



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/04808/2011

THE IMMIGRATION ACTS

Heard at Field House
On 13 November 2018

Decision & Reasons Promulgated
On 27 November 2018

Before

THE HONOURABLE MRS JUSTICE ANDREWS DBE
UPPER TRIBUNAL JUDGE PLIMMER

Between

MR P N
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No representation
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

Background history

1. This is a matter with a lengthy history. The appellant is a Sri Lankan national who was refused asylum as far back as 2011. It is unnecessary to rehearse the procedural history that led to the Court of Appeal order dated 9 June 2016. In that order the Court of Appeal allowed the appeal and remitted the case to the Upper Tribunal. There was then a period of unfortunate delay before the matter was first listed before the Upper Tribunal on 3 January 2018. At that hearing the appellant had recently changed solicitors and was represented by

Counsel. New evidence updating both his protection and Article 8 claims was submitted on the morning of the hearing.

2. The Secretary of State accepted that this evidence was significant and that in the light of the length of time since he had substantively considered the appellant's claims, it was appropriate to give further consideration to the new evidence and changed circumstances. The appeal was therefore adjourned by consent with directions given to both parties.
3. The matter next came before the Upper Tribunal on 18 April 2018. At that hearing the Secretary of State gave his consent for new matters in the appellant's supplementary bundle to be considered. Ms Everett, the Secretary of State's representative, apologised for the failure to comply with directions. However, Ms Everett made it clear at the hearing that the Secretary of State now accepted that the appellant and his family members should be granted discretionary leave on the basis of Article 8 of the ECHR. Ms Everett indicated that the asylum claim was not conceded, and she wished to cross-examine the appellant. A Tamil interpreter was not available at the hearing and it was therefore again adjourned by consent.
4. The Upper Tribunal gave directions that included the following: within 14 days the Secretary of State to file and serve a document concerning that which Ms Everett outlined had been conceded, as well as providing a position statement or supplementary decision letter that responded to the appellant's further evidence. Pausing there, that position statement / supplementary decision letter was necessary because matters had moved on considerably since the last decision refusing asylum back in 2011. Both parties agreed that it was appropriate for the Secretary of State to clarify which aspects of the protection claim were in dispute.
5. The matter was listed before the Upper Tribunal on a third occasion on 15 May 2018. The Secretary of State did not comply with directions, and in particular, failed to comply with the direction to file and serve a position statement / supplementary decision letter within 14 days of 18 April. At the beginning of the hearing Ms Everett confirmed that the Secretary of State had reconsidered the appellant's asylum claim in the light of the further evidence provided and intended to grant him asylum, subject to the necessary checks. There was no clear explanation for the failure to comply with directions, and no clear explanation of why the relevant communication could not have been made by the Secretary of State in advance of the hearing in order to avoid the expense of a further hearing. Unfortunately, this was the second time that the Secretary of State ignored the directions of the Upper Tribunal. The matter was adjourned again. It could not be disposed of at the hearing, as the Secretary of State had not formally provided the appellant with leave of any description. The appeal remained pending. Both parties agreed that the relevant provision which gives rise to the statutory abandonment of an appeal only follows the grant of leave to enter or remain and if all that is given is an indication, that does not mean that there is an abandonment - see section 104(4A) of the Nationality,

Immigration and Asylum Act 2002 as amended. Further directions were given requiring the Secretary of State to file and serve a short position statement attaching a further decision regarding the appellant's asylum claim, within 28 days. The Secretary of State failed to comply with these directions.

6. The matter was then relisted once again before the Upper Tribunal on 9 October 2018. At the hearing, Ms Everett confirmed that the Secretary of State as far back as May 2018 was clear that the appellant should be granted asylum and his family members leave in line, subject to the necessary checks, but that the Secretary of State had "*only recently concluded the appeal*" such that the files had only been recently transferred to the Asylum and Documentation Unit in Liverpool to grant leave. Given the chronology outlined above, it is very difficult to understand why the file had not been transferred to enable a grant of leave well before this. At that hearing Ms Hassan, who represented the appellant, outlined that the Secretary of State had failed to comply with the Tribunal's directions on three occasions and in addition unreasonably delayed progression of the case from May 2018 onwards without any clear or reasonable explanation. Ms Hassan explained the adverse impact (both financially and emotionally) the delay had on the appellant and his family members including the children.
7. Ms Everett made it clear that she would do her best to ensure that there was confirmation of leave in writing within seven working days and the hearing was once again adjourned. Ms Hassan put the Secretary of State on notice that the appellant wished to make an application for costs. To afford the Secretary of State an opportunity to address the appellant's claim that his conduct of the proceedings was unreasonable, the Upper Tribunal gave directions for the appellant's solicitors to file costs submissions before 26 October 2018 and requiring the Secretary of State to respond to those by 9 November 2018.
8. The appellant complied with those directions and provided a position statement dated 26 October 2018. That confirmed that the appellant had indeed received confirmation in writing that he was being granted leave as a refugee. That was provided on 15 October 2018. The appellant also outlined why he should be awarded the costs he had incurred unnecessarily since January 2018. Regrettably, the Secretary of State again failed to comply with the directions, and did not provide a response to the costs submissions.

Hearing

9. At the hearing before us, Mr Clarke represented the Secretary of State. He had only been provided with the file recently and was unable to provide any explanation for the failure to comply with directions on four occasions since January or to assist with why there had been such delay in providing the appellant with leave. We indicated that we were in a position to determine the appellant's costs application in light of the material available to us, together with the appellant's costs submissions. The Respondent had been provided

with every opportunity to respond to these but failed to do so. There has therefore been no clear explanation for the delay.

Legal framework

10. Rule 10(3)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008 states that the Upper Tribunal may not make an order in respect of costs or expenses except in certain set situations. This includes if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings.
11. The Upper Tribunal has recently reviewed its costs jurisdiction in statutory appeals in Thapa (costs: general principles; s 9 review) [2018] UKUT 54 (IAC). This emphasises that the power to award costs pursuant to rule 10 is to be exercised with significant restraint. We have also taken into account the Presidential Guidance Note No 2 of 2018.

Discussion on costs

12. When the chronology outlined above is carefully considered it is abundantly clear that from at least 14 May 2018, the Secretary of State was firm in his position that the appellant was entitled in principle to refugee status, subject to checks. From that date, the Secretary of State has acted unreasonably in delaying the grant of that leave by failing without explanation to “conclude” the appeal. There has been no reasonable explanation for the delay between 14 May 2018 and 15 October 2018, a period of some five months. The appellant incurred unnecessary expenses in having to attend a hearing in May and then a further hearing in October.
13. When all the matters are considered in the round, the Secretary of State has acted unreasonably in the manner in which proceedings were conducted from 14 May 2018. From the time that Ms Everett was able to confirm unequivocally that leave would be granted (subject to checks) there has been a period of delay which remains unexplained. The Secretary of State has been given an opportunity to provide an explanation but there has been a complete failure to comply with directions on his part. That must be viewed against the history of repeated non-compliance with directions on the part of the Secretary of State from as far back as January 2018.
14. We do not accept that it can be said that the Secretary of State acted so unreasonably for the period between 3 January and 14 May 2018, that an order of costs should be made against him for this period. We acknowledge that there has been a patent failure to comply with directions on the part of the Secretary of State. However, he was only provided with the new materials in support of a complex asylum claim on 8 January 2018. He was entitled to take time to consider this material and did not act unreasonably in changing his mind between the April hearing (when Ms Everett indicated she wished to cross-examine the appellant about his asylum claim) and the May hearing (when the asylum claim was effectively conceded). However, had the Secretary

of State acted reasonably and complied with directions, the May and October hearings and the unnecessarily incurred expenses associated with them, could have been avoided.

15. We have therefore come to the conclusion that in conducting the proceedings from 14 May 2018 and onwards to 15 October 2018, the Secretary of State has acted unreasonably. In reaching this conclusion we have taken into account the caution of restraint before making an award of costs in Thapa (supra) and Cancino (costs – FTT – new powers) [2015] UKFTT 59 (IAC).

Schedule of costs

16. We have been provided with a schedule of costs which sets out a total of £3700 in fees incurred from 3 January 2018. This does not indicate with the necessary degree of precision the costs that have been incurred from 14 May 2018. It seems likely that the costs from this date are likely to be in the region of £1800. That figure appears to us to be reasonable, but the accurate figure must be particularised. We have no doubt that the parties can properly address that between themselves easily and quickly and we do not propose to say anything more about that.

Final matters

17. The only matter that remains is to formally record that this is an appeal that has now been abandoned by statute, as the appellant was granted leave as a refugee on 15 October 2018.

Decision

18. The Secretary of State shall pay the appellant's legal costs incurred between 14 May 2018 and 26 October 2018, including the preparation of the costs submissions dated 26 October 2018.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Upper Tribunal Judge Plimmer

21 November 2018