



Neutral Citation Number: [2020] EWHC 47 (Admin)

Case No: CO/1051/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Civil Justice Centre
33 Bull St, Birmingham, B4 6DS

Date: 16 January 2020

Before :

CLIVE SHELDON QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

Between :

THE QUEEN
on the application of

Claimant

SALIM NOOR MOHAMED ABDULLA OSMAN

- and -

SECRETARY OF STATE FOR
THE HOME DEPARTMENT

Defendant

Zainul Jafferji (instructed by **Burton and Burton**) for the **Claimant**
Shakil Najib (instructed by the **Government Legal Department**) for the **Defendant**

Hearing date: December 17th 2019

Approved Judgment

Clive Sheldon QC, sitting as a Deputy High Court Judge:

1. At an oral hearing listed for December 17th 2019, I was asked to consider the question of costs in a dispute between Mr. Salim Noor Mohammed Osman and the Secretary of State for the Home Department, the parties having agreed that the judicial review brought by Mr. Osman is academic and that his application for judicial review is to be withdrawn.

Factual Background

2. On March 13th 2018, Mr. Osman issued judicial review proceedings challenging the Secretary of State's decision to refuse his application for an EEA Residence Card as the extended family member of a Polish National, Wioletta Korczak-Wrobel, who was resident in the UK and exercising treaty rights here. Mr. Osman alleged that he was in a durable relationship with an EEA national and therefore fell within the meaning of an extended family member within the Immigration (European Economic Area) Regulations 2016. By decision letter dated December 13th 2017, the Secretary of State informed Mr. Osman that she did not accept that he was in a durable relationship with Ms. Korczak-Wrobel. Mr. Osman was informed that he had no right to appeal against this decision.
3. Although Mr. Osman issued judicial review proceedings, he did not produce a Statement of Grounds. He provided a witness statement, in which he contended that the failure to afford him a right of appeal was inconsistent with Directive 2004/38/EC.
4. Permission for judicial review was refused on the papers by His Honour Judge Barker QC. The application was renewed, and a hearing was listed for November 13th 2018 to consider permission. On November 12th 2018, the oral hearing for permission was vacated at the Secretary of State's request on the basis that the CJEU had issued a judgment in the case of *Banger v. United Kingdom* (C-89/17) whose implications for Mr. Osman's case (and that of others in similar circumstances) needed proper consideration. On December 17th 2018, the Court made an order staying Mr. Osman's claim behind two other cases.
5. Mr. Osman had been served with a notice of removal directions. I am told that whilst his judicial review proceedings remained outstanding, removal would not take effect.
6. On October 26th 2018, Mr. Osman married Ms. Korczak-Wrobel. The marriage was registered on November 6th 2018. Mr. Osman did not inform the Secretary of State, or the Court, of his marriage at or around the time.
7. On March 5th 2019, the Secretary of State (acting through the Government Legal Department) proposed that Mr. Osman's application for judicial review be compromised by means of a consent order. The draft consent order provided that Mr. Osman would withdraw his application for judicial review, and that there be no order as to costs. The recitals to the draft consent order provided that the Secretary of State would withdraw her decision refusing Mr. Osman's application for a residence card as an Extended Family Member of an EEA National; that Mr. Osman would have one month to provide further information on which he intended to rely in support of his application; and the Secretary of State agreed to reconsider the application within four months of Parliamentary approval or rejection of the re-introduction of appeal rights to Extended Family Members who are refused residence cards. This final recital anticipated legislation which was about to be brought before Parliament. On March 7th

2019, the Defendant laid before Parliament the Immigration (European Economic Area Nationals) (EU Exit) Regulations 2019, which re-introduced appeal rights to Extended Family Members who are refused residence cards.

8. On March 16th 2019, Mr. Osman responded to the Secretary of State's offer of compromise to say that the Secretary of State had to pay his costs. He also explained that he was now married, and was therefore a family member of an EEA national. Mr. Osman said that he would provide his marriage certificate and current evidence of his wife's exercise of Treaty Rights. He said that he wished to be issued with a certificate of application enabling him to work. He asked for reporting requirements to be terminated and confirmation that no removal action be taken until his application had been determined. He asked for a decision to be made within one month on his application for a residence card on the basis of his current circumstances as the family member of an EEA national.
9. On April 5th 2019, the Secretary of State sent a revised consent order, and offered to pay Mr. Osman's "reasonable costs to be assessed on the standard basis if not agreed". The recitals to the draft consent order were essentially the same as that sent on March 5th 2019, save that mention was made of the 2019 Regulations and a specific date was set for agreeing to reconsider Mr. Osman's application – September 4th 2019, "absent special circumstances".
10. On May 7th 2019, Mr. Osman emailed to say that he had submitted his application in August 2017, and did not think it was right for him to have to wait four months to receive a decision on his application for a residence card now that he was married to his former partner and was therefore a family member of an EEA national. He explained that his wife had submitted an application for permanent residence and had provided evidence of the exercise of Treaty rights. He enclosed a copy of his marriage certificate. He said that the evidence to decide his application was readily available and so the consideration process need not take very long. He also said that he should no longer have to report, and should not be subject to any removal process pending determination of his application.
11. Mr. Osman attached a proposed consent order setting out a number of recitals: (i) the Secretary of State would withdraw her decision of December 13th 2017; (ii) Mr. Osman had provided the Secretary of State "with a marriage certificate evidencing his marriage to his EEA National spouse"; (iii) his spouse had provided evidence of the exercise of her Treaty rights with her application for a permanent residence card; (iv) the Secretary of State agreed to issue a certificate of application permitting Mr. Osman to reside and work in the UK freely pending the outcome of his application for a residence card; and (v) the Secretary of State would agree to reconsider the EEA claim on the basis that Mr. Osman was a family member of an EEA National by June 21st 2019. The body of the Order provided that the Secretary of State would pay Mr. Osman's reasonable costs and, if the parties could not agree costs, then within 5 weeks the Secretary of State would pay Mr. Osman a reasonable sum on account of costs – this was set at 50% of his schedule of costs.
12. On May 15th 2019, the Secretary of State wrote back to Mr. Osman to inform him that certain of the confirmations that he wanted recorded in the consent order would "in effect grant the application", and that this could not be agreed to as "it would inappropriately fetter the decision maker who will be reconsidering your application". The Secretary of State could not agree to the request for permission to reside and work in the UK pending the outcome of his application. This was regarded as "inappropriate",

on the basis that Mr. Osman had not established a right to work in the UK. The Secretary of State did not agree to a change in the timeline for determining his application. The Secretary of State did not agree to the extra provision regarding payment on account of costs. The Secretary of State repeated her offer of April 5th 2019 (see paragraph 9 above).

13. On May 23rd 2019, Mr. Osman responded to say that the confirmations in the recitals in his proposed consent order did not fetter the Secretary of State in any way, but just record that evidence had been provided. Also, that the certificate of application was a standard document that the Secretary of State was required to issue upon receipt of an application for a residence card as the family member of an EEA national. This did not fetter the Secretary of State in her decision making. The timeline proposed by the Secretary of State was said to be unreasonable. The provision as to payment on account of costs was said by Mr. Osman to be entirely appropriate. Mr. Osman suggested that if the parties could not reach agreement, then the court should be asked to decide the outstanding matters between the parties on the basis of written submissions.
14. On May 28th 2019, the Secretary of State countered the points made by Mr. Osman, and reiterated her offer of April 5th 2019. It was stated that if the consent order was not agreed to, then the Secretary of State would write to the Court confirming the settlement offer and would refer to Mr. Osman's conduct on the issue of costs. The settlement terms were said to render the claim "academic", and it was said that the Court would be asked to refuse the claim on that basis.
15. On July 1st 2019, Mr. Osman wrote to a different person at the Government Legal Department who was now handling the case on behalf of the Secretary of State to say that there had been "significant developments" that were relevant, and attached a revised consent order. Mr. Osman explained that he had married his partner, and so his application needed to be considered as a family member and not an extended family member. Further, his wife had been granted a permanent residence card in June 2019, and so his application as an extended family member was no longer relevant. Mr. Osman explained that he did not think that the recitals in the consent order tied the Secretary of State's hands: she could decide that the marriage certificate was not genuine or the marriage was one of convenience. The recitals referred to the withdrawal of the decision of December 13th 2017, to the marriage certificate, to the grant of a permanent residence card to Mr. Osman's wife, and that the Secretary of State would issue a certificate of application in accordance with policy guidance within 14 days, and that the Secretary of State would agree to reconsider the EEA claim on the basis that Mr. Osman is a family member of an EEA national by September 4th 2019.
16. Later that day, the Secretary of State responded to say that the additional provisions were inappropriate. The offer of April 5th 2019 was reiterated. Mention was also made of her writing to the Court about the offer and that the settlement terms rendered the application for judicial review academic. The offer was once again rejected by Mr. Osman.
17. On July 15th 2019, the Secretary of State wrote to Mr. Osman with a revised consent order. This noted that his circumstances had changed in that he had married his partner and was no longer an Extended Family Member, that he should submit a valid application for a residence card as a Direct Family Member within one month, and that the Secretary of State would agree to consider the application within 6 months, absent special circumstances. The order provided that the judicial review should be withdrawn and that there be no order as to costs.

18. On July 21st 2019, Mr. Osman responded to ask why the Secretary of State was proposing that there should be no order as to costs. He said that this was “unacceptable”. He explained that the Secretary of State was still obliged to consider his application for a residence card that was the subject of the judicial review, and that if the matter was to go before the First Tier Tribunal he could argue that he was entitled to the residence card as a family member of an EU national. Mr. Osman mentioned that the Secretary of State’s behaviour was resulting in him incurring increased costs.
19. On July 23rd 2019, the Secretary of State responded to say that it was no longer appropriate to consider Mr. Osman’s application made on August 8th 2017 for a residence card as an Extended Family member as this was made on the basis of him being an unmarried partner. The judicial review was rendered academic by him being married to an EEA national. The Secretary of State explained that “No order as to costs is proposed as your actions have superseded the judicial review application” and he would need to make a new appropriate application. The Secretary of State said that if he did not agree to her consent order, she would write to the Court and request the matter to be listed for an oral permission hearing, where costs for preparing and attending that hearing would be sought. The Court was written to on July 30th 2019, setting out the Secretary of State’s account of what had taken place, and asked for an oral permission hearing to be relisted to have this matter settled.
20. Mr. Osman responded to the Secretary of State’s letter to the Court by producing his own submissions to the Court on September 23rd 2019. In these submissions, Mr. Osman explained that he had now made an application for a residence card as a family member of an EEA national sponsor. Accordingly, the claim was academic, and the only outstanding issue was costs. It was said that Mr. Osman’s rights had strengthened due to the passage of time and the consequent change in his personal circumstances.
21. On October 1st 2019, the Secretary of State responded to these submissions, noting what was said about the claim being academic. A proposed consent order was provided which stated that Mr. Osman’s personal circumstances had changed, and that an application for a residence card had been made, and that the judicial review should be withdrawn with no order as to costs. On October 3rd 2019, Mr. Osman replied to say that the Secretary of State had not engaged with any of his submissions and that he did not understand why the Secretary of State was asking for the case to be listed for an oral permission hearing when both parties accepted that the claim was academic: the only outstanding issue was of costs. Mr. Osman suggested that the matter should be dealt with by the Court on the papers.
22. On October 14th 2019, the Secretary of State informed Mr. Osman that she agreed that the matter of costs should be decided on the papers, and a draft consent order recording this was sent through. On November 30th 2019, Mr. Osman responded by saying that he thought it was better for the issue of costs to be determined at an oral hearing. On December 2nd 2019, the Secretary of State replied to say that it was “cost effective” for the issue to be dealt with on the papers, and that if the matter was to be pursued at an oral hearing, the Secretary of State would seek her costs of preparing and attending. Later that day, Mr. Osman said that the Secretary of State was the one who had wanted the oral hearing, but she had now changed her position. He said that the costs issue was complicated because of the change of position by the Secretary of State after initially offering to pay his costs. He would want an opportunity to respond to the Secretary of State’s written reply, which would prolong matters and so given that a hearing date had been listed it made sense for the matter to go before a judge at an oral hearing. On December 3rd 2019, the Secretary of State wrote to say that the oral hearing was agreed.

23. On December 4th 2019, the Secretary of State informed the Court that the issue of permission would also need to be decided as settlement could not be agreed. On December 9th 2019, Mr. Osman informed the Court that he was not pursuing his application for permission as the matter was academic, but wished the Court to determine the issue of costs. On December 11th 2019, the Secretary of State wrote to say that the issue of costs should be dealt with on paper.

Decision

24. It is not usual for the Administrative Court to spend two hours listening to arguments about costs for a judicial review claim which has become ‘academic’. The ordinary approach where it is agreed that the claim is ‘academic’ is for the parties to make written submissions, and for the Court to consider the matter in accordance with the well-known authorities, such as *M v. L B Croydon [2012] 1 WLR 2607*. In the instant case, given the rather convoluted history of the claim and the copious correspondence, including offers and counter-offers, an oral hearing was useful.
25. In deciding this matter, I am guided by CPR Part 44 which in relevant part provides that:
- (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
 - (a) the conduct of all the parties;
 - (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
 - (c) any admissible offer to settle made by a party which is drawn to the court’s attention, and which is not an offer to which costs consequences under Part 36 apply.
 - (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 the Practice Direction – Pre-Action Conduct or 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 its case or a particular allegation or issue; and
 - (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.
26. In my judgment, had the challenge proceeded, and had not been rendered academic due to the change in Mr. Osman’s status, not only would permission have been granted, but (in the language of *M v. L B Croydon*), it is “tolerably clear” that his application for judicial review would have succeeded. I cannot say what the outcome would have been on the substantive question as to whether he would have been entitled to a residence

card on the account of his relationship with an EEA national, but he would at least have been entitled to an appeal to the First Tier Tribunal from the Secretary of State's refusal.

27. Accordingly, if the matter had come before the Court before the change in Mr. Osman's personal circumstances he would have been entitled to his reasonable costs. The Secretary of State effectively acknowledged as much in her initial proposal to settle the dispute, a position which she maintained until July 15th 2019.
28. I cannot leave the matter there, however, as so much has happened since Mr. Osman's personal circumstances had changed. I have to consider the conduct of the parties. I have to consider the various offers that have been made.
29. With respect to the conduct of the parties, Mr. Osman did not inform the Secretary of State that he had married an EEA national until March 16th 2019, more than 4 ½ months after their marriage. This was without doubt an important matter, and relevant to the judicial review proceedings. It rendered the judicial review proceedings academic, as the dispute with the Secretary of State concerned her refusal of Mr. Osman's application for a residence card as an extended family member of an EEA national, in circumstances where he had not been offered any appeal rights. He would have been offered appeal rights if the application had been made for a residence card as a purported family member of an EEA national. There is no explanation provided by Mr. Osman as to why he did not raise the matter until the middle of March 2019. His conduct in not notifying the Secretary of State of his marriage was, in my judgment, unreasonable.
30. It was argued on behalf of Mr. Osman that informing the Secretary of State of this matter at an earlier stage would have made no difference, as the Secretary of State's offer to Mr. Osman of April 5th 2019 was made and then repeated on several occasions after the Secretary of State had learned of the marriage. However, I cannot be satisfied that it would have made no difference if the Secretary of State had been told of this earlier, especially when she was considering how to deal with the progress of Mr. Osman's case in November and December 2018. It is possible that the fact of the marriage would have affected the Secretary of State's approach to the stay, or listing, of the application and that the Secretary of State may have made an appropriate and reasonable offer to settle the claim far sooner than she did.
31. I have also considered the subsequent conduct of the Secretary of State, and of Mr. Osman, and the various offers that they made.
32. With respect to the Secretary of State, I consider that she acted unreasonably and/or made unreasonable offers (i) initially on March 7th 2019, when she made no offer to pay any of Mr. Osman's costs; and (ii) on July 15th 2019 and subsequently, when her offer to Mr. Osman did not make any provision for payment of any of his costs.
33. With respect to Mr. Osman, I consider that it was reasonable for him to refuse the Secretary of State's offer on March 7th 2019 as this did not involve the payment of any costs to him. I do not consider that it was reasonable for him, however, to counter that offer on March 16th 2019, and later on May 7th 2019, by insisting that his application for a residence card be *treated* as an application as a Direct Family Member: he could have made a fresh application as a Direct Family Member (I was told that the fee was £65), something which he did do later in the year. I also do not consider that it was reasonable for Mr. Osman to insist on certain conditions: in particular, permission to reside and work in the UK pending the outcome of his application, which was

something which the Secretary of State was right to reject as “inappropriate” on the basis that Mr. Osman had not established a right to work in the UK. These requirements of Mr. Osman made it difficult for the Secretary of State to reach agreement with him

34. Given the position taken by the Secretary of State, it was necessary for the question of costs to be considered by this Court. Although this question could have been determined on the papers, it was not in my judgment unreasonable for the matter to have been determined at an oral hearing. The matter has a complicated history.
35. I am presented with a situation, therefore, where I consider that Mr. Osman behaved unreasonably in not informing the Secretary of State of his marriage for several months after it had occurred, in circumstances where this might have made a difference. I am also presented with a situation where I consider that Mr. Osman acted unreasonably with respect to his approach to the offers. I am also presented with a situation where I consider that the Secretary of State acted unreasonably with respect to her approach to the offers.
36. In order to do justice overall, I consider that it would be fair and appropriate for Mr. Osman to be entitled to his reasonable costs up until the date of his marriage – October 26th 2018. From that date, any costs which Mr. Osman would otherwise be entitled to should be reduced (i) by 20% to reflect the chance that had Mr. Osman notified the Secretary of State of his marriage in late October or early November 2018, a suitable offer may have been forthcoming much sooner; (ii) by 20% to reflect Mr. Osman’s unreasonable conduct in making counter offers which contained inappropriate conditions, and which required his initial application for a residence card to be *treated* as if he had made it as a Direct Family Member.
37. In the circumstances, therefore, I consider that Mr. Osman should be entitled to his reasonable costs up until the date of his marriage – October 26th 2018, and for 60% of his costs from October 27th 2018, including the costs of the hearing before me on December 17th 2019.