relief effectively made the proceedings academic as MS got access to benefits before the Secretary of State's acknowledgement of service was due to be filed. The Secretary of State submitted that there should be no order for costs, because she had made no concessions, her decision had not been held to be unlawful and the combination of the grant of interim relief and later events made the claim academic.

26. On 21 July 2020, MS replied to the Secretary of State's submissions. MS referred to a costs order made in favour of a claimant by Tipples J in *Jabarkhil v Secretary of State for the Home Department* (CO/4495/2019). That case was on all fours with this case. The same counsel and solicitors acted both for Jabarkhil and for MS. The Court should make the same order for the same reasons. The Secretary of State had made the same arguments in *Jabarkhil* and they had been rejected. That was a complete answer to the Secretary of State's submissions in this case. The Secretary of State failed properly to understand the *rationes decidendi* of the Court of Appeal decisions on which MS relied. MS had obtained the relief sought, or substantially similar relief. A 'simple analysis' of MS's pleaded case made that clear. The starting point was whether the claimant had achieved 'what he sought in his claim'. MS continued, 'A simple review of the pleaded case, the Order made by Johnson J, and outcome obtained by [MS] as a direct consequence of issuing these proceedings, makes clear that he has achieved what he sought'. The Secretary of State's liability for costs was

'straightforward and clear, applying orthodox costs principles. That is powerfully fortified by the Order of this Court in *Jabarkhil*.'

The decision which is the subject of this appeal

27. On 23 February 2021 the Judge, having considered the parties' written submissions, made the order which is the subject of this appeal. He summarised the facts in paragraphs 1-7. He referred to the two grounds of claim in MS's pre-action protocol letter, and to the Secretary of State's response. He noted the relief sought in the claim form. He set out Johnson J's order in full. In paragraph 7 he explained how the consent order had been proposed and agreed.

28. He summarised the parties' submissions in paragraphs 8-10. He noted that MS argued that he had been 'compelled' to come to court to get interim relief to avoid homelessness and destitution, and 'having achieved substantially what he sought by the claim, he is to be treated as the successful party'. The Secretary of State argued that MS had obtained interim relief on the basis that the claim was arguable and because the balance of convenience favoured the status quo. The Secretary of State's position was mandated by the Regulations and her position was lawful. MS did not get everything he sought. There was no declaration and no acceptance by the Secretary of State that the claim would have succeeded. The order in *Jabarkhil* was made on the basis of submissions which were 'markedly similar' to those in this case.

29. This was not a case in which the arguments about the lawfulness of the Secretary of State's decision to discontinue support are 'so clear that the Court can see who would have succeeded on this claim'. Nor was it a case in which the Secretary of State had in effect agreed to give MS what he sought. The success relied on was the grant of interim relief. MS would say that getting the order was substantial success, even if no declaration was made. Tipples J regarded success on the application for interim relief as success which justified an order for costs. Her view was 'strongly persuasive' but the Judge differed from it. The order might have provided MS with what he sought from the claim, but the Judge questioned whether that was 'success' for the purposes of the general rule. The Judge referred again to Johnson J's reasons (see paragraph 21, above). The order for interim relief reflected the reality at the interim stage, and the court's reliance on the balance of convenience. If the proceedings had continued, they might well have been defended, and the Secretary of State might have established that the decision was lawful. In that situation, the Secretary of State would have been the successful party, even though the order for interim relief was made correctly. 'Consequently, in this case I do not regard the interim order as success for the purposes of the general rule in CPR Part 44.2'. He added that this was a case which was in the third category in *M v Croydon London Borough Council* [2012] EWCA (Civ) 595. It was not possible to say who was the successful party and there should be no order for costs.

The order in Jabarkhil

30. It is convenient to refer here to the reasons which Tipples J gave for her order in *Jabarkhil*. In her reasons, she described the general rule that the unsuccessful party will be ordered to pay the costs of the successful party. Part of the relief sought by the claimant was interim relief. That application succeeded. The Secretary of State did not apply to vary or to set aside that order on the ground that it had been wrongly made.

The claim for interim relief was 'necessary and appropriate' to provide him with support between 15 November 2019 and 21 November 2019 when he was provided with accommodation. It was not a case in which the Secretary of State had acted unreasonably in defending the claim, so it was not appropriate to make an order for indemnity costs. Further, she was not able to investigate the claimant's allegations that the Secretary of State had breached the order of Lang J.

The statutory scheme

31. There is no dispute about the terms and effect of what has been treated as the relevant statutory scheme, so I can summarise it briefly. Part VI of the 1999 Act is headed 'Support for Asylum-Seekers'. Section 95(1) of the 1999 Act gives the Secretary of State power to provide, or to arrange for the provision of, support for, among others, asylum seekers who appear to the Secretary of State to be destitute, or to be likely to become destitute within such period as may be prescribed. Section 95(12) introduces Schedule 8, which 'gives the Secretary of State power to make regulations supplementing this section'. The power conferred by paragraph 1 of Schedule 8 is a broad power.

32. 'Asylum seeker' is defined in section 94(1), for the purposes of Part VI, by reference to listed criteria, including that the person has made an asylum claim (as further defined in section 94(1)), and that that claim has not yet been determined. By section 94(3), again for the purposes of Part VI, an asylum claim is determined at the end of 'such period beginning with the date on which the Secretary of State notifies the person of her decision on the claim …as may be prescribed'.

33. Section 167(1) defines 'prescribed' as meaning 'prescribed in regulations made by the Secretary of State'. By section 166(1), and subject to the exceptions in section 166(2), any power to make rules, regulations or orders conferred by the 1999 Act is exercisable by statutory instrument. Some orders and regulations must be laid before Parliament in draft and approved by a resolution of each House (section 166(4) and (5), (5A) and see section 166(5B)). Other statutory instruments made under the 1999 Act are subject to annulment by a resolution of either House (section 166(6)). Regulations made under section 94(3) are subject to the negative resolution procedure.

34. Section 112 provides for the recovery by the Secretary of State of expenditure on the provision of support which is incurred as a result of misrepresentation or non-disclosure, if a court so orders on an application by the Secretary of State. Section 113 provides in some circumstances for the recovery of support from a sponsor. Section 114 provides for the recovery of overpaid support if the overpayment is the result of a mistake by the Secretary of State. Paragraph 11 of Schedule 8 gives the Secretary of State a power to make regulations providing for the recovery of sums representing the value of support when an applicant had assets in the United Kingdom which were not realisable when the applicant applied for support but which have later become, and still are, realisable.

35. The Regulations (as amended) are made under powers conferred by sections 94, 95, 97, 114, 166 and 167 of, and Schedule 8 to, the 1999 Act. Regulation 2 is headed 'Interpretation'. Regulation 2(2) provides that the period prescribed under section

94(3) '(day on which a claim for asylum is determined) for the purposes of Part VI' of the 1999 Act is '28 days where paragraph (2A) applies'. Paragraph 2A applies when, among other circumstances, the Secretary of State notifies a claimant that she has decided to accept the asylum claim. When paragraph (2A) does not apply, the prescribed period is 21 days.

The relevant authorities

36. The Court was referred to several decisions of this Court on costs disputes in public law cases. It is important to resist the temptation to treat isolated statements in these decisions as if they were enactments, and to subject them to minute analysis, divorced from the facts which prompted them. I accept Ms Barnes's submission, to which I refer in paragraph 59, below, that previous decisions in costs appeals should be approached with caution.

37. I consider that it is only necessary for me to refer to two decisions of this Court: the decision in *M v Croydon* and the decision in *R (Naureen) v Salford City Council* [2012] EWCA (Civ) 1795; [2005] 2 Costs LR 257.

38. *M v Croydon* concerned a dispute about the assessment of his age between an unaccompanied child asylum seeker and a local authority. In the course of the dispute, the Supreme Court, overturning an earlier understanding of the law, decided that the question of a child's age was a question of fact for the court, not a question for the reasonable judgment of the local authority. The claimant had applied for judicial review of the local authority's assessment. In due course, the local authority settled the claim, having agreed, eventually, that the claimant's claimed age was his actual age. The claimant applied for a costs order. The judge made no order for costs, holding that since the outcome of the case had not been obvious from the outset, and since the law had developed during the course of the litigation, the local authority's conduct did not justify an award of costs in the claimant's favour.

39. The Court of Appeal allowed the claimant's appeal. It held that the general rule in civil litigation (that a successful party who obtained all the relief he sought, whether by consent or after a hearing, was entitled to be paid his costs unless there was good reason to the contrary) applied to claims in the Administrative Court. Neuberger LJ (as he then was), giving a judgment with which the other members of the Court agreed, described the 'general rule' about costs in paragraphs 29 and 30 of the judgment, by reference to CPR Part 44.3(2). The unsuccessful party is generally ordered to pay the costs. The court may, however, make a different order, by reference to various express factors, such as the conduct of the parties and the extent of any success. He then reviewed earlier decisions about costs in the Administrative Court (paragraphs 31-43). He next described the position in ordinary civil litigation in more detail (paragraphs 44-46), and the position about costs in civil litigation when there is a settlement (paragraphs 47-51).

40. The next heading in the judgment is 'The position where cases settle in the Administrative Court'. The question was whether the principles which applied in ordinary civil litigation applied 'when the defendants accept that claimant is entitled to all, or substantially all, the relief which [the claimant] claims' (paragraph 52). He considered, and rejected, five arguments why the position might not be the same

(paragraphs 53-57). Where, as in *Bahta*, a claimant got all the relief he sought, whether by consent or after a contested hearing, he is 'undoubtedly' the successful party and entitled to all his costs, unless there is good reason to the contrary. Where, however, the claimant only obtains some of the relief he seeks (whether by consent or after a trial) 'the position on costs is obviously more nuanced' (paragraph 59).

41. In the Administrative Court 'particularly where a claim has been settled' his view was that there is 'a sharp distinction' between three groups of cases in which, after a hearing or pursuant to a settlement:
    i. the claimant has been wholly successful;
    ii. the claimant has only succeeded in part; and a third type of case in which
    iii. there has been a compromise which does not actually reflect the claimant's claims.

42. Even in case i. there could be a good reason why the claimant should not get the costs of the hearing (paragraph 61), but the normal position was that he should get his costs. Those costs could have been avoided if the defendant had settled the case at the earliest opportunity, under the pre-action protocol (paragraph 61). In paragraph 62, he listed the types of factors which are relevant to any decision on costs in the second group of cases. The court would be in a good position to assess those factors after a trial. If there has been a settlement, however, it may be more difficult. In such cases 'there is often much to be said for concluding that there is no order for costs'. Where there is no clear winner, much will depend on the facts. It might help to consider who would have won if there had been a 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' (ibid). In the third group of cases, the court is often unable to gauge whether there is a successful party in any respect. In such cases, there is 'an even more powerful argument that the default position should be no order for costs'. It might be sensible in some such cases to ask whether it was 'tolerably clear' who would have won if there had been no settlement. If it is, that might support an argument that the party who would have won did better out of the settlement, and therefore did win (paragraph 63).

43. In a judgment with which Neuberger LJ agreed Stanley Burnton LJ added that the parties should seriously consider the merits of including an agreement about costs in any settlement negotiation, as that would be cost-effective and in the parties' interests (paragraph 76). No order for costs will be the default when 'the judge cannot, without disproportionate expenditure of judicial time, if at all, fairly and sensibly make an order in favour of either party'. There will be cases in which the merits can be decided and no order for costs is the appropriate order, 'but in such cases that order is not the default order, but an order made on the merits' (paragraph 77).

44. The claimants in *Naureen* were failed asylum seekers who applied to the defendant local authority ('the Council') for assessments under section 47, and for accommodation under section 21, of the National Assistance Act 1948 ('the 1948 Act'). The Council assessed the claimants' needs and decided not to provide them with accommodation. The claimants applied for judicial review of that decision. The relief they claimed was a declaration that they were 'in need of care and attention' for the purposes of the 1948 Act and a mandatory order requiring the Council to provide

them with accommodation. They applied for interim relief. It was granted after a hearing, the costs of which were reserved by agreement, until the date of 'rolled-up' hearing. The Judge observed on that occasion that the case was 'prima facie arguable'.

45. The litigation continued. The claimants discontinued when the Secretary of State gave one of the claimants exceptional leave to remain ('ELR') The application for judicial review was withdrawn by consent. The parties agreed that costs should be decided by a judge on the basis of written submissions. The claimants argued that there were three reasons why they should get the costs of the claim.
    i. They had complied with the pre-action protocol.
    ii. They had got an order for interim relief.
    iii. Their substantive case was strong. If the case had gone to trial, it was highly likely they would have won.

46. The Council argued that there should be no order as to costs. They had a strong defence to the claim.

47. The judge to whom the dispute was referred (HHJ Stewart QC (as he then was)) decided that there should be no order as to costs. He considered that, having analysed the issues, it was not clear enough to him which side would have won if the claim had not settled (judgment, paragraphs 22 and 37).

48. On appeal, the claimants relied on five points which overlapped with those they had advanced to the judge. Their additional points were that that they had achieved what they set out to get, that is, long-term housing and support; they had achieved an immediate benefit, interim relief, which they had had to litigate to get, and the Council had acted unreasonably by resisting their claims at every stage.

49. Jackson LJ, with whom the other members of the Court agreed, noted that *M v Croydon* had been decided after the judge's decision. He considered each of the claimants' arguments.
    i. The claimants achieved their long-term objective, but not because of any court order or concession by the Council. They achieved it because of the Secretary of State's decision to give them ELR. '[T]he favourable intervention by a third party cannot be a reason' to make an order for costs.
    ii. The costs of the application for interim relief were reserved, by consent. The underlying dispute was never tried. Jackson LJ could not see any basis on which the judge could have ordered the Council to pay those costs to the claimants. The judge could not be criticised for not dealing with those costs separately. The fact that the claimants were granted interim relief was not a reason for giving them the costs of the action. The judge who granted interim relief was not making a decision about the merits of the underlying dispute. He did not even grant permission to apply for judicial review. He simply protected the claimants' position until a 'rolled-up' hearing. 'In my view, the fact that the claimants obtained interim relief does not mean that they were successful in the action. It is not a reason for awarding the claimants the costs of the action' (judgment, paragraph 44).

iii. The Council had had a consistent position. Whether it was right or not had not been decided. It was not a reason for ordering the Council to pay the costs of the claim.
iv. It was not the function of a court on a costs appeal to give a substantive decision about the merits of litigation which did not come to trial. Both sides had 'formidable arguments'.

50. Jackson LJ said it was important to focus on the material which the judge had had: the parties' written submissions and the court file, which would have included the pleadings and the evidence previously lodged. It was not surprising that the judge could not tell who would have won if the application for judicial review had been decided. Jackson LJ did not know, either. 'In my view, it cannot possibly be said that the judge's conclusion in this regard was either wrong or perverse' (judgment, paragraph 49).

The parties' submissions

51. Mr Buley provided the Court with a note before the hearing which suggested that the legal basis for the provision of support to MS was section 4 rather than section 95 of the 1999 Act. Ms Barnes did not accept that that was so. Whether or not Mr Buley's note is correct, MS did not, at any stage, rely on section 4. This new argument, raised shortly before the hearing of this appeal is not a basis for revisiting the Judge's order. Nor, in fairness to Mr Buley, did he suggest that it was. I say no more about it.

52. Mr Buley started his submissions with six 'core propositions'.
i. The role of the Court of Appeal is limited to a review. It will only interfere with the decision of the lower court if it erred in principle or took into account irrelevant, or failed to take into account relevant, considerations. He drew our attention, among other authorities, to the decision of this Court in *R (Tesfay) v Secretary of State for the Home Department* [2016] EWCA Civ 415; [2006] 1 WLR 4853, at paragraphs 13-14, per Lloyd Jones LJ (as he then was).
ii. The general rule in civil litigation (see CPR Part 44.3(2)) is that the unsuccessful party pays the costs of the successful party. The reason for the rule is that the successful party should not be out of pocket because he had to go to court to 'vindicate a right or entitlement'. That is 'relatively juster' than the alternative.
iii. The effect of the decisions of this Court in *Bahta* and *M v Croydon* is to apply the same rule when cases settle in public law litigation. If there is a settlement, the successful party is identified by reference to what the claimant achieved from the settlement, and that is what, in substance, the claimant achieved. He referred to paragraph 65 of *Bahta*: 'Where relief is granted [by the Secretary of State pursuant to the terms of the settlement], the defendant bears the burden of justifying a departure from the general rule that the unsuccessful party will be ordered to pay the costs…'. In paragraph 6 of *AL (Albania) v Secretary of State for the Home Department* [2012] EWCA (Civ) 710; [2012] 1 WLR 2898, this Court held that paragraph 65 of *Bahta* expressed its *ratio*.

iv. The identification of the successful party is a pragmatic exercise in the real world. He referred to *Day v Day* [2006] EWCA (Civ) 415, and to paragraph 57 of *Tesfay*. In paragraph 57 Lloyd Jones LJ observed that it can be difficult to say who has won in a public law claim; sometimes the most that can be achieved is an order requiring the decision-maker to reconsider, on the correct legal basis, the decision which has been challenged; and that might not lead, in the end, to a win for the claimant, because the new decision may be a lawful decision against the claimant's interests. Nevertheless, an order for reconsideration will often be a substantial achievement. Success must be assessed by reference to what was sought, how it was opposed, and what was achievable. Mr Buley also referred to *Dempsey v Sutton London Borough Council* [2013] EWCA (Civ) 863 in which, he said, the interim order set out in paragraph 11 of the judgment was a final solution to the dispute, even though it did not reflect the relief the claimant had sought (see paragraph 23 of the judgment). The present case was *a fortiori*, because interim relief was 'all' MS was seeking.

v. Subject to one exception, it was wrong in principle when considering who was the successful party to speculate about how the litigation would have been decided at trial. He relied on paragraph 52 of *Tesfay*. That proposition was not limited to cases in which there was a settlement. The exception was articulated by Neuberger LJ in paragraph 62 of *M v Croydon*. He accepted the argument, in relation to 'case (iii)' 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 for concluding that there is no order for costs…Where there is no clear winner, so much would depend on the particular facts. In some 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.' Case (iii) is a case in which there has been a compromise which does not reflect the claimant's claims. Mr Buley submitted that neither party relied on this exception. It was a fall-back, and it only applied in a clear and obvious case.

53. In answer to Newey LJ, Mr Buley contended that the statement in paragraph 65 of *Bahta* is not an exhaustive statement. The successful party for this purpose included a claimant who had succeeded in court by getting interim relief; in this case the settlement was not the success. The party had to be wholly, rather than partly, successful.

54. In the course of argument, Newey LJ pressed Mr Buley with the point that *Bahta* and *M v Croydon* were both cases in which the claimant had been given all the relief he sought by consent, and, in the present case there had been no concession by the Secretary of State. Mr Buley's response was that in some cases, the grant of interim relief can be a win in court. He accepted that the consent order had discharged the order for interim relief. That did not matter, because the claimant had only needed interim relief for a short period.

55. When he was asked whether MS's case that the Secretary of State had acted unlawfully was articulated in any pleading, his response was that it was not, because the focus of the pleading was interim relief. It was repeat litigation, and MS was anxious to get interim relief. Mr Buley was then asked why MS should get all his costs if the focus was interim relief but there had been no concession, or decision by the court, that the Secretary of State had acted unlawfully. Dingemans LJ pointed out that an argument was articulated in the pre-action protocol letter. Mr Buley said that MS's case on appeal was that this Court should not investigate the underlying merits of the litigation. A period of 28 days would never be enough to protect a claimant because it takes on average 35 days for UC to be awarded. It was probably not possible to get a job, either, in that time.

56. Mr Buley then submitted, by reference to those propositions, that the Judge's decision was wrong. *Dempsey* showed that interim relief can be part of success, if it could be part, he asked rhetorically, why not all? In a case where all the claimant ever wants is interim relief, the grant of interim relief should amount to success for the purposes of the general rule. In the real world, the claimant has achieved what he set out to achieve and that should be recognised as success. He could only achieve that by going to court and it was just that the Secretary of State, who made MS go to court, should pay the costs of that exercise. He accepted that whether or not the Secretary of State had power to extend support beyond 28 days was an issue in the litigation. Principle v. meant that it was wrong in principle to say that interim relief was not 'success'. The fact that no-one knows what the outcome of the litigation would have been is irrelevant in principle to the question whether MS was the successful party.

57. There was no application to set aside the order for interim relief and no appeal against it. It stands, therefore. Johnson J had held that the claim was sufficiently arguable. The Judge had accepted, in paragraph 12 of his reasons, that 'the interim order may well have provided [MS] with what be sought from the claim'. Mr Buley submitted that the Judge should have stopped there. In an interim relief case, the grant of interim relief is success. It was an error of principle for the Judge then to speculate about who would have won if the claim had been litigated.

58. In his reply Mr Buley submitted that this Court should not decide this appeal on the basis of the fact that MS had not explained in his pleading how the Secretary of State had acted unlawfully. That was not the reason for the Judge's decision and had not been relied on by the Secretary of State. In any event the pleading was 'perfectly adequate'. Its focus, rightly, was the live issue, which was interim relief. He added that this Court should not go behind the decision of Johnson J. There had been no application to set it aside, and no appeal against it. He wished to make it clear that his submission was not that a grant of interim relief will amount to success in every case. It did not do so in *Naureen*. But on the particular facts of this case, it did. The dividing line was as was suggested by Dingemans LJ in a question to Ms Barnes. It was between cases in which a long-term resolution provided by the intervention of a third party was foreseeable, and those in which it was not foreseeable. MS, unlike the claimants in *Naureen*, did not submit that the award to him of UC and housing constituted success in the claim against the Secretary of State. It was never MS's case that he was entitled to long-term support. The resolution of any dispute about the lawfulness of the Secretary of State's decision was irrelevant. The only issue was the provision of short-term support to MS. It was not inevitable that the claim in *Naureen*

would become academic. In the present case, the legislation and/or the Secretary of State's practice failed to bridge a gap in support. *Naureen* was also distinguishable precisely because the claimants in that case sought long-term support. The interim relief in *Naureen* held the ring, but did not resolve the litigation in that case, whereas it did resolve it in the present case.

59. Ms Barnes made succinct submissions about Mr Buley's six principles. She did not take issue with them, as such, but urged the Court to apply them with caution. Costs decisions were highly fact-sensitive, and some apparent statements of principle had to be understood against the background of the facts of the case in which they were articulated. She illustrated her point by referring to *Dempsey*. On analysis, it was not a case in which the claimant only got interim relief, as the claim was settled by an offer of suitable and acceptable accommodation (see paragraph 21 of the judgment).

60. The key point was that it did not follow from the facts that (i) all that MS wanted was interim relief and that (ii) he got interim relief that he was the successful party in the application for judicial review. The claim settled because of the actions of third parties: the DWP, which allowed the claim for UC, and the local housing authority, which provided MS with accommodation. Those decisions were not in the gift of the Secretary of State and they were not prompted by MS's application for judicial review. Nor had the Secretary of State withdrawn the decision under challenge, or conceded that it was unlawful.

61. She did not accept that the case was 'all about interim relief'. There was no pleaded case that the Secretary of State had acted unlawfully. Relief had been granted ex parte. The Court had not considered, or decided, that the Secretary of State had acted unlawfully. That was not a proper basis for the award of costs. Moreover, it was clear from the terms of paragraph 6 of Johnson J's order that he had granted interim relief on a limited basis. The test he had applied, by reference to the balance of convenience and preserving the status quo, was very different from the test which would apply at a substantive hearing. The key factor was the risk of irremediable harm to MS. The Judge was clearly motivated by a desire to hold the ring. The Judge was right to hold that it was not clear who would have won had the case fought.

62. Ms Barnes relied on *Naureen* to support her submission that if a claim is pleaded with the sole objective of getting interim relief, without explaining how the Secretary of State was said to have acted unlawfully, and the court has made no decision on the merits of the underlying claim, the claimant cannot properly be described as the successful party. *Naureen* was an example of a case in which the Court of Appeal had endorsed the approach of considering what would have happened if the case had not settled.

63. In answer to a question from the Court, Ms Barnes submitted that the fact that the intervention of the Secretary of State in *Naureen* could not have been anticipated was not a relevant distinction between that case and the present case. She submitted that the Court's responses to the claimants' arguments in that case could be transposed to the present case. In answer to further questions from the court, she submitted that the facts that the Secretary of State had not sought the discharge of the order for interim relief or sought repayment of the benefits paid during the currency of the order were also irrelevant. The case had become academic within nine days of the date of the

order. It was far from clear that the Secretary of State would have been able to secure a hearing to set aside the order for interim relief in that period. Moreover, there is a real question whether in the circumstances, the court would have discharged an order for interim relief which was designed to 'hold the ring'. I should note that, in his reply, Mr Buley did not accept that the relevant period was as short as nine days.

64. Dingemans LJ asked Ms Barnes what power the Secretary of State had in this case to extend the period of 28 days to 41 days. She said she would take instructions. By the end of the hearing, she had not been given an answer to his question. She did, however, refer the Court to a decision of Chamberlain J in *R (Secretary of State for the Home Department) v First-tier Tribunal (Social Entitlement Chamber)* [2021] EWHC 1690 (Admin). In that case Chamberlain J recorded a submission by the Secretary of State that support for failed asylum seekers who could return to their home countries provided outside the powers conferred by the relevant regulations 'has been conceptualised as the exercise of the prerogative power' (judgment, paragraph 58).

Discussion

65. What follows is not designed to be a comprehensive statement of the law about costs in judicial review cases. It should not be treated as such a statement. The purpose of this judgment is to decide this appeal on its facts. I have described those facts, the arguments, and what seem to me to be the two relevant authorities at some length. I can therefore keep these reasons relatively short.

The issues

66. There are four main issues.
    i. What was in dispute in the application for judicial review?
    ii. Did Johnson J decide that dispute when he granted interim relief?
    iii. What was settled by the consent order?
    iv. Which party was successful for the purposes of CPR 44.3(2)? On this appeal, that involves two sub-issues: whether the Judge was entitled to
        1. ask himself which side would have won if there had been a substantive hearing; and
        2. decide that he could not tell which side would have won.

What was in dispute in the application for judicial review?

67. The nature of the dispute is to be derived primarily from the claim form, as the Secretary of State did not file an acknowledgement of service before the date of the consent order. In this case, the Judge also considered the pre-action protocol correspondence, which set out both parties' contentions in some detail. MS's case, in short, was that the Secretary of State had acted unlawfully in ending his asylum support. The contention that the Secretary of State had acted unlawfully was an essential foundation for the claim for interim relief, just as much as it was for the application for judicial review. This appears to me to be recognised in the passage from the pre-action protocol letter which I quote in paragraph 19, above. That passage refers to 'the issue in the case', which, in context, is not the issue of interim relief. The Administrative Court cannot give interim relief in any case which comes before it. The precise test which should be applied when the court considers whether or not

to grant interim relief is not an issue in this case, but it involves a threshold of arguability. That threshold relates, not just to the need for interim relief, but to the unlawfulness of the conduct of the public authority which is challenged. A claimant who fears imminent destitution is not entitled to interim relief unless he persuades the court, not only that the balance of convenience favours the grant of interim relief, but that a public authority has, arguably, acted unlawfully in withdrawing, or not granting, support. I therefore reject Mr Buley's argument that the claim was only ever about interim relief and nothing else. It could not only be, and was not only, about interim relief. It may be that, for different reasons, it suited both sides not to have the underlying legal issue decided by a court; but that does not mean that the case was only ever about interim relief. The essential core of the claim for interim relief and for judicial review was the contention that the Secretary of State had acted unlawfully.

Did Johnson J decide that dispute?

68. Johnson J's careful reasons for granting interim relief make clear that he was not deciding the underlying legal issue. He made clear that he was deciding no more than that the underlying claim was arguable. Moreover, he also made clear, because his decision was not to bind the judge who decided the application for permission to apply for judicial review, that he was not deciding that the claim was sufficiently arguable to be granted permission to apply for judicial review. His grant of interim relief cannot, therefore, be a decision that the claim that the Secretary of State acted unlawfully had succeeded on its merits. In that respect, his decision exactly mirrored the decision of Judge Waksman QC on the application for interim relief in *Naureen*. He too expressly did not decide that the claim was arguable enough to be granted permission to apply for judicial review. This analysis does not involve 'going behind' the decision of Johnson J; instead, it asks what he did, and did not, decide. It is no doubt for these reasons that part of the ratio of *Naureen*, which applies here, is that the grant of interim relief in a public law dispute is not, in and of itself, a reason for giving the claimant the costs of the action.

What was settled by the consent order?

69. The consent order dealt with the discharge of the order for interim relief and with the withdrawal of the claim. It did not involve any concession about, still less any decision on, the contention that the Secretary of State had acted unlawfully. The types of settlement which Neuberger had in mind in *M v Croydon* are settlements in which the parties have advertently settled a claim in a way which acknowledges that the claimant was *entitled* to all, or to substantially all, the relief he claimed (see the question posed by Neuberger LJ in paragraph 52 of his judgment, which I have quoted in paragraph 40, above). This is not such a case. There was a consent order, but it did not purport to, and in my view did not, compromise the underlying dispute of law, still less acknowledge that MS was entitled to all, or to substantially all, the relief he claimed, because the underlying dispute of law was the central issue in the claim. In any event, I do not consider that it is profitable to parse the relevant paragraphs of *M v Croydon* or to try to shoehorn this case into one of Neuberger LJ's three categories. The decision in *M v Croydon* is not an enactment, and does not articulate a comprehensive code of rules for deciding every conceivable costs dispute in the Administrative Court. It is clear from Neuberger LJ's language, rather, that he was giving guidance about the general approach to commonly encountered types of case.

Which party was successful for the purposes of CPR 44.3(2)?

(i) Was it open to the Judge to ask himself who would have won at a substantive hearing?

70. Like the Judge, I have no doubt that MS got all that he wanted from his claim, that is, an order requiring the Secretary of State to provide him with support for a short time after the end of the 28-day period set in the Regulations. Mr Buley submitted that it followed that MS was the successful party. I do not accept that submission. The consent order did not resolve all the issues in the claim, the foundation of which was the contention that the Secretary of State had acted unlawfully: and it certainly cannot be seen as having resolved the issue of lawfulness in MS's favour. The Secretary of State did not concede that issue, nor was it decided by any court. I have already rejected the argument that the grant of interim relief somehow decided the question whether the Secretary of State had acted unlawfully (see paragraph 68, above).

71. For that reason alone, the facts that the Secretary of State did not apply to set aside that order, and did not appeal it, are irrelevant. Neither omission amounts to a concession by the Secretary of State that she acted unlawfully. Nor is the fact that the Secretary of State did not ask for re-payment of any support relevant. While this question was not the subject of argument in this appeal, it seems to me, provisionally at least, that there is a cogent argument, based on the provisions I refer to in paragraph 34, above, that there is an exhaustive legislative code for the recovery of support in the circumstances specified in that code. The Secretary of State was ordered by the court to continue to support MS. That is not a case foreseen in the detailed recovery provisions.

72. Mr Buley nevertheless submitted that the Judge should have stopped, having decided that MS got all he wanted from the claim, and should not have speculated about the final outcome.

73. First, for the reasons I have just given, the fact that MS got all he wanted from the claim when interim relief was granted does not mean that he was the successful party in the claim. The fundamental issue in the claim had not been tried, decided, or conceded. I consider, in that situation, that, not only was it open to the Judge to go further, but that he was required to do so, to the extent that I describe below. As the Judge rightly recognised, had there been a substantive hearing, the Secretary of State might have succeeded. In such a situation, the Secretary of State, not MS, would have been the successful party. The Judge had already rightly identified what was, and was not, decided by Johnson J. The possibility that the Secretary of State could have been the successful party after the substantive hearing was an additional reason why success at the interim stage could not be equated, in this case, with success in the claim.

74. Second, *Tesfay* does not, on analysis, support an argument that it is always wrong in principle in a costs case to consider whether it is possible to say who would have won the case, had there been a hearing. The statements in *Tesfay* about the extent to which a judge can consider who would ultimately have succeeded have to be understood against the issues in that case. In *Tesfay* the Secretary of State had agreed to withdraw the relevant certificates (and, therefore, to reconsider whether such certificates were

appropriate). That was a final outcome of the claim for judicial review, and an outcome which might be thought to have involved an implicit concession by the Secretary of State that she had acted unlawfully. Whether or not it did involve such a concession, the claimants had all sought orders quashing the certificates and requiring the Secretary of State to reconsider them; and that is what they got from the settlement. Had the claims been argued out at a hearing, they could not have achieved more.

75. Third, while I do not consider that the approach in *M v Croydon* is binding in this case, it is clear that Neuberger LJ considered that, in the case of two of his categories, it could be appropriate to ask whether one could tell what would have happened at a final hearing. That suggests that there is no bar in principle to such an investigation.

76. Fourth, I reject the submission that the Judge speculated about the final outcome. What he did was somewhat different. He asked himself, instead, whether he could tell who would have won at the substantive hearing (see paragraph 14 of his reasons). Paragraph 13 might be read as suggesting a degree of speculation, but I read it as a test by the Judge of the accuracy of the proposition that MS's success at the interim relief stage should be equated with success for him in the claim overall.

(ii) Was it open to the Judge to decide that he could not tell?

77. The claim form (which, more than once in his costs submissions, MS expressly asked the Judge to consider) consisted of a bare assertion that the Secretary of State had acted unlawfully. The claim was argued in more detail in the pre-action protocol letter. The Judge was confronted with a situation in which the Regulations, on their face, did not permit the Secretary of State to extend support beyond the 28-day period. A decision that the Secretary of State had, nevertheless, acted unlawfully, would have required MS to convince a court that the gap in support was not, in general a breach of article 3 or of article 8, but, on the facts, a breach of MS's article 3 or article 8 rights, and that, as a result, regulation 2 of the Regulations breached section 6 of the HRA.

78. That was not a self-evidently correct argument for several reasons.
    i. There is a high threshold for establishing a breach of article 3 in a case concerning state support.
    ii. Article 8 does not confer rights to benefits or to housing.
    iii. MS was permitted to work.
    iv. His solicitors had delayed in providing him with his BRP.
    v. As he acknowledged in the pre-action protocol letter,
        1. he could have applied for an advance of UC to bridge the relatively short gap, and
        2. he might have seen by local housing authority being as in priority need for housing.

In those circumstances, it was not only open to the Judge to decide that he could not tell who would have won had there been a substantive hearing, that was also the right decision.

Other matters

79. It follows from what I have already said that I consider that the order in *Jabarkhil* was wrong in principle. The order for interim relief in a case like the present case is not a decision on the merits of the underlying claim. The facts, therefore, that a claimant has been granted interim relief in a case like this, and that the Secretary of State has

not applied to discharge or vary that order, do not make the claimant the successful party for costs purposes.

80. It also follows that I do not consider that the intervention of a third party, or whether or not that intervention is foreseeable, is a potential criterion for deciding whether or not a party who benefits from interim relief is the successful party overall. The questions, rather, are as I have described them above. I merely note that, in this context, MS, in his first set of submissions on costs, appears to have equated success in the claim with the provision of part of what he sought in the claim by third parties, whose decisions were not challenged in the claim. He appears, at that stage, to have fallen into the same error as Mr Buley criticised in his submissions to this Court about the argument of the claimants in *Naureen*, as recorded in paragraph 38.i) of the judgment in that case. I accept the submission that, in a case like this, benefits obtained, after the issue of the claim, from third parties who are not joined in the claim, are not relevant to the question whether the claimant has been successful in the claim. That proposition is part of the ratio of *Naureen*.

Conclusion

81. For those reasons, I would dismiss this appeal.

Lord Justice Dingemans

82. At the conclusion of the hearing my view was that MS was "the successful party" for the purposes of CPR 44.2(2)(a). This was because, in practice, the only matter which had divided MS and the Secretary of State was whether there should be "bridging" payment of funds and provision of accommodation for a period from 28 days after the making of the positive decision on MS's refugee status until MS was in receipt of Universal Credit and had obtained accommodation from the relevant local authority. MS obtained an order from the Court for that interim relief, and that order for interim relief had continued until MS obtained Universal Credit and suitable accommodation. Neither party sought to discharge the interim order and neither party sought to determine the underlying issue of whether the Secretary of State had power to make a payment after the 28-day period provided for in the Asylum Support (Amendment) Regulations 2002. Further the interim relief was obtained in a context where it was always apparent that the underlying dispute between MS and the Secretary of State was never going to be determined unless either party pursued the matter to a full hearing. This is because it was clear that MS would be provided with Universal Credit by the Department of Work and Pensions and suitable accommodation by the relevant local authority so that an interim order for the payment of bridging funds and accommodation would determine the issue.

83. It is apparent that Lady Justice Elisabeth Laing and Lord Justice Newey take a different view of whether MS was the successful party notwithstanding that MS got all he wanted for the claim, see paragraph 70 of the judgment of Lady Justice Elisabeth Laing. However, as this appeal relates only to costs, where part of the role of the Court of Appeal is to give clear practical decisions, it does not seem to me that it would be appropriate to press my view into a dissenting judgment.

84. I therefore agree with the judgment of Lady Justice Elisabeth Laing that the appeal against the decision that there be no order for costs should be dismissed. I do so on

the basis that a reading of the decision in *Naureen* at paragraph 41 to 43 is that a successful order for interim relief in an action will not, without more, justify an order for costs where the parties have not agreed the issue of costs and have left it to be determined by the court. This means that in these type of "bridging support" cases under the Asylum Support (Amendment) Regulations 2002 if the claimant obtains only an order for interim relief, the claimant will not obtain an order for costs if the parties leave the issue to be decided by the Court, unless the action is progressed to a further determination.

Lord Justice Newey

85. I agree with Elisabeth Laing LJ that the appeal should be dismissed. In substance, it is MS's case that the fact that he obtained relief on a without notice application in respect of which costs were rightly reserved entitles him not only to his costs of that application but to all his costs of the claim, and that although he withdrew his application for judicial review, and Johnson J's order was discharged, without the Secretary of State making any concessions and without even any inter partes hearing ever taking place. I do not consider that to be correct. True it may be that MS achieved all he wanted with Johnson J's order, but that does not mean, in my view, that the Secretary of State falls to be treated as "the unsuccessful party" for the purposes of CPR 44.2(2) or, more generally, that a costs order should be made in MS's favour.

86. As Elisabeth Laing LJ has mentioned, Lord Neuberger MR identified three categories of case in paragraph 60 of his judgment in *M v Croydon*. Mr Buley QC suggested that, contrary to Judge Worster's view, the present case falls within the first category as "a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement". However, MS gained his success by means of a without notice application, not a contested hearing or a settlement. Moreover, as Lord Neuberger explained in paragraph 1 of his judgment, the issue in *M v Croydon* was as to "the proper approach to awarding costs in judicial review proceedings, where the defendant public authority effectively concedes some or all of the relief which the claimant seeks", yet the Secretary of State has made no relevant concession in the present case.