



OUTER HOUSE, COURT OF SESSION

[2022] CSOH 1

P1094/20

OPINION (no 2) OF LORD MALCOLM

In the petition of

OA

Petitioner

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Pursuer: A. Caskie advocate; Drummond Miller LLP
Defender: C. Pirie advocate; Office of the Advocate General**

7 January 2022

[1] The petitioner was successful in a judicial review brought on behalf of a young adopted child who had applied under the EU Settlement Scheme for permission to join him in family in the UK. The full circumstances are set out in my earlier opinion, see [2021] CSOH 80. Reduction was sought of a determination of the First-tier Tribunal (FtT) that there was no right of appeal against a decision of the Secretary of State for the Home Department refusing the application. The Secretary of State did not enter appearance. While there were unusual features to the case, the determination was quashed on only one ground, namely that the FtT either failed to engage with the grounds of appeal or provided inadequate

reasoning for its decision, see paragraph 17 of the opinion. The matter was remitted for a redetermination.

[2] Having been successful, the petitioner now moves for an award of expenses against the Secretary of State. This was opposed on the basis that the Secretary of State did not resist the petition and was not responsible for the circumstances leading to the need for court proceedings. On the basis of recent Court of Appeal authority I was invited to postpone a decision until the overall outcome of the underlying application for permission for the child to come to the UK is resolved.

The submissions

[3] For the petitioner Mr Caskie relied on the general rule that expenses follow success. It was the refusal of the application by the Secretary of State which triggered the appeal to the FtT. The court proceedings are a separate process and expenses should be resolved now in the usual manner. Reference was made to awards against interested parties in appeals against planning decisions. A new application has been made on behalf of the child so there may never be a decision on the first claim. In any event the procedures from now on could be lengthy. While it was accepted that the child is legally aided, practitioners in this important area of work rely on the higher level of recovery if an award is made.

[4] For the Secretary of State Mr Pirie submitted that, given that the petition had not been opposed by the Secretary of State, the successful and unsuccessful parties for the purposes of the general rule on expenses could not be ascertained until the underlying application was resolved. He drew attention to the Court of Appeal decisions in *R (Faqiri) v Upper Tribunal* [2019] 1 WLR 4497 and *JH (Palestinian Territories) v Upper Tribunal* [2021] 1 WLR 455. However, unlike the procedure adopted in those cases, he was not asking the

court to transfer responsibility for the decision on the court expenses to the tribunal, but rather to treat the current application as premature.

[5] The Secretary of State's decision to refuse the application had been made on the basis of the relevant Immigration Rules. There had been no suggestion that, on its own terms, that was an erroneous decision. An appeal was sifted out by the FtT in a rule 22 jurisdictional decision. The Secretary of State did not participate in those proceedings; indeed she was not informed of them. She could not be held responsible for the failure of the FtT to engage with the grounds of appeal and give adequate reasons for its decision, nor for the circumstances which required the petitioner to go to court.

[6] As to the Secretary of State's non-appearance in the petition process, it was explained that an administrative oversight meant that the Secretary of State's mind was never applied to whether answers should be lodged. Nevertheless the fact remains that the petition was not resisted and the original decision to refuse the child's settlement application still stands. The court has made no decision as to whether the tribunal has jurisdiction, nor as to whether the child can come to the UK. In these circumstances it would not be appropriate to make an award of expenses against the Secretary of State when, for all yet seen, the successful petition might be no more than a pyrrhic victory.

[7] In support of the submission that the decision on expenses should be reserved until events unfold counsel made reference to various passages in the Court of Appeal decisions mentioned earlier and also to *R (Gourlay) v Parole Board* [2020] UKSC 50. In respect of a UK wide scheme it would be preferable if a common approach was taken on both sides of the border.

[8] In a short reply Mr Caskie submitted that but for the administrative oversight it is likely that the Secretary of State would have recognised the defect in the FtT's decision and

conceded the petition with expenses. Scottish procedure recognised staged awards. The petitioner had won this particular battle – there is no need to await the final outcome of the war which could be a long way off.

R (Faqiri)

[9] *R (Faqiri)* concerned a successful unopposed application for judicial review of a refusal of permission to appeal to the Upper Tribunal (UT). A judge ordered a redetermination with the court costs to be treated as costs of the appeal before the UT. The claimant appealed seeking an award of costs against the UT, whom failing the Secretary of State. The Secretary of State cross-appealed on the basis that there should be no order for costs.

[10] The leading judgment was delivered by Hickinbottom LJ. Much of it addresses the court's normal practice of not awarding expenses against an inferior court or tribunal which has not participated in the proceedings – an issue which does not arise in the present case. Of more interest is the treatment of the submission that the judge should have made a stand-alone costs order against the Secretary of State on the basis that he was the claimant's true opponent. The Secretary of State agreed that the expenses of the court proceedings should have been dealt with on a separate and discrete basis. However, having taken no active part, and although interested in the outcome, he could not be described as an unsuccessful party. He did not cause the claimant to incur the costs of the judicial review. It was submitted that it followed that there was no principled basis for even a contingent liability in costs.

[11] In dismissing both the appeal and the cross appeal the Court of Appeal decided that the judge's order was legitimate and lawful. The claimant was seeking to vindicate a right

to asylum which the Secretary of State, his true protagonist, denied and still denies. The court application could not be viewed in isolation. It was part of the attempt to appeal against the Secretary of State's decision. Even though the proceedings were uncontested there was a sufficient operative causative link between the costs incurred and the Secretary of State's conduct. However costs would only have to be paid if the claimant was ultimately successful. (It can be noted that under the UT Rules expenses could be awarded against the Secretary of State only in limited circumstances, for example where there was unreasonable conduct.)

JH (Palestinian Territories)

[12] In *JH (Palestinian Territories)* a claimant was refused asylum by the FtT but was granted leave to remain on humanitarian protection grounds. Both parties were given limited permissions to appeal the respective adverse decisions. An UT judge refused the claimant's application to allow extended grounds of appeal. The claimant raised judicial review proceedings. In the absence of any request from the UT or the Secretary of State for a hearing or a transfer to the UT, a judge of the Administrative Court quashed the decision and remitted for a redetermination. Since neither the Secretary of State nor the UT had entered appearance, and there was no suggestion of unreasonable conduct, the order was silent as to costs. Another judge refused the claimant's application to vary the order regarding costs. The claimant appealed on the basis that Secretary of State should pay his costs. The Secretary of State cross-appealed seeking an order that they be treated as costs in the appeal before the UT. In the meantime the underlying dispute was resolved by the parties who withdrew their respective appeals against the FtT's decision.

[13] The leading judgment was given by Macur LJ. As to the UT having responsibility for an order concerning the court costs, the view was taken that jurisdictional issues meant that this could only be achieved by a transfer of the judicial review to the UT in respect of the application for costs. This would import the court costs regime into the UT which would allow it to deal with the matter unrestricted by its own rules.

[14] It was observed that winning a judicial review is often something of a pyrrhic victory for the claimant. Granting a judicial review is not in itself a principled reason to award costs to the claimant. Usually the successful and unsuccessful parties cannot be identified at that stage. Ultimate success in the underlying claim should be a prerequisite for an award of costs. Unless the case is one where an immediate decision is warranted the proceedings should be transferred to the UT for this purpose. In response to a plea, which was echoed here by Mr Caskie, to support the sustainability of publicly funded litigation concerning fundamental rights, the court observed that litigants in receipt of legal aid should be treated no differently from privately funded parties.

[15] However, given that the underlying appeals to the UT had been resolved extra-judicially, it was necessary for the court to deal with the costs itself, and this on the basis of how things stood after the FtT's determination. Though the claimant had been granted leave to remain on humanitarian protection grounds, this was being challenged by the Secretary of State. In these circumstances it was reasonable for him to contest the refusal of his asylum claim. Once the Secretary of State withdrew her appeal he no longer required to pursue this. The Secretary of State could have done this earlier in which case the judicial review would not have been necessary. In these circumstances the claimant should be regarded as the successful party and receive an award against the Secretary of State.

[16] In a short concurring judgment Bean LJ agreed that in cases of this kind there should be a transfer to the UT to allow the court costs to be assessed after the overall outcome is known. As for the case before the court, in substance the claimant was the winner and the Secretary of State should pay his costs.

Analysis

[17] The rationale for the general rule that expenses follow success is that they have been caused by the conduct of the party ordered to pay. The essence of the opposition to the motion is that, as yet, successful and unsuccessful parties cannot be identified. For the petitioner it is said that there is no doubt that his application for judicial review has been granted and that the trigger for all of this was the Secretary of State's refusal of the child's application.

[18] Unlike an ordinary action, a petition does not necessarily involve person A seeking to vindicate a right against person B. Rather it concerns a request to the court to grant a discretionary order. This applies equally to an application for judicial review which is an equitable remedy at the gift or withholding of the court. Consistently with this, normally a petition will crave expenses from anyone who unsuccessfully resists it, though I note that this petition seeks such order as to expenses as seems just and reasonable in the circumstances. In short, success in a petition, whether for judicial review or otherwise, where there may not be an easily identifiable unsuccessful party, will not always create a strong prima facie case for an award of expenses. Everything will depend on the particular facts and circumstances.

[19] It follows that if a successful petitioner asks for an award of expenses, it still requires to be justified. That may not be difficult if the proposed payer has opposed the petition, or if

by his conduct has created the need for it, especially if he has acted unreasonably. In immigration judicial reviews it is normal for the Secretary of State to be involved as a contradicting party seeking to uphold the tribunal decision under challenge. Barring particular circumstances, I do not envisage any difficulty in awarding expenses to a successful petitioner in such a case. In particular the court would not delay the matter pending the eventual resolution of the underlying claim. I can understand that any such general practice might threaten the financial viability of this kind of work for those representing claimants in immigration and asylum cases.

[20] If a discrete part of court proceedings can be identified, it is common practice to deal with its expenses there and then; for example in respect of an amendment procedure, an interim application, a procedure roll debate or a preliminary proof. Delay can cause problems and uncertainties, perhaps in recalling the precise circumstances, and in the final outcome the reserved issue might be overlooked. Thus judges will usually prefer not to reserve expenses if a sensible decision can be made at the time. Reference can be made to the judgment of Sheriff Sir Alan G Walker QC in *Williamson v John Williams (Wishaw) Ltd* 1971 SLT (Sh Ct) 2 and to his plea in the final paragraph that the expenses of each chapter of a case be dealt with at the time. He expressed the “strongly held opinion” that expenses should “never be reserved unless the court intends that they should be governed by the general finding at the conclusion.” If that is so in respect of a chapter of a case, how much more so at the end of the entire proceedings.

[21] The explanation for the practice approved in *JH (Palestinian Territories)* was that until the tribunal proceedings are resolved it is not possible to identify the successful and unsuccessful parties for the purpose of allocating responsibility for the court expenses. This approach was no doubt influenced by the terms of the relevant civil procedure rule applying

south of the border (CPR r 44.2 (2) (a)). The court proceeded on the view that the judicial review is but a part of the progress of the claimant's appeal against the original decision of the Secretary of State. I would be concerned if this court were to adopt a practice of reserving, or transferring, its decision on the expenses of otherwise completed judicial reviews in cases of this kind. This would prolong the process for an indefinite and often extended period. Furthermore, as illustrated by *JH (Palestinian Territories)*, events might intervene with the consequence that there is no ultimate outcome. I was told by counsel that a fresh application having been made, there might never be a decision on the remit by the court to the FtT for a redetermination. And in most cases it will be relatively easy to identify the judicial challenge as a separate and distinct process capable of closure when the merits are determined.

[22] In the present case, if there is a redetermination and it remains adverse to the child seeking leave to come to the UK to join his adopted family, I would not describe the success in this judicial review as a pyrrhic victory. There is a strong public and private interest in such important decisions being made in a lawful manner. I say private since it will be easier for the disappointed party to accept a result which is properly reasoned and not otherwise tainted by illegality.

[23] The particular feature common to the present case and to those before the Court of Appeal is that the challenges to the tribunals' decisions were unopposed. At least in this jurisdiction that is an unusual feature which was explained by reference to an administrative oversight. It makes it difficult to identify an unsuccessful party in the judicial review, but I do not consider that this necessarily excludes an award in favour of the petitioner, nor does it require attention to turn to the outcome of the underlying matter which triggered the

decision quashed by the court. As mentioned earlier the general rule is founded on the attribution of a causal link.

[24] Especially in the somewhat unusual circumstances of a challenge to a rule 22 jurisdictional sifting decision in a process of which the Secretary of State was unaware, I could understand a submission that no award should be made against the Secretary of State. However that was not her position. It was accepted that should an appeal against her decision be successful she should pay the judicial review expenses. This can be rationalised on the basis that she is the petitioner's true opponent and the court proceedings were a necessary part of prosecuting the appeal against the initial refusal. Thus even at this stage the original refusal by the Secretary of State plays a contributory role in the need for the judicial challenge of the FtT's decision – or to use Hickinbottom LJ's phrase, there is "a sufficient operative causal link".

[25] The competing propositions were (a) making an order in favour of the petitioner now, or (b) reserving the position meantime. (It can be recalled that, I think rightly, I have not been asked to transfer the matter to the UT or otherwise delegate decision-making on this motion to it.) I do not read Hickinbottom LJ's judgment in *R (Faqiri)* as going beyond acceptance of the judge's order as falling within the scope of those lawfully open to him. However I recognise that the court in *JH (Palestinian Territories)* does appear to be more prescriptive in the sense of saying what should happen, as opposed to what can happen.

[26] In matters of expenses the court enjoys a wide discretion, although of course any order has to be capable of reasoned justification. If a fair and reasonable order can be made now, for the reasons given earlier I favour that course. The petitioner was successful in the application for judicial review. If there had been no administrative oversight and the Secretary of State had entered appearance it is likely that the current issue would not have

arisen. Nevertheless the fact is that the petition was not opposed, and this is a factor in favour of making no order, or only a modified order as to expenses. And where the Secretary of State played no part in the decision complained of, again this militates against the petitioner's motion. However the acceptance of even a contingent liability necessarily implies at least a material contribution to the need for the court proceedings. The eventual overall outcome cannot be predicted with any confidence, and as already mentioned, so far as the first application is concerned there may never be a formal resolution.

Decision

[27] In all the circumstances I consider that an award of the petitioner's expenses against the Secretary of State modified to 50 per cent thereof would be fair and reasonable. I shall pronounce an interlocutor to that effect. For the avoidance of doubt, this is based on the particular and far from usual circumstances of this case and is not intended as general guidance.