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No. CO/3624/2022

IN THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

ADMINISTRATIVE COURT



Royal Courts of Justice

Monday, 31 October 2022

Before:

DEXTER DIAS KC

(Sitting as a Deputy Judge of the High Court
s.9(4) Senior Courts Act 1981)

B E T W E E N :

THE KING
on the application of
PZX
(anonymity order granted)

Claimant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

MR G LEE (instructed by Duncan Lewis Solicitors) appeared on behalf of the Claimant.

MR J SWAIN (instructed by the Government Legal Department) appeared on behalf of the Defendant.

(Hearing dates 27 and 31 October 2022)

J U D G M E N T

Dexter Dias KC, sitting as a Deputy High Court Judge :

- 1 This is the judgment of the court.
- 2 I have granted an anonymity order in this case. I am satisfied that:
 - 1) Non-disclosure of the identity of the claimant is necessary (a) to secure the proper administration of justice and (b) to protect his right to respect for private and family life under Art. 8 of the European Convention on Human Rights; and
 - 2) There is no sufficient countervailing public interest in disclosure (CPR 39.2(4)).¹

A - Introduction

- 3 I rule on two applications by the claimant. Both applications are about costs in respect of an application for interim relief in a judicial review claim. First, that costs should follow the event. That is not – and could not realistically be - disputed by the defendant because the claimant has substantially succeeded in his claim. I therefore make the order. Second, that costs should be assessed on an indemnity basis. That second application is hotly disputed and this judgment provides my determination of this further application.
- 4 The parties to the case are PZX, the claimant, who is represented by Mr Lee of counsel. The defendant is the Secretary of State for the Home Department, represented today by Mr Swain of counsel, who, I emphasise, did not appear prior to today.
- 5 The background facts have some, but limited, relevance to this application. I state them only so far as they are essential to the costs decision.

¹ Pursuant to the ‘Practice Guidance: Publication of Privacy and Anonymity Orders’ issued by the Master of the Rolls dated 16 April 2019, a copy of the anonymity order is published on the Judicial Website of the High Court of Justice (www.judiciary.uk).

B - Material facts

6 PZX is an Algerian national who has been in immigration detention following serving the custodial portion of a criminal sentence of imprisonment. Thus he was detained under immigration powers from 16 January 2022 at Brook House Immigration Removal Centre. A condition of his licence was that he reside at premises approved by the Probation Service. On 7 February Dr Catherine Eades provided a medical report for the purpose of Rule 35 of the Detention Centre Rules 2001. That rule provides, inter alia, that

The medical practitioner shall report to the manager on the case of any detained person who he is concerned may have been the victim of torture.

7 Dr Eades, in a careful report, concluded that she “had concerns that the detainee may have been a victim of torture”. A positive Rule 35 indication does not automatically lead to release. However, in this case the defendant decided on 14 February 2022 that the claimant’s vulnerabilities outweighed the immigration factors as per the Adults at Risk policy. This decision was confirmed at Director level on 30 May 2022 and Schedule 10 accommodation was authorised on that date.

8 There is dispute about whether during an assessment interview on 9 March the claimant expressed a wish to make a protection claim. However, if that were so, the necessary steps to be taken by the defendant were not taken. PZX denies he made any such claim. To clarify the position, on 20 October his solicitors – unusually in the circumstances of such cases – felt compelled to write to the defendant to state in unmistakable terms that he had *not* made a protection claim and any such intimation that the defendant erroneously believed he had made was withdrawn. The claimant submits that the issue of an international protection claim only raised its head in the autumn. Why? Because it was being used strategically by the defendant to resist the interim relief application he made. That was for (1) a mandatory order that the defendant provide him with accommodation; and (2) release from immigration detention to those premises.

- 9 The case came before me on Thursday 27 October 2022. With some reluctance, I agreed not to determine the interim relief application on the basis that, as the defendant assured the court, it was likely that accommodation and release would be “sorted out” by the end of the week. The court ordered that the defendant update the court and parties by 4pm the next day, Friday 28 October. I reserved the case to myself and listed it on Monday 31 October with liberty granted to parties to vacate.
- 10 The claimant was not released from immigration detention. The claimant’s solicitors sought to clarify with the defendant under what statutory power the claimant would be released. The defendant refused to specify the statutory provision. In such circumstances, the claimant’s solicitors, given the troubled history of the case, decided not to vacate. They could not agree to an administrative decision on a basis that was being withheld from them.
- 11 Since PZX continued to remain in immigration detention, the case came back before me again on 31 October. The defendant now stated that the claimant would be released on a statutory basis that satisfied the claimant. He would be granted accommodation and it had been checked and found suitable by the Probation Service. He would be given a travel warrant to assist him reach the accommodation.
- 12 Given this history, the claimant applied for costs on an indemnity basis.

C - Legal Principles

- 13 The legal principles governing the award of costs on an indemnity basis are uncontroversial. It seems to me that they are reducible to the following 10 propositions:
- 1) Section 51 of the Senior Courts Act 1981 states that costs “shall be in the discretion of the court”. In judicial review claims, as in cases governed by the Civil Procedure Rules

more generally, the court has a wide discretion as to costs (CPR 44.2(1); Judicial Review Guide 2022 (“JRG”) §25.1).

- 2) In *Excelsior Commercial and Industrial Holdings Ltd* [2002] EWCA Civ 879, the Court declined to give detailed guidance about the principles to be applied in ordering costs on the indemnity basis because the language of the rules should not be replaced with other phrases. Instead, the matter should be left so far as possible to the discretion of judges at first instance (per Waller LJ, [38]).
- 3) In *Excelsior*, the Court held that the making of a costs order on the indemnity basis would be appropriate in circumstances where:
 - (1) the conduct of the parties; or
 - (2) other particular circumstances of the case (or both) took the situation “out of the norm” in a way which justifies an order for indemnity costs ([31] per Lord Woolf LCJ and [39] per Waller LJ).
- 4) There are an infinite variety of situations justifying an indemnity costs order; the starting point is always the rules themselves, in particular rr.44.3 and 44.4; the court in *Excelsior* emphasised the width of the discretion conferred on the court (ibid.).
- 5) In *Esure Services Ltd v Quarcoo* [2009] EWCA Civ 595, the court stated that the word “norm” was not intended to reflect whether what occurred was something that happened often, so that in one sense it might be seen as “normal”, but to reflect “something outside the ordinary and reasonable conduct of proceedings” – a point I specifically emphasised to counsel during oral argument.
- 6) Following *Excelsior* and *Esure Ltd*, many first instance decisions have considered and granted indemnity costs where the “out of the norm” circumstance involved the procedural conduct (or misconduct) of parties rather than the intrinsic facts of the case (see list at *White Book 2022*, 44.3.8, p1506).
- 7) The discretion to award indemnity basis costs is ultimately to be exercised to deal with the case justly – and is thus an expression of the overriding objective (ibid. 44.3.9; CPR 1.1(1)).
- 8) In *Three Rivers DC v Bank of England* [2006] EWHC 816 (Comm) (Tomlinson J), the court noted three factors:
 - (1) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide;
 - (2) The critical requirement before an indemnity order can be made in the successful [receiving party’s] favour is that there must be some conduct or some circumstance which takes the case out of the norm;

- (3) The test is not conduct attracting moral condemnation, which is an a fortiori ground, but rather unreasonableness. [This echoes, I would add, the precept in *Balmoral Group Ltd. v Borealis (UK) Ltd. & Ors.* [2006] EWHC 2531 (Comm) that “it is not necessary that the claimant should be guilty of dishonesty or moral blame”, per Christopher Clarke J (as then was), [1].)
- 9) *Three Rivers* focused on the defective behaviour of a claimant. While the judge went on to list factors specifically relevant to claimant conduct, I see no reason why the initial three overarching principles should not apply with equal force to any defecting party.
- 10) In the *Access to Justice Final Report* (July 1999), it was recommended that failure to comply with directions and orders “should produce orders for indemnity costs” (Ch.7 para.25) (cited in *White Book* 44.3.6).

D - Analysis

- 14 I am bound to say that the background to this case has troubled me.
- 15 One only has to look at the chronology to see that there are matters of potential concern. This claimant was assessed in a r.35 report in February this year. A decision was made on 14 February that because of his particular vulnerabilities, he should be released subject to suitable accommodation. That did not happen. After that, there was an exchange of correspondence. On 14 April there was a Schedule 10 bail form completed by PZX’s solicitors on his behalf; that was an application for accommodation. On 30 May, the Director decided that he should be released subject to suitable accommodation. That did not happen. Thus PZX has been in immigration detention for months. I find myself here, on 31 October, with PZX, this vulnerable person, who “appears older than his years and exhausted”, who was “under psychiatric review” with “multiple lateral scars secondary to self-harm by cutting” (Bundle 77-78), and who has been assessed by the defendant as a person who may have been the victim of torture, *still* in immigration detention. It is not right to pass over the fact that he may have been a victim of torture without pausing to reflect upon its potentially severe implications. There are three large scars on his trunk, two on his abdomen, one on the left-hand side of his chest (*ibid.*). It is entirely understandable why Dr Eades reached the conclusion she did.

16 When this matter came before me last week, I expressed the court's concern about the stasis in this case. I acceded, I am bound to say with reluctance, to the application by the defendant for the matter not to be decided last week and be relisted today. Although defendant counsel informed the court that things were likely to be "sorted out", as he put it, by the end of the week if the court granted the adjournment, they were not.

17 It is absolutely mystifying to me why, if the defendant were prepared to release the claimant, she would not inform his solicitors of the statutory basis for such a release. If that had happened on Friday, today's hearing could have been vacated as I envisaged in my order from last week. I have asked Mr Swain, counsel who appears on behalf of the defendant today, what the explanation is for the defendant not being prepared to state on Friday the basis of the statutory power for the claimant's release, and yet today, after the weekend, that is communicated to the court. Mr Swain, and it is absolutely no criticism of him, is unable to assist the court. He has no instructions that he can or can credibly put before the court. Whether this was unreasonable conduct cannot be answered in the abstract or in purely general terms. What one looks at is nature of the failure, the importance of issue being litigated, the connection between these two factors and the wider context of the case. Here a highly vulnerable person was in administrative detention. The court had expressed its concern. There was the prospect of his release prior to the weekend. Instead of giving the simple indication that the claimant's legal team needed about the statutory basis of the release, the defendant, without any rational explanation, refused. Then after the weekend, that confirmation was given, with no explanation whatsoever why it was withheld. I find this unreasonable conduct by the defendant. Regrettably, that was not the end of it.

18 On 5 October this year, Eyre J made an order that the defendant should file a skeleton argument to assist the court in this case which has a complex and sensitive past (Order, [4]).

The Judge found that the case ought to be dealt with expeditiously. Nevertheless, the defendant chose not to file a skeleton. No explanation has been given to the court for the breach of the court order, save that, as Mr Swain put it, the Government Legal Department “was without instructions”. Again, I emphasise that Mr Swain was not at that point instructed counsel. Nevertheless, this is a dismal picture.

- 19 In *R (AB) Chief Constable of Hampshire Constabulary* [2019] EWHC 3461 (Admin) the Divisional Court held (per Dame Victoria Sharp P, [108]):

The conduct of litigation in accordance with the rules is integral to the overriding objective set out in the first part of the CPR and to the wider public interest in the fair and efficient disposal of claims. Public law cases do not fall into an exceptional category in any of these respects. If the rules are not adhered to there are real consequences for the administration of justice.

- 20 In respect of the failure to file a skeleton, I find that the defendant’s conduct was unreasonable.

E - Conclusion and disposal

- 21 I therefore go back to the prime test in respect of indemnity costs assessment. I ask, as the authorities require me to do, whether this is conduct out of the norm. Is it, in other words, unreasonable litigation conduct? It is. In respect of both the heads of unreasonable conduct I have found, the defendant has offered no justification, no explanation, no or no meaningful apology. In conducting judicial review cases, the need for procedural rigour has been emphasised by appellate courts (Court of Appeal in *R (Spahiu) v Secretary of State for the Home Department* [2018] EWCA Civ 2604; *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605; see also JRG §2.1). I find that the conduct of the defendant fell far short of that essential requirement.

- 22 In those circumstances, and having careful regard to the “generally accepted principles” (*M v Croydon*, [44]), I have no hesitation in exercising the court’s wide discretion to grant the claimant’s application. Costs must be assessed on an indemnity basis.
- 23 That is my judgment.