Neutral Citation Number: [2012] EWCA Civ 1795

Case No: C1/2012/1028

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN's BENCH DIVISION
HIS HONOUR JUDGE STEWART QC
CO126262010

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2013

Before :

LORD JUSTICE MOORE-BICK
LORD JUSTICE ETHERTON
and
LORD JUSTICE JACKSON

- -

Between:

THE QUEEN ON THE APPLICATION OF **(1) IFFAT NAUREEN** **(2) SHEIKH MOHAMMED WASEEM HAYAT**	**Appellants**
- and -	
SALFORD CITY COUNCIL	**Respondent**

- -
- -

Mr. Ian Wise QC and Mr. Stephen Broach (instructed by **Irwin Mitchell Solicitors LLP**) for the **Appellants**
Mr. John Howell QC and Mr. Hilton Harrop-Griffiths (instructed by **Salford City Council**) for the **Respondent**

Hearing date: 13th December 2012

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Judgment

Lord Justice Jackson :

1. This judgment is in five parts, namely:

Part 1. Introduction,

Part 2. The facts,

Part 3. The appeal to the Court of Appeal,

Part 4. The law,

Part 5. Decision

Part 1. Introduction

2. This is an appeal by claimants in judicial review proceedings against the court's refusal to award costs in their favour following settlement. The settlement was an agreement that the claimants would withdraw their claim, because of a change in circumstances.

3. The claimants are failed asylum seekers. The second claimant obtained exceptional leave to remain at a late stage of the proceedings and it was clear the first claimant would also be granted leave to remain. The defendant is the Salford City Council, to which I shall refer as "the council".

4. I shall refer to the Pre-Action Protocol for Judicial Review as "the pre-action protocol".

5. I shall refer to the National Assistance Act 1948 as "the 1948 Act". Section 21 of the 1948 Act provides:

> "(1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing —
>
> (a) residential accommodation for persons who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them; and
>
> (aa) residential accommodation for expectant and nursing mothers who are in need of care and attention which is not otherwise available to them
>
> (1A) A person to whom section 115 of the Immigration and Asylum Act 1999 (exclusion from benefits) applies may not be provided with residential accommodation under subsection (1)(a) if his need for care and attention has arisen solely —
>
> (a) because he is destitute; or

> (b) because of the physical effects, or anticipated physical effects, of his being destitute."

6. I shall refer to the National Health Service and Community Care Act 1990 as "the 1990 Act". Section 47 (1) of the 1990 Act provides:

> "Where it appears to a local authority that any person for whom they may provide or arrange for the provision of community care services may be in need of any such services, the authority—
>
> (a) shall carry out an assessment of his needs for those services; and
>
> (b) having regard to the results of that assessment, shall decide whether his needs call for the provision by them of any such services."

7. Having set out the relevant statutory provisions, I must now turn to the facts.

Part 2. The facts

8. The claimants are a married couple from Pakistan. They applied for asylum in this country, but those applications were refused and in due course their appeal rights were exhausted. Thereafter the claimants remained in this country as failed asylum seekers. They both made fresh claims for asylum.

9. On 16th August 2010 the UK Border Agency withdrew the accommodation which it had previously provided to the claimants. The claimants then went to live in a hostel provided by a charitable organisation called the Boaz Trust. I shall refer to this accommodation as "the Boaz hostel". Both claimants had health problems. The first claimant, the wife, had osteoarthritis. The second claimant, the husband, had prostate problems and needed to urinate frequently.

10. The claimants maintained that the Boaz hostel was unsuitable accommodation in view of their poor health. They applied to the council, as their local authority, to assess their needs pursuant to section 47 of the 1990 Act and to provide them with accommodation and support pursuant to section 21 of the 1948 Act.

11. The council duly carried out assessments pursuant to section 47 of the 1990 Act. Having done so, the council rejected the claimants' claims for accommodation and support.

12. After sending appropriate pre-action protocol letters, the claimants commenced judicial review proceedings against the council on 7th December 2010. The substantive relief which the claimants claimed in their claim form was the following:

> "(a) A Declaration that the Claimants are in need of care and attention for the purpose of s.21 (1) (a) NAA 1948;
>
> …

> (c) A Mandatory Order requiring the Defendant to provide the Claimants with suitable accommodation and support until such time as the Claimants' needs are re-assessed and the Defendant finds that circumstances have changed such that the Claimants are no longer 'in need of care and attention';
>
> …"

13. The essence of the claimants' pleaded case was as follows. They accepted that, as failed asylum seekers, they had to overcome the hurdle set up by section 21 (1A) of the 1948 Act. The claimants relied upon the reasoning of the House of Lords in *R* (*M) v Slough Borough Council* [2008] UKHL 52, [2008] 1 WLR 1808. They contended that they needed to be "looked after" because of their health problems. Accordingly they fell into the category of infirm destitute, not able bodied destitute. Appropriate care and attention could not be delivered to the claimants in the Boaz hostel. Therefore the council should provide suitable residential accommodation for the claimants pursuant to section 21 (1) (a) of the 1948 Act.

14. The council resisted this claim. The council contended that the claimants' condition was not such that they needed "care and attention" within the meaning of section 21 (1) (a) of the 1948 Act. In the alternative, if the first claimant was in need of care and attention, that could be provided by the second claimant, her husband: see *R (Mwanza) v Greenwich London Borough Council* [2010] EWHC 1462 (Admin), [2011] PTSR 965. The claimants were currently residing at the Boaz hostel and the council was under no duty to provide other accommodation for them.

15. Having commenced proceedings, the claimants immediately applied for interim relief. That application came on for hearing before His Honour Judge Waksman QC on 10th December 2010. Both parties were represented by counsel. The available medical reports on the claimants were put in evidence. So also were the assessments carried out by the council.

16. Judge Waksman directed that there should be a "rolled up" hearing to deal with the question of permission and (if granted) the substantive claim. He gave directions for the service of evidence, skeleton arguments and so forth. Judge Waksman also granted the claimants' application for interim relief, observing that the claimants' case was "*prima facie* arguable". He ordered the council to provide the claimants with suitable accommodation and subsistence support until the trial of the action. Neither party applied for costs. The parties agreed that the costs of the application for interim relief should be reserved. Judge Waksman so ordered.

17. Thereafter the action duly proceeded. The council served its detailed grounds of resistance. Both parties subsequently amended their pleadings. The council carried out further assessments. The parties duly served their evidence. In the event, however, the claimants no longer found it necessary to pursue this litigation. On 2nd February 2012 the Secretary of State granted exceptional leave to remain to the second claimant. It was clear that the first claimant would also be granted leave to remain. In those circumstances it was anticipated the claimants would become entitled to mainstream benefits. Accordingly they decided not to pursue their claim against the council under section 21 of the 1948 Act.

18. On 14th March 2012 the Administrative Court in Manchester made the following order by consent:

> "It is ordered by consent that:
>
> 1) The Claimant's application for judicial review be withdrawn; and
>
> 2) The question of costs be determined by the Court on receipt of written submissions, such submissions to be filed and served simultaneously at 4pm on Friday 30 March 2012."

19. This order appears to have been stamped and issued by the court office without any involvement of a judge. This is a matter to which I shall return.

20. The parties duly lodged their written submissions on costs. The claimants contended that the council should pay the claimants' costs of the action, essentially on three grounds:

i) The claimants had complied with the pre-action protocol.

ii) The claimants had obtained an order for interim relief.

iii) The claimants' substantive case was strong. If the action had gone to trial, it was highly likely that the claimants would have won.

21. The defendants contended that there should be no order as to costs. The defendants contended that they had a strong defence to the claim. They relied upon their own assessments of the claimants and upon the decision of Hickinbottom J in *R (Mwanza) v Greenwich London Borough Council* [2010] EWHC 1462 (Admin), [2011] PTSR 965.

22. His Honour Judge Stewart QC considered this matter on the papers. On 12th April 2012 he decided that there should be no order as to costs. His written reasons read as follows:`

> "Applying the factors identified in R (Bhata) [2011] EWCA Civ 895 and in Harripaul [2012] EWCA Civ 266:
>
> On analysis of the issues it is not sufficiently clear to say which side would have won absent the settlement."

23. The claimants were aggrieved by the judge's failure to make a costs order in their favour. Accordingly they appealed to the Court of Appeal.

Part 3. The appeal to the Court of Appeal

24. By an appellant's notice dated 2nd May 2012 the claimants appealed to the Court of Appeal against the decision of Judge Stewart.

25. I would summarise the claimants' grounds of appeal as follows:

i) The judge failed to give adequate reasons.

ii) The judge failed to take into account relevant factors, in particular, the conduct of the parties, the interim relief obtained and the strength of the claimants' case. If the judge had considered all relevant factors, he would have been bound to award costs to the claimants.

26. Six days after this appeal was launched the Court of Appeal delivered a judgment giving general guidance on how costs should be dealt with following the settlement of litigation. I shall deal with this authority in Part 4 below.

27. This appeal came on for hearing on 13th December 2012. Mr. Ian Wise QC leading Mr. Stephen Broach appeared for the claimants. Mr. John Howell QC leading Mr. Hilton Harrop-Griffiths appeared for the council. I am grateful to all counsel for their assistance.

28. Before addressing the grounds of appeal I must first review the law.

Part 4. The law

29. Rule 44.3 of the Civil Procedure Rules provides:

> "Court's discretion and circumstances to be taken into account when exercising its discretion as to costs
>
> (1) The court has discretion as to –
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs –
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order.
>
> …
>
> (4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
>
> (c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention, and

> which is not an offer to which costs consequences under Part 36 apply."

30. In recent years a number of judicial decisions have addressed the question of how costs should be dealt with following the settlement of litigation. At the time of Judge Stewart's decision the two most important authorities were *R (Bahta) v Secretary of State for the Home Department* [2011] EWCA Civ 895, [2011] 5 Costs LR 857 and *Harripaul v Lewisham London Borough Council* [2012] EWCA Civ 266, [2012] HLR 24. These were, of course, the two authorities to which the judge referred in his decision.

31. That situation changed, however, six days after the judge's decision. On 8th May 2012 the Court of Appeal handed down its decision in *R (M) v Croydon London Borough Council* [2012] EWCA Civ 595, [2012] 1 WLR 2607. The claimant in that case was an asylum seeker, whose age was in dispute. The claimant brought judicial review proceedings to compel the defendant local authority to reassess his age. The action ultimately settled in the claimant's favour, leaving only the question of costs to be determined by the court. Lindblom J decided that there should be no order for costs. The Court of Appeal allowed the claimant's appeal and ordered the defendant to pay the claimant's costs.

32. Lord Neuberger MR gave the leading judgment, with which Hallett and Stanley Burnton LJJ agreed. At paragraphs 47 to 64 Lord Neuberger gave general guidance as to how costs should be dealt with following a settlement. In the latter part of that passage he dealt specifically with cases in the Administrative Court. He identified three different scenarios. The first scenario is a case where the claimant has been wholly successful whether following a contested hearing or pursuant to a settlement. The second scenario is a case where the claimant has only succeeded in part following a contested hearing or pursuant to a settlement. The third scenario is a case where there has been some compromise which does not actually reflect the claimant's claims.

33. At paragraph 63 Lord Neuberger gave the following guidance in respect of the third scenario:

> "In case (iii), the court is often unable to gauge whether there is a successful party in any respect and, if so, who it is. In such cases, therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some such cases it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. If it is, then that may well strongly support the contention that the party who would have won did better out of the settlement, and therefore did win."

34. The only other authority to which I should refer is *In re appeals by Governing Body of JFS* [2009] UKSC I, [2009] 1 WLR 2353. Lord Hope DPSC delivering the judgment of the court said this at paragraph 25:

> "It is one thing for solicitors who do a substantial amount of publicly funded work, and who have to fund the substantial overheads that sustaining a legal practice involves, to take the risk of being paid at lower rates if a publicly funded case turns out to be unsuccessful. It is quite another for them to be unable to recover remuneration at inter partes rates in the event that their case is successful. If that were to become the practice, their businesses would very soon become financially unsustainable. The system of public funding would be gravely disadvantaged in its turn, as it depends upon there being a pool of reputable solicitors who are willing to undertake this work."

35. Mr. Ian Wise QC rightly drew attention to this passage at the start of his submissions and I firmly bear it in mind.

36. Although a number of other authorities have been cited in argument, there is no need to rehearse them in this judgment. *M* is now the governing authority in this area and I must reach my decision by reference to the guidance given in that case.

Part 5. Decision

37. The first ground of appeal is that Judge Stewart did not give proper reasons. I reject that criticism. The judge reviewed *Bhata* and *Harripaul*, which were then the leading authorities. He concluded that the crucial question in this case was whether it was sufficiently clear which side would have won if the matter had gone to trial. He concluded that it was not sufficiently clear. He therefore made no order as to costs.

38. The second ground of appeal is that when one looks at all the factors which ought to have been taken into account, the judge should have been driven to the conclusion that the defendant should pay the claimants' costs. The factors upon which the claimants rely are the following:

    i) The claimants achieved the substantive benefit which they were seeking, namely long term housing and welfare support.

    ii) The claimants achieved an immediate benefit, namely interim relief, which they could not have achieved without litigation.

    iii) The claimants complied with the pre-action protocol and sent appropriate letters to the council before commencing proceedings.

    iv) The conduct of the council was unreasonable. It resisted the claimants' claim at every stage. It brushed aside the letters from the claimants' solicitors. It did not provide interim accommodation for the claimants until it was ordered to do so.

    v) The claimants' case was strong. If the litigation had gone to trial, it is very likely that they would have won.

39. Let me deal with those factors in the order set out above. As to the first factor, it is undoubtedly correct that the claimants have achieved their ultimate objective, namely long term housing and welfare benefits. On the other hand they have achieved that

objective not because of any court order or concession by the council. The claimants have achieved that objective because of the Secretary of State's decision to grant exceptional leave to remain. As Moore-Bick LJ observed in argument, this came as a *deus ex machina*. In my view the favourable intervention by a third party not involved in the litigation cannot be a reason to order the defendant to pay the claimants' costs.

40. I turn now to the second factor. The claimants applied for interim relief. The council opposed the application. The court granted interim relief. If the claimants had applied on 10th December 2010 for the costs of the interim relief application, Judge Waksman may have ordered the council to pay those costs. Alternatively, he may have ordered that the claimants' cost of the application be costs in the cause. In the event, however, with the agreement of both parties Judge Waksman reserved the costs of the interim relief application, without any discussion of the basis on which costs were reserved.

41. Since the underlying dispute between the parties never came to trial, I do not see any basis upon which Judge Stewart on 12th April 2012 could have ordered that the costs reserved by Judge Waksman on 10th December 2010 be paid by the council. Indeed in their lengthy written submissions on costs dated 30th March 2012 the claimants did not ask for an order that they be awarded the reserved costs of the interim application. I am therefore quite satisfied that Judge Stewart cannot be criticised for failing to make any separate and specific order in respect of the reserved costs.

42. Mr. Wise relies upon the claimants' success in obtaining interim relief as one of the reasons why Judge Stewart should have awarded to the claimants the entire costs of the action. He points out that the claimants got what they wanted in the teeth of the council's opposition.

43. The difficulty with this argument is that Judge Waksman was not adjudicating upon the substantive dispute between the parties. He began his judgment by saying that for the purpose of the current application the claimants had "a fairly modest task". They only had to show their case was "*prima facie* arguable". He did not even decide whether the claimants' case was strong enough to merit the grant of permission to proceed. He simply made an order for interim relief to protect the claimants' position until there could be a "rolled up" hearing.

44. In my view, the fact that the claimants obtained interim relief does not mean that they were successful in the action. It is not a reason for awarding to the claimants the costs of the action.

45. I turn now to the third factor. The claimants are to be commended for complying with the pre-action protocol. If following the commencement of proceedings the council had conceded the relief sought without admitting liability, they would have had difficulty in resisting an order for costs. The present case, however, is different. There has been no substantive decision by the court and no concession by the council. In these circumstances the fact that the claimants complied with the protocol is not a reason for awarding to them the costs of the action.

46. I turn next to the fourth factor, the conduct of the council. The council, like the claimants, have been consistent. They have carried out assessments as required by

1990 Act. They concluded that they were not obliged to provide accommodation for the claimants pursuant to section 21 of the 1948 Act. This was the council's position both before and after the issue of proceedings. Whether the council were right in their assessment of the position is a matter which has not been judicially determined. In my view, the council's conduct in this case is not such as to attract an adverse costs order.

47. I come finally to the fifth factor, the strength of the claimants' underlying case. We have heard submissions from Mr. Wise as to why the claimants would probably have won. We have heard submissions from Mr. Howell as to why the claimants' case was unfounded and they would probably have lost.

48. It is not the function of this court on a costs appeal to give a substantive decision about litigation which never came to trial. Suffice it to say that both Mr. Wise and Mr. Howell put forward formidable arguments.

49. For present purposes, it is necessary to focus on the material which was placed before Judge Stewart in April 2012. This comprised the parties' written submission on costs and the court file. The court file would have included the pleadings and the evidence previously lodged. On reading and re-reading this material, I am not surprised that Judge Stewart was uncertain as to who would have won if the action had come to trial. I find myself in a similar state of uncertainty. In my view, it cannot possibly be said that the judge's conclusion in this regard was either wrong or perverse.

50. On reviewing all the circumstances of this case, I do not believe that the judge's costs order can be faulted. The judge made no error of law or error of principle in the exercise of his discretion under rule 44.3 which would warrant intervention by this court.

51. Before parting with this case, I should make a comment about the court order of 10th March 2012. That order appears to have been made administratively by an official at the Manchester Civil Justice Centre. It ought to have been made by a judge. If parties settle all substantive issues in litigation and wish the court to determine costs on the basis of written submissions, the draft order to that effect should be placed before a judge for approval. The judge will then decide whether the court is willing to deal with costs in this way.

52. Let me now return to the present case. For the reasons set out above, I can see no grounds for impugning the costs order made by the judge. In my view, this appeal should be dismissed.

Lord Justice Etherton:

53. I agree.

Lord Justice Moore-Bick:

54. I also agree.