In the Upper Tribunal (Immigration and Asylum Chamber)

R (on the application of Khan and Others) v Secretary of State for the Home Department (common costs) IJR [2015] UKUT 00684 (IAC)

Heard at
Field House

2 October 2015

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Before

MR C M G OCKELTON, VICE PRESIDENT

Between

The Queen on the Application of

WALEED KHAN - 1st Applicant
BILAL IFTIKHAR - 2nd Applicant
GAURAV JAKHU – 3rd Applicant
NAGINA ROOHI – 4th Applicant
NILABEN PATEL – 5th Applicant
BILAWAL AFRIDI – 6th Applicant
MUHAMMAD BINYAMEEN – 7th Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Representation:

No appearance by the 1st Applicant.
Mr G Davidson, instructed by Adam Bernard Solicitors, appeared on behalf of the 2nd Applicant.
Mr Swain, instructed by Eagle Solicitors, appeared on behalf of the 3rd Applicant.

Mr M Biggs, instructed by Mayfair Solicitors, appeared on behalf of the 4th and 5th Applicant.
Mr Pennington-Benton, instructed by Farani Javid Taylor Solicitors, appeared on behalf of the 6th Applicant.
Mr Z Malik, instructed by BLC Solicitors, appeared on behalf of the 7th Applicant.

Mr W Hansen, instructed by the Government Legal Department appeared on behalf of the Respondent.

1. *The Tribunal has jurisdiction to make a Common Costs Order in appropriate cases.*

2. *That jurisdiction will, however, be exercised only on the basis of establishing facts demonstrating the total amount of costs in question and the number of cases to which that total is attributable.*

3. *If ETS cases are pursued to an oral hearing at which there is no prospect of success, the Tribunal will consider whether the case should be treated as an exception to the Mount Cook principles.*

JUDGMENT ON COMMON COSTS

1. The "ETS cases" arise from decisions refusing to extend, or effectively terminating, a large number of individuals' leave to remain in the United Kingdom. Following a broadcast investigation by the television programme "Panorama" and internal review by Educational Testing Services itself, the conclusion was reached that many English language certificates issued by ETS had been obtained in a fraudulent manner, because thousands of tests had been undertaken not by the person named on the certificate but by somebody else. The effect of this discovery, and the Secretary of State's action on it, varied between individuals. Some had an in-country right of appeal against the decision about their leave; others had or have a right of appeal exercisable only from outside the United Kingdom. Efforts by substantial numbers of those in the latter class to maintain judicial review proceedings have been met by the Secretary of State's argument that permission should be refused because there is an adequate alternative remedy in the form of the out-of-country appeal, prescribed by Parliament in their case. The Secretary of State's argument to that effect has been accepted; and it is clear that, for those who have an out-of-country right of appeal, judicial review will not lie save in a small minority of cases that are in some way exceptional. I do not need to give any more detail about the background, which is set out in detail in judgments by Beatson LJ in R (Mehmood and Ali) v SSHD [2015] EWCA Civ 744 and R (Sood) v SSHD [2015] EWCA Civ 831.

2. The claims for judicial review fall for determination by this Tribunal in those cases covered by the Lord Chief Justice's direction under s.18(6) of the Tribunals, Courts and Enforcement Act 2007, and otherwise by the High Court. Many of the claims were stayed awaiting the judgments of the Court of Appeal to which I have referred. When those judgments were both available, the Tribunal's staff began, on

judicial authority, a process of writing to the individual claimants inviting them to say whether, in the light of the authoritative statements of the law now available, they wished to proceed with their claim and, if they did, requiring them to submit amended grounds within a specified timescale, failing which their applications would be automatically struck out. Undaunted by the weight of authority apparently against them, some hundreds of applicants have submitted amended grounds and a sample group has been listed for hearing before the President and myself. The substantive hearing of those cases was on 2 and 5 October, and judgments will follow in due course.

3. A subsidiary matter, raised by the Secretary of State as part of the proceedings on 2 October, was an issue as to costs. That issue was heard and dealt with by myself sitting alone. I gave a short oral decision at the conclusion of the hearing. This judgment constitutes the full written reasons.

4. The issues were presented by Mr Hansen in his skeleton argument on behalf of the Secretary of State, on which he also made oral submissions. His submissions were predicated on the Secretary of State's success in one or more of the individual cases heard on 2 and 5 October; but they are of general application and it is appropriate to reach a general conclusion about them. The Secretary of State applies for an award of costs as common costs. She seeks, as against each unsuccessful applicant for judicial review, an order that, in addition to paying the defendant's costs of the Acknowledgment of Service attributable to that particular case, each pay an apportioned part of a larger sum. That sum is the total amount of Counsel's costs incurred by the Secretary of State in taking advice on the ETS cases as a whole, so enabling her to formulate a common response to the large number of individual claims. The Secretary of State proposes the calculation of the common costs on the following basis. She has spent £29,745.80 on Counsel's fees. The "total number of ETS claims" is 2,539. She therefore seeks an additional £11.72 against each claimant, that being the former sum divided by the latter. The claim is made on the basis that that calculation provides a fair attribution of the total cost to each individual applicant.

5. Mr Hansen referred me briefly to the power of the Upper Tribunal in relation to costs, deriving primarily from s.29 of the 2007 Act, and, perhaps, to an extent augmented or supplemented by the powers in s.25. He reminded me that an order for common costs may be made in relation to individual claims that have not been consolidated (Bairstow v Queens Moat Houses plc [Nelson J, 14 April 2000]). He cited the observation of Smith LJ in Russell Young & Co v Kevin Brown & Others [2007] EWCA Civ 43 at 31:

> "There is nothing fundamentally different or special about generic costs; they are simply costs that have been shared for the sensible purpose of keeping the costs of each claim down. I could see no merit in the suggestion that some special rule applies to the generic element of a bill of costs."

6. Mr Hansen also referred me to the discussion of the calculation of the generic costs by Jay J in Haynes v Department for Business Innovation and Skills [2014] EWHC 643.

7. In my judgment, there is no serious room for doubt that the Tribunal has jurisdiction to make an award of generic or common costs in appropriate cases. What precisely might be the appropriate cases is rather more difficult to determine. It is well-known that immigration litigation may feature groups of large numbers of cases which may be factually similar and which may justify legally identical responses. None of the cases particularly cited to me was of very much help in determining whether a common costs order is appropriate when, as in the present cases, a large number of claimants, not for the most part acting together, bring claims against a single defendant over a period of time, and that defendant, over that period, incurs costs in taking, and then refining, a general line of defence in the light of both the increasing number of cases and the developing jurisprudence as some of them come to Court. In Young v Brown the order sought was in favour of successful claimants with cases more or less identical on their facts, and prepared together, against a single defendant. In Haynes v Department of Business, the claimant had prepared ten claims against possible defendants. The claim against one defendant was settled for about a tenth of the total sum sought, and the other nine claims were not served. The question was the extent of the costs liability of the single defendant and the basis of its calculation. Bairstow v Queens Moat did concern separate unsuccessful claimants against a single defendant, but part of the expressed reason that the judge gave for considering that a common costs order was appropriate was that each of the claimants had known that by pursuing his unmeritorious claim he was assisting the other claimants in doing the same thing.

8. If I may put it in this way, the elements of appropriate commonalty may differ between claimants and defendants. Accepting as of course I do that there may need to be no formal link between individual cases in order to make a common costs order appropriate or available, nevertheless the basis of approximate arithmetical calculation, as endorsed in Haynes v Department of Business and urged upon me in the present case, has to be a factual starting point indicating that the total sum in question is one that should be shared. It was, after all, a similar issue which led to Jay J's allowing the appeal in that case. The Master had failed properly to distinguish between those costs which the claimant was entitled to recover in full against the single defendant, and those which were properly to be shared. Although the precise issue, which was the distinction between "specific" and "non-specific" costs, is not precisely that which arises in the present cases, the judgment, which reviews a number of other cases, makes it clear that considerations of this sort cannot be properly be ignored.

9. I should add that none of the cases to which I had been referred sounded in public law: (Haynes v Department of Business was a private law claim); and in none of them does there appear to have been any real doubt about the amount available in principle for division, or the number of parties or potential parties amongst which it might be divided.

10. The present cases are very different; and although I appreciate that in the limited time available to Mr Hansen he could not make a complete survey of the law and practice in relation to common costs, nevertheless the authorities he cited are the ones which he chose to support his application. For the purposes of proceedings in

the Tribunal I am content to accept in principle what was said in argument before Nelson J in Bairstow v Queens Moat at [20] that the usual order is that common costs are the responsibility of all unsuccessful parties. That principle must, however, be subject to enquiry as to which costs are common and which parties are to be regarded as the unsuccessful parties in the litigation in question, and must be subject also to any specific extraneous limitation on the amount of costs awarded.

11. I have reached the conclusion that Mr Hansen's application must be refused. There are three primary reasons, which interlink almost inextricably. They are each a consequence of the history of these cases, where over a relatively short but by no means negligible period of time, the number of claimants and applicants increased, the jurisprudence developed, and the costs were incurred.

12. Mr Hansen submits that dividing the total cost incurred in Counsel's fees by the total number of ETS cases is an appropriate way to divide the common costs amongst the unsuccessful parties. Before looking at the calculation in any detail, I must refer to the most important of the relevant extraneous limitations to which I referred above. That is the principle normally cited as the Mount Cook [2003] EWCA Civ 1346 principle, that a defendant or respondent successfully defending an application for permission for judicial review is normally entitled to the costs attributable to considering whether to defend the claim, and entering an Acknowledgment of Service, but not, in the usual case, to any more than that. In the group of cases under consideration, the Secretary of State's position is that permission should be refused; and indeed the vast majority of cases before the Tribunal, including all but one of those being considered at this hearing, await a decision on the application for permission, either on paper or as a result of renewing the application to an oral hearing. As is clearly accepted by Mr Hansen in these circumstances, therefore, the defendant's claimable common costs will be only those which could be attributable to the Acknowledgement of Service.

13. In looking at the proposed calculation, it is perhaps convenient to start with the total cost of Counsel's fees, which is proposed as the numerator (top line) of the fraction. Here at once Mr Hansen is in difficulties. For the costs to be in any sense common, it must be possible to attribute them to all the cases amongst which they are to be divided. Mount Cook means, therefore, that the Acknowledgement of Service in each of the cases must have post-dated the incurring of the whole of that sum, because any work done by Counsel after the presentation of the Acknowledgement of Service in a particular case could not be attributable to that case. In response to a question I asked at the hearing, a certain amount of research was done by those behind Mr Hanson, and it appears that in none of the cases selected for this hearing could it be said that the whole of the costs of £29,745.80 had been incurred before the relevant Acknowledgment of Service. It follows that although there may be costs common to ETS cases or some group of them, it cannot be said that the sum claimed is common to a group of cases of which these cases form part. In general, it does not look as though the Secretary of State is able to identify any appropriate numerator for a specified denominator.

14. Turning then to the denominator (bottom line) of the fraction, this is described, as noted above, as the "total number of ETS claims". I do not know exactly what that

means: Mr Hansen did not say, and I omitted to ask. It is, I think, almost double the number of judicial review claims commenced in the Tribunal. It looks as though the figure must include judicial review claims commenced in the High Court. It may also include cases in which an in-country right of appeal has been exercised: it may even be the total number of the Secretary of State's decisions on what may broadly be called ETS grounds. I assume in the Secretary of State's favour for present purposes that the number is limited to the total number of judicial review claims and applications.

15. The first problem might be said to be that that is not necessarily the number of "unsuccessful parties", because some claims may not be pursued, and some claimants may succeed in their claim. The success of some claimants does not, however, make any difference to the calculation of the amount of the common costs attributable to each claim; and Haynes v Department of Business shows that the process of division may be appropriate even if not all the divisors are litigants.

16. More important, however, is again the question of commonalty. Bearing in mind the terms of the Lord Chief Justice's direction, it is in the highest degree likely that those claims brought in the High Court rather than in the Tribunal were so brought because they include a challenge to a claimant's detention. Certainly it is within my knowledge that a considerable number of those affected by ETS decisions have been detained with a view to their removal. No doubt common advice has been given in respect of them; but it is advice which does not apply at all to those claimants who bring their cases in the Tribunal and do not challenge detention. So here again there must be considerable doubt about what the appropriate figure is. A calculation based on dividing one unknown figure by another unknown figure is not a sound basis for the award of costs.

17. The third difficulty is the application of the indemnity principle, recently examined by this Tribunal in R (Bakhtiyar) v SSHD [2015] UKUT 00519 (IAC). As Mr Biggs pointed out on behalf of two of the applicants in the present hearing, it is not clear whether the Secretary of State has yet obtained substantive costs in any of the cases she has successfully defended. It is true that both Sood and Ali were cases where the refusal of permission was upheld by the Court of Appeal, and Mehmood, though a substantive hearing, was not an ETS case. Nevertheless, general costs (not limited to £11.72) in relation to the defence of ETS cases may have been awarded in these and possibly in other cases. The Secretary of State's present application could only be maintained on the basis that she has not, to date, recovered any of the costs attributable to Counsel's advice towards a common defence in ETS cases.

18. Further, Mr Hansen indicated during the course of the hearing that part of the effect of Counsel's advice in these cases was that case workers had been provided with standard forms for completion in order to produce an Acknowledgement of Service. There is nothing wrong with that in principle, but it must reduce the time that needs to be spent in drafting an Acknowledgment of Service. It may be that if the general advice is to be claimed and paid for separately, more attention would need to be given to the claim of time for the Acknowledgement of Service which, again in my own experience, does not seem to have noticeably reduced despite the production and presumably refinement of the templates. A claim for the costs for

the Acknowledgement of Service can properly include a contribution to general advice which was relevant to it. The cost of such advice comes, broadly speaking, under the same head as the assistance and the price of advisory lawyers: see Bakhtiyar at [36]. It might therefore be assumed that the appropriate cost had already been included in the claim for the costs of the Acknowledgment of Service: it does not very obviously constitute a justifiable addition to them.

19. Mr Hansen's application is, in substance, to amend the claim for costs in each of the cases currently before the Tribunal (and, presumably, an unspecified and as yet unidentified number of other claims) by adding £11.72 to each. The reason for the late application is presumably that the Secretary of State did not previously realise that these costs, said to be nearly £30,000, could be claimed; and the amount is obtained by dividing one figure by another, neither of which are shown to be the correct figure. When it is expressed in those terms, it is of course clear that Mr Hansen's application must fail. An alternative would, as the parties before me recognise, be a detailed assessment of the costs. That I would regard as inappropriate. First, the costs of detailed assessment would be wholly disproportionate to the amount in dispute, which, in an individual case, is £11.72. Secondly, detailed assessment of the common costs would not be possible without a detailed examination not limited to the cases in which such a claim was made, but also encompassing all the cases said to justify the figure given as the denominator, and all the cases said to justify the figure given as the numerator, in each case by reference to the time that particular costs were incurred. I hesitate to describe the task as impossible, but it would certainly be very difficult and time-consuming.

20. So far as the present cases are concerned, therefore, costs will be awarded on a Mount Cook basis in those permission applications (if any) in which the Secretary of State is successful in resisting the application. I anticipate that there will be an application for the costs to be summarily assessed on the basis set out in the Acknowledgement of Service. Such a claim is likely to be regarded as reasonable if it is for a reasonable time at a reasonable rate. Preparation costs can properly be claimed as long as they are properly attributable to the preparation of an Acknowledgement of Service resisting permission, rather than to a complete defence of the claim. If authority for that proposition is needed, it can be readily found in the judgment of Sir Anthony Clarke MR in Davey v Aylesbury Vale District Council [2007] EWCA Civ 1166 at [32]–[33].

21. The cases in which Mr Hansen's application is specifically made are sample cases. Looking at the ETS claims as a whole, the binding authority of the Court of Appeal is applicable to the great majority of the grounds that have been advanced. Further issues may arise from time to time, and the present cases give an opportunity for a newly-raised substantive issue to be decided authoritatively at Tribunal level. In Mount Cook itself at [76] Auld LJ set out at sub-paragraph (5) the exceptions to the restriction on awarding costs to a defendant at this stage of judicial review proceedings. Two of the exceptions are:

> "(a) the hopelessness of the claim;
> (b) the persistence in it by the claimant after having been alerted to facts and/or of the law demonstrating its hopelessness"

22. Applicants to the Tribunal may expect those exceptions to be applied where cases that are hopeless on their merits are renewed to an oral permission hearing.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 5 November 2015