

IN THE UPPER TRIBUNAL



JR/3328/2018

Field House,
Breams Buildings
London
EC4A 1WR

23 August 2021

**THE QUEEN
(ON THE APPLICATION OF)
CHADI MAHMOUD ELRACHIDI**

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

- - - - -
ORDER
- - - - -

UPON consideration of all documents lodged and having heard Ms S Jegarajah, Counsel for the Applicant, and Mr J Fraczyk, Counsel for the Government Legal Department at a hybrid hearing conducted on 23 August 2021

IT IS ORDERED THAT

1. For the reasons set out in the approved judgment dated 1 September 2021, the Applicant's application for judicial review is refused.

COSTS

1. For the reasons set out in the approved judgment dated 1 September 2021, there shall be no order as to costs for the period leading up to and including the making of the judicial review application on 9 May 2018 until 3 July 2019, that being the day before the Applicant received the re-served decision dated 25 October 2018.
2. For the period beginning on 4 July 2019 up to and including any work undertaken in respect of consideration of the embargoed draft judgment, the Applicant shall pay the Respondent's costs on an indemnity basis.

IT IS DIRECTED THAT

1. **No later than 14 days after** this Order is handed down, the Respondent shall file and serve a schedule of her costs, covering the period set out in paragraph 2, above.

PERMISSION TO APPEAL

1. There has been no application by the Applicant for permission to appeal to the Court of Appeal. In any event, I refuse permission on the basis that there are no arguable errors of law in my judgment, nor do any matters of general importance arise in this case.

Signed: H Norton-Taylor

Upper Tribunal Judge Norton-Taylor

Dated: 1 September 2021

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Ms S Jegarajah, Counsel, instructed by the Applicant on a Direct Access basis.

Mr J Fraczyk, Counsel, instructed by the Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

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JUDGE NORTON-TAYLOR:

Background

1. The Applicant and his dependants are stateless individuals who resided in Lebanon prior to their arrival in the United Kingdom. The Applicant and his wife entered this country at some point in 2006. Over the course of their residence here three children were born, the eldest in 2012 and twins in 2014.
2. There is a protracted and relatively complex history to these proceedings, however I need not set it all out here and will provide only a summary of relevant events. On 12 December 2016, the Applicant made an application to the Respondent under the Immigration Rules on the basis that he and his dependent children were stateless and should be granted leave to remain under paragraph 403 of the Rules. That application was not decided until 25 October 2018 (the October 2018 decision). There is arguably a lack of clarity as to whether that decision was properly served on the Applicant at that time. Prior to the decision being made, on 11 May 2018, the Applicant made this application for judicial review (the application), asserting that the Respondent's then ongoing delay was unlawful.
3. Following the application, an Acknowledgment of Service was provided by the Respondent. On 30 November 2018 permission was granted by Upper Tribunal Judge L Smith on the basis that the delay was arguably unlawful.
4. Following the making of the October 2018 decision, the Respondent began what turned out to be concerted, but in the event, unsuccessful, attempts to settle proceedings by way of a consent order. The position put forward was that the

application had become academic in light of the decision refusing the statelessness application.

5. At some point in early 2019 (I cannot quite pinpoint the exact date, but it may well have been on or around 15 February 2019), it appears from the GCID evidence before me that the October 2018 decision was re-served on the Applicant.
6. On 24 May 2019, an oral hearing before Upper Tribunal Judge Kamara was adjourned. At that point in time Ms Jegarajah was instructed. Judge Kamara was concerned about the effectiveness of service and whether the Applicant had had a proper opportunity to consider his position.
7. On 2 July 2019 the Respondent re-served the October 2018 decision on the Applicant (perhaps for the second time) and there has been no suggestion that this was not effective.
8. From the information before me it would appear that the Respondent made at least five attempts to settle the proceedings by way of a consent order. In stark contrast, no attempt was ever made by either the Applicant or any legal representatives to engage with these, or to indicate in any other way that the proceedings had indeed become academic in light of the October 2018 decision. It was also the case that at no stage had the Applicant sought to make an application for Administrative Review (AR) of the October 2018 decision.
9. On 5 March 2020, the Applicant and his dependents were all granted discretionary leave to remain in the United Kingdom on the basis of Article 8 ECHR (specifically, the length of residence of the eldest child). This important fact was not communicated to the Tribunal by the Applicant or any legal representatives.
10. The Tribunal has, over the course of time, sought to obtain confirmation from the Applicant as to whether or not he wished

to pursue the application. This culminated in the decision of a Lawyer of the Upper Tribunal issuing a decision and directions notice on 4 June 2021 including an “unless” direction to the effect that if the Applicant failed to contact the Tribunal within a specified period the application would be automatically struck out. I have been unable to see anything on file to indicate that any such communication was received and I conclude that none was. However, I have proceeded to consider this case on the basis that it remains live (if necessary, I would formally reinstate the application).

Submissions

11. In a detailed and helpful skeleton argument dated 13 August 2021, Mr Fraczyk set out the history of the correspondence to which I have alluded above, providing extracts from relevant emails, all of which support the Respondent’s contention that she had done all that she reasonably could to resolve these proceedings at an earlier stage. His primary submission was that this application was now, and had been for a considerable period of time, entirely academic, that there was no point of public interest which arose, and that it should be refused on that basis. In addition, he submitted that the Respondent should recover at least part of her costs in respect of these proceedings in light of the Applicant’s conduct over the course of time. Exceptionally, he submitted, these costs should be made on an indemnity basis. His fall-back position was that there should be no order as to costs.
12. Ms Jegarajah accepted that this application was academic and did not suggest that I should do anything other than refuse it on that basis. However, she urged me to direct the Respondent to re-serve the October 2018 decision so that the timeframe

for making an AR application could be 'reset' and that such an application could then be made by her. Further or alternatively, as I understood the suggestion, these proceedings could be adjourned in order that such an AR application could be made. She indicated that the parties could discuss a re-service of the October 2018 decision even if this claim was refused. She confirmed that if all else failed, the Applicant would make a fresh statelessness application. She informed me that the Applicant might have new legal representation in order to assist him with any further matters.

13. Mr Fraczyk strongly objected to any course of action involving the re-service of the October 2018 decision. That decision had been served initially and then re-served at the latest in July 2019. There was no good reason, in his submission, for any further action to be taken by the Respondent in this case.
14. On the issue of costs Ms Jegarajah urged me to make no order. She submitted that the consequences of making an order, which she stated the Applicant could not comply with in any event, would be that he would be landed with a litigation debt which might in turn have adverse consequences in respect of any future applications for leave to remain in the United Kingdom. She also highlighted what she said were the Applicant's "vulnerabilities" and that any omissions in the past had not been his fault.
15. For his part, Mr Fraczyk acknowledged that some individuals in precarious situations in this country might be vulnerable. However, there was no evidence as to any vulnerability faced by the Applicant or his family members. The Respondent had been forced to incur significant and unnecessary expense in these proceedings.

16. At the end of the hearing I formally reserved my decision.

Conclusions

17. I can state my conclusions in this case relatively briefly. It is clear that as of, at the very latest, the beginning of July 2019, when the October 2018 decision was effectively re-served on the Applicant, this application for judicial review had become entirely academic: the Respondent had made a decision on the statelessness application and this had been effectively served on him. No point of public interest has ever arisen in this case and the Applicant has not contended to the contrary. There has never been any material issue as to the possibility of damages being claimed for the alleged unlawful delay in the decision making.

18. In my judgment the Respondent has taken every possible step to try and settle these proceedings from the earliest stage following the making of the October 2018 decision. Even if (and I am far from convinced of this) the decision was not effectively served in October 2018 or February 2019, it is common ground that it was effectively (re-)served on 2 July 2019. I am bound to say that I am troubled by the apparent inaction of the Applicant when, I am satisfied, he became aware of the first proposed consent order in December 2018 or, at the latest, at the beginning of February 2019 when the next proposed consent order was provided (there being no evidence to suggest that he was not so aware). Even if he had not received the October 2018 decision letter itself, he must surely have been put on notice that it existed, was not in his favour, and that he could and should have requested a copy immediately.

19. Despite the best efforts of the Respondent to resolve matters efficiently in order to prevent the unnecessary expenditure of time and money, nothing of any value at all was done by the Applicant and/or any legal representatives engaged over the course of the last 2 years. The lack any constructive communication from his side has, in my judgment, been prolonged, unexplained, and entirely unjustified. The failure to act in a reasonable fashion has not only applied to his dealings with the Respondent, but also in respect of the Tribunal.

20. An additional matter which causes me significant concern is the failure of the Applicant or anyone else to have informed the Tribunal of the grant of discretionary leave in 2020, or at least the failure to have engaged with the question of whether the current application was to be pursued notwithstanding that grant and the relative security which it provided to the Applicant and his family.

21. Ms Jegarajah has alluded to "vulnerabilities" on the part of the Applicant and/or his family. Mr Fraczyk was right to point to the absence of any evidence of problems which might have even begun to explain the unreasonable inaction. There is no indication of mental health problems. The family unit have had leave to remain since March 2020. There has been legal representation in place for at least part of the time. If that was said to be inadequate or negligent, there is no evidence of any complaints having been made. In any event, I note that the Applicant has had help from some other person very recently: an adjournment application was made, with assistance, the day before the hearing (this was not pursued at the hearing).

22. Finally, I address Ms Jegarajah's request that I direct the Respondent to re-serve the October 2018 decision on the Applicant in order that an AR application can be made.
23. I have no hesitation in refusing such a course of action. The request flies in the face of all that has preceded it. The October 2018 decision was effectively (re-)served at the beginning of July 2019. No AR application was made at that stage or at any time over the next 2 years. Meanwhile, the Applicant has failed to engage with the Respondent's attempts to settle these proceedings. As far as I can see, there has been no request for a further re-service of the October 2018 decision prior to the hearing before me. These basic facts speak for themselves.
24. Further, Ms Jegarajah confirmed that fresh statelessness applications could be made in any event, thus completely undermining her request to me.
25. I refuse this application for judicial review and make no direction to the Respondent.

Costs

26. All of the above feeds into my decision on costs. Ultimately, having considered all of the particular circumstances, relevant case-law, and the submissions made by Counsel, I have decided that the costs issue should be dealt with by way of separate time periods, as follows.
27. In respect of the initial period of delay in reaching a decision on the statelessness application, I am not satisfied that unlawful delay was made out. No such finding had ever been made by the Tribunal and the grant of permission was just that. A period of 18 months could not of itself be deemed

irrational and there is no evidence before me as to any significant prejudice caused to the Applicant or his family during the period in question. It is also very difficult for the Applicant to establish any causal link between the making of the judicial review application in May 2018 and the refusal decision in October of that year. There is no evidence to suggest that the latter was a direct result of the former. Having said that, I note that the Respondent had offered to pay the Applicant's reasonable costs when providing her draft consent order in early 2019. All other things being equal, I would have been inclined award costs to the Applicant to cover the making of the judicial review application and the period until the Respondent's initial offer to settle the proceedings in December 2018 (or, at the latest, the second settlement attempt in February 2019).

28. However, the Applicant's overall conduct in these proceedings has been so poor that I make no order as to costs in respect of this initial period.
29. The second period of time begins on 18 December 2018 when the Respondent made her first attempt to settle the proceedings by way of a consent order. There is no suggestion that the Applicant was unaware of this attempt and no explanation has ever been given as to why it was unreasonable for the Applicant to have acceded to it. Even if I were to take the second consent order provided on 5 February 2019 as the starting point, it makes no difference. Erring on the side of caution, I take into account the service issue in respect of the October 2018 decision and regard the end of this period as being 2 July 2019. I see no basis for making an award of costs in the Applicant's favour for this period. Even if there was, his overall conduct is such that I would make no order as to costs.

30. From the point at which the Applicant will have (at least taking his case at the highest) set eyes on the October 2018 decision to date, I regard the Applicant's conduct, whether acting for himself or with the assistance of legal representatives, to have been plainly beyond the parameters of what can be considered reasonable. I do not intend to repeat here what I have set out previously, but incorporate those conclusions into my evaluation of the costs issue.
31. Ms Jegarajah's submission that an order of costs against the Applicant would have adverse consequences in terms of future applications, by virtue of incurring a litigation debt, is unpersuasive. That is not in my view a good reason not to make an order against him. There is almost always a risk of incurring costs in judicial review proceedings and a failure to conduct oneself in a reasonable manner, whether or not assisted by legal representatives, creates an entirely foreseeable possibility of having to pay money to the other party.
32. Having regard to the judgment of the Court of Appeal in Excelsior Commercial and Industrial Holdings Limited [2002] EWCA Civ 879 at paragraph 32, I conclude that the Applicant's conduct since receiving the October 2018 decision after its re-service on 2 July 2019 has clearly fallen significantly outside of the norm of what is expected in litigation. In my view, taking matters cumulatively, an award of costs in favour of the Respondent on an indemnity basis is, exceptionally and on the particular facts of this case, justified in respect of the period from 4 July 2019 (a date I consider fair, being 2 days after the re-service by post) to the hearing before me. I make such an order.

Signed: H Norton-Taylor

Upper Tribunal Judge Norton-Taylor

Dated: 1 September 2021