Neutral Citation Number: [2020] EWCA Civ 919

Case No: C4/2018/1458 & 2049

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
HHJ PEARCE
CO/4353/2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2020

Before:

MACUR LJ
BEAN LJ
and
HADDON-CAVE LJ

- -

Between:

JH (PALESTINIAN TERRITORIES)	**Appellant**
- and -	
(1) UPPER TRIBUNAL OF THE IMMIGRATION AND ASYLUM CHAMBER **(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT**	**Respondents**

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Mr Martin Westgate QC and Mr Paul Draycott (instructed by **Paragon Law**) for the **Appellant**
Ms Lisa Giovannetti QC and Mr Paul Joesph (instructed by **by the GLD for the Secretary of State for the Home Department)** for the **Respondents**

Hearing dates: 24 June 2020 via Skype for Business

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals

Judiciary website. The date and time for hand-down is deemed to be on Friday 17 July 2020 at 10.30 a.m.

Macur LJ:

Introduction.

1. The Grounds of Appeal in this case were settled in August 2018, and therefore prior to this court's decision in *R (Faqiri) v Upper Tribunal (Immigration and Asylum Chamber)* [2019] EWCA Civ 151, in which it was determined that an order for costs could be made in favour of a successful claimant in CPR r 54.7A proceedings against the Secretary of State for the Home Department ("SSHD") even though he was not a Defendant but an "interested" party who had not actively participated in the proceedings. The issues in the instant appeal appeared to be mostly on all fours. Consequently, it was initially difficult to see why the appeal was not compromised; indeed, the Respondent's Notice filed in September 2019, suggested that an order for costs be made in the same terms as the order endorsed by the Court in *Faqiri.* However, the Appellant, by Mr Westgate QC and Mr Draycott, dismisses the proffered solution as a worthless outcome in this particular case, (now long since resolved as indicated below), and likely to be made in error in similar cases in the future, by virtue of a jurisdictional elephant trap, which issue was not fully argued before the Court in *Faqiri* he says. The SSHD by Miss Giovannetti QC and Mr Joseph, disputes that there is any jurisdictional impediment to the type of contingent costs order made in *Faqiri*, which effectively provided for 'costs in the appeal.'

Background.

2. The Appellant ("A") is a Palestinian national, whose claim for asylum and humanitarian protection ("HP") lodged in December 2010 was rejected by the SSHD on 1 September 2015. He appealed to the First-tier Tribunal ("FTT") which, on 3 May 2016, allowed his HP claim related to the humanitarian situation in the Gaza Strip but rejected his asylum claim based on his alleged inability to return there. Both parties applied for permission to appeal ("PTA"): A challenging the rejection of his asylum claim; the SSHD challenging the finding of A's HP claim.

3. On 26 May 2016, the FTT granted both applications for PTA but limited the scope of the appeals. On 24 June 2016, A applied to the Upper Tribunal ("UT") for permission to rely upon amended and extended grounds of appeal. On 26 July 2016, the application was refused by UT Judge Gleeson who considered that "*the proposed amended grounds … are neither of substantial assistance to the Tribunal nor in line with the over-riding objective*".

4. A applied for permission to issue proceedings for judicial review ("JR") against this refusal. The SSHD did not lodge an acknowledgment of service in respect of the claim, but instead wrote to the Administrative Court ("Admin Crt") on 13 September 2016 in, what has become, standard terms:

`I calculate in this case that the Secretary of State has until 23 September 2016 to lodge her acknowledgment of service in this case. However, in this case my instructions are not to lodge an Acknowledgment of Service and to allow the Court to consider the matter without one. This is because my client considers that the law in this area is settled by the case of Cart -v- Upper Tribunal [20111 UKSC 28. I understand that if the Court takes the view that it would be assisted by a detailed response from the Secretary of State it will contact GLD requesting that the Secretary

of State provide an acknowledgment of Service before considering the question of permission and I therefore reserve the right to lodge such an acknowledgment at a future date should the need arise'.

5. On 2 February 2017, Gilbart J refused permission, stating that it was "entirely within the UTJ's discretion in terms of her case management powers to decline to permit the amendment." A appealed. Sales LJ, as he then was, granted permission to appeal against the Admin Crt's refusal to grant permission to issue JR proceedings on 28 December 2017, subsequently amended on 23 March 2018 to add the Upper Tribunal (Immigration and Asylum Chamber) & anr as Respondent for SSHD. Sales LJ identified an important point of principle, namely that a lesser standard of proof should have been applied in A's asylum claim, and may consequently lead to a different outcome. The grant required that the parties should promptly invite the Admin Crt to consider assigning the claim for JR to UT with a view to the claim being heard together with the appeal for which permission had already been granted, on a "rolled up basis" with the appeal to follow in the event that the UT decided that the previous refusal of the UT for PTA on this part of the case should be quashed.

6. Since no request was made by the UT or SSHD for a hearing, nor any request made for the JR to be assigned to the UT in accordance with the observations of Sales LJ, the decision to refuse permission to amend the grounds was quashed by HHJ Pearce pursuant to CPR 54.7A(9) on 20 April 2018. The order was silent as to costs.

7. On 10 May 2018, A applied to vary HHJ Pearce's order to award him his costs of the JR claim and detailed assessment of his legal aid costs. The SSHD filed written submissions in response on 21 June 2018 resisting an order for costs against him but without objection to an order that there should be a detailed assessment of A's legal aid costs.

8. On 27 July 2018 Moulder J. ordered detailed assessment of A's legally aided costs, but made no other order as to costs, reasoning that: (i) SSHD was an interested party, not the Defendant. He had not taken any step in the litigation and was not liable for A's costs, citing *R (on the application of Gudanaviciene) v Immigration and Asylum FTT* [2017] EWCA Civ 352; (ii) the UT had made no appearance before the Admin Crt and it was not suggested that there was any improper behaviour on its part. This is the order, made before the decision in *Faqiri*, which is the subject of this appeal.

9. On 10 July 2019, the single judge, Hickinbottom LJ, who had given the lead judgement in *Faqiri*, gave A leave to appeal, it being "arguable that the approach of the Admin Crt in respect of the costs order was wrong." On 27 November 2019, he granted an extension of time to the SSHD to file a Respondent's Notice and skeleton argument seeking an order that "the costs of the claim in the Administrative Court be treated as costs in the appeal before the Upper Tribunal" and directed the appeal and cross appeal to be heard together.

10. The appeal was listed for hearing on 5 February 2020. In a "second supplemental" skeleton argument dated 3 February, A raised the 'jurisdictional issue' for the first time. On 4 February, the Court adjourned the hearing listed for the following day to enable SSHD to "research and argue" the same, reserving the costs thrown away.

11. In the meantime, and not without significance in terms of the order being sought by each party in this case, on the remittal of A's case to the UT, and following 2 directions/case management hearings, the appeal was resolved by SSHD on 25 September, and then A on 8 October 2018, withdrawing their respective appeals against the FTT determination. The order confirming A's leave to remain was recorded on 31 October 2018.

The Appeal

Legislative Framework

12. The routes of appeal in these cases are well established. Section 11 of the Tribunals Courts and Enforcement Act 2007 ("TCEA") provides a right of appeal to the UT on a point of law arising from a decision of the FTT, but only with the permission of the FTT or the UT. Section 13 (1) provides a further right of appeal from the UT to the Court of Appeal on a point of law, save for an 'excluded decision' which includes a decision of the UT refusing PTA from the FTT to the UT (s 13(8) (c)) which is instead subject to JR under a modified procedure in CPR Part 54.7(A), a "Cart JR", following *R (Cart & ors) v the Upper Tribunal* [2011] UKSC 28.

13. Where PTA for JR is granted, then by CPR 54.7A(9)(a) if the UT or any interested party wishes there to be a hearing of the substantive application, it must make its request for such a hearing no later than 14 days after service of the order granting permission; and (b) if no request for a hearing is made within that period, the court will make a final order quashing the refusal of PTA without a further hearing. If no further hearing occurs the substantive appeal will be remitted to the UT.

14. The costs in the Admin Crt are governed by s.51(1) of the Senior Courts Act 1981 ("SCA"), viz:

> "Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in –
>
> (a) the civil division of the Court of Appeal
>
> (b) the High Court;
>
> (c) any county court
>
> … shall be in the discretion of the court".

15. By s.51(2) rules of the court '*may make provision for regulating matters relating to the costs of those proceedings*'.

CPR 44 provides the "General Rules about Costs". By CPR 44.2:

> "(2) If the court decides to make an order about costs –
>
> the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> 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; and

.....

(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;"

…

16. Costs in the UT are subject to Section 29 of the TCEA:

"(1) The costs of and incidental to–

all proceedings in the First-tier Tribunal, and

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".

17. Rule 10(3) of the Tribunal Procedure (Upper Tribunal Rules 2008) ('TP(UR)R') directs that the UT may not make an order in respect of costs or expenses except

"(a) in judicial review proceedings

….

> (d) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending, or conducting the proceedings".

By Rule 10 (6) :

> "An application for an order for costs or expenses may be made at any time during the proceedings but may not be made later than 1 month after the date on which the Upper Tribunal sends –
>
> a decision notice recording the decision which finally disposes of all issues in the proceedings; or
>
> notice under rule 17(5) that a withdrawal which ends the proceedings has taken effect"

18. JR proceedings are defined by TR(UT) R 1(3) as including proceedings within the jurisdiction of the UT pursuant to section 15 of TCEA, whether such proceedings are started in, or transferred to, the UT. Section 19 of TCEA (inserting 31A into the SCA) provides for the transfer of judicial review applications from the High Court to UT. By s 19 (3) of the TCEA the application for costs made in this and similar cases can be so transferred if "it appears to the High Court to be just and convenient to do so."

Grounds of Appeal and Respondent's Notice

19. A's Grounds of Appeal claim that Moulder J erred in law in failing to order SSHD to pay the costs of his successful (Cart) JR proceedings because:

> "(a) A had achieved the relief he was seeking in the claim and should have been awarded the entirety of his costs, particularly to ensure that claimants are not deterred in cases involving fundamental rights by the uncertainty as to whether they will be able to recover their costs even if they are successful and the public interest in there being an adequate number of competent and specialist practitioners willing to undertake the work on a publicly funded basis, which number may decrease if there was a refusal to order costs in favour of the successful party with consequent reduction of access to justice; and,
>
> (b) she relied upon ***R(Gudanaviciene) -v- First Tier Tribunal (Immigration and Asylum Chamber) (2017) 1 WLR 4095 CA*** as an alleged authority which precluded an order for costs against the SSHD because he did not take any step in the litigation."

20. SSHD appeals the order because:

> "(a) the decision in *Faqiri* was not available to the lower court at the time it made its order for costs; and,
>
> (b) the order contended for by R, namely, that the costs of the claim in the Admin Crt be treated as the costs in the appeal before the UT, would constitute a just resolution of the costs issues between the parties."

In summary, SSHD concedes the second ground of appeal and that Moulder J's order as to costs should not stand but A and SSHD disagree as to the terms of the order which should be substituted in its place. However, the arguments have not been confined to the facts of this case, as indicated in paragraph 1 above, and join issue in general with the capacity of the Admin Crt to remit the issue of the costs of the CPR 54.7A proceedings to the UT without also transferring the JR proceedings and the principle of doing so.

Submissions and analysis

21. Mr Westgate challenges the legitimacy of the order made by the Admin Crt and confirmed in Faqiri since, he argues:

i) the general rule is that costs in one set of proceedings cannot be recovered in another set of proceedings;

ii) the CPR 54.7A proceedings and UT proceedings are distinct and a separate assessment of costs is necessary;

iii) the fact that the CPR 54.7A proceedings are a precondition for the UT appeal proceedings is not sufficient to make the costs incurred in relation to them "of and incidental to" the costs in the UT proceedings;

iv) alternatively, if there is the ability to remit the issue of CPR 54.7A costs, or they are properly to be regarded as "of and incidental to" the costs of the appeal before the UT, the two sets of proceedings are governed by different costs regimes which have a different focus. TP(UT)R r10.3(d) means an order for costs will only exceptionally be made. In these circumstances, the successful claimant is not likely to be awarded costs of the appeal and therefore will not receive the costs of the JR; a *Faqiri* 'contingent' costs order is therefore equivalent to making an order for no order for costs;

v) if the costs issue is transferred it runs the risk that the Tribunal will be a judge in its own cause; the SSHD will, in most cases, be upholding the Tribunal decision and is unlikely to be regarded as 'unreasonable' in responding to the appeal.

22. As to (i), he relies upon Lord Sumption's judgment in *Plevin -v- Paragon Personal Finance Ltd & anor* (No 2) (2017) 1 WLR 1249 at [18] and [20] to the effect that:

> "[18] It is clear that for some purposes the trial and successive appeals do constitute distinct proceedings. In particular they are distinct proceedings for the purpose of awarding and assessing costs…"

23. As to (iii) he adopts the reasoning of Martin Rodger QC, Deputy Chambers President UT of the Lands Tribunal, sitting as a County Court judge in *John Romans Park Homes Ltd v Hancock*, claim number C00WY133, in support of his argument that it is not possible to transfer the costs of one jurisdiction to be assessed in another. In that case an issue relevant to possession proceedings commenced in the county court was transferred to the FTT. The FTT decision was appealed to the UT. Thereafter, the issue being resolved in the defendant's favour, the claim resumed in the county court and, by consent, the claim for possession was dismissed. The defendants sought to include the costs of the tribunal hearings as "of and incidental to" the county court proceedings. The judge ruled that s 51(3) SCA did not encompass the costs of that part of the claim dealt with in the FTT as "incidental to" the associated proceedings in the County Court, since the discretion of the court was limited to the civil division of the Court of Appeal, High Court, family court or county court. Mr Westgate also draws comparison with the situation in *Darroch v FA Premier League Ltd* (2017) 4 WLR 6, and the obiter reasoning of Burnett LJ, as he then was, in confirming the Divisional Court's refusal of civil costs in relation to a criminal matter, otherwise governed by a different costs regime. At [29] he said:

> "It follows that the term "of and incidental to" is not apt to include the costs of the proceedings from which an appeal is brought. Appeal courts have power to make orders in respect of the costs in underlying proceedings because it is expressly conferred by legislation or by the rules…"

Mr Westgate reminds us that the Civil Procedure Rules Committee in contemplating the 'streamlined' CPR 54.7A procedure did not provide for an exception to s51(1) SCA or export the CPR 44 costs regime into the UT on remittal of the appeal.

24. As to (iv) he refers us to the case of *Thapa and others (Costs: General Principles; s 9 review)* [2018] UKUT 54 (IAC), which was not referred to in *Faqiri,* and in which Lane J, President, at [28] made clear that:

> "the power to award costs under r 10 of the 2008 Rules...is to be exercised with significant restraint. In particular, the parties and their representatives must realise that these powers are of a fundamentally different character from the procedural provisions and practices found in the courts and some tribunals, whereby costs regularly 'follow the event'; in other words, where a successful party will normally be awarded his or her costs."

25. Miss Giovannetti agrees that the CPR 54.7A proceedings and UT appeal are separate proceedings, but disputes that the Admin Crt is without jurisdiction to make an order such as that upheld in *Faqiri*. In allowing an appeal and remitting the matter for a rehearing, it is not uncommon for the Court of Appeal to make an order that the costs of the appeal be costs in the rehearing as Davis LJ observed in *Faqiri* [55]. The ability to make such an order is explained by Lord Sumption in *Plevin* at [20]:

> "The starting point is that as a matter of ordinary language one would say that the proceedings were brought in support of a claim, and were not over until the courts had disposed of that

> claim one way or the other at whatever level of the judicial hierarchy…….a distinct order for costs must be made in respect of the trial and each subsequent appeal, and a separate assessment made of the costs specifically relating to each stage"

In the context considered by Davis LJ, the appellate court will have addressed the matter at the conclusion of the appeal and will have exercised its discretion by making a "distinct" order for the costs of the appeal. In the absence of such an order, the first instance court could not simply take it upon itself to make an order in respect of the costs of the appeal, in the same way that the UT could not simply take it upon itself to make an order for the costs of the CPR 54.7A proceedings. This, she says, answers A's points (i) and (ii) above. She notes that A has not identified any authority to the effect that it is not open to the appellate court to make an order that the costs of the appeal be costs in the rehearing. She argues that the authorities upon which Mr Westgate relies to illustrate 'distinct' proceedings which have been found to be a bar to a contingent order across jurisdictional lines are fact specific.

26. As to point (iv), she argues that the difference in costs regimes arises since Parliament has determined that costs in Tribunal proceedings should be restricted.

27. As to point (v), she submits that it would be highly unlikely that the Admin Crt would remit the hearing if the conduct of the Tribunal was the reason for successful CPR 54.7A proceedings. Otherwise, the Admin Crt was entitled to expect a fair and principled approach to be adopted by the UT, as with any other Court, regardless that its decision had been impugned.

28. It seems to me that the judgment of Lord Sumption in *Plevin* supports both Mr Westgate and Miss Giovannetti's arguments as to the necessity for, and fact of, a distinct order as to costs. That is, there must be an order for costs made by the Admin Crt, at the conclusion of the CPR54.7A proceedings, but an order for costs in the cause is an order for costs at a distinct stage of the proceedings. The assessment made in such an order is not as to quantum but as to the contingent event, namely, in cases such as this, the success or otherwise of the asylum claim.

29. However, I agree with Mr Westgate that, absent express statutory provision, the distinct order for costs, whether contingent or otherwise, cannot easily cross the jurisdictional divide as I think is made clear by the text of s53(1) SCA. That is, the discretion of the relevant appellate court in making an order for costs is subject to the "*provisions of this or any other enactment and to rules of court"* and restricted to the civil jurisdiction. The costs in the appeal proceedings before the UT are governed by s 29 TCEA and TP(UT)R. (See [14], [16] and [17] above.) I think the reported observation of Davies LJ in *Faqiri* [55] must be read as referring to the remittal of cases in the same jurisdiction. Save for *Faqiri*, SSHD has not identified any authority in which it is held that an appellate court is authorised make a costs order effective in an appeal in a separate jurisdiction, governed by other enactments and different rules of court

30. I do not think that the jurisdictional point is answered by considering the costs of the CPR54.7 proceedings as 'of and incidental to' the costs of the appeal and respectfully agree with the *obiter dicta* of Burnett LJ, as he then was, in *Darroch* above. The

SSHD agrees that the UT dealing with the appeal proceedings is not authorised by statutory provision or rules of court to make an order in respect of the costs of the proceedings in the Admin Crt.

31. In any event, if I am mistaken as to these jurisdictional difficulties, there can be no doubt that the TP(UT)R govern applications for costs in UT proceedings. The Admin Crt's contingent cost order is fettered by the application of a different regime and judicial intent may thereby be thwarted since, as *Thapa* makes clear, an order for costs in the appeal proceedings will be the exception rather than the rule.

32. Fortunately, this jurisdictional issue can be addressed by the transfer of the JR proceedings to the UT in relation to the application for costs. This is clearly permitted by s 31A SCA, 19 TCPA and TP(UT)R 10 (see [17] and [18] above). Jurisdictionally, this is a fail-safe course and will import the CPR 44 costs regime in respect of the JR proceedings. The UT judge may then consider the costs of the CPR54.7A proceedings separately from those in relation to the substantive appeal. That is not to say that the exercise of his/her discretion under the different costs regimes will necessarily reach a different conclusion.

33. For completeness, I make clear that I do not agree with Mr Westgate's categorisation of the UT being a judge in its own cause, unless the Admin Crt had determined the UT misconduct to be the basis of grant of PTA, in which case it would be unlikely to remit the proceedings. Taken to extreme, this argument would mean that no hearing could be remitted to the court/tribunal which the appellate court determined had likely made an error of law.

34. Acknowledging the jurisdictional solution, Mr Westgate nevertheless argues that in some cases such as that of A, there is no good reason to delay the award of costs following the conclusion of the R54.7A proceedings. That is, the application of s 51(3) and CPR 44 and the principles to be derived from several recent authorities are clear (see *R(M) -v- Croydon v London Borough Council* [2012] 1 WLR 2607, [58] and *Faqiri* [34]). Although any decision relating to costs is a matter for the discretion of the trial judge, generally a successful party can look to an unsuccessful party for his/her costs. (See *R(M)* supra at [44] and [45]). There must be a principled basis on which to make an order for costs (see *ZN (Afghanistan) -v- Secretary of State for the Home Department* [2018] Costs LO 357, [75] referring to *R (RL) v Croydon London Borough Council* [2019] 1 WLR 224, [78]). The rationale was explained in *R(Faqiri) -v- Upper Tribunal* [2019] 1 WLR 4497 [17] by reference to *ZN (Afghanistan)* [67]:

> "The underlying rationale for the normal rule that costs follow the event is that a party has been compelled by the conduct of the other party to come to court in order to vindicate his legal rights. If those legal rights had been respected in the first place by the other party, it should never have been necessary to come to court. Accordingly, there will normally be a causal nexus between the fact that costs have been incurred and the underlying merits of the legal claim.".

35. What is more, he says, to make an award of costs to A as the successful claimant in the Cart JR, would also serve the public interest in cases involving fundamental rights, lest litigants be "deterred from seeking redress in this court by the prospect

that, even if successful and at no fault themselves, they may be liable for their own costs": *AN(Afghanistan) -v- SSHD* [2012] EWCA Civ 1333 [20]. It would benefit the public funding environment. Legal aid costs are artificially low compared to those that would be recoverable on an *inter partes* basis and the sustainability of legal aid practice depends on being able to recover costs *inter partes* where a case succeeds, as explained by Lord Hope in *Re appeals by Governing body of JFS* (2009) 1 WLR 2353 [24] and [25]; *AL(Albania)* [14]; and *ZN* [87]- [90], [101] and [106].

36. Relying on the case of *R(Rahman & Ors) -v- Secretary of State for the Home Department* [2018] EWCA Civ 1572 [26], which was not referred to in *Faqiri*, Mr Westgate argues that a claimant who successfully applies for PTA may seek his/her costs without reference to a successful outcome of the appeal.

37. Miss Giovannetti does not seek to dispute the well-established principles behind the CPR costs regime but, as indicated above, challenges whether the TP(UT)R costs regime should be subjugated to CPR 44.3 in what are UT appeal proceedings, and takes issue with the suggested timing of the consideration of an application for costs. She does not argue that the Admin Crt cannot entertain an application for costs against the SSHD at the conclusion of the R54.7 proceedings but rather that it should not ordinarily do so. To award costs, the Court must inevitably identify the successful party; it should not attempt to do so in normal circumstances until the conclusion of the proceedings, namely the disposal of the appeal.

38. Regarding public interest, she relies upon the court's observations in *Faqiri*, that there is no evidence that legal aid rates have proved any impediment to justice in this context. CPR 54.7A procedure is expressly designed to be straightforward and should incur very little by way of additional costs. In the absence of a costs order made because of SSHD's unreasonable conduct of proceedings, the substantive appeal would be paid at legal aid rates in any event. She submits that the decision in *Rahman* read as a whole, is far more in accord with the submissions made on behalf of SSHD than A in this case.

39. *Rahman* followed this Court's decision in *Ahsan and Others v SSHD* [2017] EWCA Civ 2009, which was concerned with allegations of cheating in an English language proficiency test that had resulted in the SSHD cancelling, or refusing, leave to remain to over 40,000 individuals. The Court of Appeal determined that an out of country appeal would not be an effective remedy when it would be necessary for an individual to give oral evidence, but where facilities to do so by video link from the country to which they had been deported were not realistically available. The SSHD had reviewed the appeals that had been stayed pending the decision in *Ahsan* and offered a compromise which included that all costs, including the costs of the appeal would be reserved to the UT. Hickinbottom LJ dealt with the applications for costs on the papers in relation to 3 of the held back cases, and gave written judgement to "assist with the resolution of the many cases behind it". At para 26 he determined that:

> "In respect of the appeal, in my view there can be no doubt but that Mr Rahman has been wholly successful, in that he has achieved all that he sought to achieve from the appeal, namely that the appeal be allowed, permission to proceed with judicial review be granted and remittal of the substantive judicial

> review to the Upper Tribunal for determination, as effectively required after Ahsan. In my view, in those circumstances, Mr Rahman is entitled to his costs of the appeal in any event. That is so irrespective of what the tribunal might ultimately find in relation to the allegation of deception or otherwise."

However, at [27] Hickinbottom LJ remitted the issue of whether the applicant had cheated, to the Tribunal to be determined on the evidence.

> "In my view, the costs of the judicial review cannot be dealt with now. They should await the claim before the Tribunal…."

40. I agree that Hickinbottom LJ's judgment in *Rahman* does not assist A in this case. The result of the appeal in *Ahsan* had achieved substantive relief for the appellants who would otherwise be deported in the application stayed behind it, rather than merely providing them with the opportunity to argue their appeal. That which was at the heart of the JR proceedings, the assumption made as to fraud, was still to be resolved and costs were withheld pending resolution of the individual cases. This accords with what Hickinbottom LJ said at [52] in *Faqiri*:

> "In my view, those proceedings [JR] cannot be viewed… in isolation. They have been brought to enable the claimant to proceed with his appeal to the UT, and only for that purpose. …The judicial review was brought by the claimant with a view to vindicating his right to asylum, which the Secretary of State continued to oppose (ultimately, as I have described, successfully). In my view, that is a principled basis for an order in the judicial review that may (underlining provided) result in the Secretary of State bearing some of the claimant's costs…"

41. I should mention that Mr Westgate also prays in aid the outcome in the three cases in *AL (Albania) v SSHD* [2012] 1 WLR 2898 in which costs of appeals were ordered. However, I do not think these cases take the matter any further. They were statutory appeals to the Court of Appeal, and I agree with Miss Giovannetti, a "very different creature" from CPR 54.7A proceedings. We have not been referred to any other authority in which the recipient of PTA has been awarded costs forthwith, rather than pending the conclusion of the substantive remitted proceedings.

42. Clearly, at the point when the Admin Crt considers orders pursuant to CPR 54.7(9), the successful claimant has established that there is an arguable case, which has a reasonable prospect of success, that the decision of the UT refusing PTA and the decision of the FTT against which PTA was sought are wrong in law; and that the claim raises an important point of principle; or there is some other compelling reason to hear it. The grant of PTA has obviously involved a qualitative assessment of the chance of success in the appeal but is not determinative of successful outcome. Undoubtedly, as can be seen from the law reports, a significant number of appeals in the UT following JR proceedings fail. Therefore, if Mr Westgate's argument that A, and other successful claimants, should be awarded their costs immediately upon securing PTA succeeds, there will be many compensated for achieving a Pyrrhic

victory, namely the ability to prosecute an appeal which ultimately fails, or as in the case of *Israr Shah v SSHD* [2018] UKUT 00051, as Lane J, President determined to have happened, cases where the Admin Crt had been persuaded to grant permission on a wrong basis. Therefore, I do not think that the claimant's success at this stage of the proceedings, of itself, provides a principled basis upon which to base an order for costs. It may be different if SSHD unreasonably seeks and prosecutes a full hearing of the JR or is demonstrated to have misled the UT when considering the application for PTA. Otherwise, the "successful party" can only usually be identified once ultimate outcome, by order or compromise, is known.

43. I do not seek thereby to undermine the importance of CPR 54.7A, which exists to "guard against the risk that errors of law of real significance slip through the system", nor the expertise that must be deployed in coherent written advocacy for a once only opportunity to establish the second appeals test. That is, if the application for permission is refused on paper, there is no right to seek an oral hearing CPR 54.12(3). However, the authorities dealing with the relevance of public funding in the context of applications for costs are clear, whilst sympathetic to the plight of publicly funded advocates and mindful of public interest,

> "legally aided litigants should not be treated differently from those who are not." (See, e.g. *ZN v Secretary of State for the Home Department* [2018] EWCA Civ 1059 [71]-[90], and [97] – [106].)

Conclusions

44. This court in *Faqiri*, described the order of HHJ Cooke in the Administrative Court, namely, "The costs of the Claim in the Administrative Court be treated as the costs of the appeal before the UT" as having been made in the knowledge of rule 10 (3)(d) of the UT Rules and its effect. Hickinbottom LJ described it as a principled order which was:

> "not arguably unjust to either party. It meant that if the claimant were ultimately successful in his appeal to the UT, then the Secretary of State would be potentially responsible for his costs of vindicating that right including the reasonable costs of the Cart judicial review claim; but if the claimant's appeal were unsuccessful, he would not be responsible for any of those costs." [55]

45. I respectfully agree with Hickinbottom LJ that, in the normal course of events, success in the underlying claim should be a prerequisite to trigger an award of costs, and provides a fair outcome. However, for the reasons I give above, I consider that there is a jurisdictional bar to making this as a stand-alone order. Even if I am wrong as to the legitimacy of the contingent order in these circumstances, the operation of TP(UT)R 10 may thwart Admin Crt judicial intent that a successful claimant will at least receive the costs of the CPR 54.7A proceedings, although

> "[t]here will be cases where…she [SSHD] will be at risk of costs for unreasonable behaviour; for example, if she does not

concede an appeal which is, on the facts of which she is aware, simply bound to succeed." (See *Thapa*) [33])

46. In my view, the issue of costs, if not in one of those cases where an immediate order is warranted either way, should be transferred to the UT as JR proceedings so as not to fetter the discretion of either the Admin Crt or the UT. The exercise of judicial discretion under different costs regimes may still result in no order for costs of the CPR 54.7A proceedings being made to the successful claimant, dependent upon the circumstances which the UT will be far better placed to adjudicate.

47. Turning to the instant appeal, I have no doubt that the UT, or Admin Crt if a concession had been made soon enough by SSHD, would have been better placed to assess the merits of A's costs of the CPR54.7 proceedings. Unfortunately, the end of proceedings far in excess of 1 month ago means that the UT is unable to make any order for costs, under either CPR or TP(UT)R. (See TP(UT)R 10.6, at [17] above.) Therefore, as Miss Giovannetti recognises, the SSHD's invitation in the Respondent's Notice that the Court dismiss the appeal, and allow the cross appeal by substituting an order that the costs of the JR be treated as costs of the UT appeal, even under the umbrella of transferred JR proceedings, is now overtaken by events. This court must therefore consider the question afresh.

48. The appeal was compromised by mutual, albeit staggered withdrawal, and the status quo that existed at the conclusion of the hearing before the FTT prevails. A has leave to remain. However, I agree with Mr Westgate that it was necessary for A to protect his position by appealing the lost asylum claim in view of SSHD's appeal against the FTT's recognition of his HP claim. Once the SSHD withdrew her appeal then it was not necessary to proceed with any part of the appeal. The SSHD could have accepted the FTT decision at any time after it was given. Had he/she done so then the CPR54.7A proceedings could have been avoided. A is the "successful party".

49. In seeking to support the terms of Moulder J's order that there be no order for costs save legal aid detailed assessment, Miss Giovannetti relies on the fact that UTJ Gleeson did not see the need for expanded grounds of appeal, in relation to which the CPR54.7 proceedings were commenced, and regarded them as unnecessarily lengthy and confusing. However, objectively assessed at this remove, the reasons given by the single judge for the grant of PTA validate A's stance. In those circumstances, I am not swayed by the argument that "even if A had followed the direction of Sales LJ and asked the Administrative Court to transfer the JR to the UT to be considered on a "rolled up" basis with the appeal, in the event that the refusal of PTA (or, to be precise permission to amend) was quashed it is reasonably clear that the UT would have been unlikely to make a costs order in A's favour." It is speculative. As previously indicated, if the JR proceedings had been transferred the CPR 44 costs regime would apply and is far more permissive than the TP(UT)R.

50. Miss Giovannetti also suggests it is "far from clear" that A had included all the relevant documentation in the JR bundle. His JR grounds asserted that he had been refused PTA when in fact he had been refused permission to amend his grounds. Again, I am not swayed by these arguments. SSHD would have been served with the CPR54.7 documents, and if concerned at omissions was at liberty to file an Acknowledgment of Service or seek a hearing of the JR claim, but waited to raise it before the UT. Nevertheless, I note that she relies on the inactivity of the SSHD as an

Interested Party to suggest it is not a straightforward case of identifying the SSHD as "*the unsuccessful party*" within the meaning of CPR 44.2.

51. Subject to my Lords, I would allow the appeal and dismiss the cross appeal. Imperfect as the exercise of assessing merit must inevitably be in this forum and to reflect A's success, I would substitute an order that the SSHD pay A's costs of the CPR 54.7 proceedings in place of the order that there would be no order as to costs.

Bean LJ:

52. I agree with the judgment of Macur LJ. In particular I endorse her suggestion at paragraph 46 that the best course in a case of this kind will often be for the application for costs in the judicial review to be transferred to the UT to be dealt with when the outcome of the substantive appeal is known. In the present case I agree that the Appellant was in substance the winner and that he should be awarded his costs of the application for judicial review.

Haddon-Cave LJ:

53. I also agree.