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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Salad's (Fowsiya) Application (Leave Stage) [2015] NIQB 32

IN THE MATTER OF AN APPLICATION BY FOWSIYA SALAD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

TREACY J

Introduction

[1] By this application the Applicant challenges a decision of the Home Office dated 15 August 2014 whereby it refused to waive the fees attached to a family reunification application made in respect of the applicant's mother and siblings who currently reside in Ethiopia. The applicant and her family are all Somali nationals who fled Somalia due to persecution. Mr Stephen McQuitty appeared for the applicant and Mr Joseph Kennedy appeared for the proposed Respondent in this 'rolled-up' hearing. I am indebted to both counsel for their very clear and helpful oral and written submissions.

[2] This is the second judicial review challenge brought by the applicant in respect of a refusal to waive the fees attached to a family reunification application. The first set of proceedings related to an initial decision to apply fees of $3200 to a family reunification application on 17 December 2012 when the applicant was still a minor aged 17. The applicant turned 18 on 13 January 2013. Those proceedings resulted in a decision to quash the impugned decision - see Re Salad [2014] NIQB 37.

[3] After the original impugned decision had been quashed the applicant requested that the Home Office make a fresh decision in light of all the information that had been provided in the course of the first judicial review. The applicant also provided some further evidence as to her own limited means. Because of the delay in the Home Office making a new decision the applicant issued proceedings to compel a response. The Home Office made a new decision on 15 August 2014 which is the decision under challenge in these proceedings.

[4] On 23 September 2014 the applicant's solicitor sent a pre-action protocol letter. The Home Office replied on 2 October 2014 rejecting all of the grounds of challenge. As their letter failed to meet with the required response the applicant's solicitor applied for legal aid to bring these proceedings on 23 October 2014. Legal aid was granted on 7 November 2014 but for a solicitor only. Authority for Junior Counsel was granted on 26 November 2014. Proceedings were issued on 12 December 2014.

[5] There has been delay in bringing this matter before the Court. The application was not brought promptly nor within the outer three month period provided for in Order 53, rule 4(1). The three month period expired on 15 November. The applicant submitted that (i) some of the delay was accounted for by the need to secure legal aid with no prejudice caused to the Home Office; (ii) none of the delay that has arisen is on account of any act or omission on the part of the applicant and the applicant submitted that (iii) there were good reasons to extend time given the chronology of events and the merits of her case.

Background

[7] The applicant has refugee status in the UK granted when she was a minor. The applicant became separated from her family and escaped Somalia and came to the UK to claim asylum. The applicant's family ended up seeking refuge in Ethiopia.

[8] The applicant is in receipt of JSA and DLA (on account of injuries sustained due to persecution in Somalia) and is of limited financial means. The applicant's family situation in Ethiopia is dire. The applicant's mother suffers from some sort of mental disorder and the applicant's sister, Habon, has had to assume the role of primary carer for the family. The applicant averred that in the last 12 months (as of December 2014) she had sent over £3,000 to her family in Ethiopia. The applicant's family are reliant on these funds for basic subsistence living. They have no other source of income and are dependent upon the applicant to defray costs in relation to their accommodation, food and other essential items.

[9] The applicant misses her family and wishes to be reunited with them. She is distressed by her current circumstances and those of her family. The applicant's primary difficulty is that the Home Office will not even consider the application for family reunification without the payment of fees connected with same to the sum of £1,512 for all applications.

Order 53 Statement

[10] The applicant sought the following relief:

> (a) An Order of *Certiorari* to quash the impugned decision.

(b) An Order of *Mandamus* to compel the respondent to waive any applicable fee and accept the application for determination on its merits or, alternatively, an Order of *Mandamus* to compel the Home Office to reconsider the issue of fee waiver in accordance with the law and any judgment, order or direction of this Honourable Court.
(c) A declaration that the impugned decision was unlawful, *ultra vires* and of no force or effect.
(d) A declaration that the impugned decision was contrary to the applicant's family life rights under article 8 ECHR and section 6 of the Human Rights Act 1998.
(e) An Order of Certiorari to quash the impugned policy.
(f) An Order of Mandamus to compel the respondent to introduce a lawful policy to replace the impugned policy in accordance with any judgment, order or direction of this Honourable Court.
(g) A declaration that the impugned policy was unlawful, *ultra vires* and of no force or effect.
(h) A declaration that the impugned policy was contrary to the applicant's family life rights under article 8 ECHR and thereby in contravention of section 6 HRA 1998.
(i) Such further or other relief as this Honourable Court shall deem necessary.
(j) All necessary and consequential directions.
(k) Damages and/or Just Satisfaction.
(l) Costs.

[11] The grounds upon which the relief was sought included:

(a) The decision was unlawful in so far as the respondent has fettered their own discretion in respect of application fees per the relevant Regulations. The Regulations provide simply that no fee will be payable where the Secretary of State determines that the fee should be waived. This broad discretionary power has been impermissibly fettered by the terms of policy OPI 216 (now ECB06) whereby the Secretary of State will only waive an application fee where there are the most exceptional, compelling and compassionate circumstances and only then in

relation to the payment of the fee. The Regulation is thereby and impermissibly subservient to the policy.

(b) The decision is unlawful in so far as there has been a clear error in fact in so far as the impugned decision concludes that there are *"no medical or other compassionate circumstances which bring this case out of the ordinary"* when there were clearly both medical and other compassionate circumstances which bring this case *"out of the ordinary"*, albeit that it is difficult to ascertain what the Home Office official (in Croydon) was using to determine what was *"ordinary"* in this context.

(c) The decision was unlawful as in breach of section 6 of the Human Rights Act 1998 in so far as the decision was contrary to the applicant's right to respect for her family life protected by article 8 ECHR (and the family life rights of the applicant's mother and siblings in Ethiopia). Family life is obviously engaged and interfered with by the impugned decision, see *ZB (Pakistan)* [2009] EWCA Civ 834. The impugned decision is not proportionate. The applicant's claim to be reunited with her family was a strong one in all the circumstances given that she was separated from her family while still a child and later secured refugee status in the UK and cannot reasonably be expected to give that status up in the UK to return to Ethiopia to live with her family in poverty. There is therefore **a direct and immediate link between the waiver of the fee and respect for the family life at issue** and as such article 8 is breached by the refusal to waive the fees in this case.

(d) The decision was unlawful as irrational in so far as the Home Office have failed to take into account, adequately or at all, a series of relevant factors including, *inter alia*:

i. The evidence provided by the applicant in support of her application for fee waiver;

ii. The physical injuries suffered by the applicant in Somalia;

iii. The traumatic nature of the separation of the applicant (as a child) from her family;

iv. The murder of the applicant's brother in Somalia and the abduction of her sister;

v. The applicant's subsequent mental health problems, including a Chronic Adjustment Disorder;

vi. The applicant's financial and personal circumstances, including her education/training;

vii. The dire circumstances of the applicant's family in Ethiopia, including their financial dependence on the applicant (pejoratively described by the Home Office as *"relatively financially straightened circumstances"*);

viii. The age of the applicant's remaining siblings in Ethiopia;

ix. The applicant's mother's significant mental health issues;

x. The judgment of Mr Justice Treacy in *Salad* [2014] NIQB 37 quashing the initial decision;

xi. The fact that the applicant was a minor at the time of the unlawful initial impugned decision of 17 December 2012.

(e) The decision was unlawful in so far as the respondent took into account or gave wholly disproportionate weight to a number of irrelevant factors including *inter alia*:

i. The applicant is now an adult;

ii. The applicant has been living without her family since 2011;

iii. That relationships with her family in Ethiopia can be maintained by telephone. One might contrast this with the approach taken by the Upper Tribunal in *LD (Article 8, best interests of*

the child) [2010] UKUT 278 at §21 and *Omotunde* [2011] UKUT 247 at §28;

iv. That the applicant could find work such that she can fund the application of her family;

v. Speculation that the applicant and her family would be *"unlikely"* to meet the requirements of the Immigration Rules in respect of the substantive application for family reunification in any event – suggesting that there would be no point in waiving the fee for an application in those circumstances. This factor imports an inappropriate and subjective (indeed biased or *apparently* so) assessment of the substantive merits of an application when considering the question of fee waiver. It is of note that the policy – ECB06 – requires that when considering whether or not a fee should be waived in exceptional (etc…) circumstances the Home Office must only consider those circumstances specifically in relation to the payment of the fee. This approach mandated by the policy appears to be in stark contrast with the wide range of factors that can be taken into account when refusing fee waiver (which includes a subjective assessment by a Home Office official as to whether they think you have a good case). The actual policy excerpted by the Home Office in the impugned decision letter of 15 August 2014 also casts doubt on the lawfulness of this approach see §14 and subparagraph 8 therein.

vi. That fact that there was no evidence that the family in Ethiopia had contacted other agencies (such as UNHCR) who *"would be able to assist"*.

(f) The decision was unlawful as in breach of section 55 of the Borders, Citizenship and Immigration Act 2009 in so far as the respondent has failed to consider the applicant's best interests adequately or at all. In addition the applicant was entitled to have her further application for fee waiver assessed as if she was still a minor (irrespective of the section 55 obligation). The applicant is entitled to have her application for fee waiver considered on

that basis for the following reasons. The applicant was still a minor (aged 17) at the time the initial application for family reunification was made on 17 December 2012 and the (incorrect) fee of $3200 was levied on the same date by the Home Office. As such, as of 17 December 2012 when the applicant was still a minor, the Home Office failed to waive the fee and instead imposed an application of $3,200 which, it transpires, was significantly higher than the fee actually due and owing – being £1,628. This decision of 17 December 2012 was subsequently quashed by the High Court in Northern Ireland and was, in any event, void as the incorrect fee had been levied in the first place. The applicant contends that she has now suffered irredeemable prejudice to her application for fee waiver and has been seriously disadvantaged by that unlawful initial decision of 17 December in so far as she is no longer a minor. Given that the decision of 17 December was quashed the applicant was entitled to have that decision taken again on the basis of her age at the time of the initial decision. Had the decision of 17 December been made lawfully it would have taken into account the fact that the applicant was a minor at that time and would have considered the issue of fee waiver in that context.

(g) [This ground was not pursued]

(h) The decision was unlawful as irrational as *Wednesbury* unreasonable in all the circumstances.

The Impugned Policy/Immigration Rules

(i) The impugned policy is unlawful under part 11 of the Immigration Rules. This policy/Immigration Rule provides for gratis applications to be made for pre-existing dependent family members of the sponsor classified as including only the following in connection with the sponsor – their spouse, civil partner, unmarried same sex partner, child of a refugee under 18 who is not leading an independent life and a child conceived before the sponsor fled to seek asylum. As such this policy expressly excludes a child refugee sponsor (whether under 18 or over) who wishes to bring their dependent parent (and

siblings) to the United Kingdom. It is perverse and irrational that these rules do not recognise the relationship between a child and their parent as constituting family members for the purposes of gratis applications irrespective of which one is the sponsor. Instead a sponsor who wishes to bring their parent or parents to the UK does so under a different category – Other Dependent Relatives – which does not provide for gratis applications.

(j) The impugned policy is thereby unlawful as in breach of article 14 ECHR within the ambit of article 8 ECHR as amounting to unlawful discrimination. The applicant is less favourably treated because she is a child (over 18) sponsor seeking a dependent parent and is therefore not entitled to a gratis application whereas a parent sponsor seeking a dependent child is afforded that advantage. There is no adequate justification for this difference in treatment.

Statutory Framework

[12] The power to charge fees for an application in connection with immigration is contained in s51 of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act") which provides:

> "(1) The Secretary of State may by order require an application or claim in connection with immigration or nationality (whether or not under an enactment) to be accompanied by a specified fee.
>
> (2) The Secretary of State may by order provide for a fee to be charged by him, by an immigration officer or by another specified person in respect of—
>
> (a) the provision on request of a service (whether or not under an enactment) in connection with immigration or nationality,
>
> (b) a process (whether or not under an enactment) in connection with immigration or nationality,
>
> (c) the provision on request of advice in connection with immigration or nationality, or
>
> (d) the provision on request of information in connection with immigration or nationality.

> (3) Where an order under this section provides for a fee to be charged, regulations made by *the Secretary of State*—
>
> (a) shall specify the amount of the fee,
>
> (b) may provide for exceptions,
>
> *(c) may confer a discretion to reduce, waive or refund all or part of a fee,*
>
> (d) may make provision about the consequences of failure to pay a fee,
>
> (e) may make provision about enforcement, and
>
> (f) may make provision about the time or period of time at or during which a fee may or must be paid. [emphasis added]
>
> [8] Section 5.1 of Table 5 of the Immigration and Nationality (Cost Recovery Fees) Regulations 2012 ("the 2012 Regulations"), provides the Secretary of State with a general power to waive any visa fee. Table 5 of Schedule 1 contains the following general waiver:
>
> "No fee is payable in respect of an application where the Secretary of State determines that the fee should be waived."

[13] The 2012 Regulations have been updated by the Immigration and Nationality (Cost Recovery Fees) Regulations 2014 which came into force on 6 April 2014. Section 3.1 of Table 3 contains the equivalent provision:-

> "No fee is payable in respect of an application where the Secretary of State determines that the fee should be waived."

[14] Reg 11 of the Immigration and Nationality (Cost Recovery Fees) Regulations provides:

> "No fee is payable by the applicant in relation to an application referred to in regulation 10 where— …
> (c) the Secretary of State determines that the fee should be waived."

[15] In the Home Office's Entry Clearance Guidance entitled "ECB06: Entry clearance fees" para 6.6 regarding the issuing of gratis visas provides as follows:

> "Paragraph 11 (c) "the Secretary of State determines that the fee should be waived" will apply only to cases where there are the most exceptional, compelling and compassionate circumstances specifically relating to the payment of the fee."

Submissions

[16] In order for a fee to be waived by the Home Office the Secretary of State must be satisfied that there are the most exceptional, compelling and compassionate circumstances specifically relating to the payment of the fee. Destitution alone will not be considered as valid grounds for waiving a fee. The Home Office contends that the applicant has not satisfied this test and furthermore is not entitled to fee waiver by virtue of the operation of Article 8 ECHR.

[17] The Applicant noted that the first judicial review challenged a fee of $3,200 which the Home Office has now accepted was a mistake. The amount now levied by way of fees (in sterling) is £1,512 and at the time of the first impugned decision only £1,628. This is substantially less than the $3,200 quoted (over £2,000). The Home Office apologised for this error in respect of the first impugned decision at para 3 of the current impugned decision letter. What is not explained is how this error only came to light as of 15 August 2014 given that there had been a full judicial review in respect of that earlier decision to levy the incorrect fee of $3200.

[18] The Applicant submitted that the Respondent has impermissibly fettered their own discretion by adopting a policy that puts an impermissibly narrow gloss on the relevant Regulations. The relevant Regulations simply empower the Secretary of State to waive fees when she determines that a fee should be waived. The policy guidance (set out in the impugned decision) that is then applied in this context expressly limits this discretion so that the Secretary of State will only grant fee waiver where there are the most exceptional, compelling and compassionate circumstances specifically relating to the payment of the fee. The policy appears to expressly deny any wider discretion beyond the confines of the policy position (despite the obviously unfettered discretion afforded to the Secretary of State under the Regulations).

[19] The Applicant submitted that the impugned decision is flawed by a material error of fact. The Home Office concluded that there are no medical or other compassionate circumstances that would bring the applicant's case *"out of the ordinary"*. The Applicant contends that the Home Office has failed to consider or ignored the evidence that was provided in respect of both medical and other compassionate circumstances. The applicant is a refugee in receipt of benefits including DLA arising from a disability due to injuries sustained as a result of persecution. The applicant was separated from her family whilst still a child. There are many more compassionate and indeed medical factors apparent from the papers,

including a report by Dr Patterson, see page 197 of the Bundle for conclusion that the applicant has suffered from a Chronic Adjustment Disorder and exhibits symptoms associated with PTSD (albeit not meeting the diagnostic criteria for same). The Home Office statement that there were no such factors is plainly irrational and amounts to a basic mistake of fact.

[20] The Applicant relied upon Art 8 in respect of her right to respect for her family life insofar as there is a direct and immediate link between the waiver of the fee and respect for the family life at issue and the applicant referred the Court to ZB (Pakistan) [2009] EWCA Civ 834 and the decision of Sales J in SS [2011] EWHC 3390 (Admin) at para 74. The applicant further submitted that her Art 8 claim to be reunited with her family was a strong one in all the circumstances of her case and that the requirement to pay the fee effectively sets that Art 8 claim to nought. Therefore there is an obligation to waive the fee by virtue of Art 8 and s6 HRA 1998.

[21] The applicant further submitted that the Home Office failed to take into account a series of relevant factors and took into account a series of irrelevant factors set out in her Order 53 statement at 4(d) and 4(e). She further submitted that her further application for fee waiver ought to have been determined as if she was a minor because the initial application (and obligation to consider fee waiver) arose on 17 December 2012 (when she was 17) and this decision was deemed unlawful in the first judicial review and was, it transpires, void *ab initio* in that the levied fee was incorrect in any event (a fact only revealed by the current impugned decision). This would mean that the s55 duty would still apply in respect of the need to consider the applicant's best interests. For the applicant's minor siblings there remains an obligation at the policy level to give effect to the spirit of the s55 duty in any event. The basic proposition is that had the initial decision been made lawfully on 17 December 2012 it would have taken into account the fact that the applicant was a minor at that time.

[22] The respondent rejected all the grounds of challenge contending that the impugned policy was lawful involving no impermissible fettering of the discretion vested in the SSHD, that the impugned decision did not violate art 8 ECHR, that the decision was not vitiated by any mistake of fact or failure to take into account relevant matters or the taking into account of irrelevant matters. The decision was reasonable and in accordance with a lawful policy. The applicant was not a minor at the time of the impugned decision and accordingly the section 55 duty did not arise.

Discussion

[23] I reject the applicant's challenge to the underlying policy. The basis of this challenge is the contention that the respondent has unlawfully fettered its own discretion by putting an impermissibly narrow gloss on the relevant regulations. The regulations empower the SSHD to waive fees when she determines that a fee should be waived. The policy guidance explains that the SSHD will only grant fee waiver where there are the most exceptional, compelling and compassionate

circumstances specifically relating to the payment of the fee. The adoption of such a policy is consistent with the expectation underlying the statutory scheme that applicants seeking a visa to enter the UK will pay the appropriate fee. Visa operations are an essential part of the UK's immigration control and it is clear that the policy objective is that, where possible and lawful, fees charged for such services should cover the cost of providing them, to reduce the burden upon the taxpayer upon whom the burden would otherwise fall. In Gordon Anthony's "Judicial Review in Northern Ireland", 2nd edition at para 5.56 the author states:

> "Although the courts have long recognised that it is legitimate for public authorities to formulate policies that are 'legally relevant to the exercise of (their) powers, consistent with the purpose of the enabling legislation, and not arbitrary, capricious or unjust', they have at the same time emphasised that authorities must remain free to depart from their policies, or make exceptions to them, as the circumstances of individual cases require. A public authority cannot therefore adopt a policy that (a) is so rigid that it in effect becomes a rule to be applied in any given case or (b) establishes an unacceptably high threshold for individual applicants to cross."

In the present case I am satisfied that the impugned policy is legally relevant to the exercise of the relevant powers, consistent with the purpose of the enabling legislation and is not arbitrary, capricious or unjust. The policy requires the decision maker to look at the circumstances of each individual case and make an assessment as to whether the individual circumstances are sufficiently exceptional, compelling and compassionate to grant a fee waiver. That is what the decision maker purported to do in this case. I do not accept that the policy constitutes an impermissible fetter and therefore reject the policy challenge.

[24] The applicant also relied on art 8 ECHR in respect of her right to respect for her family life in that it is contended there is a direct and immediate link between fee waiver and the respect for the family life at issue. Founding principally on the decision of Sales, J in SS [2011] EWHC 3390 (Admin) at para 74 the applicant submitted that her art 8 claim to be reunited with her family was a strong one and that the requirement to pay the fee effectively set her art 8 claim at naught. I disagree. The judgement relied upon contains a penetrating analysis of the application of art 8 in the context of non-waiver of such fees in a case strikingly similar to the present case. The judge's synthesis of the main points in structuring consideration of art 8 in that context are set out at para 74. In particular at para 74(10) he said:

> But in a case where the claimant, sponsor and family can show that they have no ability to pay the fee, it will in my view be necessary to assess in broad terms the strength

> and force of the underlying claim which is to be made. If, upon undertaking such an exercise, it can be seen that the claimant may well have a strong claim under Article 8 involving an aspect of the interests protected by that provision of particularly compelling force - supporting his claim to be allowed to enter the United Kingdom to develop or continue his family life with other family members already here - and that insistence on payment of the fee will set that claim at nought, then in my view an obligation may arise under Article 8 for the Secretary of State to waive the fee (or for the court to order the Secretary of State to waive the fee). In doing this, the Secretary of State and the court are not bound to take the claimant's asserted case at its highest, as on a summary judgment application, as Mr Armstrong submitted. They are entitled to subject the case to critical evaluation to determine its true underlying strength and the true force of the particular Article 8 interest being asserted. If it is a strong underlying case concerning a compelling interest under Article 8(1), then (by contrast with the position under sub-paragraph (9) above) it can be said that there is a "direct and immediate link" between the waiver of the fee and respect for family life and that the fair balance between the interests of the individual and the interests of the general community does require the state authorities to forego collecting the application fee. Putting the same point negatively, the collection of the fee would not then fall within the margin of appreciation to be accorded those authorities (especially, in the case of a child, after adjustment in light of Article 3 of the UNCRC);

[25] In its decision letter the SSHD noted that any valid application for entry clearance submitted by the applicant's family "… would be unlikely to meet the requirements of the Immigration Rules set out at Annex FM for such family to be able to be maintained without recourse to public funds". The assessment of the SSHD regarding the ability of the applicant's family to meet the Immigration Rules seems rational. On any view the underlying claim does not have the requisite strength to bring it within the parameters discussed in the passage from Sales J cited above. I reject the applicant's claim based on art 8.

[26] The applicant's claim that the impugned decision is vitiated by material error of fact is unsustainable as is the claim that the SSHD failed to take into account relevant factors or took into account irrelevant factors. The SSHD made a rational, lawful and reasonable assessment of the material placed before her and arrived at a decision which is within the bounds of the published policy that fee waiver will only be granted where there are the most exceptional, compelling and compassionate

circumstances. Her conclusion that such circumstances had not been established is unassailable and the judicial review must be dismissed. In reality the attack on the rationality of the decision was a thinly disguised attack on the merits of a decision that the applicant understandably wishes had been different. For the sake of completeness I reject all of the other grounds pursued including the contention that the application for fee waiver ought to have been determined as if she was a minor. She was not a minor at the time of the application grounding the impugned decision and the Section 55 duty did not arise.

[27] There has been delay in bringing this matter before the Court. The application was not brought promptly nor within the outer three month period provided for in Order 53, rule 4(1). The three month period expired on 15 November. The applicant submitted that (i) some of the delay was accounted for by the need to secure legal aid with no prejudice caused to the Home Office; (ii) none of the delay that has arisen is on account of any act or omission on the part of the applicant, and (iii) there were good reasons to extend time given the chronology of events and the merits of her case. I do not accept that good reason has been demonstrated for extending the time.

[28] I grant leave but for the above reasons the application is dismissed.