Case No: C2/2013/0093

Neutral Citation Number: [2013] EWCA Civ 1027

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
(acting as a judicial review court)
[Appeal No: CO/10561/2011]

Royal Courts of Justice
Strand, London, WC2A 2LL
Tuesday, 16th July 2013

Before:

LORD JUSTICE LLOYD
LORD JUSTICE JACKSON
and
LORD JUSTICE RYDER

- -

THE QUEEN ON THE APPLICATION OF TH (Iran)

Appellant

- and -

EAST SUSSEX COUNTY COUNCIL

Respondent

- -

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Ms Shu Shin Luh (instructed by TV Edwards LLP) appeared on behalf of the **Appellant**.

Mr Scott Matthewson (instructed by East Sussex CC in-house legal team) appeared on behalf of the **Respondent**.

- -

Judgment

Lord Justice Jackson:

1. This judgment is in three parts, namely:
Part One. Introduction;
Part Two. The Facts;
Part Three. The Appeal to the Court of Appeal.

Part One. Introduction

2. This is an appeal against a costs order made by the Upper Tribunal.

3. The award of costs in the matter is within the discretion of the first instance court or tribunal. The Court of Appeal does not interfere with the award of costs unless the court or tribunal below has made some error of law or some error of principle. It is important to say this at the outset, because in recent months I have seen a large number of costs appeals come into this court, many of them based on the misconception that the court will, so to speak, re-exercise the judgment of the court below and start on a blank sheet of paper. That approach is not to be encouraged.

4. After these introductory remarks, I must now turn to the facts.

Part Two. The Facts

5. The claimant is a citizen of Iran, who came to the UK in January 2011 claiming asylum. The claimant asserted that he was aged 16 years and 10 months, having been born on 22 March 1994.

6. The defendant carried out an assessment of the claimant's age. That assessment was carried out by a social worker, Mr John Barston. He concluded on 7 January 2011 that the claimant had been born on 21 April 1993 and so was aged at that time 17 years and nine months. The claimant challenged that assessment. The defendant local authority then carried out a fresh assessment on 6 April 2011. The fresh assessment was done by two social workers, one of whom was Mr Barston, dealing with this matter for a second time. The outcome of the second assessment was that the claimant had been born on 22 March 1993 and was therefore aged 18. The result of the second assessment is set out in a document dated 6 April 2011.

7. The claimant was aggrieved by the results of these two assessments and commenced judicial review proceedings in order to challenge the second age assessment. Ms Luh, who appears for the claimant at the hearing today, has taken us through the claim form and has pointed out that there are two prongs to the claimant's claim. The first prong is the contention that there was a defective procedure followed by the defendant local authority. The second prong is to the effect that, when one looks at all the available evidence, it is clear that the claimant does have the age that he asserts. So far as the first prong of the claim is concerned, the essential points made are that the claimant was not offered the opportunity to have an appropriate adult present at the assessment. The claimant ought to have been, but was not, notified of any adverse factors relied upon by the defendant. The claimant should have been given a chance

to comment on those matters. Furthermore, it was wrong that the same social worker should have conducted the second assessment who had been involved in the first assessment.

8. Turning to the second prong of the claim, the claimant relied upon his own account, his experiences of life in Iran as recounted, and independent evidence that the claimant and his solicitors were assembling. In particular, the claimant obtained a report from an independent expert psychologist and also from an independent social worker. Both of these reports supported the claimant's case. Ms Luh has also taken us to the relief which was sought in the claim form. This relief is as follows: the claimant was seeking a declaration that he had been born on 22 March 1994, a declaration that the defendant's refusal to accept his age was unlawful and an order that the defendant carry out a lawful assessment of his needs and so forth in accordance with his correct age. The real relief which was sought to be achieved by one means or another was a declaration as to the claimant's correct age. Thereafter, all appropriate statutory entitlements would follow from that, if the claimant was successful in the litigation.

9. The litigation came before Nicol J at a permission hearing on 12 December 2011. On that occasion, Nicol J granted such extension of time as was necessary for commencement of the judicial review proceedings. He granted permission to proceed with the judicial review claim and he ordered that the proceedings be transferred to the Immigration and Asylum Chamber of the Upper Tribunal. The judge added one or two observations in his order explaining why he thought that the claim was arguable.

10. Following the grant of permission, the defendant rapidly reassessed its position in this litigation. That is not at all unusual. It is strongly to be encouraged that in public law proceedings, if the Administrative Court decides contrary to the contention of the defendant that the claimant has an arguable case, the defendant should review its position and see whether it should continue to contest the litigation with the same vigour that it has previously evinced. The result of the defendant's reassessment of its position was an offer. On 15 December 2011 the in-house solicitor of the defendant local authority wrote to the claimant's solicitors as follows:

> "I now make an open offer to your client to conduct a fresh age assessment which will take into full account the information supplied to social services in September of this year. The age assessment will contain the following safeguards:
>
> 1. The Age assessment will not involve or be carried out by anyone who attended the previous assessments;
> 2. Your client will have the opportunity to have an appropriate adult present;
> 3. At the end of the assessment, your client will be told the decision reached and the reasons why, and will be given an

> opportunity to comment. Those comments will be noted down;
> 4. He will be sent a written copy of the assessment along with a covering letter explaining the decision and the reasons given. He will be offered a right of review by an independent officer if he is unhappy with the decision reached."

The council then went on to reserve its position in what might be described as the conventional way.

11. The claimant, acting no doubt on the advice of his solicitors, rejected that offer. The council repeated its offer on more than one occasion. By letter dated 7 June 2012 the defendant local authority's in-house solicitor wrote as follows:

> "...my client wishes to confirm its open invitation to a fresh age assessment as made in our letter to you dated the 15th of December 2011 (attached). We will also enable [Mr H] to have an independent social worker present to conduct the age assessment with one of the Council's staff. [Mr H] may also bring his own appropriate adult if he wishes."

The claimant, by his solicitors, accepted that revised offer. The claimant's solicitors also added the entirely sensible suggestion that the proceedings should be stayed pending the conclusion of the reassessment. That proposal was, of course, accepted by the defendant.

12. The further assessment was duly carried out on 4 September 2012. Two social workers carried out the assessment: a Ms Sandra Lambert, who was a senior practitioner employed by the defendant, and Mr Clive Yeadon, an independent social worker who had been nominated by the claimant's solicitors. The two social workers studied the expert reports obtained on the claimant's behalf. They also interviewed the claimant. They both independently came to the conclusion that the claimant had been born on the claimed date, which was 22 March 1994.

13. Following the result of that assessment, the litigation rapidly settled. The parties entered into a consent order which contained a declaration that the claimant had been born on 22 March 1994 and that the defendant's previous decisions were quashed. That consent order was approved by the court and duly issued.

14. So far as costs were concerned, the parties were not agreed. That matter was therefore dealt with by written submissions. The claimant sought the entire costs of the action. The defendant resisted that claim on the basis that the claimant should have accepted the original offer dated 15 December 2011.

15. Upper Tribunal Judge Allen considered the rival submissions. On 31 October 2012 he ordered that the claimant be awarded his costs up to and including 14 December 2011. The judge further ordered that there should be no order for costs in respect of the period thereafter. The basis of the judge's decision, as explained in his written observations, was that the defendant had offered to reassess the claimant's age on 15 December 2011. The claimant had not accepted that offer until many months later. The final acceptance of that offer led to the resolution of the litigation.

16. The claimant is aggrieved by the Upper Tribunal Judge's decision, and accordingly appeals to the Court of Appeal.

Part Three. The Appeal to the Court of Appeal

17. The claimant contends that he has achieved by the final consent order the relief which he was seeking in these proceedings; therefore he should recover his entire costs of the action. Accordingly, says the claimant, the Upper Tribunal Judge erred in law or erred in principle in only awarding to him his costs up to 14 December 2011. In support of this contention, the claimant places reliance upon the decision of the Court of Appeal in *R (M) v Croydon LB Council* [2012] EWCA Civ 595, [2012] 1 WLR 2607. The judgment of the Master of the Rolls in that case is well known. I shall therefore resist the temptation to quote from it at length. Suffice it to say that at paragraphs 58 to 61 inclusive, the Master of the Rolls states that, unless there is a good reason to the contrary, where the claimant in judicial review proceedings obtains in a settlement the relief which he is seeking in the litigation, then he should recover the entire costs of the action.

18. The important point to note is that this does not follow if there is a good reason to the contrary. All sorts of good reasons are possible in different cases. It may be, for example, in some cases that the claimant has failed to abide by the pre-action protocol. Therefore that requires some adjustment in respect of the costs order. In this case, the defendant's case is very simple: the defendant's case is that the claimant acted unreasonably by not accepting the offer of a reassessment of the claimant's age in December 2011. The claimant, as the defendant puts it in its skeleton argument, allowed the action to roll on for many months before eventually the claimant accepted the offer, which was substantially the same as that made in December. The age assessment followed. The claimant was vindicated, and there was the consent order in the claimant's favour.

19. At the hearing of the appeal today, Ms Shu Shin Luh appears for the claimant appellant and Mr Scott Matthewson appears for the defendant respondent. Ms Luh has argued her appeal vigorously and tenaciously in the fact of a not entirely sympathetic court. We did not, in the end, find it necessary to call upon Mr Matthewson, having the benefit of his very clear and succinct skeleton argument. Ms Luh began her submissions by arguing that it was not appropriate for the defendant in December 2011 to require the claimant to withdraw the judicial review proceedings before the age assessment took place. That, in my view, is a bad point. The offer of 15 December 2011 did not contain any requirement that the judicial review proceedings should be withdrawn. It simply offered a fresh age assessment, acknowledging that there were serious shortcomings in the two previous age assessments. If the defendant had replied accepting that offer, I have no doubt

whatsoever that the proceedings would have been stayed whilst the assessment took place. That is what happened when the claimant accepted a similar offer in June 2012. The proposed stay was accepted without demur by the council.

20. The next point made by Ms Luh is that the council reserved its position in the letter of 15 December. It maintained its contention that the claimant was an adult with a date of birth in 1993. That is absolutely right. It is obvious that if the council was proposing that someone independent should carry out a fresh assessment of the claimant's age, unless and until the assessment goes in favour of the claimant the council is bound to reserve its original position. The whole point of having an independent assessment is so that the independent expert can proffer an opinion as to who is right: is it the council or is it the claimant? I do not see in the latter part of the letter of 15 December any rational basis for rejecting the offer on the grounds that the defendant was in some way not serious about offering a reassessment or not willing to accept the outcome of any reassessment.

21. Ms Luh then took us to the detailed grounds of resistance which the defendant served shortly after the grant of permission. In these grounds of resistance, the defendant makes an admission that the assessments carried out by the defendant in January and April 2011 were procedurally unfair. The defendant admits that the claimant ought to have had an appropriate adult present, and that did not happen. The defendant admits that the claimant ought to have had an opportunity to respond to and comment upon the adverse points relied upon by the defendant, and that did not happen. Having made these admissions, Mr Luh points out, the defendant went on to assert its case that the claimant was in fact born in 1993. That seems to me to be entirely understandable. The defendant was maintaining its position in the litigation unless and until it was either decided at an independent assessment or determined by the court that the claimant was born in 1994. I do not see in the detailed grounds of resistance any reason why the claimant should have rejected the December 2011 offer.

22. Ms Luh then took us to the decision in R (ota of Kadri) v Birmingham City Council [2012] EWCA Civ 1432. Mr Luh drew out attention to paragraphs 50 to 52 of the judgment of the Master of the Rolls in that case. I readily accept that, in the light of the K decision, the court would not resolve the judicial review proceedings by simply sending the matter off to be reassessed by more social workers. The defendant was not, however, proposing that the entire litigation should be resolved by sending the matter off to be determined by two social workers. The defendant was proposing a shortcut, namely an independent assessment, with the obvious inference that if the assessment went in favour of the claimant, then thereafter there would be a consent order resolving the litigation in favour of the claimant. Paragraph 52 of the K decision does include a sentence which is of some relevance to this appeal. It reads as follows:

> "These appeals show how disputes as to age assessments can generate prolonged and costly litigation."

23. Litigation of the character that is now before the court is inherently expensive. Lawyers are instructed on both sides, both solicitors and counsel; independent experts are instructed; then instructions are drafted to the experts, and no doubt approved by

the lawyers. There is a high duty on both parties to public law litigation to take advantage of any reasonable and sensible opportunity for settlement which presents itself. It is not at all unusual for opportunities for settlement to present themselves in the early weeks after the grant of permission to proceed with the claim. In this case, a golden opportunity to settle was presented in the defendant's offer dated 15 December 2011. The claimant should, in my view, have accepted that offer. If the assessment had gone in his favour, the litigation would have been resolved at an early date and at much reduced cost. If the assessment had gone against him, it would still be open to the claimant to pursue the litigation and to contend at the final hearing, on the basis of his expert reports and so forth, that he had been born in March 1994.

24. Indeed, what happened in the summer of 2012 is strong evidence of what would probably have happened in or soon after December 2011 if the defendant's original offer had been accepted. If that offer had been accepted there would have been, as Ms Luh tells us, two social workers carrying out an age assessment; they would have had the benefit of the expert evidence provided by the claimant; they would have the benefit of talking to the claimant. I see no reason to suppose that they would have come to any different conclusion from that which was reached by Ms Lambert and Mr Yeadon on 4 September 2012.

25. Ms Luh submitted that there was a key difference between the offer of December 2011 and the offer of June 2012. That key difference was that in June 2012 the council said that the claimant could nominate one of the two social workers to carry out the fresh assessment. This seems to me to be the one important issue in the case: does that difference between the two offers make any material difference? I have come to the conclusion that it does not. The social workers, whether they were proceeding pursuant to the first offer or proceeding pursuant to the second offer, were obliged to stand back and exercise their own independent judgment. I asked Ms Luh whether she was alleging that the social workers would be biased in favour of the council if it were the case that both of them, rather than one of them, was an employee of the council, and Ms Luh does not make that assertion. It is not at all unusual that professional people have to stand back and form an independent view, holding the balance between two parties, one of whom may be paying their salary or paying their consultancy fee. In this case, it is significant that Ms Lambert, an employee of the council, exercising her own independent judgment, reached precisely the same conclusion as Mr Yeadon, namely that the claimant had been born on the stated date. It is clear in the written decision that each of the two social workers had independently come to precisely the same conclusion on the evidence.

26. Ms Luh submits that the essential difference between the first and second offer is that, under the second offer, the claimant would "have his voice heard". Now, the phrase "having his voice heard" is a resonant one, which is apt to arouse the sympathies of any listener. But it is not the function of independent experts holding the balance between parties with different contentions to side with one party rather than the other. The expert nominated by the claimant was not there to support the claimant's case; the expert nominated by the council was not there to support the council's case. The two social workers were there to exercise their own independent judgment.

27. I have come to the conclusion that there is no material difference between the two offers. In my view, the claimant did not act reasonably by pressing on with the

litigation rather than accepting the offer of 15 December 2011. That seems to me to be a special feature of this case which made it entirely appropriate for the Upper Tribunal Judge to depart from the normal order for costs and to make an order which reflected the manner in which the claimant had conducted this litigation. Different judges might well come to slightly different costs orders in order to take account of the special circumstances of this case. It is not for this court to second guess the decision of Upper Tribunal Judge Allen. It seems to me that he made an order for costs which was well within the range of permissible orders in the exercise of his discretion. I see no ground for interfering with that order. Therefore, I for my part would dismiss this appeal.

Lord Justice Ryder

28. I agree.

Lord Justice Lloyd

29. I also agree. We have the benefit of a short and clear statement from UTJ Allen as to his reasons for departing from the normal order, which would be that the claimant, having obtained what he wanted from the proceedings, should also have his costs paid by his opponent. UTJ Allen said this:

> "However, given that an offer to reassess the claimant's age was made on 15 December 2011, I do not consider the claimant is entitled to his costs from that time onwards, since that offer was ultimately taken up which led to the final age assessment agreeing the age the claimant had claimed to be all along, which itself led to the consent order."

As it seemed to me, the only real point on the appeal arose from that passage, and in particular from the proposition which Ms Luh advanced to us, as Jackson LJ has mentioned, that this was a mistaken assessment of the history, because the offer that was taken up in June, she submits, was not the same as the offer that was made in December 2011. One can see that there is a difference in terms between the two offers.

30. Ms Luh argued forcefully, in the interests of her client, that the element of her client's ability to nominate an independent social worker to be one of the two social workers who carry out the age assessment was critical to his position. But for the reasons that Jackson LJ has given, it seems to me that that is not in the end the critical point. The offer made in December 2011 was not one that required the claimant to withdraw his proceedings. It was one that kept his options open. He could agree to the fresh age assessment being carried out, which might have come up, as the eventual assessment did, with the answer for which he contended. If so, further expense and time would have been saved. Alternatively, if the further age assessment came up with a figure with which he was not content, he had his permission granted by Nicol J, he had his proceedings on foot, and he could simply proceed with those to seek to persuade the judge at the end of the day that the right answer was 1994 rather than 1993. So there

would have been no downside for him in agreeing to accept the offer, because it did not require him to withdraw or abandon his existing proceedings.

31. In those circumstances and for those reasons, I agree with Jackson LJ that UTJ Allen was not proceeding on any error of principle or misdirection when he gave the reasons that I have quoted for depriving the claimant of his costs from after 14 December 2011 and, as it seems to me, that was a rational approach which the judge was entitled to take.

32. For those reasons, I agree that the appeal should be dismissed.

Order: Appeal dismissed