Neutral Citation Number: [2019] EWCA Civ 1319

Case No: C4/2018/1046

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE UPPER TRIBUNAL**
**(IMMIGRATION AND ASYLUM CHAMBER)**

The Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 3 July 2019

**Before:**

**LORD JUSTICE PETER JACKSON**
**and**
**LADY JUSTICE NICOLA DAVIES**

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**Between:**

**THE QUEEN ON THE APPLICATION OF SANNEH**

**Appellants**

**- and -**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

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**Ms A Carse** (instructed by the Government Legal Department) appeared on behalf of the **Appellant**

**Mr B Beckford** (instructed by Dylan Conrad Kreolle) appeared on behalf of the **Respondent**

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# Judgment

**(Approved)**

**LORD JUSTICE PETER JACKSON:**

1. This is an appeal about costs. The Secretary of State for the Home Department challenges an order made at the end of proceedings in the Administrative Court, by which she (and I shall use the female pronoun as applicable at the time) was ordered to pay 75 per cent of the costs of WS, an applicant for judicial review. She claims that the judge should instead have required WS to pay 80 per cent of her costs. Permission to appeal was granted by Davis LJ, who noted that this court is always very slow to interfere with a discretionary award of costs made by a trial judge but that in this case it was arguable that something may have gone very wrong. He urged the parties to come to a sensible and pragmatic compromise.

2. The background is that WS came to the United Kingdom in 2001 on a visitor's visa. He then married a British citizen and was granted indefinite leave to remain in 2003. That marriage did not last, and he then resumed a relationship with and married a woman by whom he already had two children, and another child was born in 2004. They also have indefinite leave to remain. In March 2014 WS was convicted of wounding his wife. He was sentenced to 24 months' imprisonment suspended for two years. A three-year restraining order was made in favour of the wife and children, which he quickly breached. For that he was sentenced to 20 months' imprisonment, including activation of part of the suspended sentence. In December 2014, while he was in prison, a deportation order was made. He challenged this on Article 8 grounds by reference to the presence in the United Kingdom of his wife and children. In March 2015 WS was released from prison and detained under immigration powers. He brought a series of proceedings and in September 2016 for the first time claimed asylum. In November of that year this was refused and certified as clearly unfounded.

3. It is not necessary to recount all the various applications made by WS. They were all legally unsuccessful but had the practical effect of preventing his removal. For present purposes it is sufficient to note that he was detained between March 2015 and January 2016 and, relevantly, between 19 August 2016 and the 21 February 2018. The particular proceedings that this appeal concerned began with a claim issued on 9 August 2017, by which WS challenged the lawfulness of his detention. In October 2017 permission was granted on a limited basis and WS was ordered to redraft his

grounds. The Secretary of State filed grounds of defence. Three bail applications, in which the address given for bail was that of WS's wife and children, were refused in September and November 2017 and on 5 January 2018. However, on that last occasion the judge, Moulder J, remarked that there was not a sufficient prospect of removal to warrant continued detention. The Secretary of State then asked WS to offer an alternative bail address. On 8 January he provided the address of a friend. Inquiries were made, and the person was spoken to on 23 January. A release referral was made on the same day but not acted upon until 20 February. WS was released on 21 February with an electronic tag.

4. The Judicial Review proceedings were heard by Mr Michael Kent QC sitting as a deputy High Court judge on 27 February 2018, with written arguments on the certification being submitted subsequently. At the start of the hearing, in fact, in court, the Secretary of State conceded that the period of detention from 24 January to 21 February 2018 had been unlawful and that substantial as opposed to nominal damages were appropriate. She disputed that the earlier period of detention or the certification of the asylum claim had been unlawful. In a substantial judgment delivered on 13 April 2018, he judge dismissed WS's claim in every respect but for the last four weeks of detention, which the Secretary of State had lately conceded.

5. The certification argument was protracted. To some extent the judge accepted arguments made on behalf of WS, but in the end his arguments on that issue failed also for the reasons given. The judge then transferred the assessment of damages to the county court. He heard submissions on costs. For WS, Mr Bedford, who appears before us today, asked for an order for full costs, as anything else would eat into any damages awarded. For the Secretary of State, Ms Carse, who also now appears, sought an order for WS to pay 80 per cent of her costs, noting that if the claim had been heard before January 2018 it would have failed entirely. The judge referred to the general rule that the unsuccessful party will be ordered to pay the costs of the successful party but that the court may make a different order (see Civil Procedure Rule 44.2(2), and he noted that the rule required consideration of whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue. During the course of his ruling, he said this:

> "Therefore the position is that the claimant has succeeded in obtaining a remedy in these proceedings. There was no offer brought to my attention before the concession was made on the first day of the hearing. Therefore, applying CPR 42.2(2), the general rule is that the unsuccessful party, namely the defendant, will be ordered to pay the costs of the successful party, but the court may make a different order."

And later:

> "It is an unusual situation. Nevertheless, as I say, the claimant is the successful party and the starting point is that he recovers his costs, but in taking into account all the circumstances, CPR 44.2 requires me to consider amongst other things whether it would be reasonable for a party to raise, pursue or contest a particular allegation or issue.
>
> There is no doubt that the main issues in this case were directed to the lawfulness of the section 94B certificate issued in 2014, the maintenance of detention thereafter and the refusal of bail on a basis relating to the provision of some sort of a suitable bail address, whereas the concession made relates to a much narrower question, which is whether the Secretary of State was entitled to maintain detention even after a bail address had been proffered by the claimant following the observations of Moulder J on 5 January of this year. It does seem to me that there were significant issues, to which no doubt a very large proportion of the costs on both sides have been directed, which fell in favour of the defendant and on which the claimant has lost. Nevertheless this does not mean in my judgment that the costs order should be in favour of the defendant, let alone one in the amount of 80 per cent, but I do think that there should be some deduction from the costs which the claimant recovers."

6. He therefore determined that there should be a reduction in WS's costs recovery and consider various means of achieving this, including by identifying issues or specifying dates, before reaching his conclusion in these terms:

> "I think in the circumstances the proper thing is to deduct a percentage, and I deduct 25 per cent from the claimant's costs. It is difficult to arrive at a proper assessment, but the position must be that where a claimant succeeds in showing that he has been unlawfully detained, which is a serious matter, the defendant should only get a reduction of the costs which he has to pay in respect of that finding if there are unusual circumstances. There are unusual circumstances. I think in the circumstances overall a 25 per cent reduction is appropriate. That is what I order. The

> claimant will recover 75 per cent of his costs, to be subject to detailed assessment if not agreed."

7. We have been referred to the full provisions of the relevant Civil Procedure Rule and to a number of authorities on its application. From these I need only extract the observations of Lord Neuberger MR in *R (M) v Croydon London Borough Council* [2012] 1 WLR 2607. At paragraph 62 he considered a number of permutations, one of which was a case in the Administrative Court where a party has succeeded only in part following a contested hearing. As to that, he said this:

> "… when deciding how to allocate liability for costs after a trial, the court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim. Given that there will have been a hearing, the court will be in a reasonably good position to make findings on such questions."

8. As to the tests for a costs appeal, Lord Neuberger said this at paragraph 44 when identifying certain general principles:

> "The first is that any decision relating to costs is primarily a matter for the discretion of the trial judge, which means that an appellate court should normally be very slow indeed to interfere with any decision on costs. However, while wide, the discretion must be exercised rationally and in accordance with certain generally accepted principles. To a large extent, those principles are set out in CPR 44.3, and in particular, paras (2), (4), (5), and (6). If the trial judge departs from rationality or the correct principles then it is legitimate for an appellate court to interfere with his conclusion."

9. On this appeal, Ms Carse submits that even though the Secretary of State's concession was not made until trial, the judge's approach was wrong and unjust in the following respects. Firstly, although he decided that there were significant issues on which the Secretary of State had won, he wrongly concluded that this did not entitle her to recover her costs on those issues but instead ordered a limited deduction from the claimant's costs. Secondly, the judge ignored relevant factors, namely (1) that the proceedings were prolonged by about three months because of the redrafting of the grounds (had it been otherwise, they would probably have finished before the period of unlawful detention began); (2) the costs were increased by the number of unsuccessful applications made by WS, including significant costs arising from three unreasonable

bail applications; and (3) the costs were further increased by the need to produce additional submissions on certification. Taking account of those matters, she argues that the judge should therefore have made an order in favour of the Secretary of State.

10. In response, Mr Bedford argues that WS was the successful party. He had established that he was unlawfully detained, which was a serious matter, and he had succeeded in obtaining a remedy in the proceedings. It was WS who had succeeded, if only in part. The judge's decision was reasonably open to him. He took account of all the relevant matters including points now argued by the Secretary of State. He noted that there had been no offer to settle before the day of trial. He was, as stated in *M v Croydon* above, best placed to determine how reasonable or important the pursuit of the unsuccessful claim had been compared with the successful claim and by how much the costs were increased thereby. The decision was not perverse. The appeal is no more than a disagreement with the decision.

11. Having considered the competing submissions, I am clear that the judge's decision on costs cannot stand. The reality, noted by the judge in his ruling but not reflected in his determination, is that whilst WS was a successful party in the proceedings, he was not the only successful party. While any finding of unlawful detention is a serious matter, WS only succeeded in one aspect of his much larger claim. As against that, the Secretary of State succeeded in relation to the previous 20 months of detention and ultimately on the issue of certification. The duration of the proceedings during which costs were accumulating largely coincided with claims that were unsuccessful if not indeed unreasonable. Further, even if the judge was right to characterise WS as the successful party, the extent of deduction from his costs did not to any sufficient degree reflect the contours of the case as established by his findings and conclusions. I therefore consider that the judge departed from correct principle to such a degree that we must intervene and make a fresh order.

12. As to what that might be, I begin by echoing the observations of Davis LJ when granting permission to appeal that the Secretary of State's claim for 80 per cent of her costs is extremely ambitious. This was a case in which, by whatever route, she was found to have unlawfully detained someone for four weeks. As Mr Bedford says, it was by pursuing his claim to the bitter end that his client achieved a remedy as a result of proceedings that he had brought. But for those, it might be said that his period of

unlawful detention could well have been longer. As against that, WS's original claim pursued to trial was thoroughly overblown. There are of course a range of permissible approaches to how the balance should be struck between these competing factors. Taking a broad view of the justice of the case, I consider that the correct order is one that each side pays its own costs of the proceedings below. To that extent, I would allow the appeal.

**LADY JUSTICE NICOLA DAVIES:**

13. I agree.

**Order:** Appeal allowed