Neutral Citation Number: [2018] EWCA Civ 5

C2/2015/3947 & C2/2015/3948

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
McCloskey J and UT Judge Lindsley

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/01/2018

Before :

LORD JUSTICE PETER JACKSON
and
LORD JUSTICE SINGH

- -

Between :

(1) Ndubuisi Callistus Nwankwo	**Applicants**
(2) Charles Anyamene	
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Mr Arfan Khan (instructed by **Dylan Conrad Kreolle**) for the **First Applicant**
Mr Tiki Emezie (Solicitor-Advocate) (instructed by **Dylan Conrad Kreolle**) for the **Second Applicant**
Ms Sian Reeves (instructed by the Government Legal Department) for the **Respondent**

Hearing date: 7th December 2017

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Approved Judgment

The Court certifies that this judgment may be cited in other cases, notwithstanding that it is a decision on an application for permission to appeal, under para. 6.1 of the *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001

Lord Justice Singh :

Introduction

1. These two applications for permission to appeal arise from a decision of the Upper Tribunal (Immigration and Asylum Chamber) ("UT"), which gave guidance on how the UT should treat applications for permission to appeal to the Court of Appeal in cases of this kind. The present decisions under appeal only concern the question of costs; the substantive issues had been resolved by consent. The two cases were joined when the UT considered permission to appeal. The UT stated that in cases of this kind the second appeal test should be applied.

2. The applications for permission to appeal to this Court were considered on the papers by Sir Kenneth Parker (sitting as a judge of the Court of Appeal) on 23 February 2017. In an order sealed on 8 March 2017 he adjourned the applications to an oral hearing before a full court because an important issue of principle arose as to the test which should be applied by the UT when considering an application for permission to appeal to this Court in cases of this kind.

3. Before this Court it is common ground that the UT guidance was based on an error of law and that the first appeal test applies rather than the second appeal test. In view of the general importance of the point, I will later set out the reasons why that concession is rightly made by the Secretary of State. I will then consider the application for permission to appeal in each of the two cases before this Court. I will first outline the background to each application.

Nwankwo

4. The Applicant seeks to appeal against a decision of UTJ Rintoul, dated 15 June 2015, to make no order for costs in his claim for judicial review. The substantive issues in the claim were resolved by a consent order sealed on 18 December 2014, in which the Respondent agreed to re-take her decision to refuse to grant the Applicant leave to remain on Article 8 grounds.

5. The factual background can be summarised for present purposes as follows.

6. The Applicant made an application for leave to remain in the United Kingdom ("UK") as the spouse of a settled resident on 7 November 2013. On 14 January 2014 the Respondent refused that application.

7. The Applicant sent a Pre-Action Protocol letter challenging the lawfulness of that decision on 28 January 2014. Notably, this letter did not contain any details of the requested relief, although no doubt the Applicant was hoping to have the decision re-made and subsequently to be granted leave to remain.

8. The Respondent replied on 19 February 2014. She understood that the Applicant wanted her to re-consider the earlier refusal. The Respondent conceded that she had not considered section 55 of the Borders, Immigration and Citizenship Act 2009 ("the 2009 Act") and said that she would reconsider the decision.

9. The Applicant filed a claim for judicial review in the UT on 14 April 2014.

10. The Respondent offered to settle the claim on 13 May 2014 and on 17 November 2014 granted the Applicant 30 months leave to remain. On 18 December 2014 a consent order was sealed by which the claim was withdrawn. There was no agreement on costs and so that question had to be determined by the UT. On 15 June 2015 UT Judge Rintoul made no order as to costs, essentially on the ground that the claim for judicial review had been premature in the light of the stance taken by the Secretary of State in her response to the Pre-Action Protocol letter.

Anyamene

11. The Applicant seeks permission to appeal against the order made by UT Judge Hanson on 17 April 2015, when no order as to costs was made in his claim for judicial review.

12. The factual background can be summarised as follows.

13. The Applicant made an application for leave to remain on Article 8 grounds on 21 June 2012, which was refused on 7 March 2013. His solicitor sent a Pre-Action Protocol letter to the Respondent on 25 March 2013, requesting the following relief:

> "The Claimant's [sic] expects that his case would be reconsidered under Article 8 ECHR as an unmarried partner of a British Citizen present and settled, and who are in a genuine relationship in the UK, and there are insurmountable obstacles such as her health issues that affect family life and private life with his partner continuing outside the UK, Paragraph 276ADE of the immigration rules 2012, PARAGRAPH 295A (i) (a) (i)/(vi) and 295B (a) (b) and grant her leave to remain in the UK."

14. The Respondent replied on 9 April 2013 stating that she would not respond in detail because no letter of authority from the Applicant had been enclosed.

15. The Applicant lodged a claim for judicial review in the High Court on 25 April 2013 and requested the following remedies:

> "1. A quashing Order quashing the decision of the SSHD dated 7 March 2013.
>
> 2. A mandatory Order that the SSHD grant the claimant leave to remain on the basis that he meets the requirements of the Immigration Rules under DP 2/93 and DP 3/96 on married/unmarried couples.
>
> 3. A mandatory Order [sic] that the SSHD grant the claimant leave to remain on the basis that he meets the requirement of paragraph 276ADE of the Immigration Rules.

> 4. A prohibitory [sic] Order prohibiting the SSHD from carrying out any enforcement action pending the resolution of the claimant's Judicial Review and any remedies being considered after the date of the Judicial Review Claim.
>
> 5. A declaration that the removal of the claimant from the UK would be disproportionate and contrary to the Immigration Rules and or his Article 8 rights.
>
> 6. An Order that the SSHD pays the claimant's reasonable costs, if not agreed to be subject to detailed assessment."

16. On 7 October 2013, Silber J refused permission and found the claim to be totally without merit. The claim was then transferred to the UT. On 15 July 2014 UT Judge Latter granted permission following an oral hearing.

17. On 12 December 2014, the UT sealed a consent order in which the Respondent agreed to reconsider her decision and make a new decision within three months. The consent order left the issue of costs to be determined by the UT.

18. On 17 April 2015 UT Judge Hanson made no order as to costs, essentially because the Applicant had failed to achieve all of the remedies sought in the claim.

UT Permission Decision

19. At this point the two cases were linked by the UT (there was a third case before the UT but this Court is not concerned with that case). On 13 October 2015, McCloskey J (the then President of the Immigration and Asylum Chamber of the UT) and UT Judge Lindsley refused permission to appeal to this Court.

20. The UT noted that there is a dichotomy in its rules between statutory appeals and judicial review proceedings (para. 15). In addition, the rules (which have subsequently been amended) make no provision for appeals to the Court of Appeal (also para. 15).

21. Nevertheless, the UT said, it is possible to appeal a costs order to the Court of Appeal: see *R (TH (Iran)) v East Sussex County Court* [2013] EWCA Civ 1027. It was of the view that the determination of such applications for permission to appeal is governed by section 13(6) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), which imposes the second appeal test. The UT said that it will be rare that a proposed costs appeal will satisfy those criteria because costs decisions involve a substantial measure of judicial discretion (para. 16).

22. Finally, the Tribunal provided the following guidance:

> "By way of general guidance, we consider that provided that a costs decision of the Upper Tribunal is in harmony with

> established principles and has a tenable basis for the course chosen by the Judge in the exercise of his discretion, it will be unassailable. Judges determining applications for permission to appeal against costs decisions should give effect to this general rule." (para. 18)

23. Paras. 19-22 of the UT decision concern the use of Upper Tribunal forms. Paras. 23-27 concern time limits with the UT. Para. 32 sets out the substantive requirements for an application for permission to appeal in the Upper Tribunal, which are uncontroversial. Paras. 33-40 contain guidance for UT judges on how to treat deficient permission to appeal applications. Paras. 41-42 concern UT fees.

The order made by Sir Kenneth Parker

24. Sir Kenneth Parker adjourned these permission applications to an oral hearing before a full court because, although he thought there was no prospect of successfully appealing the cost orders:

> "It does appear, however, that the guidance is incorrect in one significant respect. Contrary to what the Upper Tribunal states at paragraph 16 of its decision, section 13(6) TCE Act 2007 is expressly limited in scope. The power of the Lord Chancellor is restricted to applications falling within section 13(7). An application falls within section 13(7) only if the application is for permission to appeal from any decision of the Upper Tribunal on an appeal under section 11. That section in turn is restricted to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal. That is a reference to the ordinary Tribunal appellate jurisdiction; it has no application to judicial review proceedings in the Upper Tribunal, where the First Tier Tribunal is not engaged and the Upper Tribunal is exercising an original jurisdiction. It is also notable that the High Court, and the Court of Appeal itself on a renewed application, does not apply an elevated test for granting permission to appeal to the Court of Appeal a costs (or any other) order made in judicial review proceedings: the normal test for civil litigation is applied. The guidance given by the Upper Tribunal would appear also therefore to create an unjustified anomaly. The full Court might wish to have the opportunity to consider the guidance given by the Upper Tribunal, in that other judges in the Upper Tribunal may be following the guidance, and following it not only in respect of costs orders but quite generally, and may be wrong to do so."

Respondent's Submissions

25. In her Skeleton Argument Ms Sian Reeves, who appeared on behalf of the Respondent, limited her submissions to the issue of principle, as to whether the UT had applied the correct test for an appeal, namely the second appeal test. She informed this Court that this issue was not fully argued before the UT (para. 47 of her Skeleton Argument).

26. On the issue of principle Ms Reeves accepts that an appeal against a costs order in a claim for judicial review considered by the UT will not fall within section 13(7) of the 2007 Act and therefore that the second appeal test does not apply.

27. At our invitation Ms Reeves also made brief submissions at the oral hearing before this Court in response to the application for permission made by the Second Applicant. We did not need to call on her in response to the application for permission made by the First Applicant.

The Correct Test for Permission to Appeal to the Court of Appeal

28. It is common ground between the parties that the UT fell into error in deciding that the second appeal test applies in the present context. Although that is common ground, it is important that this Court should explain why that concession is rightly made by the Secretary of State.

29. Section 13(6) of the 2007 Act applies to an appeal under section 11 from a decision of the First-tier Tribunal ("FTT"). It confers a power on the Lord Chancellor to make provision by order for permission not to be granted for appeals from the UT to the Court of Appeal unless the second appeal test is satisfied. The relevant order that was made by the Lord Chancellor is the Appeals from the Upper Tribunal to the Court of Appeal Order 2008 (SI 2008 No. 234), which came into force on 3 November 2008.

30. The second appeal test is restricted to applications falling within section 13(7), where the application is for permission to appeal from any decision of the UT when it has decided an appeal from the FTT under section 11. Unsurprisingly it is because there has already been one appeal to the UT that the second appeal test applies. In the present context, by way of contrast, the UT did not exercise its appellate jurisdiction at all. It was exercising an original jurisdiction, to consider a claim for judicial review.

31. The UT's judicial review jurisdiction is governed by different provisions in the 2007 Act, in particular sections 15-21. In the past such claims had been considered only by the High Court (in recent times by the Administrative Court, which is part of the Queen's Bench Division). However, in 2012, provision was made for many immigration cases brought by way of judicial review to be commenced in the UT or, where they were commenced in the Administrative Court, for them to be transferred to the UT.

32. The jurisdiction of the UT to make a costs order has a number of sources. The primary source is section 29 of the 2007 Act. Subsection (1) provides, so far as material, that the costs of and incidental to all proceedings in the UT shall be in the discretion of the Tribunal in which the proceedings take place.

33. Para. 12(1) of Sch. 5 to the 2007 Act provides that rules may make provision for regulating matters relating to the costs of proceedings before the UT. Rule 10 of the 2008 Rules regulates orders for costs made by the UT. Rule 10(3)(a) sets out the discretionary power of the UT to make a costs order in "judicial review proceedings". That phrase is defined by Rule 1(3) to mean proceedings within the jurisdiction of the UT pursuant to section 15 or 21 of the 2007 Act (whether or not they started in the UT or were transferred to the UT).

34. I turn to consider the statutory provisions governing appeals from the UT in more detail.

35. Section 13(1) of the 2007 Act confers a right to appeal to the relevant appellate court "on any point of law arising from a decision made by the Upper Tribunal other than an excluded decision." The relevant appellate court for present purposes is the Court of Appeal of England and Wales. A costs decision is not "an excluded decision" within the meaning of subsection (8). Subsection (2) provides, so far as material, that any party to a case has a right of appeal.

36. However, permission to appeal is required under subsection (3). Subsection (4) provides that permission may be granted by the UT or by the Court of Appeal on an application by the party. Subsection (5) provides that an application may be made to the relevant appellate court only if permission has been refused by the UT.

37. Subsection (7) provides that an application falls within that subsection if the application is for permission to appeal from any decision of the UT "on an appeal under section 11." Section 11 provides for a right of appeal to the UT on any point of law arising from a decision made by the FTT other than an excluded decision: see subsections (1) and (2).

38. Part 7 of the Tribunal Procedure (Upper Tribunal) Rules 2008 contains rules in relation to appeals from the UT. Rule 41 defines an "appeal" to mean the exercise of a right of appeal under section 13 of the 2007 Act. Rule 44 contains a series of rules in relation to an application for permission to appeal. However, as the Secretary of State observes, there is nowhere to be found any test laid down which the UT is required to apply in considering an application for permission to appeal to the Court of Appeal.

39. The position is also further complicated by the fact that, with effect from 3 October 2016, the whole of Part 52 of the Civil Procedure Rules ("CPR") was amended by the Civil Procedure (Amendment No. 3) Rules 2016 (SI 2017 No. 788). However, para. 16(1) of the amending rules provides that, where an appellant's notice was issued before 3 October 2016, the provisions of Part 52 in force immediately before that date continue to apply. I will refer to these as the "old" provisions of Part 52. They are the relevant provisions so far as the present two cases are concerned, since both were issued in this Court before 3 October 2016.

40. The basic criteria for permission in a first appeal were to be found in the old rules at Rule 52.3(6). This provided:

> "Permission to appeal may be given only where –
>
> (a) the Court considers that the appeal would have a real prospect of success; or

> (b) there is some other compelling reason why the appeal should be heard."

41. The old rules contained the second appeal test in Rule 52.13. The second appeal test requires that an appeal would raise "an important point of principle or practice" or that there is some other compelling reason for the Court of Appeal to hear it.

42. As I have mentioned, the Secretary of State accepts before us that the costs orders in the present two cases were made in judicial review proceedings and therefore did not fall within the provisions of section 13(7) of the 2007 Act. Accordingly the second appeal test was of no application. Although Ms Reeves fairly and correctly makes that concession, she makes two further points.

43. First, she submits that it is difficult to locate anywhere the test which the UT should apply when considering an application for permission to appeal to this Court from one of its decisions in judicial review proceedings. I do not find that at all difficult. It would be absurd if the test for permission to appeal to this Court which is to be found in Part 52 of the CPR said one thing when an application comes to this Court and the UT applied some other test. In my view it makes obvious sense that the same test must be applied when the UT initially considers an application for permission to appeal to this Court. That is the test to be found in Part 52 of the CPR.

44. Secondly, Ms Reeves submits that a "robust attitude to the permission threshold should be applied" and that there should be "an elevated or robust approach to the permission threshold in the context of costs orders made in judicial review proceedings". She submits that such an approach is justified because, first, the principles of costs in judicial review cases are now settled; and, secondly, UT judges have wide discretion when making cost decisions.

45. I do not accept those submissions. In my view the same test for permission applies as is always the case. That will be true of costs orders in judicial review proceedings which come directly to this Court from the High Court. It will also be true in principle of costs orders in other kinds of proceedings. It is inherent in the nature of a costs decision that it will usually be a discretionary one. Accordingly it may well be difficult in practice for an applicant to succeed in persuading a Tribunal or Court that there is any real prospect of success in an appeal. However, in my view, that does not call for any different test to be applied; it is all a matter of applying the same test in the context of costs orders.

46. Furthermore I would decline the invitation extended by Ms Reeves to this Court to offer any further guidance to lower Tribunals as to the application of that test in the context of costs orders. In my view sufficient guidance has already been given by this Court in the well-known case of *R (M) v Croydon LBC* [2012] EWCA Civ 595; [2012] 1 WLR 2607, in which this Court considered how applications for costs should be dealt with in judicial review proceedings, particularly where a case has been settled before being resolved at a substantive hearing.

47. In *M*, at para. 60, Lord Neuberger of Abbotsbury MR said:

> "… There is, in my view, a sharp difference between (i) a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement, and (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement, and (iii) a case where there has been some compromise which does not actually reflect the claimant's claims. While in every case the allocation of costs will depend on the specific facts, there are some points which can be made about these different types of case."

48. At para. 61 Lord Neuberger considered the scenario in case (i) and said:

> "It is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary. Whether pursuant to judgment following a contested hearing, or by virtue of a settlement, the claimant can, at least absent special circumstances, say that he has been vindicated, and as the successful party that he should recover his costs. In the latter case the defendants can no doubt say that they were realistic in settling and should not be penalised in costs, but the answer to that point is that the defendants should on that basis have settled before the proceedings were issued: that is one of the main points of the pre-action protocols. …"

49. At para. 62 Lord Neuberger turned to category (ii) and said:

> "In case (ii), when deciding how to allocate liability for costs after a trial, the Court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim. Given that there will have been a hearing, the Court will be in a reasonably good position to make findings on such questions. However, where there has been a settlement, the Court will, at least normally, be in a significantly worse position to make findings on such issues than where the case has been fought out. In many such cases the Court will be able to form a view as to the appropriate costs order based on such issues; in other cases it will be much more difficult. I would accept the argument that, where the parties have settled the claimant's substantive claims on the basis that he succeeds in part, but only in part, there is often much to be said for concluding that there is no order for costs. … However, where there is not a clear winner, so much would depend on the particular facts. In some such cases it may help to consider who would have won if the matter had proceeded to trial as, if it is tolerably clear, it

> may for instance support or undermine the contention that one of the two claims were stronger than the other. …" (Emphasis added)

50. It is unnecessary for present purposes to consider category (iii), which was addressed by Lord Neuberger at paras. 63-64 in *M*, since no-one suggests that either of the present cases fell within category (iii).

51. Against that background I now turn to consider the applications for permission to appeal in each of the present cases before this Court. In particular I consider whether an appeal in either of these cases would have any real prospect of success.

The Application for Permission to Appeal in Nwankwo

52. The costs order which the Applicant seeks to appeal was made by UT Judge Rintoul on 15 June 2015 (sealed on 16 June). So far as material the reasons for making no order as to costs in this case were set out at para. 2:

> "It is accepted that this is a case which falls into the first category identified in *M v Croydon* [2012] EWCA Civ 595 in that the Applicant did obtain the remedy sought, but equally the pre-action protocol letter was sent to an incorrect address. Part of the claim was conceded in the response thereto of 19 February 2014. I consider that, given the failure to correspond with the Respondent thereafter, and given that there would have been a right to challenge a continuing failure to review in the light of the response to the PAP, the commencement of proceedings was premature and not necessary; this was not a straightforward case given the previous findings of the First-Tier Tribunal. In all the circumstances of this case, I am satisfied that the appropriate order is that there be no order for costs."

53. The application for permission to appeal to this Court was considered by Sir Kenneth Parker on the papers. His view was that an appeal against the costs order would have no realistic prospect of success. At para. l of his reasons he said:

> "… The Claimant for judicial review sent the pre-action protocol letter to the wrong address and the response was thereby delayed. In the response of 19 February 2014 the Secretary of State expressly conceded that the challenge to the decision was flawed by reason of the fact that she had failed adequately to consider section 55 of the 2009 Act. The Claimant did not wait for a follow-up communication on that concession, but prematurely and unnecessarily issued

> proceedings for judicial review on 14 April 2014. If the Claimant was concerned about time limits, that matter could have been raised with the Secretary of State before the issue of proceedings. The costs order made by the Upper Tribunal was therefore appropriate in this case."

54. On behalf of the First Applicant Mr Arfan Khan, who did not appear below, submits that the UT Judge erred in making no order as to costs in this case since, as he acknowledged, it fell into category (i) as set out in *M* and so the normal position would be that costs should be awarded to a claimant.

55. In my judgement, there is no arguable basis for an appeal against the costs order made by the UT Judge in this case. He directed himself correctly as a matter of law and made a finding, in the Applicant's favour, that the case fell into the first category identified in *M v Croydon*. However, that was not the end of the matter. In the particular circumstances of this case he found that there was reason for making no order as to costs. In particular the commencement of proceedings was premature and unnecessary in the light of the concession made by the Secretary of State in her letter of 19 February 2014. In my judgement that decision was entirely understandable and indeed is the one that I would have made myself. What matters for present purposes is that there is no real prospect of success in any appeal to this Court against that costs order. The UT Judge exercised his discretion in a manner which was open to him in the circumstances of this case. It was not suggested by Mr Khan that there was any other compelling reason why an appeal should be heard by this Court nor can I think of any such compelling reason.

56. Accordingly I would refuse the application for permission to appeal in this case.

The Application for Permission to Appeal in the Case of Anyamene

57. The case of Anyamene was considered by UT Judge Hanson to fall within category (ii), in other words he was of the view that the Claimant had been successful but only in part. As Lord Neuberger observed at para. 62 of *M*, there is often much to be said in such cases for concluding that there should be no order for costs, although the issue is always fact-sensitive.

58. Mr Emezie, who appeared on behalf of the Second Applicant, relies in particular on the decision of this Court in *R (Tesfay & Others) v Secretary of State for the Home Department* [2016] EWCA Civ 415; [2016] 1 WLR 4863. In that case the main judgment was given by Lloyd Jones LJ (as he then was). At paras. 67-68 he said:

> "67. In public law litigation securing reconsideration of a decision which is challenged is usually considered a success for costs purposes. The fact that following reconsideration a decision may be taken which is against the interests of the claimant is not a reason for refusing costs on the judicial review. As Mr Knafler put it, in a striking figure of speech, the

> claimant faced with a new decision against him may thereafter 'stick or twist'. The claimant may accept that he cannot challenge the new decision and simply seek his costs of the judicial review. Alternatively, he may challenge the new decision. The fact that he follows the latter course should not normally affect the costs of securing the reconsideration.
>
> 68. In my view, the withdrawal of the human rights certifications which occurred in the present cases should equally be regarded as a success for costs purposes. Considering the matter in the round, the claimants were vindicated in the proceedings in the following respects: their position on legal issues was accepted by the Supreme Court in the *EM (Eritrea)* case, they obtained repeated stays on removal and the certifications of their human rights claims were withdrawn. Applying the approach laid down by this court in *R (M) v Croydon London Borough Council* [2012] 1 WLR 2607, they should be awarded their costs in the absence of a good reason to the contrary."

59. Lloyd Jones LJ noted that there are considerations which can lead to costs not following success, e.g. failure to comply with the Pre-Action Protocol (para. 70). Further, he suggested that, if the Secretary of State makes further decisions, this will strongly favour an award of costs to the Claimant, whether she seeks to include them within the proceedings or not (para. 83). However, withdrawal of a decision is not a decisive consideration. The court refused costs for the claimants seeking to avoid removal to Malta because the certification decisions were withdrawn because of a new point not raised below (paras. 112-114).

60. On behalf of the Second Applicant Mr Emezie has with great eloquence submitted that very often in judicial review claims, the most that can and will be obtained, even if the claim succeeds, is a reconsideration. He submits that where a case is settled on the basis that there will be reconsideration, in substance the Claimant has succeeded just as he would be regarded as having done so if the case had proceeded to a full hearing, as in *Tesfay*.

61. Mr Emezie criticises the reasons which were given by UT Judge Hanson for making no order as to costs in the present case. UT Judge Hanson observed that initially permission to bring the claim for judicial review had been refused on the papers by Silber J when the case was still in the High Court. Permission was granted after an oral hearing before UT Judge Latter on 15 July 2014. UT Judge Latter had found there to be an arguable case. However, UT Judge Hanson was of the view that:

> "It has not been found the impugned decision is unlawful."

Pausing there, Mr Emezie criticises that sentence on the basis that Judge Hanson was posing for himself a test in law which is wrong. In my view, when read in its context, that sentence was not a direction of law. It was simply one of the factors which the

Judge was taking into account in the exercise of his discretion given that this was a category (ii) case.

62. The Judge continued:

> "… The Respondent has adopted a pragmatic view leading to settlement. The Respondent contends in a letter dated 7 January 2015 that the Applicant failed to comply with the PAP and relied upon new material to achieve the grant of permission which was not before the decision maker."

63. Further, at para. 4 of his reasons, UT Judge Hanson said that the Applicant had "substantially failed to achieve the remedies sought in the claim."

64. As to that last point, he was undoubtedly right. The details of the remedies sought, which were set out (as they had to be) in section 6 of the claim form included, as I have mentioned at para. 15 above, a number of remedies, including a mandatory order that the Secretary of State should grant the Claimant leave to remain, which the Claimant clearly did not succeed in obtaining. In those circumstances I do not accept Mr Emezie's submission that the Applicant had substantially succeeded and therefore this was in truth a category (i) case. In some cases, where the only remedy which the Claimant seeks is reconsideration and where that is conceded by the Secretary of State, no doubt it can be said that the Claimant has been wholly successful. However, the Judge was entitled to take the view that in the circumstances of the present case that was not so. In my view, the most that can be said is that the Applicant was successful in part. This was therefore rightly regarded by UT Judge Hanson as a category (ii) case.

65. Although it is not entirely clear on the material before this Court why UT Judge Latter was persuaded to grant permission in this case despite the finding by Silber J previously that the case was totally without merit, it would appear that there was new information which persuaded him to do so.

66. First, it would appear from the form of consent that the Applicant had agreed to provide the Secretary of State with "up to date medical evidence of his partner" within 14 days of the date of that order being sealed: see the second recital which appears in the form of consent dated 27 November 2014.

67. Secondly, it would appear from the letter from the Treasury Solicitor dated 7 January 2015 that:

> "… No medical report was included with the Applicant's original application even though it was erroneously stated that one was included."

Further, the letter continued that:

> "Counsel for the Applicant at the oral permission hearing advanced for the first time new arguments which were different

> from the original basis of the claim. As the factual situation had moved on, it is considered that the application should be considered afresh."

68. The suggestion that there was new information relating to the Applicant's partner which had not been before the original decision-maker receives some support from the fact that there was a manuscript letter dated March 2013 (with no other date being specified) which mentions, on page 6, that on 15 March 2013: "Our world was torn apart [when] we got the bad news from the Home Office that Charles had been refused his stay with no right of appeal …"

69. After the hearing in the present case had concluded before us we were helpfully supplied with the order made by UT Judge Latter on 15 July 2014. In that order the Judge set out his reasons for granting permission to bring the claim for judicial review in the following way:

> "I am satisfied that it is arguable that the Respondent may have failed to take all relevant matters into account when considering whether there were insurmountable obstacles to the Applicant and his partner living in Nigeria or to consider whether there were exceptional or compelling circumstances requiring further consideration under Article 8."

70. Although that sheds some light on why UT Judge Latter considered the claim for judicial review to be at least arguable, I am not convinced that it takes matters much further so far as the costs order is concerned. So much depends on what the position was when the consent order was agreed between the parties.

71. There is a distinct lack of clarity in the material before this Court as to what exactly happened. Although a helpful chronology has been filed on behalf of the Respondent relating to his immigration history and the factual background, a number of important documents have not been provided by the parties. What the Court does have is the exchange of correspondence between the parties, although not in full, between the date when UT Judge Latter granted permission to bring the claim for judicial review on 15 July 2014 and the date when UT Judge Hanson made no orders to costs on 17 April 2015. However important documents are missing.

72. In particular there is nowhere in the appeal bundle the medical report sent on behalf of the Applicant concerning his partner. The Respondent's Acknowledgment of Service stated that the Applicant had provided no evidence of his partner's medical conditions: see para. 48. The Applicant's costs submissions, which were placed before UT Judge Hanson, as were the Respondent's costs submissions, did not directly rebut what the Respondent had said about this. Instead they made what I regard as oblique references to the overall "Article 8 factual matrix" and the "preponderance" of the evidence before the Respondent at the time of her initial decision. In my view, this is a very unsatisfactory state of affairs.

73. However, what can be said is that it must be a matter for the Applicant to place before this Court the relevant factual material that was before the court below in order to be able to launch an appeal against a discretionary decision such as one relating to costs. Here, since there is a factual dispute it is impossible on the state of the documentary material placed before this Court for us to be able to say whether the Applicant is correct or whether the Respondent is correct when she asserts that the decision maker did not have the relevant medical evidence at the time the decision was made on 7 March 2014. The burden of proof lies on the person who asserts a fact to be true, in this context the Applicant. Even allowing that this was a case in which he might have succeeded in obtaining an order for at least some of his costs to be paid, he has simply not demonstrated to this Court that he made the necessary case to the UT that should have led it to make that order.

74. Against that background it cannot be said, in my judgement, that UT Judge Hanson erred in his approach or that the exercise of discretion which he performed as to costs was unavailable to him. On the material before him, he was entitled reasonably to exercise his discretion in the way that he did.

75. Mr Emezie did not suggest that there was any other compelling reason why this Court should hear an appeal nor can I think of any such compelling reason.

76. For those reasons I would refuse this application for permission to appeal also.

Conclusion

77. For the reasons I have set out, the test for an appeal to the Court of Appeal from the UT in cases of this kind, which are claims for judicial review heard by the UT exercising its original jurisdiction rather than appeals from the FTT, is the first appeal test and not the second appeal test. The UT erred in applying the second appeal test.

78. However, applying the correct test, I have come to the conclusion that there is no real prospect of success in either appeal nor is there some other compelling reason for permitting an appeal to proceed.

79. Accordingly, in my view, both of these applications for permission to appeal should be refused.

Costs

80. After this judgment was circulated in draft form in the usual way the parties were unable to agree an order as to costs and have made written submissions in support of their respective positions. The Applicants seek their costs in this Court, limited to the point of principle which I have identified in para. 2 above. The Respondent submits that she should have her costs, both of the written submissions dated 16 November 2017 and attendance at the hearing on 7 December 2017.

81. It seems to me that it would not be appropriate for the Applicants to recover their costs, since their applications for permission have been refused. Although it could be said

that one of the arguments made on their behalf has succeeded (on the point of principle), I would make the following observations. First, it is clear that Sir Kenneth Parker would have refused permission to appeal on the papers and only referred the applications to a full Court because of the importance of the point of principle for other cases, even though it would not have made any difference in the present cases. Secondly, that is exactly the view to which I also have come, since (applying the first appeal test) I have concluded that permission to appeal should be refused. Thirdly, as the Respondent has pointed out in her written submissions on costs dated 10 January 2018, the point of principle was not raised in the Applicants' grounds of appeal. No application has ever been made to amend the grounds of appeal. The point was raised for the first time in the Applicants' skeleton argument dated 12 February 2016 but that document was not served on the Respondent until 9 November 2017. Furthermore, the Respondent conceded the point of principle in her skeleton argument dated 16 November 2017.

82. I turn to the application for costs made on behalf of the Respondent. It is common ground between the parties that the starting point is to be found in para. 20(2) of Practice Direction 52C in the CPR, which states:

> "If the court directs the Respondent to file submissions or attend a hearing, it will normally award costs to the Respondent if permission is refused."

83. In the present case the Respondent was invited both to file submissions and to attend the hearing by direction of Beatson LJ: see the letter from the Civil Appeals Office dated 21 March 2017.

84. However, as I have said at paras. 43-45 above, although the point of principle was conceded in the skeleton argument filed on behalf of the Respondent, Ms Reeves made submissions as to "an elevated or robust approach to the permission threshold in the context of costs orders made in judicial review proceedings" which I have rejected. I also bear in mind that the reason why the present applications had to be considered by a full Court was because the UT made an error of law in relation to the point of principle. That was not something which can be attributed to the conduct of the Applicants. Although it has been helpful to have the written and oral submissions made by Ms Reeves, in all the circumstances of this case I have come to the conclusion that, in the exercise of the Court's discretion, it would be appropriate to make no order as to costs.

Lord Justice Peter Jackson :

85. I agree.