Neutral Citation Number: [2020] EWHC 736 (Admin)

Case No: 1882/2019, 1514/2019, 1310/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/04/2020

Before :

DAVID PITTAWAY QC

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Between :

D and P and K	**Claimants**
- and -	
THE LORD CHANCELLOR	**Defendant**
-and-	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

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- -

Christopher Buttler and Zoe McCallum (instructed by **Duncan Lewis**) for the **Claimants**
Stephen Kosmin (instructed by **the Government Legal Department)** for the **Defendant**

Hearing date: 3 March 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:15am on 2 April 2020

DAVID PITTAWAY QC:

Introduction

1. All three claimants sought the withdrawal of the President of the First-tier Tribunals (Immigration and Asylum)'s protocol or policy ("the protocol"), dated 26 February 2019, that individuals represented by Duncan Lewis solicitors should not have their appeals heard at the Birmingham hearing centre of the First-tier Tribunal (Immigration And Asylum Chamber), following the appointment of two directors of Duncan Lewis as fee-paid judges in Birmingham. Notwithstanding correspondence from Duncan Lewis submitting that the protocol was unlawful and should be withdrawn, the President maintained the application of it. All three claimants made applications to the tribunal to vacate hearing dates at Hatton Cross, West London, and began judicial review proceedings against the defendant. After various applications to the tribunal and to the court relating to the judicial review claims, the defendant wrote on 17 May 2019 stating that the protocol was withdrawn. The directions contained in the protocol were replaced with new listing directions consistent with the existing case law on bias.

2. The defendant made a CPR Part 36 offer to settle the first claimant's claim, which was accepted on 2 January 2020, entitling him to his costs, pursuant to CPR rule 36 (13) (1). Before that offer was made the second and third claimants applied to discontinue their claims on the basis that the withdrawal of the protocol gave them, in substance, the relief sought. They seek permission to discontinue the claims pursuant to CPR rule 38.2(2)(a)(i) and on terms that the defendant shall pay the costs of the claims. The defendant submits that there should be no order as to costs.

Issues

3. Mr Buttler, on behalf of the claimants, contends that the protocol imposed an unlawful blanket policy, which did not include any criteria for hearings to remain in Birmingham, even for those involving clients who would be disadvantaged by having to travel from the West Midlands to Hatton Cross. The second and third claimants, who were respectively victims of sex trafficking and torture, were, it was alleged, disadvantaged by having to undertake the journey from Birmingham to Hatton Cross. Mr Kosmin, on behalf of the defendant, contends that it was not a blanket policy and contained, what he describes as a caveat, which enabled claimants to request a transfer to an alternative hearing centre. He draws attention to the caveat being applied to both the second and third claimant's cases, where applications to change hearing centres were ultimately successful. He also disputes whether it is necessary for the second and third claimants to obtain the court's permission pursuant to CPR rule 38.2(2)(a)(i) for discontinuance.

4. I am satisfied that although the second and third claimants' claims forms do refer to the applications to vacate hearing dates for the appeals at Hatton Cross, the underlying challenge, and reason for the challenge, was the protocol issued by the President on 26 February 2019. I am also satisfied that the claimants had standing to bring these proceedings and continue them after their appeal hearings had been moved.

Relevant Factual Background

5. I have not set out a full chronology of all the applications before the tribunal or court for either the second or third claimants. I am no longer concerned with the first claimant's claim except in so far as it provides background to the events which occurred. There is a full chronology set out in the defendant's skeleton argument, which I have considered. I have set out a partial chronology of the events relating to the second and third claimants' claims for judicial review of the defendant's protocol and applications to the tribunal.

6. As I have said, the background to the claim is that two directors of Duncan Lewis applied to sit as Judges of the First-tier Tribunal (Immigration and Asylum Chamber) and, having been successful in their applications, were allocated to sit at the Birmingham Tribunal Centre. On 26 February 2019 the President of the First Tier Tribunal (Immigration and Asylum Chamber) ("the President") issued a policy applicable to cases in which an appellant was represented by Duncan Lewis. He directed that all such cases were to be transferred out of the Birmingham hearing centre to Hatton Cross, West London.

7. The letter stated:

> " I write to inform you that following the recent fee paid tribunal judge recruitment exercise across The First Tier Tribunal Immigration and Asylum Chamber see two existing employees of Duncan Lewis solicitors were successful in their (FtTIAC) applications and have been assigned to the Birmingham hearing centre. To avoid any perception of bias within the FtTIAC I have decided that all current appeals lodged at Birmingham by Duncan Lewis solicitors will be transferred to Hatton Cross as soon as logistically possible. Therefore, no further appeals will be listed or heard at Birmingham whilst any of your employees sit at that hearing centre in a fee paid capacity. I understand that this arrangement may not be convenient however we will endeavour to accommodate any request to transfer your current appeals to an alternative hearing centre wherever possible. If you have any appeals lodged at Birmingham that you would like to be transferred to a particular hearing centre, you will need to contact the centre directly to request this."

8. On 20 March 2019, three weeks after the protocol was issued, Duncan Lewis wrote to the President explaining that the protocol was not practicable and requested that affected cases be listed in front of other judges in the Birmingham hearing centre. No response was received to that letter.

9. On 1 April 2019 the third claimant issued proceedings challenging the protocol and seeking an interim order to vacate his asylum hearing set to proceed on 4 April 2019 to Hatton Cross. Before the issue of the proceedings, Duncan Lewis sought the disapplication of the protocol by making representations to the Resident Judge by letter on 14 March 2019, by making a transfer request on 26 March 2019, and by sending a pre action protocol letter on 28 March 2019. An application for interim relief in the High Court was refused the following day on the basis that the transfer application was still under consideration. In response to that order the tribunal converted the hearing on 4 April 2019 into a case management hearing to determine the transfer request.

Following that hearing the Resident Judge continued to apply the policy and relisted the hearing at Hatton Cross. On 19 April 2019 the third claimant's representatives filed with the tribunal an expert psychiatric report, which concluded that the third claimant's psychiatric disorder was a disability under the Equality Act 2010, and that the journey to Hatton Cross from his home in Wolverhampton would be very likely to have a negative impact on his capacity to give evidence. On 23 April 2019 the Resident Judge directed that his appeal proceeds at the Coventry hearing centre.

10. The second claimant issued proceedings on 12 April 2019, challenging the policy, and seeking to vacate her asylum hearing set to proceed on 15 April 2019 at Hatton Cross. Before the issue of proceedings, Duncan Lewis challenged the application of the policy by a transfer request dated 4 April 2019, refused on 8 April 2019, a renewed transfer request dated 8 April 2019, and a pre action letter dated 11 April 2019. The resident judge at Hatton Cross gave directions on 12 April 2019 requiring the second claimant's appeal to proceed at Hatton Cross the next working day. On 12 April 2019 Supperstone J granted interim relief by vacating the hearing at Hatton Cross and ordering that her asylum claim should not be heard before the oral hearing of the interim relief application.

11. On 7 and 8 May 2019 the defendant filed an Acknowledgment of Service in relation to the second and third claims respectively, stating that he took a neutral position on the claims by reason of being a court or tribunal. The claimant submits that although the defendant indicated in the Acknowledgments of Service that he intended to take a neutral position the defendant actively opposed the claims. In respect of each case the defendant filed letters alongside the Acknowledgments of Service dated 30 April an 8 May 2019 contesting both claims, on the basis that the second and third claimants lacked standing, that the relevant case management decision was not amenable to judicial review, and that the claimants had overstated the legal position on the appearance of bias.

12. On 17 May 2019 the defendant sent all three claimants a joint three-page letter, in which it explained that the President had decided to amend the policy in context of the claimants' challenge as follows:

> "The President of the First Tier Tribunal (IAC) has decided to alter current administrative arrangements. The new arrangements will be in these terms:
>
> "Hearing centres and the national business centre should have access to a list of fee paid judges that will alert them to any possible conflicts of interest i.e. if a fee paid judges is also a principle partner employed by legal firms this will be clear. Administrative listing teams will work to identify where a conflict of interest may arise and will list cases accordingly in conjunction with the resident judge. Whilst administrative teams will do all they can, it remains the responsibility of the individual judge to flag any incidences where a conflict may exist. In this situation the judge should declare as soon as they are aware and recuse themselves from the case at which point administrative arrangements can be made immediately."

The President of The First Tier Tribunal will issue guidance to this effect if necessary. We will also understand that the Senior President of the Tribunals will be consulting on introducing such arrangements more broadly across tribunals."

13. The defendant stated that the application for general interim relief had been overtaken by these developments and also warned that unless all three claims were discontinued "with immediate effect on the basis that there shall be no order as to costs then the defendant will defend the claim and seek costs against you." A directions hearing took place on 20 May 2019. On 24 May 2019 the claimants made a global CPR Part 36 offer relating to all three claims. In fact, it was not until the defendant's letter dated 6 June 2019 that it became entirely clear that the protocol had, in practice, been revoked. On 10 June 2019 the parties agreed to vary the timescale for filing amended grounds and consequential directions. The second and third claimants made an application to withdraw the claims on terms as to costs. The first claimant made a further CPR Part 36 offer on 12 July 2019 in relation to his damages claim. No response was received to the claimants' CPR Part 36 offers of 24 May or 12 July 2019 until 13 December 2019.

14. There were serial disputes, in the first claimant's case, over the directions and Acknowledgment of Service. On 11 June 2019 the defendant wrote to court objecting that that the amended statement of case filed by the first claimant had not been marked up, and also contended that the court's permission was not required for the second and third claimants to withdraw, giving notice that he contested the costs application and requested an oral hearing. On 13 June 2019 the defendant applied for an extension of time to file his Acknowledgement of Service, pending receipt of a marked-up version of the amended statement of case. The claimants filed a response on 17 June 2019, pointing out that neither the CPR nor directions required a marked-up statement of case. On 25 June 2019 the defendant's Acknowledgement of Service, again ticked the box for courts or tribunals, and there was no intention to make submissions, nevertheless, inter partes correspondence was filed relating to the contested application and clarification that the protocol had indeed been revoked. Throughout the autumn there was further correspondence between the parties. On 5 November 2019 the claimants wrote to the defendant drawing his attention to the CPR Part 36 offer of 12 July 2019 to which no reply had been received. On 13 December 2019 the defendant served detailed grounds of resistance in the first claimant's claim. By separate correspondence the defendant made a CPR Part 36 offer to settle the first claimant' s claim which was accepted on 2 January 2020.

Submissions

15. The second and third claimants seek to discontinue their claims, on terms as to costs, because they submit, they have obtained the equivalent of the relief sought, namely an order quashing the policy, by the revocation of the protocol. It should be added that they also obtained individual relief, largely but not exclusively, through the tribunal process, regarding the listing of their appeals at alternative venues.

16. Mr Buttler referred me to the general rule, CPR 44.3 (2) (a) that an unsuccessful party must pay the successful party's costs applies equally where the claimant in judicial review proceedings is awarded all the relief he seeks, *R (M) v Croydon LBC* 2012 1WLR 2607. Lord Neuberger of Abbotsbury MR drew a distinction as to costs as between (1) a case where a claimant has been wholly successful, following a contested hearing or pursuant to a settlement, (2) a case where he has only succeeded in part,

following a contested hearing or pursuant to a settlement, and (3) a case where there has been some compromise which does not actually reflect the claimant's claim. The Court of Appeal held that a party in situation (1) should normally recover all its costs. He also referred me to the cases of *R (Boxall) v Walton Forest LBC* [2001] CCL Rep 258 and *R (E) v JFS Governing Body* [2009] 1 WLR 2353, per Lord Hope at paragraph 24-25, where he recognised the consequences of inter partes costs orders for the survival of legal aid firms, which was reaffirmed in *ZN (Afghanistan) v SSHD* [2018] EWCA Civ 1059.

17. Mr Kosmin submits that a failure to exhaust alternative remedies or to engage properly in pre action correspondence can operate to preclude a claimant from recovery of its costs. He referred me to *R v (Gourlay) v Parole Board* [2017] 1WLR 4107, per Hickinbottom LJ at para 25 to 26. He submits that a proper consideration of the second and third claimants' chronology shows that the judicial review proceedings were commenced prematurely before exhausting applications in the immigration proceedings before the tribunal. He submits that the proper course was to have only issued the judicial review claims after the parties had complied with the procedural requests made by the Resident Judge, and had their transfer applications been refused, issuing their judicial review claims only after they had exhausted their appeal rights. He also suggests that neither the second nor third claimants engaged sufficiently early in pre-action correspondence, and the proximity of the pre-action correspondence and the issuing of claims was such that the defendant lacked sufficient time to deal with the issues raised in the pre action letters before the claims were issued.

18. Mr Buttler submits that the issue of the protocol by the President, was outside the ambit of judicial acts, and was purely an administrative decision, capable of judicial review in the ordinary way. Mr Kosmin submits that the decisions, being case management decisions, in the course of appeal hearings were judicial acts for the purpose of the application of *R (Davies) v HM Deputy Coroner for Birmingham (Costs)* [2004] 1 WLR 2739. He refers me to *R (Adath Yisroel Burial Society) v HM Senior Coroner for Inner North London* [2018] 4 Costs LR 749, [2018] EWHC 1286 (Admin) at para 15. On this issue, I accept Mr Kosmin's submission that the decision to issue the protocol formed part of the tribunal's judicial process and was akin to making a standard direction that no cases in which Duncan Lewis acted for the claimants should be issued or allocated to the Birmingham hearing centre.

19. Mr Kosmin further submits that neither the second nor third claimants were wholly successful as a consequence of the judicial review proceedings. He referred me to *R (Tesfay) v SSHD* [2016]1 WLR 4853 per Lloyd Jones LJ at para 57:

> "success in public law proceedings must be assessment only by reference to what was sought and the basis on which it was sought and which it was opposed also by reference to what was achievable".

He contends that the real substance of their applications for interim relief was that the asylum appeal hearings were to be ordered not to proceed at Hatton Cross and instead be held in at the Birmingham hearing centre. He relies upon the fact that the Resident Judge at Hatton Cross, having made certain directions, transferred both appeal hearings to other centres in the Midlands but not Birmingham. He also draws attention to the fact

that the claims for declaratory relief for breach of Articles 8 and 14 ECHR were not achieved by any of the claimants.

20. In my view, the real issue in this application is whether the defendant over-stepped the mark and ceased to act neutrally in its conduct of the judicial proceedings.

21. It is an established principle that the role of judicial decision-making bodies as defendants in judicial review proceedings is to provide assistance and information to the court rather than to contest the proceedings, *R (Stokes) v Gwent Magistrates Court* [2001] EWHC Admin 569. In those circumstances the decision-making body should not generally be liable for the claimant's costs, per Brooke LJ in *R [Davies] v HM Deputy Coroner for Birmingham (Costs)* 2004 1WLR 2739 at para 47 (iii). Its role as a court or tribunal in role in judicial proceedings was to provide information and assistance in court rather than contest claim. In *Davies* the defendant played a full part in argument before the Court of Appeal, when it was open to him not to appear, and was ordered to pay the costs.

22. The relevant passage in *Davies* at paragraph 47 states:

> "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 where 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, (a category 1 case)
>
> the established practice of the courts was to treat an inferior court or tribunal which resisted the 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. (a category 2 case)
>
> If however the 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. (a category 3 case)
>
> 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 the source of public funds and not be put to irrecoverable expense in asserting his rights again after a coroner (or other inferior tribunal) has gone wrong in law and [where] there is no other very obvious candidate available to pay his costs."

23. Mr Buttler also referred me to *R (Gourlay) v Parole Board* [2017] 1 WLR 4107, in which the Supreme Court has granted permission to appeal. I am informed that the central issue will be to what extent the approach in *Davies*, in a case where a court or tribunal has played no active part in proceedings, should be modified in light of the considerations articulated in the *JFS and M v Croydon*. In *Gourlay* the Court of Appeal applied *R (Gudanaviciene) First-tier Tribunal (Immigration and Asylum Chamber)* [2017] 1 WLR 4095, and rejected the submission that *M* had modified *Davies*, see paragraphs [54]-[57]. The Court of Appeal also held that the principles in *JFS* had not modified *Davies*. Mr Buttler submits that the ratios in *Gudanaviciene* and *Gourlay* must be seen in their proper context where the court or tribunal has played no active part in the litigation. They are not applicable where the court has played an active part in the litigation i.e. cases falling within a category (2) *Davies* case.

24. Mr Buttler's principal submissions are that this is a category 2 *Davies* case. First, the claimants did not challenge a judgment of an inferior court or tribunal. The challenge was made against an administrative policy made on behalf of the defendant by a judicial officeholder. He contends that it would not have been possible for the court to review the legality of the decision by reference to the reasons of an inferior court or tribunal. Second, the defendant did not take a neutral position, instead the defendant joined issue in correspondence, threatened cost consequences, instructed counsel to attend the hearing on 20 May 2019, and advanced points of defence, including the contentions that the second and third claimants lacked standing. He asserts that the protocol was withdrawn in response to the claims being made.

25. If there had been proper engagement, Mr Buttler submits, the defendant could have withdrawn the policy in response to the pre action protocol letters, thereby avoiding the costs of the proceedings. Instead, by way of example the defendant continued to defend the claim including filing detailed grounds of defence in the first claimant's claim. Further given the overlap with the first claimant and the second and third claimants claims, it is difficult to see a principled basis as to how the defendant can maintain different positions against the second and third claimants and the first claimant on the question of costs. In these circumstances, he submits that the normal rule in *M v Croydon* should apply and the claimants having obtained the change of policy should be entitled to their costs of the proceedings. Finally, it is submitted that this conclusion is underscored by the reasoning in *JFS*, endorsed by the Court of Appeal in *(ZN) Afghanistan* where publicly funded claims are brought to protect the position of a substantial number of vulnerable opponents.

26. Mr Kosmin submits that this is a category 3 *Davies* case, to the extent that the defendant appeared in the proceedings, it did so in order to assist the court neutrally on questions of jurisdiction etc. He contends that I should not readily find that the defendant has departed from a position of neutrality. He referred me to *Gourlay*, per Hickinbottom LJ, at para 58 where he said: "it is open to a court or tribunal to make a neutral submission to the Administrative Court in response to a claim against it e,g. correcting uncontroversial facts (such as elements in the chronology) or identify the parts of the statutory regime or authorities that are relevant to the claim without incurring a potential costs order against it". He also referred to *Adath Yisroel Burial Society* at para 29 where Singh LJ and Whipple J held that:

> "The defendant's pre-action protocol response letter and detailed grounds provided a detailed explanation for her policy. We

> consider these two documents to be consistent with the defendant's assertion within them that she remained neutral. She was entitled to explain the background facts and her process of thinking leading to the policy. She did touch on issues of law in these documents but that was no more than was necessary to answer the first claimant challenged the policy. The tenor of these documents remain neutral."

27. Mr Kosmin also submits that the fact that the second and third claimants were legally aided should make no difference to their right to recover costs. He referred me to *Davies* at para (7) 45, *M v Croydon* at para 43 and 58, *Gourlay* at para 61, *R (RL) v Croydon LBC* [2019] 1WLR 224 at para 71 and 78, and *R (Faqiri)v Upper Tribunal (IAC)* [2019] 1WLR 4497 at para 38. He distinguished Lord Hope's dictum in *JFS* relying on *Guadanaviciene* [2017] per Longmore LJ at para 32. He drew my attention to that part of the judgment on this issue in *ZN (Afghanistan)* as being obiter, and added that Leggatt LJ held at para 98:

> "… the fact that the solicitors acting for legally aided claimant will otherwise go unpaid or will be paid at a lower rate is not a good reason to order the defendant to pay any costs of the claimant which the defendant would not otherwise have been ordered to pay."

Discussion

28. In my view, the second and third claimants should not be disallowed their costs on the grounds that they did not comply with the pre-action protocol. The stance that Duncan Lewis was taking on behalf of the claimants was clear from the correspondence. The letter of 20 March 2019 to the President did not receive the courtesy of a reply. There was ample opportunity to have withdrawn the protocol and, if necessary, for the Resident Judge at Hatton Cross to have contacted the President to draw his attention to the fact that applications were being made to vacate hearing dates. In any event the defendant did not request any extension of time in which to consider the response.

29. I accept Mr Buttler's eloquent submissions that the second and third claimants did achieve the principal relief that they had sought, namely the withdrawal of the President's protocol on 17 May 2019. Whilst it is correct that the claims became academic, to the extent that hearings had been vacated at Hatton Cross, the underlying complaint was the protocol issued by the President. After consultation with the Senior President of Tribunals, the protocol was withdrawn on 17 May 2019, and replaced with a new protocol, which provided for the listing of Duncan Lewis's cases in Birmingham but not before fee-paid judges who were members of the firm of Duncan Lewis. I reject Mr Kosmin's submission, that the whole matter could and should have been concluded in the tribunals. In my view, without the claims, the blanket policy would have continued, and Duncan Lewis's clients would have been deprived of appeal hearings at the Birmingham hearing centre. It was that issue to which the claims were directed and, in my view, it was in direct response to that issue that the protocol was withdrawn. Indeed, the difficulties encountered by the second and third claimants in moving the hearings to alternative centres in the Midlands underscores Mr Buttler's submissions.

30. I also accept Mr Buttler's submissions that the defendant stepped into the ring and ceased to act neutrally, and that this is a category 2 *Davies* case. In reaching this conclusion, I rely upon the tenor of the correspondence and pleadings referred to in paragraphs 13 and 14 above. In my view, the authorities relied upon by Mr Kosmin, *Gourlay* and *Adath Yisroel Burial Society* support the conclusion which I have come to. The stance adopted in these proceedings by the defendant, which regrettably persisted at the oral hearing before me, went far beyond neutrality, in assisting the court. For the purposes of this judgment it is not now necessary for me to decide whether I should take into account the fact the second and third claimants are legally aided. Whilst I see the force of Mr Buttler's submissions, I err towards the view expressed by Leggatt LJ in *ZN (Afghanistan)* at para 98 which, in effect, is that the general principles relating to costs orders should apply.

31. As I indicated at the end of the hearing, I am satisfied that the defendant should be ordered to pay the second and third claimants' costs of the two claims for judicial review. The costs consequences of the first claimant's claim will be dealt with in accordance with the provisions of CPR Part 36. Accordingly, I reject Mr Kosmin's submissions that these are appropriate cases in which no order as to costs should be made.