AC-2023-LON-000730 and AC-2022-LON-002714

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2024] EWHC 1374 (Admin)

BETWEEN

THE KING
On the Application of

(1) REFUGEE AND MIGRANT FORUM OF ESSEX AND LONDON ('RAMFEL')
(2) CECILIA ADJEI

Claimants

- and –

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

ORDER

BEFORE THE HONOURABLE MR. JUSTICE CAVANAGH

UPON HEARING from Ms. Harrison K.C. and Ms. Luh for the Claimants and Mr. Malik K.C. for the Defendant on 19 and 20 March 2024 and considering further written submissions provided by the parties on 26 and 27 March 2024

AND UPON READING the documents and evidence filed by the Parties

AND UPON Judgment being handed down on 7 June 2024

AND UPON the Court's order of 7 June 2024 allowing the judicial review on the terms set out in that order

IT IS HEREBY DECLARED THAT:

1. The Defendant's failure to provide a digital document proving the lawful immigration status and attendant legal rights to all those with leave extended under section 3C of the Immigration Act 1971 including the Second Claimant is unlawful because it is Wednesbury unreasonable, for the reasons given in the judgment.

2. In failing to provide the said digital document, the Defendant also acted unlawfully in breach of section 55 of the Borders Citizenship and Immigration Act 2009 and the duty to have due regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.

IT IS HEREBY ORDERED THAT:-

3. The Defendant shall pay the Claimants' reasonable costs of and incidental to these claims, to be subject to detailed assessment if not agreed.

4. Pursuant to CPR r. 44.2(8), the Defendant shall make a payment on account of the First Claimant's costs of £45,000 + VAT within 14 days of the date of this Order.

5. The Second Claimant's legally aided costs shall be subject to detailed assessment.

6. Permission to appeal is refused.

7. The Defendant's application for a stay of Paragraphs 1-2 of this Order until (1) 21 days of the date on which this order is sealed; and (2) if the Defendant files an Appellant's Notice with the Court of Appeal seeking to appeal this order within 21 days referred to above, until the appeal is finally determined, is refused.

John Cavanagh

Dated this 26th day of June 2024

By the Court

Reasons

1. After handing down judgment on 7 June 2024, I invited the parties to provide the Court with written submissions on consequential matters. I received submissions from the Claimants and the Defendant on 21 June 2024. I invited the Claimants to provide further short written submissions, if so advised, on the Defendant's application for permission to appeal and for a stay by 26 June 2024. The Claimants provided those further submissions on [insert date].

2. I have taken into account all of the submissions that have helpfully been provided to me by the parties.

The terms of the declarations

3. The parties were agreed on the terms of the declarations that should be made, in light of my judgment, and I make those declarations in the agreed terms.

Mandatory Order

4. The Second Claimant has applied for an order requiring the Defendant to take all necessary steps to ensure that the Second Claimant is provided with an eVisa as digital proof of her immigration status forthwith. The Defendant opposes this application.

5. The Second Claimant is not currently on section 3C leave. She has limited leave to remain under section 3(1) of the Immigration Act 1971, which will expire on 2 March 2025. At or before that date, assuming that she has by then applied to renew her section 3(1) leave, the Second Claimant will once again qualify automatically for leave to remain under section 3C. The Second Claimant currently has a biometric residence permit, which expires on 31 December 2024. Counsel for the Second Claimant submit that the Defendant should be ordered to provide the Second Claimant with an eVisa now, so as to provide her with comfort and certainty that she will not suffer hardship as a result of an inability instantaneously to prove her immigration status, once she moves back onto section 3C leave. They point out that the Defendant has publicly stated his intention to complete the roll out of eVisas for all categories of those on section 3C leave by the end of 2024 and submit that this means that the Defendant will not therefore be prejudiced by the order sought.

6. I am not prepared to grant the mandatory order sought. The Second Claimant's application is for an order which would have the effect of requiring the Defendant to issue an eVisa to a person who is currently on section 3(1) leave, not section 3C leave. As Mr Malik KC, for the Defendant, points out, there is nothing in the Court's judgment that concerns the issue of digital documents to those who are on section 3(1) leave. It follows that the relief sought by the Second Claimant by way of mandatory order does not flow from the consequences of the judgment that I have handed down. Moreover, the application is premature and may turn out to be unnecessary. Subject to any stay or decision on appeal, the Defendant in any event will be under an

obligation to provide the Second Claimant with an eVisa promptly as soon as she transfers onto section 3C leave in March 2025. There is, therefore, no need to make a mandatory order.

7. In these circumstances, it is not necessary for me to consider or deal with the Defendant's further submission that there is a jurisdictional reason why I should not provide the mandatory order that is sought.

Costs

8. The Claimants apply for their costs from the Defendant. The Defendant submits that the Claimants should not receive the entirety of their costs from the Defendant as the Claimants have only been partially successful. The Defendant submits that it would be just and proportionate and in accordance with the overriding objective for the Claimants to be awarded 60% of their reasonable costs of the claim.

9. I agree with the Claimants that they should be awarded 100% of their reasonable costs. I will give brief reasons for this decision.

10. The general rule, of course, is that the unsuccessful party will be ordered to pay the costs of the successful party: CPR 44.2(2)(a). CPR 44.2(4) and (5) require the Court to have regard to all the circumstances, including inter alia (a) the conduct of all the parties; (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; (c) the conduct of the parties before and during the proceedings; (d) whether it was reasonable for a party to raise, pursue, or contest a particular allegation or issue; and (e) the manner in which a party has pursued or defended its case or a particular allegation or issue.

11. The Claimants have referred me to the helpful case of **R(Johnson) v SSWP** [2019] EWHC 3631 (Admin). It was emphasised that a successful party should not necessarily be deprived of all its costs simply because it did not succeed on all points. It is relevant to consider, in relation to a point that was unsuccessful, whether the point was unreasonably pursued and also whether most if not all of the evidence would have been before the Court in any event.

12. In the present case, the Claimants relied upon four grounds: (1) the **Padfield** ground; (2) the **Wednesbury** ground; (3) the PSED ground; and (4) the section 55 ground. The Claimants were successful on grounds (2) and (4) but were unsuccessful on grounds (1) and (3).

13. Taking ground (1), **Padfield** first, this ground essentially overlapped with the **Wednesbury** ground. Though it is clear that a **Padfield** argument and a **Wednesbury** argument are different things, they are very close cousins, and (to mix a metaphor) they traverse much of the same territory. All of the evidence relating to the **Padfield** ground was also evidence relating to the **Wednesbury** ground. No additional evidence related to the **Padfield** ground alone. The submissions on the evidence were the same for **Padfield** as for **Wednesbury**. Still further, it would have been necessary for the parties to

make submissions on the line of authority relevant to the **Padfield** principles, even if the Claimants had relied only upon **Wednesbury** in the circumstances of this case. Put another way, grounds (1) and (2) came as a package, and it is entirely understandable that those advising the Claimants felt the need to advance their arguments both on the **Padfield** basis and on the **Wednesbury** basis, even though, in the event I found for the Claimants only on the **Wednesbury** ground.

14. It follows that it is just and proportionate, and in accordance with the overriding objective, for the Claimants to recover the costs attributable to the **Padfield** ground.

15. As for Ground (3), PSED, once again, this ground did not require that any additional evidence be placed before the Court. Most, if not all, of the material relied upon by the Claimants and the Defendant in relation to the PSED, including the two documents which the Defendant contended established compliance with the PSED, would have had to form part of the evidence before the Court even if the PSED argument had not been advanced. The Claimants did not act unreasonably in relying upon the PSED ground. They were granted permission in respect of it by Julian Knowles J. The Claimants were partially successful on the PSED ground, in that it was only during oral argument at the hearing that the Defendant accepted for the first time that the PSED was engaged. As Ms Harrison KC and Ms Shu Shin Luh, for the Claimants, submit, this was an important public law concession. The PSED argument took up only a small part of the written and oral submissions.

16. Moreover, as I have said, it is not the case that a party must win on every point in order to recover the entirety of its costs. Standing back, in my judgment it is clear that the Claimants are the winners in these proceedings and in my judgment is it just and proportionate that the order for costs should reflect this.

17. For these reasons, I have decided that there should not be any reduction in the costs award to the Claimants to reflect the fact that they did not succeed with the PSED argument.

Payment on account

18. CPR 44.2(8) states that "where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

19. The Second Claimant is legally-aided, and seeks an order that her legally aided costs should be subject to detailed assessment. There is no objection to this order from the Defendant, and I make it.

20. The First Claimant, however, was not legally aided. It seeks an award of £45,000 + VAT on account of costs. There is no up-to-date schedule of costs to support this request. Rather, the First Claimant relies upon a schedule of costs annexed to a statement by Janet Farrell of Bhatt Murphy, the First Claimant's solicitors which was submitted in support of an application for a cost-

capping order. The sum of £45,000 is slightly more than 50% of the total sum of costs, as estimated at that stage. It does not include the costs of the Second Claimant. I do not know the date of this statement, but it will have been prepared some time ago.

21. The Defendant points out that there is no updated schedule of costs.

22. CPR PD 44.9.5 makes clear that a party who intends to claim costs must prepare a written statement of those costs, showing separately in the form of a schedule the matters that are set out in PD 44.9.5(2). Though, as I have said, the schedule provided to me was provided some time ago, it does comply with the requirements of PD 44.9.5(2) as to content. There is a requirement that the statement be signed by the lawyer who prepared it (PD 44.9.5(3)). This requirement was effectively satisfied by the signature that Ms Farrell will have appended to the witness statement, and the statement of truth.

23. It is true that it would have been helpful for an updated schedule of costs to have been provided, but I think that there is no realistic chance that the costs actually incurred by the First Claimant will be less than the figure set out in the exhibit to Ms Farrell's statement. This was hard-fought litigation, with silks on both sides, a very extensive bundle, and very detailed skeleton arguments. Whatever amount is eventually awarded to the First Claimant on detailed assessment (or upon agreement between the parties) there is no real risk that it will be less than £45,000 plus VAT.

24. Accordingly, in my judgment, it is consistent with the overriding objective and with CPR 44 to make the order sought by the First Claimant.

Permission to appeal

25. The Defendant seeks permission to appeal. I should grant permission if I consider that the appeal would have a real prospect of success or if there is some other compelling reason for the appeal to be heard.

26. Taking those considerations in turn: first, I do not consider that the appeal would have a real prospect of success. I do not repeat the reasons I gave in detail in my judgment for finding in favour of the Claimants in these proceedings, but, for those reasons, I consider that an appeal would not have a real prospect of success.

27. Mr Malik KC submits that, even if the "real prospect of success" threshold is not met, I should still grant permission to appeal, because the issues of law in this case that arise are of general importance. I do not agree that I should grant permission on this basis, for several cumulative reasons. First, it is the Court of Appeal that is best placed, in all but the clearest cases, to decide whether a case raises issues of such importance that they merit an appeal before the Court of Appeal. I do not consider that this is such a clear case of general public importance that I should grant permission to appeal regardless of my view of the merits. It is true that the **Padfield** and **Wednesbury** legal principles are of great importance in the field of public law, but I have sought in my

judgment to identify and apply guidance on those principles which has been laid down by the Court of Appeal in the judgments I refer to. This case involves the application of established principles to particular facts: it does not purport to make new law. The section 55 point is not a point of general public importance, in my view. Second, the Defendant has made clear that, by the end of this year, he intends to do that which the Claimants challenged him for failing to do, namely to provide eVisas to all of those on section 3C leave. Once such a change takes place, the practical matter at issue in these proceedings will become moot. Third, I should add that, contrary to what I infer is suggested in Mr Malik KC's written submission, my reasoning on the **Wednesbury** point was not based solely on the proposition that those who are on section 3C leave should be treated in exactly the same way as those who are on section 3(1) leave to remain.

Stay

28. I decline also to grant a stay pending the outcome of any potential appeal. I have taken account of the guidance of the Court of Appeal in **Department for the Environment, Food and Rural Affairs v Downs** [2009] EWCA Civ 257, at paragraphs 8-9. The Defendant has not put forward good reasons why a stay is necessary. This is not a case in which the Defendant will suffer irremediable harm if no stay is granted. As I have said, the Defendant intends, regardless of the final outcome of these proceedings, to provide eVisas to those with section 3C leave by the end of 2024. I have not made any mandatory orders in these proceedings, and I have not granted permission to appeal.