Neutral Citation Number: [2016] EWHC 954 (Admin)

Case No: CO/879/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/04/2016

Before:

MR JUSTICE FOSKETT

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Between:

R on the application of
TAG ELDIN RAMADAN BASHIR & others **Claimants**

- and –

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

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Raza Husain QC, Tom Hickman and Jason Pobjoy (instructed by **Leigh Day**) for the **Claimants**
Thomas Roe QC and Penelope Nevill (instructed by **Treasury Solicitor**) for the **Defendant**

Based on written submissions

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SUPPLEMENTAL RULING

MR JUSTICE FOSKETT:

1. The draft judgment in this case was sent in the usual way to all legal representatives by e-mail from my Clerk at 11.05 on Friday, 22 April, the parties having been told at shortly before midday on Monday, 18 April, to expect it "in the next few days." The e-mail contained the following passage about the draft judgment:

> "It is, as you might expect, quite substantial and the Judge understands that it may take a little longer than the usual 48 hours to check for corrections. He proposes that it should be 3 days, but if that proves not to be long enough when you see it, please inform me as soon as possible."

2. There were communications thereafter about how the confidentiality of the draft judgment could be maintained given the number of parties involved and about the identities of those who would see it prior to its formal handing down. This was resolved by Thursday, 21 April.

3. When the draft judgment was sent to the parties' legal representatives, my Clerk indicated on my behalf that "if it can be achieved, the Judge would appreciate receiving any suggested corrections by 4 pm on Tuesday, 26 April, so that, all being well, he can hand down the final version on Thursday of next week."

4. It is quite clear that I was not being prescriptive about these timings given the length of the judgment and its nature and would have been open to requests for an extension of time had any been requested or indeed to delay the date of the proposed hand down if some more substantive point emerged.

5. Both sides sent suggested corrections to me, those sent on behalf of the Defendant arriving at 16.49 on Tuesday, 26 April. They were of a nature that suggested the judgment had been read carefully.

6. In the usual way I made some alterations to the draft judgment to accommodate the suggestions made by both sides and my Clerk indicated on my behalf by e-mail timed at 09.50 yesterday that the judgment would be handed down formally at 2 pm on Thursday, in line with what had been said when the draft judgment was sent to the parties. I understood that arrangements had to be made to communicate the gist of the decision to the claimants in Cyprus – and indeed doubtless to others on the Defendant's side – one hour before the formal hand down and that was one reason for postponing it until 2 pm.

7. At no stage until 16.15 yesterday had I received any intimation that either party was contemplating asking me to review any aspect of the draft judgment before the final version was handed down. Such an invitation is not an unknown occurrence, but relatively rare, in my experience. Nonetheless, if a party represented by experienced Counsel and solicitors asks a judge to give the party a little extra time before the formal hand down of a judgment to consider whether to issue such an invitation, many judges would be accommodating, certainly in a case such as this.

8. As indicated above, all parties knew from Friday, 22 April, when I hoped to hand down the judgment. At 16.15 yesterday, I received an e-mail from Mr Roe asking me

to "reconsider one aspect of your draft judgment." His e-mail was suitably apologetic indicating that "[it] has taken some time to digest the very substantial draft and to discuss its implications." He has amplified that subsequently (see paragraph 11 below).

9. My Clerk responded to him by e-mail timed at 17.22 yesterday indicating that I was not minded to accede to his request, but (a) would consider the matter overnight and (b) await any representations from the Claimants' advisers. She indicated that I would like to hear from the Claimants' advisers by 09.00 this morning with a response from Mr Roe by 10.00 so that I could consider the matter this morning. In fact Mr Husain e-mailed me at 18.27 yesterday evening with his submissions as to why I should not respond favourably to the request. Mr Roe responded at 09.39 this morning.

10. As will appear when the full judgment is read, I have rejected some very significant parts of the legal case advanced on behalf of the Claimants and have quashed the decision of the Secretary of State, made by her officials, on what I have described as a "very narrow" basis [309, 374 and 380]. It is one feature of that "very narrow" basis that I am being asked to reopen for oral argument.

11. I have to say that I found it difficult to accept that the point that is now sought to be made on the Defendant's behalf could not have been identified sooner: it would have been obvious on a first reading of the draft judgment which I had imagined all interested parties would have completed on Friday or over the weekend. However, Mr Roe has candidly told me that other professional commitments meant that he was unable to study the judgment properly until Tuesday morning and the point was identified on Tuesday afternoon. Miss Nevill was away. I have no wish to be critical, and I appreciate the exigencies of a busy practice, but this case is important from the point of view of all parties and I am a little surprised that it was not until Tuesday that the judgment was read fully. However, irrespective of that, once the point was identified, even if final instructions on whether to pursue it could not be obtained immediately, all that was needed was a polite request to delay the hand down a little longer to enable those instructions to be taken and a sympathetic response might well have been anticipated.

12. There is, of course, power to consider matters such as these: *In re L* [2013] 1 W.L.R. 634. It does not depend on exceptional circumstances being demonstrated, but it is a jurisdiction to be exercised with caution.

13. Mr Roe wishes to put forward oral argument on the Defendant's behalf that my assessment of whether the Secretary of State's decision would inevitably have been the same even if the issue of the UNHCR's view had been considered properly was wrong. The relevant paragraphs are 358-373. In paragraph 359 I explain why it seemed to me unnecessary to reopen the argument. Mr Roe seeks to persuade me that I should. He says –

> "First, natural justice gives the Secretary of State a presumptive right to be heard on this determinative issue before any final judgment against her on it is reached.

> Second, it is not the Secretary of State's fault that she did not address you on this issue. Neither did the claimants. It simply did not arise in the light of the way the claimants' case was argued.
>
> Thirdly, unless you are quite confident that nothing [said] on the Secretary of State's behalf could possibly make a difference to the conclusion expressed in your draft judgment, there is nothing to displace her presumptive right to be heard before you reach a final conclusion. In my submission there is no basis for such confidence. Nor, indeed, does your draft judgment express any."

14. I will return to those matters when I have identified the nature of the arguments Mr Roe wishes to deploy. He does say that "[in] the short time since we received the very substantial judgment we have not developed fully the points we would wish to make if we were given permission to try to persuade you to take a different view on this issue", but then goes on to identify certain matters to which I will refer. I am fairly accustomed to receiving some very well-honed arguments at short notice and I am rather sceptical that others than those foreshadowed below would be likely to arise, but I will do my best to stand back and see if anything is likely to persuade me differently.

15. I preface this by saying that Mr Roe does not suggest (because he could not do so on the authorities) that the Defendant would not have a high threshold to surmount to contend successfully for the proposition for which he contends: the word "inevitably" reflects the high threshold. Furthermore, again as I observed, this is an area where a court has to be very careful about adopting the role of decision-maker. I repeat paragraph 361 of the judgment:

> "I should, perhaps, observe at the outset that the evidence upon which any such argument could successfully be based would need to be compelling to surmount the high "inevitability" threshold required and I need, in any event, to beware of trespassing into the forbidden territory for a court of considering the substantive merits of the decision."

16. I must observe at the outset that it was I who decided that I should consider this point simply because it seemed wise to do so. It is the kind of argument with which the Administrative Court is very familiar and, in my experience, is one regularly advanced by parties (including, of course, Government departments) whose decisions are the subject of challenge by way of judicial review. The argument is ordinarily foreshadowed in the Detailed Grounds of Defence. Given the Claimants' argument based on *Launder*, it might well have been anticipated on the Defendant's side that if that argument went against her, an argument based upon the assertion that "it would have made no difference" would have been advanced. It is right to say that I have accepted the argument based on *Launder* on a far narrower basis than it was advanced by the Claimants, but nonetheless the essential response would have been the same even if the wider basis had succeeded. However, there is nothing in the Detailed Grounds of Defence that raises this kind of argument.

17. Nonetheless, let me identify the points that Mr Roe says that might make a difference to my decision on the particular point:

First, he contends that the UNHCR's letter did not state the source of the alleged announcement by the Republic that it could not take 'any more refugees', nor gives any reason for supposing that this announcement applied to the claimants, whom, on the evidence, the Republic had already agreed to treat as refugees.

Second, he says that by contrast the evidence of Ms Young was of an official, scheduled meeting between the SBA authorities and the RoC Asylum Service in April 2015 at which the latter 'confirmed that they remained willing to extend the MoU rights to the recognised refugees.' The argument would be that this was a clear assurance which the Secretary of State would "inevitably and reasonably" have regarded as binding in international law (by virtue of article 7(1)(b) of the VCLT) and reliable in point of fact, had the issue been expressly considered.

Third, he would want to argue that the RoC's request to see the SBAA in the absence of the UNHCR [369, 372] was not something that necessarily put in question the weight to be placed on the assurances given and that there may be alternative explanations.

Finally, the RoC had provided the Claimants with documentation showing that they were accepted as recognised refugees under the Convention and under Cypriot domestic law [129]. On the assumption that the law of Cyprus is the same as English law in this respect (which assumption prevails, absent any expert evidence to the contrary), the claimants thus had a legitimate expectation of being treated as recognised refugees under the Convention and under Cypriot domestic law (because the Cypriot government had given them a clear, unambiguous and unqualified representation to that effect: see e.g. *Paponette v Attorney General of Trinidad and Tobago* [2012] 1 A.C. 1). As a matter of Cypriot public law it was accordingly not open to the authorities to renege, even if they wanted to.

18. The first point, with respect, is fanciful. The terms of the UNHCR's concerns are clearly directed towards the position of the Claimants and no-one else and, given its responsibilities for refugees generally, those concerns must be taken as a clear indication of the view of the UNHCR about the capacity of the RoC at that time to abide by the informal agreement. As to the third point, a fair reading of the judgment shows that I concluded that it was one further factor that added some weight to these concerns, but that the first point predominated.

19. The second and fourth points are arguments of law suggesting that the Secretary of State would have been entitled to regard the RoC as bound to give effect to the informal agreement. In the judgment at [355] I referred to the usual (rebuttable) presumption that exists in this context, but concluded that the concerns of the UNHCR, in particular, would (or should) have raised a question about whether the presumption could be relied upon on this occasion. Given the "chequered history" of the informal agreement [348-349] and the concerns of the UNHCR at the time, to my mind it is plain that the decision-maker required much greater confidence in the efficacy of the informal agreement before rejecting the possibility of the Claimants being admitted to the UK than relying upon legal arguments of this nature assuming them to be valid.

20. None of these points has persuaded me that my conclusion on the point in issue was wrong or requires further oral argument. It is quite clear that the concerns of the UNHCR were not addressed at the time of the decision and neither were they explained in the decision letter as being irrelevant. Mr Gale said quite clearly to Ms Young [353] that he did not "anticipate that the letter from the UNHCR and the applicants would change the Home Office position" and thus what they said would have made no difference. My conclusion is that, properly considered, the matter raised by the UNHCR might have made a difference. That is as far as my decision goes.

21. For those reasons, I have declined to re-open the issue identified by Mr Roe. I do not think that my decision not to re-open the issue is unfair to the Secretary of State, nor do I consider the fact that the draft judgment apparently does not "express" confidence that nothing that might be said on her behalf would change my view (see paragraph 13 above) is relevant. I was clearly of the view, on the basis of the material I considered, that the Secretary of State could not surmount the high threshold of "inevitability" required. Mr Roe's clearly articulated points now made do not alter that view and I have not myself, having thought about it further, identified any other matter that would affect my view.