Neutral Citation Number: [2023] EWCA Civ 1357

Case No: CA 2022 001350

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM KINGS BENCH DIVISION
Mr Justice Choudhury
[2022] EWHC 1531 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 November 2023

Before:

LORD JUSTICE UNDERHILL
VICE PRESIDENT OF THE COURT OF APPEAL (Civil Division)
LADY SIMLER
and
LADY JUSTICE ANDREWS

- -

Between:

FXJ	**Claimant/ Appellant**
- and -	
(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendants/ Respondent**
(2) HOME OFFICE	

- -
- -

David Chirico and Angelina Nicolaou (instructed by **Wilson Solicitors LLP**) for the **Appellants**
Robert Cohen (instructed by **Government Legal Department**) for the **Respondents**

Hearing date: 4 October 2023

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JUDGMENT

Approved Judgment

This judgment was handed down remotely at 10.30am on 20 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Simler:

Introduction

1. This appeal raises the question whether the Secretary of State for the Home Department, the respondent, owed a duty of care in tort to the appellant and/or breached his article 8 rights, in circumstances where a delay in making a refugee status decision in his case (during which a late appeal was withdrawn) were significant aggravating factors that rendered a relapse in the appellant's mental health more severe and longer in duration.

2. The appellant is a Somali national (now recognised as a refugee in the United Kingdom in consequence of his well-founded fear of persecution in Somalia). He suffers from a severe and enduring mental illness that includes psychotic and depressive symptoms pre-dating the events that are the subject of this appeal. He first entered the United Kingdom on 1 October 2001 and applied for asylum. His application was refused and his appeal dismissed, but he was granted exceptional leave to remain until 2003. A subsequent application for asylum was also refused and an appeal dismissed but meanwhile, in August 2007, he was convicted of robbery and sentenced to 18 months' imprisonment. As a result, the respondent served him with a deportation order once his appeal rights were exhausted in February 2009. The appellant did not leave but remained as an overstayer. His immigration status was finally determined by the respondent on 27 January 2014, rejecting his asylum claim. The appellant challenged the respondent's decision and was ultimately successful in his appeal on article 3 grounds.

3. This appeal and the underlying proceedings arise out of the events that followed the appellant's successful appeal against the respondent's refusal of asylum, starting with his asylum appeal being allowed by the Upper Tribunal by a decision promulgated on 4 December 2015, and concluding with the grant of refugee status with five years' leave to remain on 23 July 2016. In particular, the appellant challenged the respondent's delay in granting him status as a refugee from 10 February 2016 (when time for appealing the Upper Tribunal decision expired), together with the respondent's decision to initiate and then withdraw a late application to appeal to the Court of Appeal against the Upper Tribunal's decision.

4. The appellant brought proceedings for damages in negligence, misfeasance in public office and under section 7 of the Human Rights Act 1998. The negligence claim alleged, in summary, that the respondent owed him a common law "duty to make a prompt decision on the implementation of his successful appeal and on the grant of leave to remain in the UK", particularly in light of his known vulnerabilities as an asylum seeker suffering from serious mental illness. He alleged that the duty was breached (among other things) by the failure to act properly and expeditiously when taking decisions regarding his immigration status and by making and then withdrawing a late application (characterised as futile) for permission to appeal out of time in the period 10 February to 23 July 2016. The claims were all denied by the respondent.

5. At the trial (on liability only), the parties' psychiatric experts agreed that:

> "the Home Office appeal and the resultant delay in his being granted refugee status were significant aggravating factors that rendered his 2016-7 episode of schizophrenic relapse more severe and longer in duration".

6. The trial judge, HHJ Baucher, dismissed all three claims. In summary:

   i) Negligence: she held that no common law duty of care was owed by the respondent to the appellant in the circumstances of this case: the true relationship between the parties during the material period was one of litigation, and as a litigant the respondent owed no duty to the appellant. But even if the respondent was exercising statutory responsibility for immigration control, the pleaded allegations were directed at omissions rather than actions, and the respondent had not voluntarily assumed responsibility in any sense. No duty of care arose on this basis either accordingly.

   ii) Judge Baucher found in the alternative, that there was no breach of duty: although provided with extracts from file notes passing between the respondent's officers at the material time, she did not have a complete picture of what the respondent was doing or thinking, and the file notes were made while the case was the subject of litigation and that formed part of the context. She held that there was no evidence on which she could properly find that the respondent failed to have adequate systems of communication, either internally or with legal representatives. She was not provided with details of exactly what passed internally or externally and observed that litigation privilege would inevitably apply. She also held that there was no evidence that the respondent failed to act expeditiously. Moreover, in relation to the aborted attempt to appeal out of time, the discussions about this case did not disclose any breach of duty.

   iii) Misfeasance: Judge Baucher rejected this claim based on untargeted malice in the pursuit of a futile appeal against a known Somali refugee suffering from serious mental illness, and in the sending of misleading correspondence about the appeal. She held that the respondent was entitled to consider the merits of a late appeal and that none of the matters complained of in relation to the appeal, even taken at their highest, could properly be considered unlawful; nor did they disclose subjective recklessness. Likewise, she rejected the claim that the correspondence and application were misleading, but even if they were, there was no unlawful conduct.

   iv) Article 8: Judge Baucher held that the respondent's delay in implementing the appellant's grant of status was not substantial. She continued:

> "118. … On any consideration, five months was a short period and I am satisfied that period of delay does not engage a breach of Article 8.
>
> 119. Even if I am wrong I am satisfied, in any event that any interference would be justified. There is important public interest in immigration control, the deportation of offenders and

> parties being able to seek permission to appeal so as to engage Article 8(2)."

7. The appellant appealed unsuccessfully against all of those conclusions (judgment of Choudhury J, reported as [2022] EWHC 1531 (QB), [2023] QB 390). I shall return to both the judgment of Choudhury J and HHJ Baucher below.

8. There are three grounds of appeal. The first two challenge Judge Baucher's conclusion that no duty of care was owed by the respondent to the appellant in the circumstances of this case. Ground two (which is logically anterior to ground one) argues that the case falls within an exception to the general rule that public bodies do not ordinarily owe a duty of care when fulfilling their public functions, because the case is properly characterised as involving conduct that caused harm or made things worse. Ground one is only relevant if the appellant succeeds in establishing a prima facie duty on ground two. It contends that once a statutory appeal was under way (with the express function of determining the United Kingdom's responsibilities under international law), the respondent had a dual role as both primary immigration decision-maker and litigant, and so is not caught by the well-established exception identified by the judge. This is a special category of litigation which is exempt from the rule that litigants do not owe any duty of care to one another. The third ground of appeal challenges the conclusion that there was no breach of article 8. The appellant contends that the balancing exercise conducted by Choudhury J was flawed because it failed to adopt an individualised approach to the question of proportionality. There is no challenge to the dismissal of the claim for misfeasance.

The facts

9. The facts were helpfully set out by HHJ Baucher in her judgment at paragraphs 10 to 15 dealing with events before the material period, and paragraphs 16 to 49 dealing with the material period. They were summarised by Choudhury J and I gratefully adopt much of his summary in what follows.

10. As indicated, the appellant exhausted his immigration appeal rights in February 2009 at which point the respondent made an order to deport him as a foreign national criminal. On 4 March 2009, the appellant made further representations seeking revocation of the deportation order. The respondent refused those representations on 27 January 2014. That was the respondent's final immigration decision in this matter before litigation ensued.

11. The appellant appealed the respondent's refusal decision to the First-tier Tribunal (Immigration and Asylum Chamber) ("the FTT"). The respondent resisted the appeal. By a decision dated 15 May 2015, the FTT dismissed the appeal, but granted permission to appeal to the Upper Tribunal ("the UT"). By a decision dated 16 October 2015, the UT set aside the FTT's decision on the ground that it contained a material error of law and ordered a rehearing. In doing so, UT Judge Finch observed that it was "clear from the medical evidence that any ongoing delay in resolving this case is likely to be detrimental to the appellant's mental health".

12. The rehearing took place very promptly on 16 November 2015, and the UT allowed the appeal by a decision promulgated on 4 December 2015. In an internal post-hearing note, the respondent acknowledged that the appeal would be allowed, in part on the

basis of evidence which the respondent had herself provided about the likely poor treatment in Somalia of people suffering from serious mental illness.

13. By an application dated 17 December 2015, the respondent sought permission to appeal the UT's decision from the UT itself. That application was refused by the UT by a decision dated 5 January 2016. The respondent was then entitled to renew the application for permission to appeal directly to the Court of Appeal. The deadline for doing so was 10 February 2016. That deadline expired without any such application to this court being made.

14. By letter dated 19 February 2016, the appellant's solicitors, Wilson Solicitors LLP, entered into correspondence with the respondent requesting that the appellant be granted settled status "forthwith" following his successful appeal. They reminded the respondent of the serious mental health problems he suffered and made clear that delay in granting him status "is likely to have a detrimental effect on his mental health". In the absence of any substantive response, the solicitors issued a pre-action letter dated 1 March 2016.

15. On 15 April 2016, more than two months after the expiry of the appeal time limit, the respondent filed a notice of appeal with the Court of Appeal together with an application for an extension of time.

16. Although a late appeal was lodged, internal file notes dated 26 and 27 April 2016 record the views of one of the responsible Home Office officers that "no further challenge [was] proposed" and that a "final sign off [was awaited] from Mike Wells". This suggested that the respondent was considering withdrawing the appeal.

17. The appeal was reviewed by Mr Wells (a senior Home Office official with authority to "sign off" on the appeal) on 10 May 2016. He concluded:

> "I agree that we should not pursue this case. I have previously expressed concerns about the Home Office position with regards to Somalis with mental illness. The UT finding – extract below – is clear (a) that those with mental health disorders are often subject to humiliating conditions including that they are often chained; and (b) that the chaining of mental health patients amounts to inhuman and degrading treatment.
>
> As I have previously stated, unless we wish to challenge one or other of these findings it follows that Somalis whom we accept have serious mental health issues cannot normally be returned. There would have to be exceptional factors such as a strong family network in the Mogadishu area to have even a chance of overcoming that presumption that Article 3 applies.
>
> Given that, where we accept that a Somali has serious mental health issues and does not have a strong family support network in Mogadishu, I do not understand why we would not grant leave nor why we would incur taxpayers' money on futile attempts to deport."

The respondent's withdrawal of the appeal very shortly afterwards was confirmed by a court order sealed on 13 May 2016. By letter dated 19 May 2016, the respondent wrote to the appellant's solicitors confirming that he would be granted leave to remain for five years. There was then a delay until 16 June when the appellant completed a biometric residence permit application. On 23 July 2016, the respondent granted the appellant refugee status and leave to remain for five years.

18. During the period leading up to the withdrawal of the respondent's late application for permission to appeal the UT decision, the appellant's mental health deteriorated. The psychiatric report from Professor Katona MD FRCPsych, dated 15 October 2017, served with the Particulars of Claim, stated that even before the UT hearing at which his appeal was allowed, the appellant became less compliant with medication and his behaviour became more irritable and aggressive. He started expressing persecutory ideas and had resumed heavy drinking by that time. Professor Katona expressed the view that the combination of increased alcohol and illicit drug use, poor medication compliance and the stress of the impending tribunal hearing were likely to have triggered that deterioration. Professor Katona said the deterioration became more marked after the UT decision and as it became clear to the appellant that he might after all not be granted leave to remain in the UK. By January 2016 his deterioration and threatening behaviour had become very marked. He was seen on about 17 May 2016, by Dr Hewitt, consultant forensic psychiatrist, and appeared irritable and expressed a number of psychotic beliefs. He was recorded as having made serious threats. Dr Hewitt was sufficiently concerned to contact the police. The appellant was arrested on 17 May 2016 and admitted to hospital on 18 May 2016, under the provisions of section 2 of the Mental Health Act 1983. He remained in hospital for 43 days.

19. After his discharge from hospital and despite confirmation that he then had leave to remain in the UK, the appellant was recorded by Professor Katona as having resumed and maintained his alcohol and drug use; his mental state had deteriorated; he was hearing voices again, and his self-care had become quite poor. Professor Katona expressed the clinical opinion that:

> "the delay in the Home Office granting him refugee status and the fact that they made a late appeal to the Court of Appeal were important stressors for [him]. In people with schizophrenia, relapse tends to occur at times of stress.
>
> I would therefore conclude that the Home Office's late appeal and the delay in the granting of refugee status were important contributors to [the appellant's] relapse which occurred between July 2015 and his hospitalisation in May 2016. His poor medication compliance, his resumption of alcohol and illicit drug use and the ongoing stress of his immigration uncertainty were however also important contributors. Given that his relapse appears to have had its onset well before the Tribunal decision which the Home Office challenged, neither the Home Office appeal against the Tribunal decision nor the resultant delay in his being granted refugee status can be regarded as causative of his relapse (which was already

> happening). They were however significant aggravating factors."

20. I also note that the appellant had at least one further relapse after the material period, leading to a 28 day period of hospitalisation in early 2019. In his 10 October 2019 report, Professor Katona said factors such as the appellant's poor medication compliance, continued heavy use of alcohol and continued use of cannabis, "had been the main "drivers" of his persistent (albeit fluctuating) psychotic and depressive symptoms and of his 2019 hospitalisation". Professor Katona said that the appellant continued to have a severe and enduring mental illness, requiring ongoing support and medication.

The judgments below

21. Although this is an appeal from the order of Choudhury J dismissing the first appeal, this court is primarily concerned with the correctness or otherwise of the judgment and reasoning of the trial judge, HHJ Baucher.

22. In relation to the duty of care question, the judge analysed the relationship between these parties as one of being in litigation against each other following the respondent's determination of the appellant's immigration status on 27 January 2014. From then, she held that the entire matter depended on the progress of his appeals and their determination by the courts. She held that the "whole tenor of the claimant's pleaded claim and the allegations of breach of alleged duty related entirely to the litigation process" and there was "not one single allegation challenging the actual original decision to deport because that was the substance of the litigation". She rejected the contentions that the conduct of the litigation and the conduct of the decisions about the appellant's immigration status were so interlinked that the decision to pursue the appeal could not be viewed as separate from the respondent's immigration responsibilities. The case was indistinguishable from *Customs and Excise Commissioners v Barclays Bank* [2006] UKHL 28, [2007] 1 AC 181 and *Business Computers International Ltd v Registrar of Companies* [1988] Ch 229, where there was held to be no duty of care owed by one litigant to another about how litigation is conducted. Neither the fact that those cases involved pure economic loss whereas this involved personal injury, nor the respondent's special role in making immigration decisions afforded any basis on which to distinguish them.

23. As for whether the respondent owed the appellant a duty of care in the exercise of her statutory immigration duties, the judge regarded *Advocate General for Scotland v Adiukwu* [2020] CSIH 47, [2020] SLT 861 as highly persuasive and concluded that there was no relevant distinction between that case and this one. She was satisfied that the appellant's pleaded allegations were all directed at omissions, and that the respondent had done nothing to justify any inference that she had assumed responsibility for making an earlier decision. The question whether the respondent had harmed (rather than failed to protect) the appellant did not arise. Accordingly, no duty of care was owed on either of the bases advanced by the appellant.

24. Choudhury J dismissed the appeal against those findings. He concluded that there was no error in the judge's characterisation of the parties' relationship as one of parties in litigation and agreed that they were in litigation once an appeal challenging the respondent's refusal to grant leave to remain in January 2014 was commenced. The

fact that the respondent had an ongoing responsibility for immigration control in relation to the appellant did not alter that position and indeed if it were the case that the existence of an ongoing public law power or duty in respect of a person nullified what would otherwise be a litigation based relationship, then there would be few if any instances of a public authority ever being in such a relationship. Nor was the judge wrong to conclude that this was an omissions case rather than one involving a positive act. Careful analysis of the pleaded claim showed it was directed at omissions rather than actions, and HHJ Baucher also "stood back" to assess what the case was really all about. She considered permissibly that, as in *Adiukwu*, this was a claim about a failure to confer a benefit.

25. In rejecting the claim under article 8, HHJ Baucher accepted the significance of the five questions identified as relevant to determining an article 8 claim by Lord Bingham in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, but said they had to be set in context, and "did not need to be determined in that format" in this case. The claim as pleaded was directed only at delay in granting immigration status rather than at the impact on the appellant's mental health; and the delay of five months was a short period. She held that the period of delay did not engage a breach of article 8, and even if she was wrong about that, any interference was justified by the "important public interest in immigration control, the deportation of offenders and parties being able to seek permission to appeal".

26. Choudhury J identified flaws in the judge's approach to and analysis of the article 8 claim:

> "89. There are two flaws in that analysis: first, Mr Chirico was not seeking through his submissions to "turn the argument" from delay to the effect of that delay. It had clearly been pleaded that the delay in implementing the Appellant's grant of status "amounted to an interference in his right to respect for his private life (including his mental integrity)". Thus the *effect* of the delay, i.e. the consequences for the Appellant's mental health, was always part of his case under Article 8. Following a structured approach would have enabled the Judge to identify the distinction between the act complained of (i.e. the delay) and the resultant interference with Article 8 rights (i.e. the effect on the Appellant's mental health). Second, the phrase, "does not engage a breach of Article 8" conflates two separate issues: the first being whether Article 8 is engaged by reason of the alleged interference; and the second being whether Article 8 is breached, which requires a consideration of whether any interference was justified."

27. However, he observed that the errors would not warrant any interference by an appellate court if the ultimate conclusion reached by the judge was plainly and unarguably correct. Notwithstanding the flaws he had identified, he concluded that the judge's ultimate analysis was focused on the question of justification and whether the effect of the delay amounted to a proportionate means of achieving a legitimate aim. That question was considered by the judge, albeit briefly, in paragraph 119 of her judgment, as an alternative to her earlier conclusions. Though not as well expressed as

perhaps it could have been, Choudhury J understood the judge's conclusion on justification as a finding that the delay and its consequential effects amounted to a proportionate means of achieving the legitimate aim of having effective immigration control systems with rights of appeal for both parties. In any lawful system of immigration control, an adverse decision or an appeal against a positive decision, would be likely to result in anxiety and stress for affected individuals, and delays in the relevant processes would be likely to add to that stress. Such delays are an occasional, unavoidable feature of any system dependent on individual decision-making. He concluded that the judge was entitled to find that the effect of delay, which was not substantial or serious, was not disproportionate. There was no error in her approach which was sufficiently specific in the context of this case.

28. Choudhury J rejected the argument that by stating that article 8(2) was not engaged, the judge asked herself the wrong question. He found nothing in this point: the judge clearly intended to state that the interference was justified within the meaning of article 8(2). The infelicitous reference to the language of "engagement" did not render that conclusion incorrect.

The appeal: common law duty of care

29. Against that background I shall start my consideration of this appeal with ground two and whether HHJ Baucher was wrong to characterise the matters complained of as the failure to confer a benefit (or failing to make things better) rather than conduct that caused harm (or made things worse).

30. There is no dispute that the statutory scheme giving immigration powers to and imposing duties on the respondent does not create a statutory cause of action that sounds in damages. It is common ground that to recover damages in tort the appellant must establish that the events relied on (including any period of delay during which the respondent attempted to pursue a futile appeal to this court) give rise to a common law duty of care.

31. It is also uncontroversial that the legal principles that apply in answering the question whether the law imposes a concurrent common law duty of care on a public body exercising statutory powers and duties were set out in three decisions of the Supreme Court: *Michael v Chief Constable of South Wales* [2015] UKSC 2, [2015] AC 1732; *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736; and *Poole Borough Council v GN and another* [2019] UKSC 25, [2020] AC 780. It is sufficient for present purposes to refer only to what Lord Reed (with whom the other members of the court agreed) said in his review of the established principles in *Poole* at paragraphs 63 to 65:

> "63. Most recently, the decision of this court in 2018 in the case of *Robinson v Chief Constable of West Yorkshire Police* drew together several strands in the previous case law. The case concerned the question whether police officers owed a duty to take reasonable care for the safety of an elderly pedestrian when they attempted to arrest a suspect who was standing beside her and was likely to attempt to escape. The court held that, since it was reasonably foreseeable that the claimant would suffer personal injury as a result of the officers'

conduct unless reasonable care was taken, a duty of care arose in accordance with the principle in *Donoghue v Stevenson* [1932] AC 562. Such a duty might be excluded by statute or the common law if it was incompatible with the performance of the officers' functions, but no such incompatibility existed on the facts of the case. The court distinguished between a duty to take reasonable care not to cause injury and a duty to take reasonable care to protect against injury caused by a third party. A duty of care of the latter kind would not normally arise at common law in the absence of special circumstances, such as where the police had created the source of danger or had assumed a responsibility to protect the claimant against it. The decision in *Hill v Chief Constable of West Yorkshire* was explained as an example of the absence of a duty of care to protect against harm caused by a third party, in the absence of special circumstances. It did not lay down a general rule that, for reasons of public policy, the police could never owe a duty of care to members of the public.

64. *Robinson* did not lay down any new principle of law, but three matters in particular were clarified. First, the decision explained, as *Michael* had previously done, that *Caparo* did not impose a universal tripartite test for the existence of a duty of care, but recommended an incremental approach to novel situations, based on the use of established categories of liability as guides, by analogy, to the existence and scope of a duty of care in cases which fall outside them. The question whether the imposition of a duty of care would be fair, just and reasonable forms part of the assessment of whether such an incremental step ought to be taken. It follows that, in the ordinary run of cases, courts should apply established principles of law, rather than basing their decisions on their assessment of the requirements of public policy. Secondly, the decision re-affirmed the significance of the distinction between harming the claimant and failing to protect the claimant from harm (including harm caused by third parties), which was also emphasised in *Mitchell* and *Michael*. Thirdly, the decision confirmed, following *Michael* and numerous older authorities, that public authorities are generally subject to the same general principles of the law of negligence as private individuals and bodies, except to the extent that legislation requires a departure from those principles. That is the basic premise of the consequent framework for determining the existence or non-existence of a duty of care on the part of a public authority.

65. It follows (1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived; (2)

> that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and (3) that public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation."

32. A critical distinction is therefore to be drawn between causing harm (or making things worse) where a common law duty of care might arise if fair, just and reasonable to impose it; and failing to confer a benefit (or not making things better), where no such duty will ordinarily be imposed. Despite the fact that there can be difficulties in drawing or applying this distinction in borderline cases, it reflects a recognition that there is a fundamental difference between requiring a person to take care, if they embark on a course of conduct which may harm others, not to create a risk of danger; and requiring a person, who is doing nothing, to take positive action to protect others from harm for which they were not responsible, and to hold them liable in damages if they fail to do so. The law of negligence generally imposes duties not to cause harm to other people or their property and does not generally impose duties to provide them with benefits, which are, in general, voluntarily undertaken rather than being imposed by the common law. As in the case of private individuals, however, a duty to protect from harm or confer some other benefit might arise in particular circumstances, for example where the public body has created the source of danger or has assumed a responsibility to protect the claimant from harm. Lord Reed explained that drawing the distinction in this way rather than the more traditional distinction between acts and omissions, better conveys the rationale of the distinction drawn in the authorities, and might be easier to apply.

33. Mr Chirico accepted below and in this court, that the distinction was and remains fundamental to the determination of whether a common law duty of care was owed to the appellant in this case. In his submission, the respondent engaged in positive conduct (by lodging a futile appeal) that made things worse and this was not (as the judge found) simply a case of failing to confer a benefit (the grant of immigration status) or a "pure omissions" case. He accepted however, that if, as HHJ Baucher held, the claim is properly characterised as one involving the failure to confer a benefit, then it would have been necessary for the appellant to show some additional basis for establishing a duty of care (such as the respondent creating the danger of harm or voluntarily assuming responsibility toward him). But since the appellant fairly accepts that no such additional basis exists, the viability of this claim depends on at least some material element being one of conduct causing harm (or making things worse).

34. Mr Chirico submitted that on a correct application of the principles in *Poole* to the circumstances of this case, the bringing of a late, futile appeal, and the conduct leading to it, amounted to or included conduct causing harm (or making things worse). The fact that this occurred in the context of or alongside a wider series of

omissions or failures to confer a benefit does not negate the fact that the respondent also caused harm, and does not deprive the positive conduct of that status. This was a mixed omissions and actions case and HHJ Baucher was wrong to conclude otherwise. Mr Chirico submitted that it is only if, in reality, no event is identified in which a defendant causes harm that the claim can be treated as falling entirely on the "failing to confer a benefit" side of the line. The error made by the judges below was in concluding that if the overall context of a claim was failure to confer a benefit, then isolated actions causing harm can and should be subsumed into that overall context.

35. There are two ways in which Mr Chirico submits that the respondent caused harm or made things worse for the highly vulnerable appellant in the particular circumstances of this case, where the respondent was on notice that delay was foreseeably likely to cause a deterioration in his mental health. First, the respondent was under a duty not to embark on an active course of action that delayed the grant of immigration status by bringing a futile appeal. Secondly, in the course of the delay in conferring immigration status on the appellant, the respondent brought a futile appeal that caused foreseeable personal injury. Both involved the respondent *conducting* an activity (she decided to bring, and brought, an appeal) and this part of the claim relates to the way in which she did so (including considering whether she took reasonable steps to ensure that she was aware of the merits of the underlying asylum/human rights claim and of the proposed appeal, before bringing it). The conduct caused personal injury by significantly aggravating the appellant's mental illness.

36. Persuasively as these submissions were advanced, I do not accept that there was any error by either judge below in characterising this as a failure to confer a benefit case. I recognise that the distinction between causing harm and failing to confer a benefit can sometimes be difficult to apply. Indeed, as Choudhury J observed, most conduct relied upon as amounting to negligence can be said to comprise acts and omissions that fall on both sides of the line. However, by considering the purpose of the distinction it is possible to come to a common sense conclusion as to which side of the line the impugned conduct falls. As Lord Reed said in *Robinson*:

> "4. The distinction between careless acts causing personal injury, for which the law generally imposes liability, and careless omissions to prevent acts (by other agencies) causing personal injury, for which the common law generally imposes no liability, is not a mere alternative to policy-based reasoning, but is inherent in the nature of the tort of negligence. For the same reason, although the distinction, like any other distinction, can be difficult to draw in borderline cases, it is of fundamental importance. The central point is that the law of negligence generally imposes duties not to cause harm to other people or their property: it does not generally impose duties to provide them with benefits (including the prevention of harm caused by other agencies). Duties to provide benefits are, in general, voluntarily undertaken rather than being imposed by the common law, and are typically within the domain of contract, promises and trusts rather than tort. It follows from that basic characteristic of the law of negligence that liability is generally imposed for causing harm rather than for failing to prevent

> harm caused by other people or by natural causes. It is also consistent with that characteristic that the exceptions to the general non-imposition of liability for omissions include situations where there has been a voluntary assumption of responsibility to prevent harm (situations which have sometimes been described as being close or akin to contract), situations where a person has assumed a status which carries with it a responsibility to prevent harm, such as being a parent or standing in loco parentis, and situations where the omission arises in the context of the defendant's having acted so as to create or increase a risk of harm."

Where a course of conduct involves features that are capable of being analysed in both ways, the real nature and purpose of the distinction must be kept in mind in coming to a common sense decision about how the matters complained of as causing the harm should properly be characterised. These are questions of fact and degree. There may be cases where, as a matter of fact, the significance of one aspect of the course of conduct leads to the conclusion that it was positive conduct that caused harm notwithstanding that other aspects involve failures to act or confer benefits. That however, is not this case.

37. HHJ Baucher's starting point was, correctly, the pleaded case as set out in the appellant's Particulars of Claim. There can be no doubt that the appellant's claim in negligence alleged a duty of care to confer on him a prompt immigration status decision, and that the failure so to act caused harm. The duty is expressly pleaded in paragraphs 49 and 50 as follows:

> "49. …there was a delay of over 5 months, from the final determination of the Upper Tribunal allowing his appeal, in granting C leave to remain in the United Kingdom. As a result, C suffered loss and damage, including psychiatric harm ...
>
> 50. At all material times, D owed C a duty of care. In particular, and in light of C's particular vulnerability … which was known to D, and in light of the specific finding of the Upper Tribunal about the likely impact of a delay on C's mental health, D owed C a duty to make a prompt decision on the implementation of his successful appeal and on the grant of leave to remain in the UK."

38. The particulars of breach of that duty are pleaded at paragraph 51. They refer to (a) failures to have in place adequate systems for communication between the respondent's officers and/or departments charged with implementing the status decision; (b) failure to operate systems adequately and promptly; (c) failure to have in place adequate systems for communication with legal representatives to ensure they were given expeditious and adequate instructions, or to operate such systems adequately and promptly; (d) failure to act with reasonable care and expedition in response to triggers which should have ensured awareness of relevant time limits for appealing. True it is, as Mr Chirico submitted, that the lodging of the appeal is expressly pleaded at paragraph 51 (e) and (f). However, the allegations are expressly that (e) the respondent failed to ensure that a full and informed decision was taken

about the merits of an appeal and/or whether there was a serious intention of pursuing it before it was lodged and/or withdrawn; and (f) if the respondent had acted with reasonable competence and expedition, she would have decided no later than 10 February 2016 not to pursue an appeal to the Court of Appeal and the delay of over three months from then to 13 May 2016, when the appeal was withdrawn, would have been entirely avoided.

39. In other words, the alleged duty and the breaches are all focussed on the requirement to make prompt and timely decisions touching on the implementation of the UT decision allowing the appellant's appeal, by granting him status in the United Kingdom. The additional period of delay from 10 May (when the appeal was withdrawn) to 23 July 2016 was also pleaded as involving further failure to act with utmost expedition in implementing the decision to grant leave to remain in light of the earlier delays. This analysis does not involve subsuming isolated actions that caused the appellant harm into an overall omissions context, as Mr Chirico sought to argue. The pleaded case identifies the gravamen of the appellant's complaint: the respondent was under a duty to act promptly but took too long in deciding and implementing the immigration status decision and this caused the appellant harm. In these circumstances it seems to me that the judges below were amply entitled to understand the pleaded case as limited to failure to confer a benefit on this appellant.

40. Accordingly, as a matter of pleading, the case was advanced on the sole basis of a failure to make prompt decisions about the appellant's immigration status, leading to delay in the grant of leave to remain. That is what is said to have caused him harm. Unsurprisingly, there is no pleaded allegation that the conduct of lodging a futile appeal, and doing so out of time, itself caused harm to the appellant.

41. Looked at as a matter of substance, it is artificial to view this claim in any other way. As a matter of common sense, this case is about the respondent, in her role as immigration status decision-maker, failing to make prompt and timely decisions about the appellant's immigration status. The respondent was under no duty to exercise or refrain from exercising appeal rights in a particular way, still less to make a status decision within a particular timeframe. Her conduct as a litigant in appeal proceedings was regulated by court rules, but the common law has no role to play in regulating that activity, and as a litigant, the respondent owed no duty of care to the opposing party. Nor did any of the exceptions to the general non-imposition of liability for omissions apply: the respondent did not voluntarily assume responsibility for expediting the implementation of the UT decision, or undertake to make a status decision by a certain date or within a certain period of time. Nor did any of the alleged failures arise in the context of the respondent having acted so as to create or increase a risk of harm.

42. The duty on the respondent was the duty to exercise her discretion to grant leave to remain. It was this benefit that was not conferred promptly and which is alleged to have led to the loss and damage claimed. The lodging of the appeal prolonged the period over which that benefit was not conferred. It is part of the reason for the delay. However, it cannot be viewed as an isolated act that caused harm, and nor was the case pleaded in this way. To do so would be to ignore the purpose of the distinction identified in *Robinson* and *Poole* between a positive act that makes things worse and a failure to confer a benefit, namely to distinguish between regulating the way in which an activity may be conducted and imposing a duty to act upon a person who is not

carrying on any relevant activity. As a matter of pleading and substance, it is clear that what caused harm to the appellant was the delay in complying with the duty to exercise discretion in this case by granting a period of leave to remain. The respondent could have delayed for the same period without taking any steps to issue a late appeal and the same harm as now alleged would no doubt have been caused; and on those facts, as Mr Chirico accepted, the case would have been an omissions case only. The decision to appeal could have been handled differently, and with greater clarity and speed. But the act of issuing the appeal late and in an "unregulated" way cannot realistically be viewed as having caused harm. There was nothing about the act of issuing the appeal itself, that involved, gave rise to or created a source of harm, even on the particular facts of this case.

43. As well as relying on the pleading to conclude that this was an omissions case rather than one involving any positive acts, HHJ Baucher also "stood back" in order to assess what this case was really all about, and in doing so, concluded that, as in *Adiukwu*, this was a claim about a failure to confer on the appellant the benefit of leave to remain status.

44. In *Adiukwu*, A claimed damages for financial loss suffered as a result of the failure of the Secretary of State for the Home Department over a period of 20 months, to issue a "status letter" confirming leave to remain following a successful appeal. The analogy with this case is clear, although the delay in that case was substantially longer and the damages claim appears to have been based on pure economic loss rather than including personal injury. The Scottish Court of Session (Inner House) analysed the duty of care question by reference to *Robinson* and *Poole*, concluding in summary that the case was not one of causing harm to the complainant but of failing to confer a benefit on her (the grant of immigration status), and therefore fell within the established principle that a duty of care did not arise save in very limited exceptions. Those exceptions (where the defender had created the source of the danger or where there had been a voluntary assumption of responsibility) equally did not apply. A was in no worse position following the decision of the First-tier Tribunal as a result of the Home Secretary's actions; the point of her claim was that the Home Secretary did not take action to put her in a better position. This did not begin to amount to creating a source of danger for her, and there was no voluntary assumption of responsibility.

45. Mr Chirico was critical of the reliance below on *Adiukwu,* which was accepted to be persuasive rather than binding. There is nothing in this criticism. The factual similarities with the present case and the detailed analysis undertaken by the court lend it particularly persuasive weight. As already stated, HHJ Baucher analysed the pleaded case, and then stood back to assess what the case was really about. Her conclusion that, like in *Adiukwu*, this was not a case of making things worse, but was one of failing to confer a benefit reflects a proper application of the principles set out in *Poole*. *Adiukwu* is not distinguishable as a pure omissions case for the reasons set out above. To the contrary, I can see no error in the judge's reference to it as an analogous case.

46. HHJ Baucher placed no substantive reliance on the two earlier cases of *Home Office* v *Mohammed and others* [2011] EWCA Civ 351, [2011] 1 WLR 2862 and *W v Home Office* [1997] Imm AR 302 that are criticised by Mr Chirico as outdated and inconsistent with *Poole*; and to the extent that they were referred to by Choudhury J, it was in a passage that Mr Chirico accepts as obiter to his judgment. In these

circumstances, and since we were not fully addressed on the question, I regard it as unnecessary to consider whether and to what extent they can still be relied on as limiting the liability of the respondent (beyond the limits identified in *Poole*).

47. For all these reasons, ground two fails. The respondent's conduct was properly characterised as a failure or series of failures to confer a benefit, rather than as causing harm or making things worse. Since the viability of the appellant's claim that the respondent owed him a duty of care in negligence depended on him establishing that at least some material element of his claim involved the respondent causing him harm, this conclusion means that no duty of care was owed. Standing back, this is a claim about the respondent's failure to act promptly and timeously in circumstances that might have given rise to a public law duty but are not susceptible of giving rise to any common law duty of care being owed.

48. This conclusion makes it unnecessary to consider the litigation exception in ground one, and I prefer to express no view about it.

Ground 3: article 8

49. This ground of appeal contends that the judges below erred in concluding that the interference with the appellant's right to respect for his private life was justified. Mr Chirico contended, in summary, that there was an overall failure to conduct a particularised analysis of the respondent's conduct and its impact on the appellant for the purposes of a lawful article 8 balancing exercise, and in the unusual factual context of this case.

50. Before addressing the arguments advanced by Mr Chirico, it is helpful to record the appellant's pleaded article 8 claim. The pleading was brief. It focussed entirely on the alleged delay:

> "D's delay in implementing C's grant of status amounted to an interference in his right to respect for his private life (including his mental integrity). For the reasons set out above, that interference was unjustified (because arbitrary and therefore disproportionate)".

Damages were claimed in respect of that breach of his article 8 rights pursuant to section 7 of the Human Rights Act 1998.

51. HHJ Baucher rejected this claim, finding that the delay in this case was not substantial and was insufficient to "engage a breach of article 8". In the alternative, she held that any interference with article 8 rights was justified.

52. Choudhury J accepted that article 8 can potentially be engaged in the circumstances of this case. He referred to paragraphs 10 and 17 in *Razgar* (cited above) where Lord Bingham stated:

> "10. …[T]he rights protected by article 8 can be engaged by the foreseeable consequences for health of removal from the United Kingdom pursuant to an immigration decision, even

> where such removal does not violate article 3, if the facts relied upon by the applicant are sufficiently strong.
>
> …
>
> 17. In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8 , these questions are likely to be: (1) will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life? (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8? (3) If so, is such interference in accordance with the law? (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others? (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

53. Whilst the *Razgar* questions relate to the specific context of a proposed removal that is resisted, they can be adapted to deal with the specific conduct and interference in a particular case, providing a structured basis for analysing an article 8 claim. Here, Choudhury J held that the conduct said to give rise to the interference is the five month delay in granting immigration status; and the interference is the impact of the delay on the appellant's mental health which engaged article 8. Mr Cohen did not seek to go behind these conclusions. In particular, he accepted that article 8 is potentially engaged in answer to question 1, and conceded that the consequences of the interference were of sufficient gravity for question 2 to be satisfied as well. I therefore proceed on the basis of these concessions without considering their correctness or otherwise.

54. Choudhury J concluded that HHJ Baucher failed to distinguish between the conduct which caused an interference and the interference itself. That meant she asked the wrong question (namely, whether the delay was substantial) and failed to ask the correct question (whether the interference was justified). However, he held that her ultimate conclusion, that any interference was justified, was plainly and unarguably correct, as he explained:

> "90. However, the failure to take a structured approach to the analysis would not warrant any interference by the appellate court if it transpires that the ultimate conclusion reached was plainly and unarguably correct. It seems to me that,

notwithstanding the flaws identified above, the Judge's analysis was, as Mr Cohen submits, essentially focused on the question of justification and whether the effect of delay amounted to a proportionate means of achieving a legitimate aim. That question was considered by the Judge, albeit very briefly, in the penultimate paragraph of the Judgment, which provides:

"119. Even if I am wrong I am satisfied, in any event that any interference would be justified. There is important public interest in immigration control, the deportation of offenders and parties being able to seek permission to appeal so at (sic) to engage Article 8(2)."

91. This is a decision in the alternative to what has gone before; in other words, if the Judge was wrong that there is no engagement or interference with Article 8 rights, the Judge considered whether that interference was justified. Having determined that the delay of five months was "a short period", the Judge's conclusion that the interference was justified "so as to engage Article 8(2)", amounted to a truncated and somewhat infelicitous way of stating that the delay and its consequential effects amounted to a proportionate means of achieving the legitimate aim of having effective immigration control systems with rights of appeal for both parties. In any lawful system of immigration control, an adverse decision or an appeal against a positive decision, would be likely to result in anxiety and stress for affected individuals, and delays in the relevant processes would be likely to add to that stress. However, delays are an occasional unavoidable feature of any system dependent on individual decision-making. The Judge was entitled to conclude that the effect of delay, which was not substantial or serious, was not disproportionate.

92. Mr Chirico submits that the conclusion on justification was inadequate because it is based on "generalities" (namely the important public interest in the deportation of offenders) rather than on the evidence that the attempts to deport were considered by the Respondent's own chief decision-maker as "futile, unlawful, and waste of tax payer's money". I do not accept that submission. Having a system of immigration controls in place (including the deportation of offenders) with appeal rights for both parties is undoubtedly a legitimate aim. The fact that the aim is expressed in high-level and general terms is neither surprising nor unlawful. Furthermore, the pleaded case on Article 8 merely complains that the interference was "unjustified (because arbitrary and disproportionate)"; it makes no reference expressly to Mr Wells' views as giving rise to arbitrariness or disproportionality. Indeed, given that the principal complaint was, as the Judge found, about delay, it is reasonable to infer

> that it was that factor (i.e. delay) that was complained about as being arbitrary and disproportionate. The Judge's clear conclusion was that the delay was relatively short, and, it may be inferred, that delay and/or its effect was not disproportionate. Furthermore, given that Mr Wells' email resulted in the withdrawal of the appeal within a matter of days of the email being sent, it can hardly be said that the content of that email contributed significantly to the allegedly disproportionate delay.
>
> 93. Mr Chirico's final complaint is that by stating that Article 8(2) was not engaged, the Judge asked herself the wrong question. There is nothing in this point: the Judge clearly intended to state that the interference was justified within the meaning of Article 8(2). The infelicitous reference to the language of "engagement" does not render that conclusion incorrect."

55. In developing this ground of appeal, Mr Chirico made clear his acceptance that there is a legitimate aim in preventing disorder and crime and in protecting the economic interests of the United Kingdom and that, for present purposes at least, having a system of immigration controls with rights of appeal for both parties is a means which is capable of furthering that aim. He also accepts that at the level of generality, delays are an occasional, unavoidable feature of any system dependent on individual decision making and that in any lawful system of immigration control, an adverse decision or an appeal against a positive decision would be likely to result in anxiety and stress for affected individuals. These general observations form part of the background against which the proportionality of an individual interference may be assessed.

56. However he submitted that they do not begin to answer the question which must be answered in this case, namely whether the specific interference with the appellant's rights is a proportionate means of achieving the legitimate aim pursued. In order to answer that question it is necessary, he submitted, to have regard to the degree of interference in this particular case and to identify the weight to be attached to the public interest in this particular case. Mr Chirico submitted that Choudhury J did neither: this was not a mere complaint about anxiety or stress, but psychiatric harm which contributed to a deterioration in the appellant's mental health sufficient to require his detention in a psychiatric hospital. Further, in terms of the weight to be attached to the legitimate aim in this particular case, particular regard should have been paid to the known urgency about the appellant's case, and the risk to his mental health of delay; the respondent's own assessment of the merits of the appeal; and whether the five month delay was justified. This resulted in an overall failure to conduct an individualised analysis of the proportionality of the interference, having regard to the aims in this case and the impact on the appellant.

57. The respondent's concession that questions 1 and 2 of *Razgar* are satisfied, and there being no dispute that question 3 is satisfied, means that the focus is on questions 4 and 5.

58. In most cases the interference relied on is a positive act by the state: a removal or deportation decision, detention or some other similar act. Here, the interference flows

from inaction by the state. I do not suggest that inaction cannot amount to an interference, but it is less obvious how the *Razgar* questions 4 and 5 are to be analysed in the context of inaction or delay because delay (culpable or otherwise) can never have a legitimate aim or in itself be justified. I therefore have some sympathy with HHJ Baucher's view that the *Razgar* questions did not need to be "determined in that format for the purpose of this cause of action". On one view it might be thought that in answering questions 4 and 5 in a case of delay, a broader judgment is required.

59. First, in a case alleging delay, it is necessary to identify the period of culpable delay. Reasonable, robust decision-making takes time and delay (in the sense of lapse of time) is an unavoidable feature of any system dependent on individual decision-making. Hindsight is not likely to be a reliable basis on which to determine what is reasonable in a particular case; and I reject Mr Chirico's argument that the period of nine days taken from the point of withdrawing the appeal to the date of the decision to afford five years' leave to remain, is a reliable yardstick against which to assess what was a reasonable time for an immigration status decision in this case. Apart from anything else, the nine day period inevitably built on what had been happening in the period before that. Nor is it necessarily the case that exceeding a time limit of, say, 28 days for lodging an appeal, means that any additional time taken inevitably constitutes culpable delay. There may be good reason for additional time being necessary, as the power to extend time in an appropriate case makes clear. Biometric residence permit applications also take time, as demonstrated by what happened in this case. Thus although the appellant relies on the whole five month period as a period of what is in effect culpable delay, the respondent contends that anything up to six months is well within the time reasonably taken for decision-making of this kind, and there was no culpable delay at all.

60. Secondly, since any administrative system of decision-making takes time and can involve undesirable lapses of time, there may come a point where the lapse is so significant having regard to its length, seriousness and culpability and the gravity of its consequences in the particular case as to be regarded as an involving a lack of respect for the individual's private life rights. Thus it is necessary to weigh the culpability of the delay and the severity of its consequence to determine whether the operation of the administrative system in a particular case remains proportionate to the public aims of such a system, or has reached the threshold of being disproportionate.

61. This broader approach finds some support in *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406, [2004] 2 WLR 603 where this court reviewed the Strasbourg authorities dealing with maladministration as a breach of article 8. It held that the failure by a public body, in breach of duty, to provide an individual with a benefit or advantage to which he or she is entitled under public law is capable of breaching the individual's human rights. It will constitute an actual breach of article 8 if it amounts to a lack of respect for private and family life because of an element of culpability by the public body. A*nufrijeva* confirms that culpable delay in the administrative processes necessary to determine and to give effect to an article 8 right, as well as outright failure to provide a benefit, is capable of infringing article 8 where substantial prejudice has been caused to the applicant. In cases involving custody of children, procedural delay has been held to amount to a breach of article 8 because of the prejudice such delay can have on the ultimate decision—thus in *H v United*

Kingdom (1987) 10 EHRR 95 (at paragraph 89) the court held article 8 was infringed by delay in the conduct of access and adoption proceedings because the proceedings "lay within an area in which procedural delay may lead to a de facto determination of the matter at issue", which was precisely what had occurred. This court also referred to the fact that the Strasbourg court had rightly emphasised the need to have regard to resources when considering the obligations imposed on a state by article 8: the demands on resources would be significantly increased if states were to be faced with claims for breaches of article 8 simply on the ground of administrative delays.

62. At paragraph 48, this court said that in considering whether there has been a breach of article 8:

> "it is necessary to have regard both to the extent of the culpability of the failure to act and to the severity of the consequence. Clearly, where one is considering whether there has been a lack of respect for article 8 rights, the more glaring the deficiency in the behaviour of the public authority, the easier it will be to establish the necessary want of respect."

63. Alternatively, and adapting the *Razgar* questions to suit the particular circumstances before the court, both Mr Chirico and Mr Cohen agree that the question is not whether the period of culpable delay has a legitimate aim and is justified. Rather, the immigration decision-making system has the legitimate aims identified above and requires a process to be followed that involves allowing decision-makers the time to make robust immigration decisions, including where appropriate taking decisions about whether to appeal. The question in those circumstances is whether when the system allows or leads to delay, the delay is serious enough in context to be viewed as culpable and has a sufficiently grave effect on the individual's private or family rights to breach article 8.

64. Adopting either approach here, on the findings of the judges below, and treating the whole period of five months as the delay period, the period was found by HHJ Baucher to be relatively short. It involved no breach of legal duty, and there was no finding of any intention to cause delay, nor was any separate element of culpability identified.

65. As for the impact of the delay on the appellant's mental health, the parties agreed that the delay was a significant aggravating factor that rendered his schizophrenic relapse more severe and longer in duration. However, this agreed description afforded no means of assessing the quality of the aggravation, or its severity in the context of the appellant's already bad mental health. On the contrary, Professor Katona's evidence was that even before the UT hearing at which the appellant's appeal was allowed, the appellant was on a downward spiral: he was not complying with his medication regime, his behaviour was increasingly irritable and aggressive, with persecutory ideas, and he had resumed heavy drinking and illicit drug use. This together with the stress of the impending UT hearing triggered a deterioration in his mental health which became more marked after the UT decision, and as early as January 2016 (well before the impugned delay period) had become very marked. There was no evidence about (and no means of assessing) how and in what way his symptoms were more severe, or for how much longer he experienced them, as a consequence of the delay. In these circumstances, the limited material available simply did not begin to justify a

finding that the delay had a substantial or serious impact on the appellant's mental health or caused the appellant substantial prejudice. On the contrary, the judges below were entitled to conclude, that the effect of the delay (which was neither substantial nor serious) on the appellant's already bad mental health, was not disproportionate.

66. I do not accept Mr Chirico's criticism that the conclusion on justification failed to balance the degree of interference in the particular case against the weight to be attached to the public interest in this particular case. Although neither judge expressed themselves in quite the same way as I have done, the findings made and conclusions reached reflect a judgment made about proportionality on an individualised basis by reference to the particular circumstances of this case. First, there can be no doubt that Choudhury J recognised that the *effect* of the delay, in other words, the consequences for the appellant's mental health, was always part of his case under article 8. That was his express conclusion at paragraph 89, and there is nothing to suggest that he overlooked it when conducting the proportionality exercise in the context of a recognition that delay is an unavoidable feature of individual decision-making and can cause stress and anxiety. Further, as I have explained, the actual impact of the delay on the appellant was agreed in the sense that it contributed to an already markedly bad mental health state that involved a relapse and hospitalisation, but was otherwise incapable of any qualitative assessment on the limited material available. There can be no doubt that the judges below were fully cognizant of the appellant's undoubted vulnerabilities and the agreed medical position. However, there was, as a matter of fact, no material to justify a conclusion that the delay had a serious or substantial impact on the appellant's mental health. For the reasons already given, there was nothing perverse in this conclusion. Secondly, the pleaded case on article 8 complained that the interference was "unjustified (because arbitrary and disproportionate)". In other words, the impact of the delay, its effect on the appellant, was arbitrary and disproportionate. Again, even in the context of a vulnerable refugee, immigration status decisions take time and can involve delay. The respondent could have acted with greater speed and clarity, but the lapse of time in context, was not substantial or serious. Nor was there any other feature that supported a conclusion that it was culpable. The pleading made no reference to the respondent's internally expressed views about the merits of the aborted appeal. But even if it had, Mr Wells' email setting out his view of the merits of the appeal resulted in the withdrawal of the appeal within a matter of days of the email being sent, and it is difficult to see how the content of that email could arguably have contributed significantly to the seriousness or culpability of the delay.

67. For these reasons, I agree with Choudhury J that the judge's ultimate conclusion that there was no breach of article 8 was one she was entitled to reach on the material placed before her, and reflected no error. Choudhury J's own analysis also reflected a proper approach to the balancing exercise required by article 8. His conclusion that there was no breach of article 8 involved no error. This ground of appeal therefore also fails.

Andrews LJ:

68. Had this appeal turned on Ground 1, I would have held that the litigation exception ceased to apply as soon as the prescribed time for seeking permission to appeal from this Court elapsed. From then onwards, the appellant and respondent were no longer parties to litigation. To all intents and purposes the litigation had been resolved, and

the appellant and his legal advisers were entitled to treat the Upper Tribunal's decision as final. I cannot see how it can be possible for the unsuccessful party to seek permission to appeal two months after the prescribed time limit for doing so, and then use that application as justification for re-characterising the relationship between the parties with retrospective effect.

69. However, nothing turns on this because, having had the benefit of seeing my Lady, Lady Justice Simler's judgment in draft, I agree with everything she says on Grounds 2 and 3. Ground 1 therefore does not arise.

Underhill LJ:

70. I agree with both judgments.