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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY YPK, MMC, SSH, YYN, GCS, XS, LSH XH, YZY/YRC AND YQZ

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

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McCLOSKEY J

Preface

Each of the Applicants in this conjoined group of ten cases is described by initials, for two reasons. The first is practical convenience. The second is that some of the cases involve children, who are entitled to anonymity. There is a prohibition on the publication of the names of such children and their parents or of anything which could result in the identification of any affected child or parent.

Introduction

[1] The only issue requiring the Court's adjudication is that of costs, in the circumstances which have evolved. This feature is common to all ten cases. The Respondent in every case, with two exceptions, is the Secretary of State for the Home Department (the "*Secretary of State*"). In the remaining two cases the Respondent is the United Kingdom Upper Tribunal (Immigration and Asylum Chamber) ("*UTIAC*").

The decision in ZHANG

[2] All cases are linked to the recent decision of this court in Re Zhang's Application [2017] NIQB 92. In Zhang proceedings were issued on 24 November 2016 and leave to apply for judicial review was granted on 22 February 2017. In the ten cases before the court proceedings were issued on various dates subsequent to the grant of leave in Zhang, mostly in

August/September 2017. The case management approach devised was that all ten cases would be stayed pending the decision of the Court in Zhang. This was based upon the assessment of the parties' representatives, which the Court shared, that each of these cases had a sufficient connection with the issues raised in Zhang.

[3] Zhang was heard by this court on 20 October 2017. Judgment was given on the same date. The written judgment of the court, transcribed and edited, was promulgated a few days later.

[4] In the weeks which followed a uniform stance was adopted in the eight cases in which the Secretary of State is respondent. The Applicants and their representatives were notified in writing of a decision that the impugned decision had been rescinded and a fresh decision would be made in due course. In the new decision making process, the Applicants will have the opportunity to submit further evidence and representations at their election. In all of these cases it is agreed that, by virtue of this development, the judicial review challenges have become academic. Thus the Applicants are no longer pursuing the grant of leave to apply for judicial review. Rather their only application is that the Court should order the Secretary of State to pay their reasonable costs.

Costs in judicial review: general principles

[5] At this juncture it is appropriate to draw attention to the *soi-disant* "Boxall" principles, deriving from the decision in R (Boxall) v Waltham Forest LBC [2001] 4 CCLR 258. The not insignificant preface to the six principles devised by Scott Baker J is that the context was one where leave to apply for judicial review had been granted but a substantive hearing was not required as the challenge had been rendered moot by certain intervening developments. The code of principles is the following:

> *"(1) The court has discretion as to –*
>
> *(a) whether costs are payable by one party to another;*
> *(b) the amount of those costs; and*
> *(c) when they are to be paid.*
>
> *(2) If the court decides to make an order about costs –*
>
> *(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but*
> *(b) the court may make a different order.*

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –

(a) the conduct of all the parties;
(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and …

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol;
(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;
(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim."

[6] As decisions such as Re Eshokai's Application [2007] NIQB 75 and Re JR78 [2017] NIQB 93 make clear, the courts in Northern Ireland have adopted the Boxall code. I conceive it necessary to examine at a little length two subsequent decisions of the English Court of Appeal of relevance to judicial review costs principles.

[7] Boxall, a decision at first instance, was considered by the English Court of Appeal in R (Bahta) v Secretary of State for the Home Department [2011] EWCA Civ 895. There were four claimants. The substantive benefit pursued by each was either permission to work in the United Kingdom or the grant of indefinite leave to remain (which would encompass permission to work). Leave to apply for judicial review was granted. I interpose at this juncture the footnote that in the jurisdiction in England and Wales this frequently – not invariably, of course – prompts a voluntary reconsideration of the impugned decision by the Secretary of State.

[8] In each of the four cases a reconsideration did indeed take place. However, it was postponed in one of them, awaiting the decision of the Supreme Court in ZO and Others v Secretary of State [2010] UKSC 36 on the issue of the availability of the right to work to repeat or subsequent asylum seekers, in circumstances where the Court of Appeal had resolved this matter against the Secretary of State: see [2009] EWCA Civ 442. In the event the Secretary of State, making voluntary fresh decisions, granted indefinite leave to remain to all four claimants. In three of the cases this step was taken in the wake of the Court of Appeal decision. In the fourth it post - dated promulgation of the Supreme Court's decision. In one of the cases there was, at the stage of the Supreme Court's decision, a pending application by the

Secretary of State to discharge an interlocutory order of the High Court granting the claimant permission to work.

[9] In all four cases leave to apply for judicial review was granted and the subsequent fresh decisions of the Secretary of State rendered the challenges academic. In each of the cases different judges of the High Court ruled that there should be no order as to costs *inter partes*. The Court of Appeal reversed all four orders. It emphasised that the effect of its decision in ZO was that the Secretary of State was bound to grant the relief pursued by the claimants and had no justification for deferring any of the reconsidered decisions until the Supreme Court had ruled on the appeal in that case. Pill LJ stated emphatically, at [53]:

> *"I do not accept that the respondent was entitled to deny relief until the Supreme Court had ruled. The Court of Appeal had ruled that applicants in the position of the appellants (apart from KD who as a primary asylum seeker was entitled to relief either way), were entitled to relief on the basis of the decision of the Court of Appeal. That was the law unless and until a higher court, or Parliament, ruled otherwise. In the absence of a stay on the Court of Appeal decision, the respondent could not require the appellants to wait for relief until the Supreme Court had ruled. It was suggested in one case that the appellant "gained nothing by these proceedings which he would not have gained by awaiting upon" the decision of the Supreme Court. What he stood to gain was the right to work at an earlier date"*

The Court was expressly critical of the High Court's decision – a case management one – to defer progressing the cases pending resolution of the appeal to the Supreme Court in KO. The effect of this was to permit the Secretary of State to delay making reconsidered decisions in some of the cases in circumstances where the Court of Appeal decision in KO represented the law and to prolong the litigation unnecessarily.

[10] The Court of Appeal allowed all four appeals. The effect of this was that the Secretary of State was ordered to pay the costs of each of the four claimants. How does this decision impact on the Boxall code? A considered examination of the key passages in the judgment, [53] – [76], is essential.

[11] Several passages are deserving of particular attention. First, Pill LJ stated at [59]:

> *"What is not acceptable is a state of mind in which the issues are not addressed by a defendant once an adequately formulated letter of claim is received by the defendant. In*

> *the absence of an adequate response, a claimant is entitled to proceed to institute proceedings. If the claimant then obtains the relief sought, or substantially similar relief, the claimant can expect to be awarded costs against the defendant. Inherent in that approach, is the need for a defendant to follow the Practice Direction (Pre-Action Conduct) or any relevant Pre-Action Protocol, an aspect of the conduct of the parties specifically identified in CPR r.44.3(5). The procedure is not inflexible; an extension of time may be sought, if supported by reasons."*

The PAP procedure was not in existence when Boxall was decided. This, therefore, may be viewed – in this discrete respect – as an extension or modification of the Boxall code. Second, the Court of Appeal expressly confronted the factors of public funding and the danger of excessive recourse to the "fall back" position viz no order as to costs *inter-partes* at [61]:

> "*In the case of publicly funded parties, it is not a good reason to decline to make an order for costs against a defendant that those acting for the publicly funded claimant will obtain some remuneration even if no order for costs is made against the defendant. Moreover, a culture in which an order that there be no order as to costs in a case involving a public body as defendant, because a costs order would only transfer funds from one public body to another is in my judgment no longer acceptable."*

Third, the Court stated emphatically at [62]:

> "*Whether to make an order for costs depends on the merits of the particular application.*"

Thus it would be wrong in principle to order costs against the public authority respondent simply on the basis that the claimant's lawyer's remuneration via public funding is normally less than that available on an *inter-partes* basis.

[12] Continuing, the Court of Appeal expressed general scepticism about claims that a case is settled for "*pragmatic reasons*", particularly where, on analysis, it is clear that the concession has been dictated by the requirements of the law. The Court cautioned, at [63]:

> "*A clear explanation is required, and can expect to be analysed, so that the expression* ['purely pragmatic'] *is not used as a device for avoiding an order for costs that ought to be made.*"

The Court added the following important statement at [64]:

> *"In addition to those general statements, what needs to be underlined is the starting point in the CPR that a successful claimant is entitled to his costs and the now recognised importance of complying with Pre-Action Protocols. These are intended to prevent litigation and facilitate and encourage parties to settle proceedings, including judicial review proceedings, if at all possible. That should be the stage at which the concessions contemplated in Boxall principle (vi) are normally made. It would be a distortion of the procedure for awarding costs if a defendant who has not complied with a Pre-Action Protocol can invoke Boxall principle (vi) in his favour when making a concession which should have been made at an earlier stage. If concessions are due, public authorities should not require the incentive contemplated by principle (vi) to make them."*

A still further general rule of importance is expressed in [65]:

> *"When relief is granted, the defendant bears the burden of justifying a departure from the general rule that the unsuccessful party will be ordered to pay the costs of the successful party and that the burden is likely to be a heavy one if the claimant has, and the defendant has not, complied with the Pre-Action Protocol."*

[13] Certain passages in the decision of the Court of Appeal also highlight the dangers arising from a superficial and broad brush judicial approach to contentious costs issues. First at [67]:

> *"The circumstances of each case do require analysis if injustice is to be avoided. Such analysis will not normally be difficult if the parties have stated their cases competently and clearly and if the statement of reasons required when a consent order granting relief is submitted to the court genuinely and accurately reflects the reason for the termination of proceedings."*

Followed by [68]:

> *"I accept that the principle of proportionality, and the workload of the courts, require that limits are placed on the degree of analysis which is appropriate but judges should not too readily be deterred. If they find obscurity, or obfuscatory conduct by the parties, that can be reflected*

> *in the order made. A willingness to investigate is likely to promote clarity in future cases."*

My analysis that the decision in Bahta both affirms and extends the Boxall code is fortified by two further passages. First, Pill LJ stated at [66]:

> *"I do not accede to the request to tack on words to the Boxall guidelines to meet the appellants' submissions. Such a formula would carry the danger of being used mechanistically when what is required is an analysis of the circumstances of the particular case, applying the principles now stated. These include the warning in Scott that a judge should not be tempted too readily to adopt a fall - back position."*

Second, Hedley J, concurring, observed at [76]:

> *"Thirdly it is clear to me that Boxall is a well-established guide in the area of judicial review but like all guides it must be applied both to the particular facts of the instant case and it must take account of procedural developments like PAPs. Compliance with PAP, whilst not determinative in itself, must now be a highly relevant factor in the exercise of the judicial discretion as to costs."*

[14] There is one further passage in the Bahta decision to which I would draw attention. It is found at [69]:

> *"Where relief is granted by consent, CPR r.54.18 provides a procedure whereby the court may decide the claim for judicial review without a hearing. That procedure should be followed wherever possible. It requires the filing of a document signed by all the parties "setting out the terms of the proposed agreed order together with a short statement of the matters relied on as justifying the proposed agreed order and copies of any authorities or statutory provisions relied on" (CPR PD 54A, para.17.1)."*

It is correct that the Northern Irish Rules of the Court of Judicature do not have any exact equivalent of the two CPR provisions noted in this passage. However, the High Court's broad case management powers, ever invigorated and nourished by the overriding objective enshrined in Order 1, Rule 1A, do not preclude the adoption of a similar practice. Indeed practitioners in the Judicial Review Court are, I apprehend, becoming increasingly familiar with this court's practice of requiring steps of this kind to be taken. One trusts that with the passage of time legal representatives will increasingly take such steps proactively rather than reactively. This practice has the additional merits of transparency and expediting the final order of the court. I consider

it a matter of some importance that in many cases where the "bottom line" of an order is a bare statement of dismiss, the preceding recitals should provide some illumination and information. This is consonant with the public law character of the proceedings. It also provides the claimant with an order of greater value, while potentially having the constructive effect of preventing, or restricting the scope of, future proceedings.

[15] A further decision of the English Court of Appeal, that of M v London Borough of Croydon [2012] EWCA Civ 595 followed hot on the heels of Bahta. The moderately lengthy factual matrix is rehearsed in [2]–[22] of the judgment of Lord Dyson MR. This was a so-called "age assessment" judicial review. The critical facts, for present purposes, are that leave to apply for judicial review was granted; approximately one month later the respondent received an expert report favourable to the complainant and shared this; the respondent was then invited to concede the claim; and it did so some two months later. In a reasoned decision the High Court made no order as to costs *inter-partes*: see [24].

[16] The Master of the Rolls embarked upon a careful comparison of the general costs principles in ordinary civil litigation and those pertaining to judicial review cases. At [52] he posed the question of whether there should be any material distinction between the two regimes. The analysis which follows begins with this starting point:

> "*However, a number of points could be raised as to why defendants who concede claims in the Administrative Court should be less at risk on costs than those who concede in ordinary civil actions.*"

In the ensuing passages the following guidance is provided. First, rejecting the argument that public authorities should not normally be penalised in costs if they concede following the initiation of proceedings, at [53]:

> "*…. It can forcefully be said that the fact that if Defendants know they will have to pay the claimant's costs it would be a powerful incentive to concede the claim sooner rather than later ….* [and] *.. the time to do so is before proceedings are issued: that is one of the main reasons for the introduction of the Protocol.*"

Second, at [54]:

> "*… Where the claim is one which reasonably requires more time to investigate than is available before the three month period runs out, there may be a powerful case for Defendants who thereafter concede the claim not being liable for any or some of the claimant's costs.*"

[17] The Master of the Rolls continues: third, in cases where it is asserted that concessions are made for practical or technical reasons or because it is "*not worth the candle*" contesting the challenge, at [55]:

> "*In the main, it seems to me that the answer to this is that the defendants should make up their minds to concede the claim for such reasons before proceedings are issued.*"

As regards cases where the law develops following the issue of proceedings, at [56]:

> "*In such a case, however, while the Defendants have a real argument for saying that they should not pay all the claimant's costs, the claimant can nonetheless raise all the normal reasons for receiving his costs.*"

Fifthly, where a respondent canvasses issues such as a claimant's failure to set out his claim with clarity in the PAP letter or the expansion of evidence following the issue of proceedings or the incorporation of a claim which does (or claims which do) not succeed or pursuing the claim in an unreasonable manner, such issues can be evaluated by the court in deciding whether to award the claimant any costs or a proportion of its costs only: see [57].

[18] The main effect of the decision in M was to generally align the principles governing the award of costs in ordinary civil litigation with those applicable in judicial review proceedings: see especially [58] in this respect. Where does this leave the Boxall code and the decision in Bahta? The court was at pains to point out that its decision did not entail any inconsistency with these two earlier cases: see [59]. Finally, the court in M promulgated the following guidance;

(i) Where a claimant has been wholly successful whether following a contested hearing or via settlement "*… it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary*": see [61].

(ii) In a case where the claimant succeeds in part only following a contested hearing or via settlement, the court will normally evaluate the factors of "*… how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim*": see [62]. The court's evaluation of such questions will be greatly facilitated where the case has proceeded to the stage of substantive judicial adjudication. But the judicial task will be altogether more

difficult in cases where the claimant's partial success arises through the mechanism of consensual resolution. In the latter type of case "*… there is often much to be said for concluding that there is no order for costs*": see [62].

(iii) In cases where a compromise which does not "*actually reflect the claimant's claims*" is struck, the court "*… is often unable to gauge whether there is a successful party in any respect …. Therefore there is an even more powerful argument that the default position should be no order for costs. However in some cases it may well be sensible to look at the underlying claims and enquire whether it was tolerably clear who would have won if the matter had not settled*": see [63].

[19] In the result, the Court of Appeal reversed the costs ruling of the High Court, substituting for it a decision that the respondent should pay 50% of the Appellant's costs in respect of the first of two identifiable periods and 100% of the costs in respect of the period thereafter. The concurring judgment of Stanley Burnton LJ contains three significant passages, at [75] – [77]:

> "*75. The consequence of our decision should be a greater willingness on the part of the parties to judicial review proceedings, at first instance and on appeal, to agree not only the substantive provision of the order to be made by the Court, but also the issue of costs. Settlements in which the question of costs is left to be determined by the Court at a later date are common, and perhaps too common. Parties can no longer assume that the likely order is no order as to costs, even where one party or another has conceded the whole, or substantially the whole, of the other side's case.*
>
> *76. A successful negotiation of costs issues is likely to be cost effective, saving the costs of subsequent written submissions and saving the time of the judge who is required to determine costs. It is in both parties' interests to address the question of comprehensive settlement as early as possible.*
>
> *77. Where the parties are unable to agree costs, and they are left to be determined by the Court, it is important that both the work and costs involved in preparing the parties' submissions on costs, and the material the judge is asked to consider, are proportionate to the amount at stake. No order for costs will be the default order when the judge cannot without disproportionate expenditure of judicial time, if at all, fairly and sensibly make an order in favour of either party. This is not to say that there are not cases where the merits can be determined and no order for costs*

> *can be seen to be the appropriate order; but in such cases that order is not a default order, but an order made on the merits."*

From these passages I distil a powerful exhortation that in cases where the pursuit of either leave to apply for judicial review or substantive relief becomes academic, the need for the court to adjudicate on costs issues should arise only as a matter of last resort. Practitioners please take careful note! This may be viewed through the prism of the overriding objective, which imposes strong duties of co-operation and assistance on all litigants.

[20] In this context the first and second of the group of ten cases before the court (the two "Cart" / UTIAC cases), to which I am about to turn, might be viewed as paradigm illustrations of this exhortation. In my judgement, the applications for costs in these two cases rank, in the abstract, among the weakest imaginable. There was no conceivable basis upon which these two costs applications could have succeeded. If these two litigants were publicly funded, this, in turn, points to the issues raised in this court's decision in Re CC's Application, about to be promulgated.

[21] The extensive treatise in [5] – [20] above should not obscure two overarching principles which shine more brightly than any other. The first is that costs lie in the discretion of the Court. The second is that the unsuccessful party should normally pay the costs of the successful party. This principle is stated in uncompromising terms in Order 62, Rule 2(3) of the Rules of the Court of Judicature.

YPK and MMC: the two UTIAC/"Cart" cases

[22] In these two cases, the first and second of the group of 10, the Applicants are YPK and MMC. These are colloquially known as "Cart" cases, following the decision of the Supreme Court in R (Cart) v Upper Tribunal [2011] UKSC 28. The effect of the latter decision is that decisions of UTIAC refusing leave to appeal from the First-tier Tribunal ("FtT") to UTIAC are, in circumscribed conditions, amenable to challenge by judicial review in the High Court. Both of these cases come before this court in the following way.

[23] In each of these cases the question is raised of whether the FtT correctly applied the UTIAC country guidance decision in AX. In Zhang [2017] NIQB 92, this court stated at [11]:

> *"The second riposte to this aspect of the decision is that it is confounded by the operative County Guidance decision of the Upper Tribunal (Immigration and Asylum Chamber), AX (Family Planning Scheme) China CG [2012] UKUT 00097 (IAC). There the Upper Tribunal, promulgating general guidance on the predictable impact and effect of the*

> *Chinese Family Planning Scheme on returning Chinese citizens, the cornerstone of the system being that child birth in China is regulated by the State, decided, inter alia, that the State expects child birth to occur within marriage; enhanced state benefits are payable to "one child" parents for their lifetimes; conversely, "two child" parents suffer a major loss of State benefits; children born out of wedlock are classified "unauthorised"; the registration of their births requires the payment of a "social upbringing charge", a financial penalty which is calculated with reference to income; and where there is an "unauthorised" child both parent and child are vulnerable to significant disadvantages, in particular reduced state funded health care, diminished state education and work discrimination."*

The judgment continues at [12]:

> *"The Upper Tribunal also specifically addressed the issue of Article 3 ECHR, holding (per paragraph 9 of the headnote):*
>
> > *'The financial consequences for a family losing its SCP [the enhanced State Benefits Certificate] (for having more than one child) and/or of having SUC** imposed (for having unauthorised children) and/or suffering disadvantages in terms of access to education, medical treatment, loss of employment, detriment to future employment etc will not **in general** reach the severity threshold to amount to persecution or serious harm or treatment in breach of Article 3'.*
>
> *[Emphasis added.** Denoting the financial penalty]*
>
> *I am satisfied that AX, considered as a whole, decided that the registration of every unauthorised child in China requires payment of the "SUC". While the Upper Tribunal also addressed the issue of the affordability of the SUC, it did so by reference to couples and, further, found that couples would in general be able to afford it: see [188] in particular. That the main focus of the Tribunal's decision was married couples is unsurprising, having regard to the circumstances of the Appellant and her husband: see [3]."*

[24] In both YPK and MMC the Secretary of State's PAP response was despatched promptly. It pointed out, correctly, that the decision under challenge was that of UTIAC and that the Secretary of State had no power to

alter or rescind such decision. As the letters written on behalf of the Applicants acknowledged – correctly – the status of the Secretary of State was that of interested party. The Secretary of State is on notice of these proceedings only because the Applicants' solicitors, having been informed via the PAP response that the Secretary of State's address for service of court documents is that of the Crown Solicitor for Northern Ireland, the judicial review leave papers were duly served on this agency. With the exception of two cursory case management reviews, there has been no hearing before this court in either of the two cases concerned. Furthermore, this court has made no formal order or direction conferring the status of interested party on the Secretary of State and is unaware of any extant application to this effect.

[25] I consider the correct analysis to be that the status of the Secretary of State has at all times been that of potentially interested party. Matters have not progressed beyond this embryonic level given the consensus that these two cases, in common with the other eight, should be stayed awaiting the decision in Zhang, coupled with the ensuing concessions.

[26] The impugned decision, namely that of UTIAC refusing leave to appeal to it against a decision of the FtT, is a determination of a judicialised body binding on all parties. The Secretary of State is powerless to do anything about it. At most the Secretary of State could, if permitted to participate as an interested party, adopt a considered stance regarding the legal sustainability of the impugned judicial decision. Such stance would not be binding on this court. Furthermore, it would be most unlikely to increase the costs which the Applicant would unavoidably have to incur in securing leave to apply for judicial review and, ultimately, a substantive remedy if appropriate.

[27] The court has considered the oral and written submissions in all of these ten cases. Unlike the submissions on behalf of the Secretary of State, those of the Applicants do not differentiate between these two "UTIAC" cases and the remaining eight. In the latter sub-group, the Applicants have achieved an outcome giving them a practical and effective benefit without the requirement for any active court intervention vis-à-vis the impugned decisions. That analysis does not, however, apply to the sub-group constituted by YPK and MMC. If the court were to dismiss the leave applications in these two cases, the impugned decisions of UTIAC would be preserved and the Applicants would secure no benefit.

[28] Thus it is incumbent on the court to sever these two cases from the larger group and to process them in the conventional way. Having adopted this approach, I have given consideration to whether any further written submissions are desirable. I am satisfied that this step, which would have the undesirable effect of generating further costs and delay, is not necessary, fundamentally because it has been intimated in writing on behalf of UTIAC

that it is agreeable to its impugned decisions being quashed, whereupon they will be reconsidered and substituted by fresh decisions. Thus UTIAC is not proposing to resist either judicial review challenge.

The Practice of UTIAC in 'Cart' challenges.

[29] The UTIAC stance in these two cases is a reflection of this Tribunal's established practice. Most frequently, UTIAC does not actively participate in judicial review proceedings of this kind. In cases where a *legitimus contradictor* on issues of substance and merits is required – a minority – this role is fulfilled by the Secretary of State *qua* interested party who, invariably, is legally represented. In a small minority of cases, normally involving issues of procedure, UTIAC may opt to be heard and represented in its own right. In the majority of cases UTIAC takes the course which it has adopted in the present cases.

[30] Having considered the Applicant's challenges on their merits, I conclude that the following Order is appropriate in each case. Leave to apply for judicial review is granted and the impugned decisions of UTIAC are quashed. There is no application for costs against UTIAC. Rather, as noted already, the Applicants seek an Order for costs against the Secretary of State. Judicial review proceedings have, regrettably, been the subject of satellite litigation which has given rise to the formulation of an assortment of principles in reported decisions of both the High Court and the Court of Appeal, examined above. These principles are designed to guide the exercise of the dominant principle, or rule, which is that costs lie within the discretion of the court. The benefit of general principles of this kind is that they promote certainty and predictability, thereby furthering the overriding objective.

[31] One of these general principles is that an applicant will not normally recover its costs from an interested party. I emphasise the word "normally" since none of the assorted judicial review costs principles operates as a rigid, inflexible rule. Some are expressed in stronger terms than others. That to which I have just alluded operates as a strong general rule in practice. I can identify no fact or circumstance warranting its displacement and none has been canvassed in argument on behalf of these two Applicants. Indeed, I find it difficult to conceive of any "Cart" judicial review in which, in the context of a concession by UTIAC, an applicant should recover its costs from the Secretary of State. However I do not discard the possibility that such an unusual case might materialise.

[32] Thus there will be no order as to costs *inter-partes*. If the Applicants are legally assisted litigants, the usual taxation provision will be included in the court's order.

THE GROUP OF EIGHT

[33] As a result of the provision by the Respondent's representatives of invaluable schedules, coupled with an excellent specially tailored bundle, the Court's task in determining the costs issues in these eight cases has been considerably facilitated.

[34] Duly equipped with and assisted by the aforementioned aids, my assessment is that this group of eight cases breaks down into two sub-groups, as follows:

(a) Those of XH and YQZ.

(b) The remaining six cases.

The basis of this segregation is that in the second sub-group the Secretary of State's position has been stated unequivocally in the same terms: the impugned decisions have been rescinded and these six Applicants have been given the facility of making further representations with a view to fresh decisions being made. In contrast, in the first (smaller) sub-group the Secretary of State's position was expressed in quite different terms. In YLL, it was that the Secretary of State "*wishes to contest this case on a net point*", whereas in XH and YQZ the Secretary of State's position was one of requiring "*further time to consider*".

THE FIRST SUB-GROUP: XH and YQZ

XH

[35] The explanation of the "more time required" stance of the Secretary of State in XH and YQZ evidently appears from what follows. The sequence of relevant events is: the Secretary of State made a decision dated 22 June 2017 refusing this Applicant's application for leave to remain in the United Kingdom, invoking paragraph 353 of the Immigration Rules and intimating his vulnerability to removal action; the Applicant, then in detention and in receipt of a "liability to removal" notice, instructed his solicitors on 26 June; on 27 June, solicitors, with commendable expedition, made comprehensive written submissions to the Secretary of State in the form of a PAP letter; these proceedings were initiated on 29 June 2017; and the Secretary of State responded the following day. The removal threat was not implemented. Subsequently the case has come before the court twice, the last listing being on 16 October 2017, for brief review purposes only, being adjourned to await the outcome of Zhang (*supra*). Ultimately, a concession was notified by letter dated 28 November 2017 from the Crown Solicitor's Office rescinding the impugned decision and intimating the initiation of a new decision making process.

[36] The Crown Solicitor's letter, adverting to the "Boxall" code (*supra)* and, specifically, the fifth of the principles therein, advances the submission that –

> "*… in the absence of good reason, there should be no order for costs between the parties to a judicial review when the case resolves or becomes academic before the leave hearing has taken place.*"

It is further submitted by Mr Kennedy (of counsel) that this Applicant's further case to the Secretary of State was all times parasitic upon his wife's case (YQZ, *infra*) and Mr Kennedy highlights that the representations of 26 June 2017 related solely to his detention. Leave to apply for judicial review has not been granted.

[37] Neither of these latter submissions qualifies for any significant traction. The first cannot detract from the Applicant's case in any tangible way, while the second was simply a reflection of the reality of his personal situation. The parasitic nature of rights is a well-established feature of the world of immigration and asylum law.

Furthermore, the timing of the initiation of these proceedings was obviously appropriate given the imminence of the Applicant's threatened removal from the United Kingdom.

[38] While there are no bright luminous lines in this fact sensitive matrix, in the exercise of my discretion I propose to give determinative weight to the irreproachable conduct of, and on behalf of, the Secretary of State. In short, the determination not to concede this Applicant's case at the PAP stage was, objectively, justifiable; appropriate and proactive steps were taken thereafter to reduce costs to a minimum; and, post – Zhang, at a stage where costs were still frozen, the Secretary of State's concession was made with reasonable expedition. To require the Secretary of State to pay the Applicant's costs in these circumstances would fail to reflect these factors and could deter commendable conduct of this kind in future cases. Thus the appropriate order is no order as to costs *inter – partes.*

YQZ

[39] In this, the second case belonging to this sub-group, the Applicant, against the background of an unsuccessful appeal to the FtT, made further submissions to the Secretary of State on 24 June 2017. These were the subject of a negative decision dated 05 September 2017, invoking paragraph 353 of the Immigration Rules and relying on, in particular, the decision in AX. This was followed by a PAP letter, despatched with commendable expedition, on 11 September 2017. No reply having been received, proceedings were initiated on 15 November 2017. Next, in circumstances where there had been

no listing before the court, the Crown Solicitor's Office, by letter dated 06 December 2017, notified the same approach as in XH above.

[40] This case, in my judgement, invites the same analysis as that in XH. While there is no evidence of a PAP response, this would inevitably have taken a negative form, having regard to the broader panorama. The sole costs incurred were those involved in issuing proceedings.

[41] As in XH, therefore, there shall be no order as to costs *inter – partes*.

THE SUB-GROUP OF SIX

[42] The case members of this discrete sub-group are SSH, YYN, GCS, XS, LSH and YZY/YRC. The denominator common to all of these cases is that following the initiation of proceedings and in the wake of the decision of this court in Zhang, a letter was written on behalf of the Secretary of State rescinding the impugned decision and inviting further representations with a view to making a fresh decision. In every case the impugned decision was a refusal of leave to remain in the United Kingdom, invoking paragraph 353 of the Immigration Rules. The case of YZY/YRC involves legal representation not mirrored in the other five cases, one incident of this being that it is not encompassed by generic costs submissions. I shall, therefore, consider it separately.

[43] In the other five cases the costs submissions presented on behalf of the Applicants are generic in nature. The submissions of Mr Peters (of counsel) involve much speculation relating to possible new negative decisions on behalf of the Secretary of State and possible ensuing legal challenges. They refer to Zhang as "*the lead case*". These submissions further condemn the impugned decisions of the Secretary of State as "*outrageously defective*".

[44] On behalf of the Secretary of State Mr Henry (of counsel) places substantial emphasis on the fifth of the Boxall code of principles, drawing attention simultaneously to Re Ullah's Application [2007] NIQB 45 at [11] and Re JR78's Application [2017] NIQB 93 at [23] – [24]. Mr Henry further stressed that the outcome in Bahta was based on an abject failure by the respondent to comply with the PAP procedures. He sought to contrast each of these five cases on the ground that a comparable failure has not occurred. He submitted, finally, that the impugned decisions of the Secretary of State entailed a sustainable interpretation of the AX country guidance decision of UTIAC and that, accordingly, the timing of the Secretary of State's rescission decisions viz within one month of the Zhang decision was entirely justifiable.

[45] It is appropriate to reduce the *inter-partes* jousting to the following simple assessment which, in my judgement, lies at the heart of the court's resolution of the contentious issue of costs. This court's decision in Zhang is a

classic example of interpreting and clarifying an extant judicial decision, namely that in AX. This interpretation and clarification were confined to certain discrete respects of the earlier decision. This court's resolution of the scope and impact of certain aspects of AX differed from the assessment which the Secretary of State had habitually applied previously. Zhang, in a nutshell, decided that the imposition of fines and the deprivation of public services flowing from the Chinese Family Planning Scheme could amount to persecution: see the passages reproduced in [23] above. This judicial assessment is the impetus for the Secretary of State's decision to rescind the impugned decisions and substitute them by fresh ones in the light of further representations received.

[46] It is beyond plausible argument that the decision in Zhang clarified the law. Indeed, it did so to the extent that it differs from other first instance decisions: see PW v SSHD [2015] CSOH 36 and XL (China) v SSHD [2017] CSOH 41. Given these facts and considerations, I consider that the clearest costs resolution guidance applicable to the matrix of these five cases is that distilled from [69] of M:

> *"The second reason is the one which weighed with the Judge, as is clear from his reference to 'the dynamic development of this area of the law while the claim was live' in his reasons for making no order for costs. In my view, so long as the law was thought to be whether the respondents' decision that the appellant was born in 1996 had to be shown to be 'Wednesbury unreasonable' before the appellant could succeed, the respondents' decision to fight the claim was plainly reasonable: indeed, the respondents appear to me to have had a strong case."*

It seems to me that this passage must apply with some force to these five cases. The consensual *inter-partes* approach was that all of these cases should be stayed awaiting the decision in Zhang. If and to the extent that the arguments on behalf of the Applicants now espouse a different position, I find no identifiable merit in them. While there is a general submission relating to paragraph 353 legal infirmities infecting some of the impugned decisions of the Secretary of State, free standing of Zhang, this is undeveloped and unparticularised and is out of harmony with the agreed *inter-partes* position just noted. I identify no merit in it in any event.

[47] Finally, I weigh the discrete issue of timing and delay. The Secretary of State's decisions post-Zhang to rescind the impugned decisions and initiate fresh decision making processes were made approximately one month after Zhang had been decided. Having regard to the number of cases involved and the broader panorama, including possible impact on other cases in the various jurisdictions of the United Kingdom, I consider this period to be beyond

reasonable reproach. It was not attacked on behalf of the Applicants in any event.

[48] I give effect to the foregoing analysis and reasoning by concluding that there should be no order as to costs *inter-partes* in any member of this group of five cases. I trust that the preceding paragraphs will convey clearly to all concerned the fact sensitive nature of the exercise of the judicial discretion in every contested costs case.

The final case: YZY/YRC

[49] I have segregated this case from the preceding five cases in order to acknowledge that it has certain distinctive features and to evaluate same.

[50] These Applicants are mother and daughter respectively. They challenged removal directions made on behalf of the Secretary of State on 01 August 2017. These directions were made pursuant to an earlier substantive decision, dated 10 July 2017, whereby these Applicants' applications for leave to remain in the United Kingdom had been refused. With commendable expedition (once again) their solicitors, in receipt of very recent instructions, compiled a PAP letter dated 02 August 2017. In an equally commendably swift response on behalf of the Secretary of State, dated 03 August 2017, the earlier (impugned) decisions, invoking paragraph 353 of the Immigration Rules, were in effect affirmed.

[51] In the events which occurred immediately thereafter, these Applicants' case overcame a significant legal threshold at a hearing in the High Court on 04 August 2017, when the court resolved to grant them interim relief. The issue of leave to apply for judicial review was deferred, at the Applicants' request. The written submission of Mr Lannon (of counsel) that this order was made "*after a fully contested hearing*" is not disputed. A substantive hearing date of 24 November 2017 was allocated.

[52] Next, in mid-November 2017, following the promulgation of this court's decision in Zhang, the Crown Solicitor's Office wrote a letter on behalf of the Secretary of State voluntarily rescinding the impugned decisions and signalling a fresh decision making process which would entail consideration of any further representations or evidence provided on behalf of these two Applicants. In his submissions Mr Lannon contends, *inter alia*:

> "*However, despite our request, the respondent has failed or neglected to provide any, let alone any proper, explanation for withdrawing the impugned decision. Instead the respondent vaguely refers us to the judgment ……. in Zhang*".

Adopting the terminology of [18] of Zhang ("*replete with grave misunderstandings and errors*"), Mr Lannon attacks the impugned decision of the Secretary of State on the same basis.

[53] The submission of Mr Henry on behalf of the Secretary of State that these Applicants' PAP letter did not explicitly invoke the Chinese Family Planning Scheme may be technically correct but is unsustainable in substance and is further confounded by the Secretary of State's PAP response. Mr Lannon's submission is to be preferred. Furthermore, this is yet another case in which the Secretary of State's decision exhibits a stark failure to comply with the free standing duty imposed by section 55(3) of the Borders, Citizenship and Immigration Act 2009. On this ground alone these Applicants would have been entitled to succeed substantively. The parallel which they seek to establish with [18] of Zhang is also persuasive.

[54] I acknowledge that, latterly, the Secretary of State has acted expeditiously and responsibly. However, this does not suffice to outweigh the foregoing analysis and reasoning, which impel to the clear conclusion that the court's discretion should properly be exercised by ordering that the Secretary of State pay these Applicants' reasonable costs, to be taxed in default of agreement.

Omnibus conclusion

[55] The Applicants' applications for costs are refused in all cases save that of YZY/YRC. If they have public funding, the usual provision will be made in the formal final Orders to follow this judgment.