In the Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Butt) v Secretary of State for the Home Department (Indemnity costs) [2022] UKUT 00069 (IAC)

Field House
Breams Buildings
London, EC4A 1WR

4 February 2022

Before

THE HON. MR JUSTICE LANE, PRESIDENT
Mr. C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

REGINA

On the application of
ASHAN BUTT

Applicant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Muhammad Zahab Jamali (Ashton Ross Law) for the Applicant
Paul Joseph (instructed by the Government Legal Department) for the Respondent

Hearing date: 27 October 2021

1. *Whilst no mention of the basis of costs assessment is made in the Tribunals, Courts and Enforcement Act 2007 or the Tribunal Procedure*

(Upper Tribunal) Rules 2008, the distinction drawn between the standard and indemnity bases by CPR 44.3(1) can properly inform the exercise of discretion by the Immigration and Asylum Chamber of the Upper Tribunal when exercising its full power to determine the extent costs are to be paid under section 29 of the 2007 Act.

2. *The distinction between the standard and indemnity bases are well-known and well-understood across the civil justice system and applied in judicial review proceedings that take place in the High Court and beyond. There is no reason not to employ it in the Immigration and Asylum Chamber of the Upper Tribunal.*

JUDGMENT

Judge O'Callaghan:

Overview

1. The respondent has agreed to pay the applicant his reasonable costs in this matter. The issue before the Upper Tribunal is whether such costs are to be paid on a standard basis or, alternatively, on an indemnity basis.

Legislative Framework

2. Provision is made by section 29 of the Tribunals, Courts and Enforcement Act 2007 ('the 2007 Act') for costs to be awarded at the discretion of the Upper Tribunal. Section 29(1)-(3) establishes:

> '(1) The costs of and incidental to—
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,

shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.'

3. The statutory power permitting the Upper Tribunal to award costs is given effect by rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the 2008 Rules'). In respect of judicial review proceedings, rule 10(3)(a) provides:

'(3) In other proceedings, the Upper Tribunal may not make an order in respect of costs or expenses except -

(a) in judicial review proceedings; ...'

4. CPR.44 is concerned with general rules about costs. CPR 44.2 confirms *inter alia*:

'(1) The court has discretion as to –

(a) whether costs are payable by one party to another;

(b) the amount of those costs; ...

(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 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; ...

(5) The conduct of the parties includes –

…

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; …'

5. The basis of the assessment of costs is set out at CPR 44.3, *inter alia*:

'(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –

(a) on the standard basis; or

(b) on the indemnity basis,

but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

…'

The Facts

6. The applicant is a national of Pakistan. On 17 August 2018 he applied for leave to enter this country as a Tier 1 (Entrepreneur) Migrant in order to establish and run a business in this country, namely a restaurant situated in the Midlands. On 26 September 2018, he was interviewed by an entry clearance officer in relation to his application.

First judicial review proceedings (JR/108/2019)

7. The respondent refused the application by a decision dated 8 October 2018. It was not accepted that the applicant was a genuine entrepreneur.

8. On 8 January 2019 the applicant filed a judicial review claim challenging the respondent's decision to refuse his application. On 22 January 2019,

the respondent filed and served a draft consent order in addition to her acknowledgment of service.

9. A draft consent order signed by the parties was received on 30 January 2019 and approved the following day by Upper Tribunal Lawyer Bakshi.

10. The recital to the consent order confirmed that the respondent agreed to reconsider her decision of 8 October 2018 and further agreed to issue a new decision within three months of her pre-action protocol letter of 10 January 2019, absent special circumstances. By means of the operative part of the order the applicant was granted leave to withdraw his claim for judicial review and the respondent was ordered to pay the applicant's reasonable costs, to be assessed if not agreed.

Second judicial review proceedings (JR/5301/2019)

11. The applicant was interviewed for a second time by an entry clearance officer on 8 April 2019. The respondent reconsidered the applicant's application and refused it by a decision dated 24 July 2019. It was again not accepted that the applicant was a genuine entrepreneur.

12. The applicant filed a judicial review claim on 14 October 2019. In addition to her acknowledgment of service the respondent filed and served a draft consent order on 8 November 2019.

13. A draft consent order signed by the parties was received on 10 January 2020. It was approved by Upper Tribunal Lawyer Hussain on 14 January 2020.

14. The recital to the consent order confirmed that the respondent agreed to reconsider her decision of 24 July 2019 within three months of the

sealing of the consent order, absent special circumstances. The operative part of the order granted the applicant leave to withdraw his claim for judicial review and the respondent was ordered to pay the applicant's reasonable costs, to be assessed if not agreed.

Third judicial review proceedings (JR/1202/2020)

15. The applicant was interviewed for a third time on 5 February 2020. The respondent reconsidered the applicant's application and refused it by a decision dated 16 March 2020. The applicant disputes having received the decision on or around this time.

16. The applicant filed a judicial review claim on 15 April 2020, accompanied by an application for expedition. Complaint was made as to the failure by the respondent to serve a decision letter in compliance with the consent order sealed on 14 January 2020. Upper Tribunal Judge Kamara refused the application for expedition on the same day.

17. The respondent filed an acknowledgment of service and summary grounds of defence on 24 April 2020. Accompanying these documents was the decision letter dated 16 March 2020.

18. The applicant filed and served an application notice on 29 April 2020 requesting that his application be withdrawn. By a decision sent to the parties on 15 May 2020 Upper Tribunal Judge Frances consented to the application being withdrawn and made no order as to costs. The Judge found the decision to have been served on 16 March 2020 in compliance with the time frame specified in the consent order but concluded that even if it was served with the acknowledgment of service on 24 April 2020, there was no egregious delay on the part of the respondent, observing the lockdown necessitated by the Covid-19 pandemic.

Fourth judicial review proceedings (JR/1436/2020)

19. On 22 May 2020 the applicant filed a judicial review claim challenging the respondent's decision dated 16 March 2020.

20. The respondent filed an acknowledgment of service and summary grounds of defence on 17 June 2020. Permission to apply for judicial review was subsequently refused by Upper Tribunal Judge Coker.

21. The applicant renewed his application for permission to apply for judicial review and was granted permission by Upper Tribunal Judge Keith at a hearing held on 13 August 2020.

22. On 14 October 2020 the Upper Tribunal received a draft consent order signed by the parties. Upper Tribunal Judge Clive Lane approved the order on 21 October 2020 and the order was sealed on 9 November 2020.

23. The recital to the consent order confirmed that the respondent agreed to withdraw her decision of 16 March 2020 and to make a new decision in respect of the applicant's Tier 1 (Entrepreneur) application within six months of the sealing of the order, absent special circumstances. The operative part of the order granted the applicant leave to withdraw his claim for judicial review and the respondent was ordered to pay the applicant his reasonable costs, to be assessed if not agreed.

Fifth judicial review proceedings (JR/652/2021)

24. On 14 April 2021 the applicant served a pre-action protocol letter giving the respondent until 9 May 2021 to issue the requested decision.

25. The applicant filed a judicial review claim on 11 May 2021 challenging an ongoing failure by the respondent to issue a decision in respect of his entry clearance application.

26. In addition, the applicant sought expedition, which was granted by Upper Tribunal Judge Stephen Smith on 11 May 2021. The application was adjourned to be considered at an oral hearing on the first available date after four weeks, on notice to the respondent.

27. On 13 May 2021 an entry clearance officer wrote to the applicant confirming that his application for entry clearance was successful and notifying him that he was required to deliver his passport to the entry clearance officer and to pay the immigration health surcharge fee ('IHS').

28. The applicant paid the IHS fee on 13 May 2021 and delivered his passport on 17 May 2021.

29. The respondent filed and served her acknowledgment of service on 24 May 2021, accompanied by a draft consent order. The applicant confirmed his intention to pursue his claim on 2 June 2021, expressing his distrust of the respondent consequent to previous poor decision-making.

30. The Upper Tribunal received a consent order signed by the parties on 4 June 2021 which was approved by Upper Tribunal Judge Perkins on the same day. The consent order states:

> 'UPON the Respondent writing to the Applicant on 13 May 2021 advising the Applicant that his entry clearance decision had been

overturned and inviting the Applicant to pay the IHS fee and submit his passport; and

UPON the Applicant having paid the IHS fee and submitting his passport on 18 May 2021 and the Respondent confirming that the Applicant will be granted entry clearance and his passport returned within 7 days of the sealing of this consent order, absent special circumstances

BY CONSENT, it is ordered that:-

1. The Applicant do have leave to withdraw the above-numbered claim for judicial review.

2. The Respondent do pay the Applicant's reasonable costs, to be assessed if not agreed.

3. The hearing of 8 June 2021 be vacated.'

Sixth judicial review proceedings (JR/857/2021)

31. The date identified by the respondent for the confirmation of the grant of entry clearance and the return of the applicant's passport, 11 June 2021, came and went without either step being undertaken. The applicant served a pre-action protocol letter on 11 June 2021 requesting that both steps be undertaken by 10am on 14 June 2021. No response was received.

32. A judicial review claim was filed on 14 June 2021, seeking a mandatory order compelling the respondent to return the applicant's passport with entry clearance. Costs on an indemnity basis were also sought.

33. Accompanying the claim was an application for expedition. By an order sent to the parties on 14 June 2021 Upper Tribunal Judge Jackson granted expedition, abridging the time for the respondent to file her acknowledgment of service and ordering that the application for permission to apply for judicial review be considered by a Judge on the papers on the first available date.

34. The applicant collected his passport and confirmation of the grant of entry clearance on 22 June 2021.

35. The respondent filed her acknowledgment of service on 23 June 2021 and provided an explanation for the delay, identifying what were said to be special circumstances:

> '4. The Respondent respectfully submits that contrary to the Applicant's grounds, there are special circumstances for failure to issue the Applicant with his visa and passport. As set out in the email of 14 June 2021 it was mistakenly understood by the relevant team when agreeing the consent order terms that the visa would be printed shortly in the overseas print hub which would enable the documentation to be received by the Applicant promptly. This is the usual process for most cases. However, as a result of the delays in this case, the workflow team explained that whilst this process would normally apply, for those cases that are aged, such as the Applicant's one, and the biometrics were provided over a year ago, it is not possible for the visa to be printed remotely and therefore has to be printed in Sheffield and courier to, in this case, Islamabad. The process has been further complicated because for the last year (due to COVID the team is told) the packages are not being couriered directly to Islamabad but rather being routed via Abu Dhabi who on receipt will then forward the package to Islamabad. As such there was a misunderstanding by the relevant team of the process of issuing the Applicant entry clearance and this led to a delay. The Respondent apologies for the delay in this matter.'

36. A draft consent order signed by representatives of both parties was filed with the Upper Tribunal on 1 July 2021 and approved by Upper Tribunal Lawyer Bakshi on 5 July 2021. The applicant was granted leave to

withdraw his claim for judicial review. The respondent agreed that she should be liable to pay the applicant's costs, but the parties were unable to agree whether the costs should be on a standard basis or on an indemnity basis. The order confirms that this issue was to be determined by the Upper Tribunal.

Conclusions

37. Section 29 of the 2007 Act confirms that the costs of and incidental to all proceedings are at the discretion of the tribunal in which the proceedings take place. This is a general provision. Section 29(3) makes it clear that power to award costs has effect subject to Tribunal Procedure Rules, which in relation to the Immigration and Asylum Chamber of the Upper Tribunal are to be found at rule 10 of the 2008 Rules. Whilst rule 10(3) cuts down on the Tribunal's power to award costs in appellate proceedings, the general provision is applicable in identified proceedings and circumstances, including judicial review proceedings: rule 10(3)(a).

38. Section 29(2) of the 2007 Act provides that this Tribunal has full power to determine the extent costs are to be paid. The 2008 Rules are silent as to the bases upon which the Tribunal may assess the amount of costs recoverable in judicial review proceedings. The CPR offers a valuable source of assistance in respect of costs and their assessment. CPR 44.3(1) provides that where a court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs (a) on the standard basis; or (b) on the indemnity basis, explaining what is meant by each. Whilst no mention of these (or any other) bases of assessment is made in the 2007 Act or the 2008 Rules, the distinction drawn by the CPR between the standard and indemnity bases can properly inform the exercise of discretion by this Chamber when

exercising its power under section 29 of the 2007 Act. The distinction is well-known and well-understood across the civil justice system and applied in judicial review proceedings that take place in the High Court and beyond. There is no reason not to employ it in this Chamber of the Upper Tribunal. Albeit in the context of sanctions and not costs, Lord Neuberger confirmed in BPP Holdings Ltd v Revenue and Customs Commissioners [2017] UKSC 55, [2017] 1 W.L.R. 2945, at [25]-[26] that it is legitimate for tribunals to follow a well-established approach established under the CPR.

39. It remains the position that in any dispute about the appropriate basis for the assessment of costs, the Upper Tribunal must consider each case on its own facts. Neither the standard basis nor the indemnity basis permits the recovery of costs which have been unreasonably incurred or which are unreasonable in amount. Where costs are to be assessed on the indemnity basis, the Upper Tribunal will give the receiving party the benefit of the doubt as to whether the costs were reasonably incurred or were reasonable in amount.

40. An award of indemnity costs is valuable to a receiving party for two separate reasons. Firstly, the burden of persuasion as to reasonableness is shifted to the paying party. Secondly, the paying party does not have the benefit of the limitation that only costs which were proportionate to the matters in issue are recoverable. These differences result in an award of indemnity costs being "considerably more favourable" to the receiving party than an award on the standard basis: Lownds v. Home Office [2002] EWCA Civ 365, [2002] 1 WLR 2450, at [6], *per* Lord Chief Justice.

41. In practice, the indemnity basis is awarded only in exceptional cases. For the Tribunal to exercise its discretion to order a party to pay costs on

the indemnity basis, the conduct of the paying party must be shown to have been unreasonable to a high degree to take the case outside the norm. Such conduct must relate to the conduct of the litigation.

42. Indemnity costs are not limited to cases where a court or tribunal wishes to express disapproval of the way in which litigation has been conducted. An order for indemnity costs can be made even when the conduct could not properly be regarded as lacking in moral probity or deserving of moral condemnation: Reid Minty (A Firm) v. Taylor [2001] EWCA Civ 1723, [2002] 1 W.L.R. 2800, at [27].

43. May LJ said at [30]-[31],

> '30. ... But it cannot be right that every defendant in every case can put themselves in the way of claiming costs on an indemnity basis simply by inviting the claimant at an early stage to give up, discontinue and pay the defendant's costs on a standard basis. It might be different if a defendant offers to move some way towards a claimant's position and the result is more favourable to the defendant than that...
>
> 32. There will be many cases in which, although the defendant asserts a strong case throughout and eventually wins, the court will not regard the claimant's conduct of the litigation as unreasonable and will not be persuaded to award the defendant indemnity costs. There may be others where the conduct of a losing claimant will be regarded in all the circumstances as meriting an order in favour of the defendant of indemnity costs. Offers to settle and their terms will be relevant ...'

44. These paragraphs were considered by the Court of Appeal in Kiam v. MGN Ltd (No 2) [2002] EWCA Civ 66, [2002] 1 W.L.R. 2810, at [12]-[13]. Simon Brown LJ stated at [12] that he understood the Court in Reid Minty to "have been deciding no more than that conduct, albeit falling short of misconduct deserving of moral condemnation, can be so

unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight."

45. Simon Brown LJ continued in the same paragraph that, "[a]n indemnity costs order ... does, I think, carry at least some stigma. It is of its nature penal rather than exhortatory."

46. Both judgments were considered in Excelsior Commercial & Industrial Holdings Limited v. Salisbury Hammer Aspden & Johnson (A Firm) [2002] EWCA Civ 879 where the Court of Appeal reiterated at [31] and [39] that an order for indemnity costs could only be made where there was "some conduct or some circumstance which takes the case out of the norm."

47. At [31]-[32] of the judgment, the Lord Chief Justice noted the width of judicial discretion and confirmed that an "indemnity order may be justified not only because of the conduct of the parties, but also because of other particular circumstances of the litigation."

48. As to what constitutes the 'norm', Waller LJ stated in Esure Services Ltd v. Quarcoo [2009] EWCA Civ 595, at [25]:

> '25. The Recorder seems to have construed the word "norm" as indicating that if the situation facing the court was one that quite often occurred that would mean that the situation was within the norm. In my view the word "norm" was not intended to reflect whether what occurred was something that happened often so that in one sense it might be seen as "normal" but was intended to reflect something outside the ordinary and reasonable conduct of proceedings. To bring a dishonest claim and to support a claim by dishonesty cannot be said to be the ordinary and reasonable conduct of proceedings.'

49. The applicant contends that the respondent's failure to abide by two consent orders (JR/1436/2020 and JR/652/2021) amounts to unreasonable conduct to a high degree and so indemnity costs should be awarded. Reliance is placed upon the collective delay approaching three years in issuing entry clearance, the filing of six judicial review claims, three challenged decisions being withdrawn or reconsidered, and a grant of permission to apply for judicial review (JR/1436/2020). The circumstances are said to establish that the matter falls outside the norm.

50. We are not satisfied that the respondent's behaviour in separate, discrete proceedings is relevant to our consideration of indemnity costs in this matter. Save for one occasion, the applicant secured his reasonable costs on the standard basis. No order for costs was made in the third proceedings: (JR/1202/2020). It is implicit from each order that the applicant did not consider the respondent to have acted unreasonably to a high degree in each of the previous matters. The mere accumulation of successful challenges in relation to the entry clearance application, without more, does not establish on the facts of this case the just exercise of discretion in respect of indemnity costs.

51. Nor was the respondent in breach of an order or orders of the Tribunal. The consent order sealed on 9 November 2020 (JR/1436/2020) did not contain an undertaking by the respondent to issue a new decision in respect of the applicant's entry clearance application within six months of the sealing of the order. Rather, the indication as to a fresh decision being made subject to a time limit was detailed in the recital. The commitment was expressed in relatively clear terms but was conditional on there being no special circumstances. Default did not entail a breach of the consent order as the operative part of the order solely related to the withdrawal of the claim and that the respondent pay the applicant's

reasonable costs. The operative part of the consent order sealed on 4 June 2021 was in similar terms.

52. Turning to the question of unreasonableness in these proceedings, we conclude that the applicant is unable to satisfy the burden placed upon him. We are concerned that the respondent consented to the establishment of a time frame within which the applicant's passport would be returned to him which was unachievable from the outset. Reliability as to the factual basis of the operative provisions of the order provided by the recital is important in enabling the Upper Tribunal to act as the arbiter of what every consent order contains. However, as to the conduct of the proceedings, the respondent made no attempt substantively to defend the decision, and instead by her acknowledgment of service drew attention to the fact that, in essence, the applicant had succeeded having collected his passport containing confirmation of entry clearance. Further, at paragraph 4 of her acknowledgement of service, the respondent provided a detailed account as to why ultimately it had not been possible to comply with the original consent order. We are satisfied that on the facts arising in these proceedings it cannot properly be said that the respondent's conduct in these proceedings was unreasonable to a high degree.

53. However, that neither party acted unreasonably does not restrict the Upper Tribunal's wide discretion in respect of indemnity costs. The Lord Chief Justice said in Excelsior, at [31]:

> '31. ... An indemnity order may be justified not only because of the conduct of the parties, but also because of other particular circumstances of the litigation. I give as an example a situation where a party is involved in proceedings as a test case although, so far as that party is concerned, he has no other interest than the issue that arises in that case, but is drawn into expensive litigation. If he is successful, a court may well say that an

> indemnity order was appropriate, although it could not be suggested that anyone's conduct in the case had been unreasonable. Equally there may be situations where the nature of the litigation means that the parties could not be expected to conduct the litigation in a proportionate manner. Again the conduct would not be unreasonable and it seems to me that the court would be entitled to take into account that sort of situation in deciding that an indemnity order was appropriate.'

54. The Upper Tribunal confirmed in R (MMK) v. Secretary of State for the Home Department (consent orders – legal effect – enforcement) [2017] UKUT 00198, at [34], that it will exercise discretion as to indemnity costs when circumstances require.

55. We conclude that what makes this matter exceptionally meritorious is that the consent order of 4 June 2021 clearly established a substantive right to have identified steps undertaken by the Executive.

56. The Court of Appeal noted in respect of public law litigation in R (Tesfay) v. Secretary of State for the Home Department [2016] EWCA Civ 415, [2016] 1 W.L.R. 4853, at [57], that while proceedings for judicial review are brought by persons dissatisfied with decisions of public bodies "the courts are not the decision makers and often in public law the most that can be achieved is an order that the decision maker reconsider on a correct legal basis."

57. In the fifth judicial review proceedings (JR/652/2021) the applicant sought a mandatory order requiring the respondent to decide upon his entry clearance application. He did not enjoy a reasonable expectation that the Tribunal would order the respondent to make a favourable decision upon the application for the reason explained by the Court in Tesfay. By means of the consent order the applicant secured more than he had sought, with the recital detailing that "the applicant will be granted entry clearance and his passport returned with 7 days of the

sealing of the consent order". We consider the terms of the compromise to be detailed in exceptionally firm terms, namely that the executive act would be exercised in favour of the applicant, and his right to the benefit of the executive act was made absolutely clear. This constituted more than the usual compromise arising in public law proceedings. The respondent did not pursue her assertion before us that special circumstances arose justifying delay. It was accepted, without reservation, that there was a failure to comply with the consent order. The failure by the Executive to comply with the agreed time frame resulted in the applicant being required to initiate further judicial review proceedings. Such conduct takes this case out of the norm, and we find in the circumstances that the applicant should be awarded his costs in these proceedings on an indemnity basis.

58. On behalf of the respondent, Mr. Joseph advanced a discrete complaint that the applicant had failed when making an application for an order for costs to send or deliver with the written application to the Tribunal and to the respondent a schedule of costs sufficient to allow summary assessment of such costs or expenses by the Upper Tribunal: rule 10(5)(b) of the 2008 Rules. We are satisfied that our consideration of costs in this matter flows from the consent order filed by the parties, and so was not initiated by a written application for an order for costs. Rule 10(5)(b) has no application in such circumstances.

59. We invite the parties to submit a draft order that gives effect to the above.

Signed: D O'Callaghan
Upper Tribunal Judge O'Callaghan

Date: 4 February 2022