

IN THE UPPER TRIBUNAL

R (on the application of Kaienga) v Secretary of State for the Home Department IJR [2015] UKUT 0272 (IAC)

Field House
London

20 April 2015

BEFORE

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

ELIDIO KAIENGA

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr P Nathan, Counsel, instructed by Sutovic & Hartigan Solicitors, appeared on behalf of the Applicant.

Ms J Anderson, Counsel, instructed by the Government Legal Department appeared on behalf of the Respondent.

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JUDGMENT

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JUDGE KOPIECZEK: This application for judicial review comes before me following a grant of permission by Upper Tribunal Judge Rintoul on 2 March 2015.

2. The decision under challenge is that dated 12 November 2014, being a decision to refuse to grant leave to remain on Article 8 grounds, with reference to the Article 8 Immigration Rules and Article 8 proper. The claim form expressly refers to the decision dated 12 November 2014 as the decision under challenge.
3. This judgment deals principally with the issue of costs given that at the hearing before me a consent order was agreed between the parties.
4. The only facet of the consent order which was not finalised and which was drafted in the alternative by the parties, was whether the application is withdrawn or dismissed. The parties agreed that either would be acceptable in terms of the consent order, although Mr Nathan's preference was for the application to be withdrawn whereas Ms Anderson's was for the application to be dismissed. The parties were content for me to decide that issue, although strictly it is a matter for the parties given that it is their consent order. Nevertheless, I can deal with the matter shortly.
5. Mr Nathan on behalf of the applicant expressed his view that the application should be withdrawn. That therefore, is in effect what the applicant had decided to do. Very often an applicant is content for an application to be dismissed where there is a consent order but here the applicant has decided to withdraw the application, and to which the Tribunal consents. The application is therefore withdrawn, and this is now reflected in the consent order.

6. So far as costs are concerned, a brief recital of the history is necessary in order to put my decision into context. It is important that the parties understand that I express no view on the merits of what is now an outstanding application for leave to remain on Article 8 grounds.
7. Although the decision under challenge is dated 12 November 2014, there was an earlier decision dated 29 April 2014, refusing to grant leave to remain, again on Article 8 grounds. By the terms of a consent order dated 8 September 2014, the respondent agreed to reconsider that decision within three months of the signing of the Order, absent special circumstances and that the applicant had leave to withdraw the claim for judicial review with the respondent agreeing to pay the applicant's reasonable costs, to be assessed if not agreed. Following that consent order, there was the decision of 12 November 2014.
8. The applicant's complaint in relation to the second decision is, in effect, that it is a decision which is effectively identical to the earlier one of 29 April 2014 and which is in itself legally flawed for the additional reason that the applicant's age at the date of the decision (25) rather than at the date of application was taken into account, with reference to the requirements of paragraph 276ADE.
9. Part of the applicant's claim was that he was entitled to a removal decision, thus giving him a right of appeal which he did not have solely on the basis of the refusal of leave to remain. It was contended that the applicant fell within the respondent's policy on removal decisions, namely that there were "exceptional and compelling reasons" to make a removal decision.
10. The respondent did eventually file an acknowledgement of service ("AOS") on 2 March 2015 although not including any

summary grounds of defence. The AOS stated that the respondent had agreed to reconsider her decision of 12 July 2014 (seemingly a mistaken reference to the decision dated 12 November 2014 as pointed out by the applicant's solicitors in their letter dated 4 March 2015).

11. The draft consent order referred to the respondent agreeing to reconsider her decision of "12 July 2014" within three months of the sealed order, absent special circumstances, and that the applicant do have leave to withdraw the claim for judicial review with there being no order as to costs. The next part of the history of the proceedings can be seen from the bundle of correspondence provided by the applicant's solicitors, at page 33. An email, dated 4 March 2015, to the respondent describes the decision of 12 November 2014 as a "sterile repeat" of the decision withdrawn in the previous proceedings. The letter expresses the concern that should the applicant agree to the relief offered they would inevitably end up with a third set of "essentially repetitive proceedings". The email continues that this would offend against the principle of finality of litigation and would "amount to an egregious waste of judicial and court resources". Reference is also made to the fact of the termination of the applicant's NASS support in consequence of the respondent's decision. The challenge to the refusal to make an appealable immigration decision is repeated and on that basis the proposed consent order was not agreed to. In addition to that, there was objection to the proposed order as to costs i.e. no order as to costs.

12. On 24 March 2015 there was a further email to the respondent referring to Judge Rintoul's directions for the respondent to file detailed grounds by 23 March 2015, and that no detailed grounds had been provided. The email continues that it is assumed therefore that the respondent does not wish to defend

the proceedings and agrees to the relief sought as set out in the grounds.

13. By email dated 24 March 2015 the respondent agreed to the proceedings being stayed pending the reconsideration and pointing out that rights of appeal derive from immigration decisions within the context of the Nationality, Immigration and Asylum Act 2002, section 82. It is suggested in the email that the only mandatory order that could now be made is for the Secretary of State to make a fresh decision, which she has agreed to do. It is also said that if the Tribunal were to attempt to order the respondent to give the applicant a right of appeal it would pre-determine the decision that is for the Secretary of State alone to determine, namely whether to grant the applicant leave to remain. Furthermore, it would, it is suggested, pre-determine the decision against the applicant in that it would presuppose that the submissions would in the first instance be rejected. The respondent contended that the correct approach was for the applicant to await a fresh decision he could either appeal, if unfavourable, or challenge by way of judicial review, depending on the circumstances.
14. The draft consent order was to the effect, amongst other things, that the judicial review should be stayed pending the outcome of the review by the respondent of the decision of 12 November 2014.
15. In a response dated 27 March 2015, the applicant's solicitors suggested that under the terms of the respondent's removal decisions policy, she is required to issue a 'criteria met' letter in response to a PAP letter whereby she would agree to reconsider the decision and then, if the decision is to maintain the earlier decision, to make an appealable decision within three months. It is suggested that the failure to make an appealable decision is a continued breach of the

second aspect of the policy. A counter proposal is made by the applicant's solicitors as to an appropriate form of wording in the consent order. It is further suggested that given the respondent's conduct following the first judicial review, including that she has still not paid the costs of that claim, there would ordinarily be an application for costs on an indemnity basis, although in the interests of prompt settlement, costs on the standard basis would be agreed, if the terms of the consent order suggested by the applicant's solicitors were themselves agreed.

16. Three days later, on 30 March 2015, the respondent sent a holding email saying that an effort would be made to respond to the proposed amendments as soon as possible. On the same date, the applicant's solicitors wrote to the respondent stating that the respondent had failed to provide any basis for resisting the applicant's grounds for judicial review and pointing out that the applicant is required to file a skeleton argument and bundle with the Tribunal on 30 March 2015. Reference is made to rule 31 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in terms of the requirement for the respondent to provide detailed grounds for contesting the application and suggesting that the Tribunal would be invited to prevent the respondent's participation in the proceedings in the absence of such detailed grounds.

17. A further email from the applicant's solicitors dated 2 April 2015 asks for correspondence to be redirected to a different solicitor within the firm because of the author's annual leave. On 8 April 2015 the respondent sent an email to the applicant's solicitors enclosing a draft consent order stating that the applicant does not meet the requirements for a removal decision. The email sets out the terms of the removals criteria and refers to the decision in Daley-Murdock

v Secretary of State for the Home Department [2011] EWCA Civ 161.

18. By email dated 13 April 2015 the applicant's solicitor's complain about the respondent's earlier email being sent to the wrong person at the applicant's solicitors (referring to the annual leave of the solicitor in question) and stating that the amended form of consent order sent by the respondent was not agreed. In summary, the applicant's solicitors contend that the applicant's case demonstrates compassionate and exceptional circumstances and the applicant continues to seek an explanation for the decision to refuse to make a removal decision. It suggests that the respondent persists in refusing to give any reasons as to why the applicant's circumstances are not exceptional and compelling and does not provide any indication as to what threshold this involves or how it can be defined. Previous points are repeated.
19. Ms Anderson submitted that an order for costs in favour of the applicant would be accepted by the respondent but only up to 8 April 2015 and perhaps up to, say, 12 April 2015 in relation to any consequential matters. 8 April 2015 was the date on which a further consent order was offered by the respondent. The respondent was not seeking her costs for the hearing, albeit that there had been an offer of settlement by the respondent.
20. Mr Nathan drew my attention to the chronology of events and referred me to the correspondence which I have set out above. He submitted that even on 8 April 2015 the respondent was still maintaining that there should be no appealable decision, although given that it was now accepted that the respondent's decision would be withdrawn, the position was different. Under the 'new' immigration rules a fresh decision on Article 8 grounds would be appealable. Thus, the applicant is

entitled to the costs up to and including the hearing, including the drawing up of any orders.

21. I was referred to the decision in Balmoral Group Limited v Borealis (UK) Limited [2006] EWHC 2531 (Comm) on the question of the award of costs on an indemnity basis.
22. It was, in essence, submitted that the applicant's approach to matters had been timely, whereas the respondent's had not. The respondent's position had been to refuse to engage with the appealable immigration decision point. The conduct of the respondent made it appropriate for costs to be awarded on an indemnity basis.
23. Ms Anderson argued that the Tribunal was asked to make a significant departure from the ordinary basis for an award of costs. The respondent had been willing to reconsider the case and the respondent could not be penalised for not incurring the public expense of providing detailed grounds of defence. Costs on an indemnity basis is not designed for punitive purposes. The applicant could not have achieved more than he has from the judicial review proceedings. It was clear that it was completely in the discretion of the Secretary of State if and when to take enforcement action in the form of a removal decision and there may be good reasons in different cases as to why no such decision had been taken.
24. After the applicant's email dated 13 April 2015, rejecting the offer of settlement by way of the draft consent order to which I have referred, nothing more was heard from the respondent. A further email was sent on behalf of the applicant on 17 April 2015 bemoaning the lack of action on the part of the respondent and lack of response to the email dated 30 March 2015. Also on 17 April a skeleton argument, albeit a brief one in the circumstances, was served by the applicant.

25. The position therefore is that after the respondent's communication of 8 April 2015 nothing more was heard by the applicant or by the Tribunal from the respondent. It seems to me that the applicant was entitled to be cautious about assenting to a consent order in the terms proposed given that previous proceedings did not advance matters notwithstanding a consent order and an agreement to reconsider the decision, because the new decision was virtually identical to the previous one. So far as the issue of an appealable removal decision is concerned, it is not unreasonable for the applicant to have expected the respondent to at least engage in a more detailed way with the issues arising from his particular circumstances, as advanced in the claim.
26. Aside from that, I do consider that greater effort could have been made by the respondent to seek to obtain agreement as to the terms of the consent order in advance of the hearing. As I say, the last communication from the respondent to the applicant prior to the hearing was 8 April 2015 and nothing was known either by the applicant or by the Tribunal until the very day of the hearing as to the respondent's position.
27. Although not referred to by the parties, I have considered the decision in Muwonge v Secretary of State for the Home Department (consent orders: costs: guidance) IJR [2014] UKUT 00514 (IAC) in terms of the requirement to take proactive steps to achieve agreement so far as consent orders are concerned, in advance of the hearing.
28. In the circumstances, I am satisfied that it is reasonable for the respondent to pay the applicant's costs up to and including the hearing on 20 April 2015. It is to be remembered that in any event the respondent has agreed to pay the applicant's reasonable costs, to be assessed if not

agreed, up to 8 April 2015. My decision therefore, includes the period from 8 April 2015, up to and including 20 April 2015.

29. As to the applicant's contention that costs should be awarded on an indemnity basis, I reject that submission. The only authority cited to me on the point is as previously indicated, the decision in Balmoral Group Limited. I quote from paragraph 1 of the decision as follows:

"Balmoral lost the action. They will have to pay the costs. The question I have to decide is whether they should pay the costs, or some of them, on the standard or the indemnity basis. The basic rule is that a successful party is entitled to his costs on the standard basis. The factors to be taken into account in deciding whether to order costs on the latter basis have been helpfully summarised by Tomlinson, J., in *Three Rivers District Council v The Governor and Company of the Bank of England* [2006] EWGC 816 (Comm). The discretion is a wide one to be determined in the light of all the circumstances of the case. To award costs against an unsuccessful party on an indemnity scale is a departure from the norm. There must, therefore, be something - whether it be the conduct of the claimant or the circumstances of the case - which takes the case outside the norm. It is not necessary that the claimant should be guilty of dishonesty or moral blame. Unreasonableness in the conduct of the proceedings and the raising of particular allegations, or in the manner of raising them may suffice. So may the pursuit of a speculative claim involving a high risk of failure or the making of allegations of dishonesty that turn out to be misconceived, or the conduct of an extensive publicity campaign designed to drive the other party to settlement. The making of a grossly exaggerated claim may also be a ground for indemnity costs."

30. Essentially, it is to be noted that the discretion in relation to costs is a wide one and it is to be borne in mind that to award costs against an unsuccessful party on an indemnity basis is a departure from the norm. I bear in mind that it is not necessary that a party should be guilty of dishonesty or moral blame. Nevertheless, I do not consider that the conduct of the respondent is such that this is an appropriate case in which to make an award of costs on anything other than the standard basis.

31. There is also something to be said for the argument advanced by Ms Anderson to the effect that public law proceedings, involving public funds, ought to be considered rather differently from commercial cases such as that in Balmoral Group Limited. I was not referred to any authority on the point but in any event, even without taking into account Ms Anderson's point, I would not have concluded that costs should be awarded on an indemnity basis. It is also to be borne in mind that, as explained in Three Rivers District Council v Governor and Company of the Bank of England [2006] EWHC 816 (Comm) at paragraph 14, the purpose of an order for costs on an indemnity basis is not to punish the paying party but to give a more fair result for the party in whose favour a costs order is made.
32. In conclusion therefore, costs are awarded in favour of the applicant up to and including 20 April 2015 on the standard basis, to be assessed if not agreed.
33. When this judgment was handed down on 30 April 2015 neither party attended, their attendance not having been required. Accordingly, although there was no application at the hearing for permission to appeal to the Court of Appeal, I am required by Rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to consider whether to give or refuse permission to appeal. There being no arguable error of law in this decision, permission to appeal is refused.