Neutral Citation Number: [2019] EWCA Civ 151

Case No: C4/2017/1927

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
HIS HONOUR JUDGE DAVID COOKE
SITTING AS A JUDGE OF THE HIGH COURT
Claim No CO/69/2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/19

Before :

LORD JUSTICE DAVIS

THE SENIOR PRESIDENT OF TRIBUNALS
LORD JUSTICE RYDER
and
LORD JUSTICE HICKINBOTTOM

- -

Between :

THE QUEEN ON THE APPLICATION OF
JAWAD FAQIRI — **Appellant**

- and -

THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) — **Respondent**

- and -

THE SECRETARY OF STATE FOR
THE HOME DEPARTMENT — **Interested Party**

- -
- -

Becket Bedford (instructed by **Sultan Lloyd Solicitors**) for the **Appellant**
Paul Joseph (instructed by **Government Legal Department**) for the **Respondent**
Paul Joseph (instructed by **Government Legal Department**) for the **Interested Party**

Hearing date: 6 February 2019

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Approved Judgment

Lord Justice Hickinbottom:

Introduction

1. This appeal gives rise to important issues in respect of the correct approach to the costs of a successful uncontested application for the judicial review of a refusal by the Upper Tribunal of permission to appeal a determination of the First-tier Tribunal ("a Cart claim").

2. The relevant facts can be shortly put. The Appellant applied for asylum. The application was refused by the Secretary of State, and the Appellant's appeal was refused by the First-tier Tribunal (Immigration and Asylum Chamber) ("the FtT"). The FtT refused permission to appeal, as did the Upper Tribunal (Immigration and Asylum Chamber) ("the UT"). There was no further right of appeal.

3. The Appellant therefore sought judicial review of the refusal of permission by the UT. Neither the UT (as defendant) nor the Secretary of State (as interested party) put in a response contesting the claim. On 9 February 2017, Lang J gave permission to proceed with the claim; and, no party having requested a hearing, on 24 April 2017, His Honour Judge David Cooke sitting as a Judge of the High Court quashed the UT decision to refuse the application for permission to appeal and remitted the matter to the UT to redetermine that application under CPR rule 54.7A. There is no challenge to that substantive order.

4. However, Judge Cooke also made the following costs order:

> "The costs of the claim in the Administrative Court be treated as costs of the appeal before the Upper Tribunal."

In his observations, he added:

> "It is not appropriate to order costs against the defendant, which is a tribunal, but to treat the application to this court as a stage in seeking permission to appeal, the costs of which are part of the appeal proceedings."

5. With the leave of Gross LJ, the Appellant appeals that costs order on the basis that the judge erred on three grounds:

> Ground 1: It was wrong in principle to deny the Appellant an order for costs against the UT because it is a tribunal.
>
> Ground 2: The judge failed to consider an order that the Secretary of State, as Interested Party, pay the Appellant's costs.
>
> Ground 3: The judge erred in directing that the Appellant's costs of the judicial review proceedings could and should be costs in the appeal to the UT.

The Appellant, who has at all material times been publicly funded, seeks an order that the UT (alternatively, the Secretary of State) pays his costs of the judicial review claim.

6. The Secretary of State cross-appeals against the order which in effect makes him liable for the Appellant's costs of the judicial review contingent upon the Appellant succeeding in his appeal to the UT. He makes common cause with the Appellant in saying that the judge erred in directing that the Appellant's costs of the judicial review proceedings could and should be costs in the appeal to the UT; but contrary to the Appellant's submission as to who should pay the costs of the judicial review, the Secretary of State submits that it would be appropriate to make no order as to costs.

7. To complete the chronology, following Judge Cooke's substantive order, the matter returned to the UT which granted permission to appeal; and, following a further hearing, found an error of law in the FtT's determination, allowed the appeal, and remitted the matter to the FtT for a re-hearing. At that hearing, the FtT refused the Appellant's appeal, and he was refused permission to appeal to the UT. His appeal rights are now exhausted. Thus, although not relevant to this appeal, his asylum claim has ultimately failed.

8. Before us, Becket Bedford of Counsel appeared for the Appellant, and Paul Joseph of Counsel appeared both for the UT and for the Secretary of State.

Cart Judicial Review Claims

9. The refusal by the UT of an application for permission to appeal from the FtT to the UT is an "excluded" (i.e. non-appealable) decision (see section 13(8)(c) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act")). Nor does the UT have any power to review such a decision, even if it is convinced that its own decision was wrong, because its power of review does not apply to excluded decisions (see section 10(1) of the 2007 Act).

10. However, in R (Cart) v Upper Tribunal [2011] UKSC 28; [2012] 1 AC 663 ("Cart") the Supreme Court confirmed that such decisions are amenable to judicial review, and set out the test by which applications for permission to proceed with such a claim should be considered by the Administrative Court, i.e. on the basis of the second-tier appeals criteria. Those criteria are set out in section 55(1) of the Access to Justice Act 1999 (which applies to second-tier appeals in the court system) and section 13(6) of the 2007 Act (which applies to second-tier appeals in the tribunal system), namely that permission shall not be granted unless, in addition to an arguable issue being raised:

> "(a) the proposed appeal would raise some important point of principle or practice; or (b) there is some other compelling reason for the relevant appellate court to hear the appeal."

11. The Supreme Court Justices each expressed a hope that the Civil Procedure Rules Committee would consider the appropriate procedure in respect of applications for judicial review of decisions by the UT to refuse permission to appeal in these circumstances (see [58], [93], [96], [106] and [133]). In the event, rule 54.7A was added to the Civil Procedure Rules ("the CPR"), to confirm the applicability of second appeals criteria and set out the procedure for such claims, as follows (so far as relevant to this appeal):

"(1) This rule applies where an application is made, following refusal by the Upper Tribunal of permission to appeal against a decision of the First-tier Tribunal, for judicial review—

(a) of the decision of the Upper Tribunal refusing permission to appeal;…

(2) Where this rule applies—

(a) the application may not include any other claim, whether against the Upper Tribunal or not; and

(b) any such other claim must be the subject of a separate application.

(3) The claim form and the supporting documents required by paragraph (4) must be filed no later than 16 days after the date on which notice of the Upper Tribunal's decision was sent to the applicant.

(4) The supporting documents are—

(a) the decision of the Upper Tribunal to which the application relates, and any document giving reasons for the decision;

(b) the grounds of appeal to the Upper Tribunal and any documents which were sent with them;

(c) the decision of the First-tier Tribunal, the application to that Tribunal for permission to appeal and its reasons for refusing permission; and

(d) any other documents essential to the claim.

(5) The claim form and supporting documents must be served on the Upper Tribunal and any other interested party no later than 7 days after the date of issue.

(6) The Upper Tribunal and any person served with the claim form who wishes to take part in the proceedings for judicial review must, no later than 21 days after service of the claim form, file and serve on the applicant and any other party an acknowledgment of service in the relevant practice form.

(7) The court will give permission to proceed only if it considers—

(a) that there is an arguable case, which has a reasonable prospect of success, that both the decision of the Upper Tribunal refusing permission to appeal and the

decision of the First-tier Tribunal against which permission to appeal was sought are wrong in law; and

(b) that either—

(i) the claim raises an important point of principle or practice; or

(ii) there is some other compelling reason to hear it.

(8) If the application for permission is refused on paper without an oral hearing, rule 54.12(3) (request for reconsideration at a hearing) does not apply.

(9) If permission to apply for judicial review is granted—

(a) if the Upper Tribunal or any interested party wishes there to be a hearing of the substantive application, it must make its request for such a hearing no later than 14 days after service of the order granting permission; and

(b) if no request for a hearing is made within that period, the court will make a final order quashing the refusal of permission without a further hearing.

(10) The power to make a final order under paragraph (9)(b) may be exercised by the Master of the Crown Office or a Master of the Administrative Court."

12. The object of the rule is clear. In the light of the Parliamentary determination that an applicant has neither a right of appeal nor a right of review by the UT itself, rule 54.7A provides a process which gives a fair opportunity for an applicant to challenge a refusal by the UT of permission to appeal from the FtT, but only on restricted grounds and with a process which restricts the necessary involvement of the tribunal itself, the respondent public authority and the court.

Costs Orders in the Tribunals

13. By rule 9(1) and (2) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014 No 2604), if it allows an appeal, the FtT Immigration and Asylum Chamber's powers to order costs against the Secretary of State is generally limited to the amount of any fees paid or payable, unless the Secretary of State has acted unreasonably in defending or conducting the appeal.

14. Similarly, by rule 10(3)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008 No 2698) ("the UT Rules"), the UT cannot award costs in an appeal from the FtT except (so far as relevant to this appeal) if the UT considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings.

Costs Orders in Judicial Review Claims

15. The general approach to costs orders in judicial review proceedings is now well-established.

16. By section 51(1) of the Senior Courts Act 1981, subject to any other enactment and the rules of court, the costs of and incidental to all proceedings in the High Court "shall be in the discretion of the court". As section 51(3) emphasises:

> "The court shall have full power to determine by whom and to what extent the costs are paid".

That is reflected in CPR rule 44.2(1) and (4), under which the court has a discretion as to any costs order it makes, having regard to all the circumstances including the conduct of the respective parties.

17. However, despite the breadth of that discretion, an award of costs can only be made on a "principled basis" (RL v London Borough of Croydon [2018] EWCA Civ 726 ("RL") at [78] per Underhill LJ). Rule 44.2(2)(a) sets out the general principle, namely that "the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party". The rationale for that was considered by Singh LJ in ZN (Afghanistan) and KA (Iraq) v Secretary of State for the Home Department [2018] EWCA Civ 1059; [2018] 3 Costs LO 357 ("ZN and KA") at [67]:

> "The underlying rationale for the normal rule that costs follow the event is that a party has been compelled by the conduct of the other party to come to court in order to vindicate his legal rights. If those legal rights had been respected in the first place by the other party, it should never have been necessary to come to court. Accordingly, there will normally be a causal nexus between the fact that costs have been incurred and the underlying merits of the legal claim. This underlying rationale also explains why civil procedure normally requires a party to send a pre-action protocol letter to the other party. If the response to that letter had been to accept the merits of the claim in advance, it should never have been necessary to bring that claim to court."

18. CPR rule 44.2 therefore generally requires the court to identify "the unsuccessful party" and "the successful party"; and, unless there is anything to rebut the presumption, order the former to pay the latter's costs.

19. That general rule applies to a public law claim in the Administrative Court as much as to a claim made in any other part of the justice system (see R (M) v Croydon London Borough Council [2012] EWCA Civ 595 at [58] per Lord Neuberger of Abbotsbury MR). Therefore, where someone challenges the decision of an arm of government, and is successful, he can expect to obtain a costs order in his favour; and, subject to giving suitable notice (e.g. in the form of a pre-action letter) and exhausting alternative remedies etc, that is so even where the decision-maker takes no part in the claim.

20. However, the courts have long recognised the need for a different approach where the decision challenged is that of an inferior court or tribunal, over which the High Court

has a supervisory jurisdiction; and the challenge comes by way of judicial review only because of the absence of a statutory right of appeal. A court or tribunal is usually required to provide reasons as part of its decision; and, in such cases, as in the case of an appeal, it does not usually seek to justify its own decision over and above those reasons and therefore does not usually seek to play any active part in the claim.

21. Often, the court or tribunal determination challenged will have been made following a *lis* between competing parties, usually an individual affected by the initial administrative decision on the one hand and the arm of the executive that made the decision on the other. When a dissatisfied party seeks to challenge the determination of the court or tribunal by way of judicial review, the other party to that *lis* will be an interested party in that claim; and will have an opportunity to make submissions in support of the decision, in a similar way to the respondent to an appeal. Where that other party plays an active part in the judicial review, it is likely that it will have a costs order made against it, if the challenge is successful; and the claimant will be ordered to pay its costs, if it is not. Consequently, the question of costs against the court or tribunal itself arises only infrequently; because, usually, the court or tribunal plays no part in the case and there is another party which is a more appropriate target for a costs order.

22. However, the issue as to when a cost order against a court or tribunal is appropriate did arise before this court in R (Davies) v Birmingham Deputy Coroner [2004] EWCA Civ 207; [2004] 1 WLR 2739 in which Brooke LJ (with whom Longmore LJ and Sir Martin Nourse agreed) set out his conclusions in [47], as follows:

> "(1) The established practice of the courts was to make no order for costs against an inferior court or tribunal which did not appear before it except when there was a flagrant instance of improper behaviour or when the inferior court or tribunal unreasonably declined or neglected to sign a consent order disposing of the proceedings.
>
> (2) The established practice of the courts was to treat an inferior court or tribunal which resisted an application actively by way of argument in such a way that it made itself an active party to the litigation, as if it was such a party, so that in the normal course of things costs would follow the event.
>
> (3) If, however, an inferior court or tribunal appeared in the proceedings in order to assist the court neutrally on questions of jurisdiction, procedure, specialist case-law and such like, the established practice of the courts was to treat it as a neutral party, so that it would not make an order for costs in its favour or an order for costs against it whatever the outcome of the application.
>
> (4) There are, however, a number of important considerations which might tend to make the courts exercise their discretion in a different way today in cases in category (3) above, so that a successful applicant… who has to finance his own litigation without external funding, may be fairly compensated out of a source of public funds and not be put to irrecoverable expense in asserting his rights after a

> coroner (or other inferior tribunal) has gone wrong in law, and there is no other very obvious candidate available to pay his costs."

23. Mr Bedford submitted that Brooke LJ intended these to be merely a recitation of the practice of the court, rather than a summary of the applicable principles; but I do not agree. Although Brooke LJ set out those propositions as the "established practice" of the courts, he made clear that they represented "the governing principles today" (see [46]). Consequently, over the last 15 years, Davies has been regularly cited for the general proposition that, if a decision of a court or tribunal is challenged by way of judicial review, it will not be liable for the costs of the claim unless it has behaved improperly or unreasonably or takes an active part in the proceedings. That is reflected in the standard form of Acknowledgement of Service in judicial review proceedings which, in section A (tick box in form), a court and tribunal defendant can indicate that it does not intend to make a submission in relation to the claim, i.e. it does not intend to take an active part. In the case before us, that box was ticked in the form of Acknowledgement of Service filed by the UT.

24. Davies was determined several years before M. As I have described, M made clear that the general principles of costs set out in the CPR apply equally to public law claims. In R (Gudanaviciene) v First-tier Tribunal (Immigration and Asylum Chamber) [2017] EWCA Civ 352; [2017] 1 WLR 4095, this court (Longmore, David Richards and Moylan LJJ) considered whether M had marked a different approach to costs in public law claims than that expounded in Davies; and firmly held that it had not. It confirmed that Davies was still good law, and binding on this court (see, particularly, [34]-[38]).

25. Longmore LJ gave the leading judgment: he was of course a member of the constitution in Davies. He emphasised that it would be a serious step to say that in an undefended appeal or judicial review, the tribunal would be at risk as to costs. He considered that any such step would amount to a substantial inroad into the normal rule of judicial immunity epitomised by Sirros v Moore [1975] 1 QB 119 in which this court (Lord Denning MR, Buckley and Ormrod LJJ) held that as a matter of principle every judge was entitled to immunity from civil claims in respect of anything done by him acting in his capacity as a judge. Longmore LJ considered that such a step could not be taken by any court of coordinate jurisdiction with the court that decided Davies, and certainly could not be implied into the decision in M (see [36]-[37]). The relevant legislation did not attribute a separate legal personality to the tribunal; and so, absent immunity (which the coroner in Davies enjoyed by virtue of section 104(1) of the Access to Justice Act 1999), court and tribunal judges might be exposed to an unindemnified personal liability (see [38]).

26. Gudanaviciene consequently confirmed – indeed, reinforced – the principle set out in Davies that, where an inferior court or tribunal was a formal defendant in judicial review proceedings, no order for costs would be made against it unless it had acted improperly or had taken a positive, non-neutral stance in the litigation. It also better identified the underlying general rationale, namely judicial immunity.

27. Finally, it is also well-established as a general proposition that judicial discretion with regard to the making of costs orders is wide; and an appeal court will only interfere with the exercise of that discretion where the judge below has erred in his approach or has exceeded the wide ambit of the discretion such that his decision is wrong.

The Grounds of Appeal

28. As his first ground of appeal, Mr Bedford submits that it was wrong in principle for the judge to deny the Appellant an order for costs against the UT because it is a tribunal. As I understood his submissions, he ultimately accepted that Davies and Gudanaviciene are binding on this court – in any event, they are clearly binding – but he submits that this case is distinguishable from them on two bases.

29. First, he submitted that this claim, unlike Davies (which concerned a challenge to a coroner's decision) and Gudanaviciene (which concerned an unappealable decision by the FtT to refuse an adjournment), is a Cart claim; and such claims have an "exceptional nature" and require a different approach. In particular, in his oral submissions, he relied upon [47(4)] of Davies, in which Brooke LJ indicated that the categories of case in which it may be appropriate to make a costs order against a tribunal are not closed: and, since Davies, Mr Bedford submitted that the constitutional right of access to justice had been better recognised in such cases as R (UNISON) v Lord Chancellor [2017] UKSC 51; [2017] 3 WLR 409. In circumstances as here, the Appellant's right to pursue an appeal was dependent upon a prior application for judicial review of a refusal of permission to appeal; and, although the Appellant in this case was legally aided and represented (and there was no evidence that he was, in fact, deterred), the inability of such an individual to recover his costs of the judicial review against the tribunal was a hindrance or impediment to his access to justice. The principles of access to justice and of judicial immunity were thus at odds; and that conflict should be resolved by a finding that judicial immunity must give way, just as (as Davies itself recognised) it gives way if the relevant court or tribunal has acted improperly or actively seeks to defend its decision.

30. However, I am entirely unconvinced that this claim is materially distinguishable from Davies and Gudanaviciene, which are binding on this court.

31. I do not accept that UNISON has marked a change in the jurisprudential landscape which enables us to depart from those authorities even if we wished to do so. It is true that UNISON focused upon the constitutional right of access to justice; but, as my Lord, Davis LJ, pointed out in the course of debate, the importance of access to justice was well-recognised by July 1999 (when the Final Report of Lord Woolf MR on the civil justice system, "Access to Justice", was published) and certainly by 2004. It is inconceivable that Brooke LJ did not have it well in mind when he gave judgment in Davies; or Longmore LJ when he gave judgment in Gudanaviciene.

32. I accept that Cart claims are different from other judicial review claims in the sense that, in CPR rule 54.7A, they have a distinct procedure: but there is nothing in that procedure which bears upon the applicable costs regime or otherwise materially distinguishes them from other judicial review claims. It merely limits the scope for repetitious applications, and restricts the resources that are necessarily expended upon them.

33. The driving force behind the proposition in Davies and Gudanaviciene – that a court or tribunal should not be liable for the costs of a judicial review which seeks to challenge one of its decisions, if the court or tribunal does not act improperly and takes no active part in the proceedings – is the important principle of judicial immunity. That principle applies equally to decisions challenged by way of Cart

claims as any judicial review of the decision of a court or tribunal. A further exception to the immunity over and above those set out in Davies is neither necessary nor appropriate. Mr Bedford submitted that it was warranted because of the high (second-tier appeals test) hurdle which applies to Cart claims, and not to other judicial reviews; but the height of the hurdle to be overcome is not rationally related or otherwise material to the applicability of the costs regime. Indeed, it seems to me that it would be incongruous if a tribunal might be liable for costs in respect of a mistake in relation to a possibly difficult point of principle or practice but not for a patent mistake only affecting a unitary case.

34. It is noteworthy that both Cart itself and CPR rule 54.7A are silent as to costs: neither suggests that the usual costs regime applicable to judicial reviews should not apply to Cart claims. Whilst of course each case is different, in my view Gudanaviciene, which concerned the judicial review of an unappealable decision to refuse an adjournment application, is a case not far removed from the case before us. There is nothing in M – nor in any of the cases to which we have been referred – that suggests that a judge can be made liable for costs if, on an appeal or a judicial review of his decision, his order is quashed, unless he has acted improperly or has actively sought to defend the challenge. Neither Counsel before us was able to refer us to a single case in which such an order for costs had been made against a court or tribunal.

35. In any event, on the evidence, I am unpersuaded that the inability to obtain a costs order against a tribunal is any hindrance or impediment to access to justice. It did not deter the Appellant; and, generally, as I have described, those who appeal against immigration decisions of the Secretary of State are usually unable to recover costs (over and above some fees) from anyone (see paragraphs 13 and 14 above). There is no suggestion before us that that regime deters prospective challenges. In a Cart claim, a claimant at least has a potential claim for costs against the Secretary of State even where he (the Secretary of State) has not acted unreasonably.

36. The second basis upon which Mr Bedford sought to distinguish Gudanaviciene is that the claimant in that case was not, but the Appellant is, legally aided. However, I do not consider that this ground has any force either.

37. Although, for reasons which will soon be apparent, I do not consider this an issue that I need to determine for the purpose of this appeal, it is unclear whether the factual basis of the submission is sound. Ms Davies was certainly legally aided. While Ms Gudanaviciene was not legally aided at the time of the judicial review – indeed, her application to adjourn the FtT appeal was on the basis that she was appealing a refusal of legal aid – she was eventually granted legal aid (see [21], recording the outcome of R (Gudanaviciene) v Director of Legal Aid Casework) [2014] EWHC 1840 (Admin) as materially approved by this court in [2014] EWCA Civ 1622; [2015] 1 WLR 2247 especially at [81]-[91]). It is unclear whether the scope of that legal aid certificate covered the relevant judicial review.

38. In any event, as Mr Bedford accepted in paragraph 14 of his skeleton argument, the fact that a party is legally aided is not permitted to affect "the principles on which the discretion of the court or tribunal is normally exercised" (section 30(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012). He referred us to ZN and KA, in which Singh LJ considered the various authorities, before concluding that, despite the general ("normal") prohibition in section 30(1), the fact that one of the

parties is on legal aid is not necessarily irrelevant to the exercise of the court's discretion in respect of costs (see [91]). The example Singh LJ gives (at [92]) is where a claimant is successful in having a challenged decision of a public body quashed, but is not successful on all his grounds, the court should be slow to engage in a technical exercise to exclude from a favourable order the costs of unsuccessful grounds. Leggatt LJ put the matter in a slightly different way, which was not dependent upon whether the relevant individual is legally aided (see especially [104]), an approach which I favour (see R (Gourlay) v Parole Board [2017] EWCA Civ 1003; [2017] 1 WLR 4107 at [60]-[61], to which Leggatt LJ refers at [100]) as apparently did the third member of the constitution in ZN and KA, Sir Brian Leveson P (at [106]). Indeed, during the course of the debate before us, Mr Bedford appeared to accept the force of that analysis. In any event, in this case, in my firm view there is nothing to affect the statutory principle that the fact that the Appellant is publicly funded will not normally affect the exercise of the court's costs discretion and, in particular, should not affect it adversely to him. Here, Judge Cooke's approach or order did not infringe that principle in any way.

39. The first ground consequently fails. In my view, it would be curious – indeed, incongruous – if a court, tribunal or the individual holder of a judicial post was potentially liable for the costs of an application for judicial review of a refusal of permission to appeal, but not for the costs of any other challenge to his or her decisions, e.g. by way of appeal or judicial review to any other decision. It is unsurprising that the well-established law is that they are not so liable.

40. That was the only basis upon which Mr Bedford contended that the UT should be liable for the costs of the Cart judicial review. The Appellant's Grounds 2 and 3 concern the potential liability of the Secretary of State as Interested Party.

41. As his second ground, Mr Bedford submitted that the judge had failed to consider an order that the Secretary of State pay the Appellant's costs; but, looked at discretely, that ground is clearly bad, given that the judge did consider and make a (limited) costs order against the Secretary of State. The remaining substantive ground of appeal is in substance Ground 3: the judge erred in directing that the Appellant's costs of the judicial review proceedings could and should be costs in the appeal to the UT. Mr Bedford submits that the judge should have made an immediate order that the Secretary of State, as the protagonist and Appellant's true opponent in the proceedings, should pay his costs of the Cart claim.

42. The Secretary of State cross-appeals. Mr Joseph submits that Judge Cooke was wrong in principle to approach costs on the basis that the judicial review proceedings were in effect a stage in the tribunal appeal proceedings: they were stand-alone proceedings, in respect of which the judge erred in not making a stand-alone costs order. Applying the principles set out in M, the judge compounded that error by concluding that the Secretary of State was the "unsuccessful" party in the judicial review claim: he was merely an interested party who took no active part in the claim, neither filing an Acknowledgment of Service, nor requesting a hearing after permission to proceed was granted. Thus, the Secretary of State did not cause the Appellant to incur any cost in the judicial review proceedings, and there was no principled basis upon which a costs order could be made against him even with only contingent liability. It is wrong in principle, he submitted, for an Administrative Court judge to make a costs order against an interested party in circumstances in

which he overturned the decision of a court or tribunal in proceedings in which that interested party played no part.

43. In support of those submissions, Mr Joseph particularly relied upon the following authorities.

44. Steele Ford & Newton v Crown Prosecution Service (No 2) [1994] 1 AC 22 concerned the grant of orders for payment out of central funds (i.e. out of money provided by Parliament) in favour of successful appellant solicitors against whom an order had been made in the Crown Court that they pay the prosecution costs of a criminal trial, absent any express statutory authority for an order for payment out of central funds in those circumstances. The House of Lords held that there was no power to make such an order. At page 39H-40C, Lord Bridge of Harwich said this:

> "I share with the Court of Appeal the view, which is no doubt held by every judge brought up in the English system, that it is just for a successful litigant, and perhaps a fortiori a successful appellant, to be able to recover his costs from someone. But unfortunately that is not always so. [Lord Bridge then referred to examples of cases in which wasted costs were not recoverable from anyone.] To take yet another example, it is relatively commonplace for a party who is victim of a misjudgement by an inferior court or tribunal to have to seek relief by an application for judicial review in circumstances where the Divisional Court cannot hold either another party or the inferior tribunal itself liable in costs and there is no power to award costs from public funds…".

45. The second case, RL, concerned an order that there be no order for costs following the settlement of a judicial review claim by the appellant against the defendant local authority which sought to challenge an assessment by the authority under section 17 of the Children Act 1989. This court dismissed the appeal against that costs order, finding that the appellant was not entitled to costs under the principles set out in M. The leading judgment was that of Moylan LJ, with whom Jackson and Underhill LJJ agreed. In a short concurring judgment, Underhill LJ said this (at [78]):

> "It follows that I do not believe that the Appellants are entitled to their costs. The reason why I reach this conclusion with some reluctance is that I am very conscious of the importance to solicitors undertaking publicly-funded work of recovering costs on an *inter partes* basis not only when they succeed in litigation but when the litigation is resolved on a basis that represents success. I am all the more conscious of that factor in the present case, where PLP's work on behalf of the Appellants appears to have been of very high quality and showed exceptional commitment to their case. But that does not justify an award of costs for which I cannot find a principled basis."

In ZN and KA at [74], Singh LJ expressly approved that passage, before proceeding to conclude that there was no principled basis upon which an order as to costs could be made in that case either.

46. Mr Joseph thus submitted that there was no principled basis for a costs order – even a contingent costs order – to be made against the Secretary of State in the circumstances of this case. He submits that the correct course would have been to make no order as to costs, and the judge erred in making the order that he did.

47. These remaining grounds of appeal and cross-appeal can conveniently be dealt with together. Mr Bedford and Mr Joseph accept that the judge had jurisdiction to make the order that he did – that is clearly so – but they each submit that the order he made fell outside the wide margin of discretion that he had in exercising his costs powers.

48. However, in my view, the judge was entitled to make the costs order that he did. In coming to that conclusion, I have particularly taken into account the following.

49. As I have indicated, the rationale for the general rule that costs follow the event is that a party has been compelled by the conduct of the other party to come to court to vindicate his rights (see paragraph 17 above). Subject to giving due notice by way of the pre-action protocol procedure, that applies even where the defendant plays no active part in the proceedings.

50. Similarly, in an appeal against a court or tribunal order the general rule is that the successful party is entitled to his costs from the unsuccessful party. Again, that is so even where the unsuccessful party does not contest the appeal, because the successful party has only been able to vindicate his rights by going to the appeal court.

51. In a judicial review, the court clearly has jurisdiction to make a costs order against an interested party. Indeed, such an order will often be appropriate where the decision challenged is that of a court or tribunal arising out of an appeal by an individual against an administrative decision of the interested party as an arm of government, e.g. in a judicial review of an unappealable immigration decision of the Secretary of State. In such a claim, the real protagonists are the claimant and the Secretary of State. Again subject to the pre-action protocol procedure, in most cases where the Secretary of State accepts that his underlying decision was unlawful, he will be liable for the claimant's costs of proceedings even if he does not contest the claim; because the claimant has again only been able to vindicate his rights by making the judicial review claim.

52. In the passage from his judgment concerning the vindication of legal rights in ZN and KA, reflecting CPR rule 44.2(2), Singh LJ referred to, not only "the successful party", but also "the unsuccessful party". In his submissions to us, Mr Joseph emphasised the fact that, in this case, the Secretary of State had played no active part in the judicial review proceedings; and so (he submitted) it could not properly be said that he was "the unsuccessful party" or that the Appellant had expended any costs as a result of his (the Secretary of State's) conduct. However, the right that the Appellant is in reality seeking to vindicate is not his right to pursue an appeal in the UT, but his right to asylum, which the Secretary of State denied by his refusal of the Appellant's claim for asylum. Given that there is no right of appeal or review in respect of the UT's refusal of permission to appeal to it, to vindicate that right the Appellant was bound to commence judicial review proceedings. In my view, those proceedings cannot be viewed – as Mr Joseph urges – in isolation. They have been brought to enable the Appellant to proceed with his appeal to the UT, and only for that purpose. His protagonist in the appeal was the Secretary of State, who made the initial decision to

refuse his asylum claim and thereafter sought to maintain that decision in the face of various appeals. The judicial review was brought by the Appellant with a view to vindicating his right to asylum, which the Secretary of State continued to oppose (ultimately, as I have described, successfully). In my view, that is a principled basis for an order in the judicial review that may result in the Secretary of State bearing some of the claimant's costs, even though he played no active part in the claim. Even if, in these circumstances, the Secretary of State might not usually be described as "the unsuccessful party":

i) The Appellant can properly be described as "the successful party".

ii) In considering and making any costs order, in accordance with the overriding objective in CPR rule 1.1, a judge must deal with the issue of costs "justly". CPR rule 44.2(2) comprises no more than a general, not a rigid, rule in pursuit of that objective.

iii) The Secretary of State's conduct in opposing and continuing to oppose the vindication of the Appellant's underlying asserted right to asylum is, in my view, sufficient to found a costs order against him in a judicial review the whole purpose of which is to assert that right: in other words, there is a sufficient operative causative link between the Secretary of State's conduct and the Appellant's costs incurred in the judicial review.

53. It is no answer for Mr Joseph to say that, even having succeeded with the judicial review, the Appellant is not bound to proceed with his appeal to the UT – a party is never bound to proceed with legal proceedings – but, if a party in the position of the Appellant fails to do so, then, unless there are other grounds upon which he is entitled to remain in the UK, he will be bound to leave or be liable to be removed.

54. Although, as is his right, the Secretary of State played no active part in the Cart claim, he could have done so. Had he chosen (e.g.) to request a substantive hearing on the Cart claim, and had he succeeded, then on the basis of the general rule he would have been entitled to his costs.

55. I am unpersuaded that the lack of activity on the Secretary of State's part in the Cart claim meant that the judge could not properly exercise his wide discretion as to costs by making the order he did, which will only make the Secretary of State potentially liable for the costs of the judicial review (which enabled the tribunal appeal to be continued) if the Appellant is successful in that appeal. The costs order was principled for the reasons I have already given. Further, as I have indicated, the judge was required to exercise his power in respect of costs in accordance with the overriding objective in CPR rule 1.1; and the order Judge Cooke made is not arguably unjust to either party. It meant that, if the Appellant was ultimately successful in his appeal to the UT, then the Secretary of State would be potentially responsible for his costs of vindicating that right including the reasonable costs of the Cart judicial review claim; but, if the Appellant's appeal was unsuccessful, he would not be responsible for any of those costs. That appears to me to be a just resolution of the costs issue as between the parties. As Davis LJ observed during the course of the hearing, it was similar in effect to an order by an appeal court who, in allowing an appeal and remitting the matter for a rehearing, make an order in an appropriate case

that the costs of the appeal be costs in the rehearing, in respect of which no party before us suggested was unfair, unjust or otherwise objectionable.

56. In fact, because of the effect of rule 10 of the UT Rules (see paragraph 14 above), the order made here would only ever have required the Secretary of State to contribute to the Appellant's costs if he (the Secretary of State) had acted improperly. With the benefit of hindsight, we now know that the UT did not find him to have so acted. As in many cases in which such an order as this has been made, there is unlikely to be any difference in practice between the consequences of an order in the terms that were made in this case and no order as to costs. However, where the Secretary of State has acted unreasonably, I do not see the force of any argument against him bearing the claimant's costs of the Cart claim. There is nothing here to suggest that Judge Cooke did not have regulation 10 in mind when he made his order.

57. For those reasons, the order made was, in my view, both principled and a just resolution of the costs issue as between the parties. It fell well within the legitimate scope of lawful costs orders open to Judge Cooke.

Conclusion

58. Consequently, I do not consider that any ground of appeal or cross-appeal has been made good. Subject to my Lords, I would refuse both.

The Senior President of Tribunals:

59. I agree.

Lord Justice Davis:

60. I also agree.