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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY 'JR248'
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

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Robert McTernaghan (instructed by Creighton & Co, Solicitors) for the applicant
Aidan Sands (instructed by the Crown Solicitor's Office) for the proposed respondent

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SCOFFIELD J

Introduction

[1] This application was initially commenced in late October 2022 on an urgent basis. The applicant is an asylum seeker who arrived in Belfast in July 2022 and has claimed asylum in the United Kingdom. She has been granted anonymity in these proceedings on the usual protective basis that, in the event that her asylum claim is unsuccessful, and she is returned to her state of origin, she should not be (at risk of being) subject to detriment on the basis of having been publicly identified as an asylum seeker in a judgment of this court, having sought to invoke its supervisory jurisdiction.

[2] When the proceedings were commenced, the impugned decision on the part of the proposed respondent, the Secretary of State for the Home Department (SSHD), was identified as the SSHD's "omission to pay her [the applicant] the required essential monies to cover essential living needs under Section 95 of the Immigration & Asylum Act 1999." The applicant sought interim relief by way of an order requiring "the urgent payment of all her essential monies/living expenses owed to her, from the period of the 16th of August 2022 to date…" The pleaded grounds of challenge were illegality, in the form of delay in making statutorily mandated payments in breach of her Convention rights under articles 3 and 8 ECHR; breach of

substantive legitimate expectation; irrationality; and unlawful departure from the SSHD's own published guidance in respect of asylum payments. The central point was that monies due to be paid to her by way of subsistence allowance had not been credited to her account.

[3] The proposed respondent's case was that there had in fact been no failure on the part of the Home Office to make the required payments to the applicant. Within a short period, the position was reached whereby it was agreed that the payments due to the applicant were up-to-date and the core issue in contention as between the applicant and respondent was whether there had been a period during which she had been unlawfully deprived of monies which were either not timeously credited to her or not timeously available to her for withdrawal. That has led to the argument, on which I heard oral argument yesterday, as to whether the proceedings ought now to be dismissed on the basis that they are academic.

[4] Mr McTernaghan appeared for the applicant; and Mr Sands appeared for the proposed respondent. I am grateful to both counsel for their helpful written and oral submissions.

Relevant statutory provisions

[5] There are a number of statutory provisions which are relevant to the present dispute. The nature and effect of these provisions is not in contention. Section 95(1) of the Immigration and Asylum Act 1999 ("the 1999 Act") provides that:

> "The Secretary of State may provide, or arrange for the provision of, support for—
>
> (a) asylum-seekers, or
>
> (b) dependants of asylum-seekers,
>
> who appear to the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed."

[6] By virtue of section 95(3), a person is destitute for the purposes of section 95 if she does not have adequate accommodation or any means of obtaining it (whether or not her other essential living needs are met); *or* she has adequate accommodation or the means of obtaining it, but cannot meet her other essential living needs. In the present case, the SSHD has determined that support ought to be provided to the applicant in order to meet her essential living needs. This brings into play the duty contained in regulation 5(1) of the Asylum Seekers (Reception Conditions) Regulations 2005, which provides as follows:

> "If an asylum seeker or his family member applies for support under section 95 of the 1999 Act and the Secretary of State thinks that the asylum seeker or his family member is eligible for support under that section he must offer the provision of support to the asylum seeker or his family member."

[7] When the proceedings were commenced the applicant's essential living expenses were met by a weekly subsistence allowance of £8.24. That sum has now been raised, following the decision of the Administrative Court in England and Wales in *R (CB) v Secretary of State for the Home Department* [2022] EWHC 3329 (Admin), to the sum of £9.10 per week. This case is concerned only with this subsistence allowance and not with the provision to the applicant of board and accommodation. It is also concerned only with the *payment* of that allowance, rather than (for instance) its adequacy.

The present situation and the applicant's case

[8] Further to these proceedings having been listed on a number of occasions to deal with the question of interim relief, an amended Order 53 statement and further affidavit were provided on behalf of the applicant. It is accepted on behalf of the applicant that she is presently being paid the appropriate allowance on a weekly basis. Nonetheless, there are two aspects to the applicant's challenge as it is now presented:

(1) She continues to seek relief in respect of the proposed respondent's alleged omission to pay essential living expenses from the period of 16 August 2022 to 14 October 2022, which is alleged to have given rise to a violation of the applicant's rights under article 8 ECHR.

(2) She further contends that the issues raised by this case are of wider public importance to asylum seekers generally and that there is a need for the court to consider the operation of the arrangements maintained by the proposed respondent for the payment of such essential living expenses.

[9] The applicant accepts that it could be said the matter raised in these proceedings is academic in that the money which was owed to her (on her case) for some two months has now been paid to her. Nonetheless, it is contended that she is entitled to relief for the historic breach of the proposed respondent's obligations towards her. Her evidence sets out a depressing picture of the effect upon her of her inability to access funds for a period of around two months, including a variety of indignities (which it is not necessary to spell out for present purposes) which she suffered as a result. She wished to use the allowance to purchase medication and sanitary products, amongst other things, as well as to pay for bus fares to allow her to attend essential appointments. I accept that, if her evidence is correct that she did not have access to the required funds for this period, this will have been extremely

upsetting and will have denied her (in Mr Sands' candid submission) "the bare minimum" of funds which were required to meet basic needs such as toiletries, healthcare, clothing and footwear.

The proposed respondent's case

[10] For her part, the proposed respondent has accepted in correspondence that, whilst the financial sums involved may be modest, they are of the utmost importance to the applicant and "she has every right to expect that she will receive it and be able to use it." It has been openly accepted on the part of the respondent that the applicant has at all material times been entitled to the appropriate weekly sum by way of subsistence allowance. However, it is not conceded on behalf of the proposed respondent that the applicant did not receive the payments which she ought to have; nor that she was unable to access the payments which had been credited to her; nor, if this was so, that this was as a result of any failure on the part of the Home Office or its agents.

[11] The proposed respondent contends that such objective evidence as there is at this stage (in the form of a financial statement from the card operator) shows that the appropriate sums were paid at the correct time. On her case, there may have been an issue at some point either with the applicant's payment card (an Aspen card) not working or with a particular ATM machine from which the applicant and her friend sought to make a withdrawal being out of order. The Aspen card was later replaced when a concern was raised. The SSHD also points to, at least, a difference in focus between different affidavits filed on behalf of the applicant; or, as the SSHD contends, a different case being made by the applicant in different sworn affidavits. Even allowing for the proceedings having been brought on urgently, the applicant's case as to precisely what went wrong with her payments has not been entirely clear. That is not intended as a criticism but illustrates, firstly, the limited evidential basis for the claim and, secondly, the difficulty the court may have in getting to the bottom of what (if anything) went wrong, when this occurred, and whose fault it was.

[12] The respondent contends that leave to apply for judicial review should be refused on the bases that the claim is now academic; that it raises no public law issue; that it is unsuitable for judicial review; and/or that to grant leave would be contrary to the overriding objective in RCJ Order 1, rule 1A having regard to the likely cost of the proceedings and the limited amount at stake.

Consideration

[13] In the applicant's skeleton argument, reference is made to the applicant not having been able to use her subsistence allowance for a period of nearly two months "by way of poor service and administration of the scheme by the proposed respondent and her servants and agents." It is difficult to know what to make of this, since the respondent contends that the objective evidence shows that the appropriate payments were being made at the correct intervals. At the same time,

taking the applicant's averments at face value, it seems unlikely that she would have gone without basic items she desperately needed for such a period if indeed she had access to the funds to purchase them. In any event, it is clear that the payments are *presently* being made as they ought to be.

[14] The question of hearing applications for judicial review which have become academic was recently considered by the Court of Appeal in *Re Bryson's Application* [2022] NICA 38, upholding a first instance decision to dismiss proceedings on that basis ([2022] NIQB 4). The Court of Appeal agreed that the focus of the court's enquiry in relation to whether a case is academic would be "intensely practical." The question is whether there is *any longer* a dispute to be decided which will *directly affect* the rights and obligations of the parties inter se.

[15] It seems to me that the present case is properly to be viewed as academic between the parties because there is presently no live dispute as between the applicant and the Home Office about the current payment to her of her subsistence allowance, *save for* the complaint about historic delay in receipt or availability of some payments made or due to her in the past. Insofar as that issue is not academic, I nonetheless propose to refuse leave to apply for judicial review in respect of it. That is because it is a matter which will require factual investigation and fact-finding to which the judicial review process is ill suited (see, for instance, *Re JR138's Application* [2022] NIQB 46, at para [25]). In addition, I accept the proposed respondent's submission that, in determining in its discretion whether or not to grant leave under RCJ Order 53, rule 3, the court should seek to give effect to the overriding objective set out in Order 1, rule 1A(1) and (2): see Order 1, rule 1A(3)(a). In this case, the question of whether the applicant was for some period not paid her weekly allowance on time, or in a way which permitted it to be withdrawn from her account, is not only ill-suited to resolution by way of judicial review but, in addition, I consider that it would not be just to put the proposed respondent to the expense of defending judicial review proceedings in relation to this when such a claim can and should be pursued in another way.

[16] It seems to me that, if the applicant is correct that she was unlawfully deprived of payments due to her for a period of (almost) two months, it is arguable that this gives rise to liability on the part of the proposed respondent to pay compensation for a breach of duty (whether by virtue of a breach of Convention rights or on some other legal basis). Damages for breach of the applicant's article 8 rights have been claimed in the Order 53 statement. Rather than simply dismissing the application therefore, I propose to exercise my power under RCJ Order 53, rule 9(5) to order the proceedings to continue as if they had begun by writ. Had I the power to do so my own motion, I would also at the same time have remitted the proceedings to the county court. The proposed respondent, as defendant, may wish to consider bringing a remittal application before the Master.

[17] The applicant continues to assert that this is a case of general public importance to asylum seekers generally. The applicant's solicitor has provided a

recent affidavit setting out a litany of problems experienced by other of his clients, or other asylum seekers of whom he is aware, relating to the payment of their asylum support. This includes views expressed by other solicitors and NGOs about problems they have encountered with the Home Office, its agents who administer the payments system (Migrant Help and a company known as Prepaid Financial Services), and with the process of making complaints and having them resolved. It is contended on the applicant's behalf that "the current system is in disarray." She also contends that complaints of this nature have been raised with the Home Office directly and/or in Parliament but that "unfortunately, nothing has changed regarding the administration/delays in the current broken system." In the circumstances, she contends, vulnerable asylum seekers such as her have no recourse but to the courts. On this basis I am invited to conclude that the present proceedings are either not academic or, nonetheless, should be permitted to proceed in the public interest.

[18] As noted above, the academic nature of the proceedings is to be determined by reference to whether they are academic *as between the parties.* A wider public interest goes to the question of whether proceedings which are academic should nonetheless be permitted to proceed. I do not propose to permit the present application to proceed on some wider basis in order to investigate what the applicant has described as "multiple examples of the proposed respondent's breaches regarding asylum support payments to asylum seekers." It seems to me that what the applicant is inviting by means of the second limb of her reformulated challenge is akin to a miniature public inquiry into the practical operation of the arrangements put in place by the Secretary of State for the payment of asylum support subsistence allowance. In my view that is not the proper function of this court exercising its supervisory jurisdiction. Unlike the case of *CB* referred to above, there is not an alleged error of law to be resolved; nor a decision forming a clear target of this limb of the proposed application for judicial review. The fact-finding difficulties which would arise in the applicant's own case would simply be multiplied.

[19] Nor have I been persuaded that the court could grant a remedy which would be practical and effective. Even assuming Mr McTernaghan is correct to assert that problems with such payments arise in a wide range of cases, this is not a classic case where an academic dispute should nonetheless be determined because, for instance, it involves a contested issue of statutory construction which needs to be resolved and on which the court can provide an authoritative ruling. I accept Mr Sands' submission that the type of complaints which have been highlighted are more in the nature of practical complaints about the operation of the system which do not raise issues of public law.

Conclusion

[20] I agree with the observation of Fordham J at para [17] of his decision in *CB*, quoting the Head of Advocacy at the Refugee Council, that, for asylum seekers such

as the applicant, every penny makes a difference. Section 115 of the 1999 Act excludes asylum seekers and their dependents from entitlement to most other Social Security benefits. They are also ordinarily prohibited from working while awaiting a decision on their asylum claim. It is right that the proposed respondent has accepted without equivocation in her submissions in these proceedings that those entitled to asylum support receive it on time and can make use of it.

[21] Notwithstanding the conclusions expressed at paras [18]-[19] above, I do not gainsay the catalogue of issues expressed by a range of practitioners in this field and impressively marshalled by Mr Creighton in his affidavit evidence. If the system adopted by the Secretary of State operates as poorly as this evidence suggests – and I recognise that no response to it has yet been provided on behalf of the Home Office, nor will such a response be necessary in these proceedings in light of my conclusions – it paints a sorry picture. Mr Creighton has exhibited a range of Parliamentary debates in which difficulties with the Aspen card system have been highlighted: delay in cards being provided, incorrect amounts being credited, technical difficulties with their use, and ineffective complaints-handling procedures.

[22] There might well be a strong public interest in these matters being investigated and scrutinised further; but the type of exercise contemplated by the applicant in this regard is not one for the High Court to conduct on an application for judicial review. This is the type of issue which might, for instance, usefully be pursued (where referred by a member of the House of Commons on behalf of a member of the public) by the Parliamentary Commissioner for Administration. Insofar as the courts have a role, this is likely to be on a case-by-case basis rather than in the more wide-ranging way contemplated by the applicant's representatives.

[23] For the reasons given above, I decline to grant the applicant leave to apply for judicial review. However, I will order that her claim, insofar as it relates to her complaint that she was wrongly deprived of asylum support for a period of 59 days (or, if still relevant, that a small amount of money in the sum of £10.99 is still outstanding), continue as if begun by writ. This will allow the factual issues in dispute to be determined in a proper forum, if necessary. Pursuant to Order 28, rule 8, I direct that the applicant serve a statement of claim within 14 days. As indicated above, such a claim would appear at first blush to be ripe for remittal. However, I would also hope that a negotiated resolution might be possible which would avoid further significant expenditure on legal costs in these proceedings.

[24] I will hear the parties on the issue of costs but provisionally consider that there should be no order between the parties as to costs to date (save for an order for legal aid taxation of the applicant's costs); and that any further costs should simply be in the discretion of the trial judge.