Neutral Citation no. [2007] NIQB 45 | *Ref:* **GILC5851**

Judgment: approved by the Court for handing down | *Delivered:* **14/06/07**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY SAEED ULLAH FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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GILLEN J

The Application

[1] The applicant in this case is an Afghani national who sought to quash the decision of the Secretary of State for the Home Department (the respondent) dated 11 September 2006 refusing to consider his asylum and human rights claim as a fresh claim pursuant to Rule 353 of the Immigration Rules(HC 395). Further a declaration was sought that the continuing failure of the respondent to issue him with the status of a person with indefinite leave to remain was unlawful and contrary to Home Office policy.

[2] The background was that the applicant had made an asylum application in 1999. It was his contention that this application was not considered in accordance with the principles of procedural fairness and that in particular the procedure was in breach of the UNHCR Handbook. His application was refused on 27 March 2001. He then appealed to the Immigration Appellant Authority. Again he contended that that appeal was not considered in accordance with the principles of procedural fairness and in breach of the UNHCR Handbook. His appeal was refused. On 4 September 2006 the applicant requested that his representations be considered as a fresh claim under Rule 353 of the Immigration Rules on the grounds that the details of the claim had not been considered previously and that there was a realistic prospect that his claim would be determined differently not withstanding the previous refusal. That claim was refused on the 11 September 2006. By way of letter 14 September 2006 the applicant made further representations requesting the claim be considered as a fresh claim. On 11 October 2006 he was served with removal directions to Afghanistan set for 29 October 2006.

Further detailed representations were made on 26 October 2006. Inter alia he drew attention to the fact that he had become aware of Home Office policy in relation to Afghani nationals which was in effect at the time of his original asylum application. It was the applicant's case that the applicant should have been awarded Exceptional Leave to Remain (ELR) in line with the blanket policy at the time and after a period of years then upgraded to Indefinite Leave to Remain (ILR). He argued there had been a failure on the part of the respondent to inform the applicant of this policy and to apply the policy as required.

[3] In a letter of 5 February 2007 the applicant's solicitors Madden and Finucane wrote to the Home Office in admirably clear terms setting out the basis of this policy which it was alleged had been in operation from January 1995 until 17 April 2002 and which favoured the relief now sought by the client . That letter was a paradigm of how a letter before proceedings should set out the facts and the law. It cited the relevant case law in a form which was easily understandable. It was obviously the product of an industrious and searching approach by this solicitor into his client's case. The case that was made was a compelling one and on the face of it seemed unanswerable. The final two paragraphs of that letter concluded:

> "Thus it is submitted that this case once reviewed by the Home Office must lead to the granting of IRL to the applicant or a similar status in the United Kingdom.
>
> Given the applicant's current immigration detention it is submitted that this matter be given priority consideration. Further the applicant would ask for a response in this matter no later than close of business at 4.00pm on Monday 12 February 2007. Failure to respond would lead to judicial review proceedings being initiated without further notice. This correspondence will also be relied on in any application for costs."

[4] The response was a letter of 8 February 2007 from the Home Office confirming that the case working unit dealing with Mr Ullah was looking into the claim and would respond in due course. Mr Rooney, the solicitor from Madden and Finucane conscientiously replied by return of post again drawing attention to the fact that Mr Ullah had been in custody in excess of six months now and requesting a time scale for a substantial response from the case working unit to the representations that had been made. The long history was again adverted to so that the Home Office was left in no doubt as to the urgency of the matter. No response was forthcoming to that letter and

so Mr Rooney again wrote to the Home Office on 16 February 2007. The penultimate paragraph of that letter stated:

> "If we have not received a response to our correspondence of 5 February 2007 by close of business on Thursday 22 February 2007 we shall initiate judicial review proceedings without further notice. We shall rely upon the correspondence in any application for costs which may arise from such proceeding."

[5] No further correspondence ensued and so the hearing for the leave application was fixed for 16 April 2007. On 7 March 2007 Mr Ullah was released and on 16 March 2007 informal indication was given to his solicitors that his status was to be appropriately changed. The matter was listed for hearing before this court on 16 April2007. The case was adjourned on one occasion before being finally resolved once Mr Ullah was granted Indefinite Legal Status.

The issue to be determined

[6] Mr McTaggart, who appeared on behalf of the applicant, today sought an order from the court granting costs against the respondent from 5 February 2007 onwards. Whilst he recognised that it was only in exceptional cases that costs should be awarded against a respondent in applications for leave, he submitted that this was one such case given the exchange of correspondence with the Home Department. Ms Connolly, who appeared on behalf of the respondent, argued that it was not such a clear case and that there had been some delay occasioned by the respondent seeking a psychiatric report on the applicant.

Conclusion

[7] I have come to the conclusion that this is one of those exceptional cases where it was appropriate to order costs against the respondent for failing to concede what amounted to a well founded case until the application for judicial review had been lodged. I came to that conclusion for the following reasons:

[8] In R v Royal Borough of Kensington and Chelsea ex p. Ghebregiogis [1995] 27 HLC 602 such an award was made in circumstances where an applicant who had arrived in the United Kingdom with his two children from Sudan. He was, with the assistance of the Law Centre, seeking accommodation under Section 75 of the Housing Act 1985. The respondents had declined to provide such accommodation. The Law Centre sent a letter to the respondent which clearly set out the facts of the case and the relevant

propositions of law in support of the applicant's claim that the respondent had a duty to provide accommodation for both himself and his family. The letter made it plain that in the absence of such a concession the applicant would have to apply for leave to judicially review their decision. In the absence of such a concession, the applicant did proceed to apply for leave to move to judicial review. Before the matter came before the single judge, the respondent considered the applicant's claim and agreed to provide such accommodation.

[9] In the course of his judgment on the question of costs Brooke J said:

> "It was only in a very clear case that the courts should exercise the power under section 51 of the Supreme Court Act 1981 to order costs against respondents in relation to judicial review proceedings which had been lodged but which had not yet proceeded to the leave stage."

However in the court's judgment, this was an exceptional case. The letter before claim set out the facts and the law with admirable clarity. There was no doubt that the applicant's case was well founded as a matter of law and if the respondent had given proper attention to its merits when it received a letter before action, it would have come to the conclusion which it had eventually reached when it received notice of the proceedings. This was a clear case and simple point.

[10] Borrowing the approach of Brooke J in this instance, I am satisfied that the law in this case was clear and had been comprehensively and succinctly set out in the correspondence of 5 February 2007. Moreover the letter of claim had made it clear what the consequence would be if urgent action was not instituted in the particular circumstances of this case. I can conceive of no good reason why a greater degree of urgency was not injected into the response of the Home Office and this case prioritised particularly in circumstances where the applicant was in custody. For these reasons I consider that this was one of those exceptional cases where costs should be granted. I emphasise that I regard the letter of claim as being a very important factor in this case.

[11] For the removal of doubt I wish to make it clear that this case is not an indication that costs will be awarded where responsibly and properly respondents concede in a sensible way a point raised in the proceedings once these have been properly considered. The courts will always be keen to encourage resolution of cases at the earliest stage possible and, particularly at the leave stage, this will as a general rule not lead to an award of costs. Respondents must not see this judgment as a cause for concern that early

concession will lead to an expensive wrangle over costs. Once again I rely on Brooke J said in the course of his judgment:

> "The court hoped however that nothing in its judgment would be interpreted as giving any green light to applicants to seek orders for costs in proceedings where the local authority had made a concession at an early stage, which were not as clear and simple as the point in issue here."

[12] In all the circumstances therefore I award costs in this case against the respondent from 5 February 2007.