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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR186 FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Mr Stephen J McQuitty (instructed by Brian Moss Solicitor of Worthington Solicitors) for the Applicant
Mr Philip Henry instructed by the (Crown Solicitors Office) for the Proposed Respondent

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COLTON J

Introduction

[1] There is a complex factual background to this application.

[2] When the applicant was aged 12 years in March/April 2016 she sought entry-clearance to come to the United Kingdom to live with her mother and (half) brother. The family originally comes from the Philippines although the applicant's mother has had British citizenship for some time and has spent much of her working life as a nurse in Northern Ireland, first in the Health Service and now in the private sector.

[3] She was initially refused entry on the basis that her mother was alleged to have dishonestly supplied a false document (a second birth certificate for the applicant) with her application for entry-clearance. That refusal decision was upheld on appeal to the First-tier Tribunal ("the FtT"). On this issue the Upper Tribunal ("the UT") did not find any error as to the approach taken by the FtT to the issue of the false document. The applicant appealed the UT decision to the Court of Appeal.

[4] The Court of Appeal held that the earlier decisions of the FtT and the UT dismissing the appellant's appeal against the refusal of the Home Secretary to grant her entry-clearance on the basis that her application had relied upon a birth

certificate which had been "fraudulently obtained", purporting to apply para 320(7)A of the Rules, were erroneous in law. Having confirmed the proper interpretation of the Rule the Court of Appeal then remitted the case back to the FtT for a full rehearing. This resulted in the decision of Immigration Judge Grimes (FtT) allowing the appeal. The decision was promulgated on 3 March 2021.

[5] The Home Secretary sought to appeal the decision of Judge Grimes to the UT. Permission to appeal was refused, twice, and the Home Secretary became appeals right exhausted on or about 11 May 2021.

[6] It was the applicant's case that from that point onwards the Home Secretary had no basis, whatsoever, for refusing or otherwise delaying provision of a visa to the applicant.

[7] The applicant's solicitor issued a first PAP letter dated 10 June 2021 in support of her claim that the Home Secretary was bound to comply with the decision of Judge Grimes. The applicant indicated that she intended to lodge urgent judicial review proceedings (giving 7 days for a response). The letter set out in clear terms what was expected, saying that –

> "The Home Secretary is expected to immediately to [sic] take immediate steps to give practical effect to the grant of entry-clearance so that the applicant can come to the UK to live with her family and without further delay."

[8] The Home Secretary provided a response to this PAP letter dated 22 June 2021, confirming that the delay that had occurred was due to the fact that the Visa Application Centre in Manilla had closed. The applicant was advised that the application had to transfer to Sheffield from the Manilla office and that it would be treated as a priority.

[9] On 23 June 2021 the Home Office emailed the applicant advising her to apply online so the Sheffield office could deal with her application.

[10] Such an application was made by the applicant on 4 August 2021. On the same day the Home Office offered an appointment to the applicant for the provision of biometric information. The applicant attended the biometric appointment on the same day in the Philippines.

[11] The proposed respondent asserts (and it is not challenged) that throughout August the Entry Clearance Officer in Sheffield attempted to contact the applicant's solicitor several times, leaving messages but without response. This included an entry-clearance emailing the applicant's solicitor asking him to call because his telephone calls and messages were not being answered on 31 August 2021. The clearance officer had a query as the applicant had applied using the name on the illegitimate birth certificate which prompted the original refusal.

[12] It is common case that on 3 September the Entry Clearance Officer spoke to the applicant's solicitor who answered the queries raised. The Officer indicated, according to the applicant's solicitor, that "the visa would be issued within 4-6 weeks."

[13] In any event by 13 October (the day prior to the expiration of the 6 week period from 3 September 2021) the applicant's solicitor emailed the Home Office asking for the visa. There was no response to this email and the applicant's solicitor issued a second PAP letter dated 20 October 2021 which raised the same grounds as before. The Home Secretary was implored to act and take all necessary steps to give effect to the grant of entry-clearance. The letter asked for a response within 7 days. No response was forthcoming. The applicant received legal aid on 29 October 2021 and judicial review proceedings were issued on 1 November 2021 and served on the proposed respondent's solicitors the same day.

[14] The proceedings sought judicial review in respect of the ongoing failure of the proposed respondent to promptly issue and provide the applicant with a visa to allow her to secure entry-clearance to come to the United Kingdom.

[15] On 3 November 2021 the applicant received email confirmation from the Visa Application Centre that her processed visa application had been received by them (on 3 November 2021). It was necessary for the visa to be printed onto the applicant's passport and this was completed after 3 November and the applicant's passport with the requisite visa delivered to the applicant in the Philippines on 6 November 2021.

[16] The matter came before the court on 8 November 2021. The court was advised of the fact that the applicant had received the passport with the requisite visa stamp as per the chronology set out above. The proposed respondent asked that the proceedings be dismissed at that stage without any order as to costs on the grounds that the application was now clearly academic. However, the applicant sought an adjournment in order to clarify some further matters with the Home Secretary. These matters are set out in correspondence dated 16 November 2021. In short the applicant, in order to complete Covid-19 vaccination requirements, was scheduled to travel to the UK on 10 December 2021 and was due to arrive in Belfast on the afternoon of 11 December 2021. The applicant turned 18 on 7 December 2021 and would have been over 18 when she arrived in the UK. The applicant therefore sought formal written confirmation from the Home Office that she would be entitled to enter the UK on foot of the visa granted to her notwithstanding that she will be 18 when she arrives in the UK. It was pointed out that such an assurance should be provided and was consistent with relevant UK Home Office Immigration Directorate instructions.

[17] The second matter related to a request from the applicant that the Home Office provide formal written confirmation that in the event that the applicant is for

whatever reason unable to travel to the UK within the currency of her visa the proposed respondent will extend the visa for a further 6 weeks.

[18] The letter went on to set out the basis on which the applicant would be seeking the costs of the judicial review application.

[19] By correspondence dated 19 November 2021 the Home Office confirmed –

(i) That there will be no issue with the applicant entering the UK after she turns 18 as the application was made prior to her 18th birthday; and

(ii) The Home Office was unable to give any assurances that the visa will be re-issued should the applicant be unable to travel as planned. Cases are assessed on a case by case basis and if for any reason she would be unable to travel the applicant should contact the Home Office to advise of the reasons and the visa would be re-issued if it was considered appropriate at that time.

[20] In light of that confirmation the Home Office sought confirmation that no application for costs would be pursued.

[21] It is agreed between the parties that the proceedings have now resolved and can be dismissed by the consent of the parties.

[22] The only issue relates to costs which are sought by the applicant. The court directed that the parties file written submissions on the issue of costs. The court has received detailed written submissions from Mr McQuitty and Mr Henry on the issues of costs. The court is grateful to them for their helpful and detailed written submissions.

The Court's Conclusion on the Issue of Costs

[23] The court is increasingly confronted with issues relating to costs in judicial review proceedings before leave is granted.

[24] The starting point is that the court has a broad discretion in relation to the issue of costs.

[25] The powers of the High Court to deal with costs of and incidental to proceedings are set out in the Rules of the Supreme Court and, primarily, in Order 62. The general rule is that the unsuccessful party should normally pay the costs of the successful party. Order 62 Rule 3(3) provides:

> "If the court in the exercise of its discretion sees fit to make any order as to the costs in any proceedings, the court shall order the costs to follow the event, except when it appears to the court that in the circumstances of

> the case some other order should be made as to the whole or any part of the costs."

[26] There is no particular rule in relation to costs for proceedings in judicial review applications, although the matter has been considered in a number of decisions.

[27] Generally it is this court's experience that in this jurisdiction the practice is not to grant costs if leave to apply for judicial review is refused. In para 16.05 of Scoffield & Larkin – Judicial Review in Northern Ireland the authors say:

> "The reason for this is that the leave application is technically an **ex parte** application, without there being any need for the proposed respondent to participate at the leave stage by lodging any form of acknowledgement of service, still less attending at an oral hearing."

[28] When faced with determining the issue of costs where a judicial review has been dismissed the courts in this jurisdiction tend to adopt the principles set out in the case of *R(Boxall) v London Borough of Waltham Forest [2000] All ER(D)*. In the *Boxall* case Scott-Baker J set out the relevant principles as follows:

> "(i) The court has power to make a costs order when the substantive proceedings have been resolved without a trial where the parties have not agreed about costs.
>
> (ii) It will ordinarily be irrelevant that the application is legally aided.
>
> (iii) The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional costs.
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> (iv) At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between the position will, in differing degrees, be less clear.
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> (v) How far the court was prepared to look into the previously unresolved substantive issues will depend on the circumstances of a particular case, not least the amount of costs at stake and the conduct of the parties.

(vi) In the absence of a good reason to make any other order the fall-back is to make no order as to costs.

(vii) The court should take care to ensure that it does not discourage parties from settling the judicial review proceedings for example by a local authority making a concession at an early stage."

Application of the Principles to this Case

[29] The applicant forcefully points out that she achieved the substantive relief sought after she had issued and served the proceedings. In these circumstances having achieved the outcome she hoped to achieve (the provision of her visa) she says that she is entitled to her costs against the Home Secretary applying ordinary costs principles.

[30] The context is important. The applicant points out that in a properly formulated letter of claim on 10 June 2021 the Home Secretary was made aware of the basis for the applicant's claim. Despite assurances from the Home Office on 3 September 2021 that the visa would be provided within 4-6 weeks this was not done despite further correspondence on 13 October 2021 (no response) and a further PAP letter on 20 October 2021 (again without any response) before proceedings were issued on 1 November 2021.

[31] There can be no doubt that the applicant was entitled to the relief sought when the original PAP letter was sent on 10 June 2021. From then on the case was really about delay in failing to comply with a clear order of the FtT. That delay has been explained in the written submissions submitted by the Home Office up to 3 September at which stage it was represented to the applicant that the visa should or would issue (depending on the different emphasis) within 4-6 weeks. As is clear from the chronology that did not happen. However it is also clear that the applicant received the visa within days of these proceedings being issued. The proposed respondent says that the provision of the visa was not influenced by the issuing of the proceedings. The process was already in train and would have happened on the same date, whether or not proceedings had been issued. She did not achieve the relief sought by issuing the proceedings. The demand that the proposed respondent reply within 7 days of the PAP letter on 20 October was, the proposed respondent says, in contravention of the timing normally permitted by the Practice Direction No. 3 of 2018. In short, the proposed respondent says that these proceedings became academic almost as soon as they were issued.

[32] Even after they became academic, the applicant requested an adjournment to correspond with the Home Office in the hope of extracting further concessions using the court proceedings as leverage.

[33] This is not a case where the respondent has failed to address issues raised by an applicant and who has changed his or her mind because of the issuing of proceedings.

[34] The court is conscious that this was a case about delay and timing was central to the applicant's case. In this regard the court has a concern about the fact that the proposed respondent accepts that the applicant's visa was issued on 22 September 2021 but was not received by the Visa Application Centre until 3 November 2021. The court therefore sought clarification for the reason for any delay between those dates. On 10 February 2022 the proposed respondent's solicitors replied to the query in the following terms:

> "The decision to issue the applicant's visa was made on 3 September 2021 after the solicitor answered the Entry Clearance Officer's queries over the phone. The Entry Clearance Officer was working from home, so when he approved the visa in principle, it had to be added to his `queue of cases that would be attended to during his next day in the office. He attended the office on 8/9/21. However, as this application involved a 'change in name' (because the applicant made the fresh application in the name on the illegitimate birth certificate), it had to be escalated to the Entry Clearance Manager, above the Entry Clearance Officer for final approval. Their approval was obtained on 10/9/21. The case was added to the list of visas to issue, with a `start date' of 22/9/2021. However, for reasons that cannot be ascertained, despite enquiries having been made, it was not issued on that date.
>
> The Home Office believes it was omitted from its manifest list. The issue was identified in October, the visa issued on 1 November 2021 and the applicant received it in the Philippines on 6 November 2021."

[35] It will be seen from the chronology that the facts of the matter are that the visa in this case was not issued until after proceedings were issued. This is in the context where a PAP letter was sent almost five months in advance of the proceedings being issued. There was never a dispute between the parties that the applicant was entitled to the visa and the issue always related to delay.

[36] The court accepts that the proposed respondent would always require some time to complete all the necessary administrative steps to provide the applicant with the visa to which she was entitled. However, the visa was meant to issue with a "start date" on 22 September 2021 and for reasons which have not been ascertained it was not issued until after the proceedings were issued in this case.

[37] In these circumstances, taking into account the matters set out in the judgment in *R(Boxall)* (above) the court considers that this is a case in which it is appropriate to award costs to the applicant. The proposed respondent was given adequate notice of the application. The concern was always about delay. When proceedings were issued the applicant had not received a visa notwithstanding that it was due to issue with a start date of 22 September 2021. In the court's view the applicant was justified in issuing the proceedings and would have inevitably succeeded had the visa not been provided to the applicant promptly thereafter. The fact that the matter was resolved shortly after proceedings were issued means that costs and court time have been saved. Nonetheless, in the particular circumstances of this case the court considers that there is good reason to make an order for costs against the proposed respondent in this matter.

[38] Accordingly, the court dismisses these proceedings and orders that the proposed respondent pay the applicant's costs, those costs to be taxed in default of agreement.