Neutral Citation Number: [2021] EWFC B1

Case No: FO1NG685

IN THE FAMILY COURT
(sitting in Nottingham)

Date: 4 January 2021

Before :

HIS HONOUR JUDGE MARK ROGERS

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Between :

AW	**Applicant**
- and -	
The Secretary of State for Work and Pensions	**Respondent**

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Ms Angela Wrottesley (instructed by **Jones and Co**) for the **Applicant/Appellant**
Mr James Fraczyk (instructed by the **Government Legal Department**) for the **Respondent**

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JUDGMENT
(Approved)

His Honour Judge Rogers:

1. There are a number of applications before the Court which I propose to deal with compendiously.

2. This case concerns issues of child support for a child NW who was born in 1989. His parents are AW, who is the Applicant, and AG. AG is not a party to the proceedings and has not provided any evidence. Her position is safeguarded by the nominal Respondent, the Secretary of State for Work and Pensions, who through the Child Maintenance Service (CMS), has responsibility for issues of child support.

3. In the substantial bundle are several statements and chronologies which variously summarise the factual background, very little of which is controversial. Bundle page references are given in brackets. The statement of JW on behalf of the Secretary of State (47) is very full and I need not set out in detail the lengthy history, inevitably going back many years. I also have the statement of AW (332), prepared for the purpose of these proceedings and so not a document before the decision maker.

4. As the parent with care following separation, the mother instigated a child support claim in 2001. The father was not co-operative but eventually a maintenance liability was set. By early 2005 the case was closed as, by then, NW was living with his father. However, there were accumulated arrears of £17240.54. Attempts were made to collect the arrears but with limited success. In 2007, as explained by JW, the debt was suspended. The Child Support Agency (CSA) letters (142, 144 and 146) in that year explain the decision. The

letter of 5 September 2007 (146) makes it clear that the decision is to suspend collection of arrears, then standing at £13598.27, in line with the mother's wishes but that "these arrears can be brought back at any time in the future". This seems to have been accepted by both parents as nothing more was heard and the matter rested.

5. A recalculation to correct an earlier arithmetical error meant that in 2019 there were still arrears of £14845.74. As a result of child maintenance reforms, the CMS made a policy decision to revisit historical debts. It wrote to the mother asking whether she wished the debt to be pursued. In very strong terms (149) she confirmed that she did. The father was contacted and he resisted payment relying on his many years of care for NW, albeit the arrears had accumulated prior to the residential changes.

6. As investigations continued the father supplied the CMS with a document (104) which reads:

> "I Mrs AMG (full name is given) withdraw my authority for the Secretary of State to collect any outstanding child support arrears and accordingly wish for the account to be discharged and the case closed"

It purports to be signed by AG and is dated 18/5/07.

7. The mother was contacted by telephone. It does not seem that she was sent a copy of the document but, in any event, denied signing a declaration and indicated she wanted the arrears to be pursued. Immediately thereafter credit reference searches were instituted and "regular deduction order (RDO) action" and "lump sum deduction order (LSDO) action" (57) was recommended. The

father continued to assert reliance on the declaration. There is no evidence of further investigations or enquiries before, on 26 September 2019, the CMS decided to pursue a RDO. The decision itself is evidenced in a document, a very unclear copy of which reads (as far as I can tell):

"RDO is an appropriate and proportionate next enforcement step……In making the above decision I have considered all the available evidence and information."

There are no case specific references to the substance of the decision. I strongly suspect this formulation is standard wording. There is no indication of what, if any, impact the disputed "declaration" had on the decision maker and whether he or she did or attempted to resolve the clear factual dispute.

8. In fact, both a RDO and a LSDO have been set up, the latter being in abeyance although its existence has some relevance to the question of an extension of time to which I must return.

9. By his Appellant's Notice of 5 December 2019, the father seeks permission to appeal against the RDO in the sum of £150.26 per week (12). By virtue of the delay, there is necessarily also an application for an extension of time. The delay in filing is agreed to be just over 5 weeks.

10. The Secretary of State resists the appeal but has chosen to make a cross application to strike out the appeal (31). The Application Notice purports to invoke Rule 4.4(1) of the Family Procedure Rules 2010 (FPR). It is a small technical point but, in my judgment, the more apt and focussed provision is that of Rule 30.10 which provides the power to strike out an appeal notice.

Significantly, Rule 30.10 (2) restricts the power to cases where there is "a compelling reason". That term is not further defined but obviously sets the bar high. Very little turns on the technical point in this case or the exact interpretation of the power as my compendious review will inevitably focus upon the substantive merits. It seems to me logically and intellectually problematic to strike out a meritorious appeal by over concentration on a procedural test.

11. The Grounds of Appeal (13) and Skeleton Argument (14) in support from Ms Angela Wrottesley advance substantive and procedural points. In short, it is said that there was no debt and/or no proper basis for making the RDO. Secondly, it is said that the decision-making process was irregular or flawed and there was no proper enquiry into the specific facts of this case.

12. In his Skeleton Argument (362) and his submissions, Mr James Fraczyk develops his case on the strike out application and in opposition to the appeal. He says that no extension of time should be granted applying established principles. Principally, he argues that the appeal is entirely without merit both on the facts and in law.

13. I need first to address the issue of an extension of time. The well-known three stage test, which in recent times, has been recast in the language of relief from sanctions with reference to the several authorities including Denton [2014] EWCA Civ 906, requires me to look at what has happened and why. At the final discretionary stage, I am also bound to consider the underlying merits in the overall circumstances of the case. I will have to return to this element later, having considered the merits in more detail.

14. Having received the RDO, the father instructed WJ, solicitor, whose statement (272) is in the bundle. As a result of a misinterpretation of the correct appellate route and an office error, WJ did not prosecute the case diligently. He accepts personal responsibility, says that he is professionally embarrassed and apologies.

15. I accept his evidence and understand what went wrong. The question as Mr Fraczyk says is that everyone makes mistakes and personal sympathy may be given but why should that make a difference? Professional standards are to be expected. He also submits that the delay, in context, is serious running into weeks and although objectively unintentional is not justifiably explained with a good reason.

16. This is a complex jurisdiction and the appeal routes and demarcations between the Court and the Tribunals can be tricky and so I am not surprised by WJ's mistake. It is, of course, compounded by the office filing error. Notwithstanding my personal sympathy with WJ's predicament, on the first two limbs of the test, the Respondent's arguments are powerful. Ultimately, my view on the merits will be critical although not independently determinative as all the factors need to be considered.

17. A curious matter arising, which is relevant to the exercise of discretion is the existence of the LSDO. As I understand it, the parties are agreed that whatever the outcome of this case there remains the highly unattractive spectre of all the same points being rehearsed, subject to estoppel and res judicata arguments, in any challenge to the imposition of the LSDO if invoked. Crucially any challenge by way of a similar appeal could be made without the impediment of delay.

There is a powerful argument for grasping the nettle now, particularly as the arguments on the merits have been deployed skilfully and at length by counsel. It seems to me that this is an important further consideration when I come to balance the arguments in respect of the extension of time application.

18. I am not persuaded that there is any significant prejudice established to the Respondent. The prejudice is that arising in all cases, namely that if an extension is granted the appeal process has to run its course whereas a refusal would summarily terminate the proceedings. I accept time, effort and expense to the public purse would otherwise have been avoided and that the interests of public justice favour compliance but I see no further fact specific prejudice. In fact, by virtue of the procedural course adopted, to roll up all issues, there is no significant costs difference. Inter partes costs orders are also available if the criteria are met at the conclusion of the case.

19. The procedural code governing appeals in this class of case is anomalous and has led to debate in this case. Normally an appeal under Part 30 of the FPR will be a review of the first instance decision conducted along very well established and well understood lines. An appeal against a deduction order is different. Such an order is not an adjudication by a Court which delivers a judgment or provides reasons. It is not wholly an administrative process but has many characteristics which are more consistent with that description. I have already quoted the material part of the relevant decision here. The decision maker is not identified and apart from very general wording the notification gives no clue as to the actual decision-making process.

20. By virtue of paragraph 9.30 of Practice Direction 30A, Rule 30(12) is amended to incorporate the new and crucial change that any deduction order appeal will be by way of "rehearing unless the appeal court orders otherwise". In his submissions Mr Fraczyk sought to persuade me either to limit the natural meaning of the word "rehearing" to something much more restrictive or in this case to "order otherwise". He submits that to adopt a more generous approach would be to place the Court in the shoes of the Secretary of State which would be contrary to the spirit of the legislative framework which entrusts the decisions deliberately to the Secretary of State.

21. I have no hesitation in rejecting these arguments. To read the word "rehearing" as if it were merely a narrow review flies in the face of sensible construction and is illogical. If that were correct there would have been no need to carve out a different test under the Rules requiring amendment. Secondly, the narrow interpretation would render the appeal right virtually impotent as, other than for glaring errors of law on the face of the documents, it would preclude an examination of the factual situation if the Court was not permitted to go behind or even investigate the somewhat anodyne wording of the decision itself. In short, a rehearing is what it says. I do not find any particular assistance in the procedures adopted in the Crown Court as suggested by Ms Wrottesley, but I am persuaded that it is proper for me to look again at the relevant factors in play, obviously within the parameters of the statutory scheme, and come to a fresh decision, if appropriate. I can see no basis for departing from the normal rule and "ordering otherwise" as suggested by Mr Fraczyk.

22. I am unable to accept or even comprehend the logic behind Mr Fraczyk's submissions in paragraph 18 of his skeleton argument (370). The Rule amendment applies specifically to deduction order appeals and so it is not open to Mr Fraczyk to rely upon the nature of the primary legislation to dictate an alternative approach and "to order otherwise". If that were logically justified it is difficult to imagine a situation where the Court would not order otherwise, which again would render the Rule change unnecessary and/or impotent.

23. I am particularly grateful to the Government Legal Department, JW in her witness statement and Mr Fraczyk for setting out at length and clearly the development of the statutory structure governing these cases over the years and also giving a policy and administrative context. I need not therefore undertake the same exercise in this judgment.

24. Paragraph 18 of the Secretary of State's strike out Application is important. It reads:

> "There is no general power to write off or accept part-payment of arrears of CSM; although CMS will usually cease enforcement if requested to do so by the PWC. Until 2012 there were no such powers at all, but by sections 41D & 41E (of the Child Support Act 1991) (added by CMOPA 2008) writing-off or compromise became possible under certain limited circumstances…"

It is pointed out that all the relevant events in this case occurred in or around 2007 and before the legislative change which has no retrospective effect.

25. In his skeleton argument, Mr Fraczyk argues that the key provision in this case is section 41E. He will forgive me, I hope, for suggesting, in fact, without undue

pedantry, that in this case the key provision actually is section 32A of the 1991 Act. The RDO, the subject of this appeal, is a determination made under section 32A and so the argument is how the Secretary of State exercised her discretion under that provision and whether I should make a different determination under that provision.

26. Section 32A, so far as material, provides:

"(1) If in relation to any person it appears to the Secretary of State –

a) That the person has failed to pay an amount of child support maintenance; and

b) That the person holds an account with a deposit-taker;

the Secretary of State may make an order against that person to secure payment of any amount due under the maintenance calculation in question by means of regular deductions from the account."

27. The use of the word "may" clearly imports a discretion. The argument before me is as to the nature and extent of the discretion. Ms Wrottesley contends for a wide and natural interpretation without a gloss which is not justified by the statutory language. Mr Fraczyk, in contrast, says that, in realty, it is highly circumscribed and is to be restricted to the choice of methods of enforcement rather than as to whether arrears should be enforced at all. There is nothing in the statutory provision itself to justify such a narrow interpretation but he submits the entirety of the statutory code, the policy objectives and the powers invested in the Secretary of State tend toward such an approach.

28. The provision upon which Mr Fraczyk places significant reliance is section 41E. It provides:

"The Secretary of State may extinguish liability in respect of arrears of child support maintenance if it appears to the Secretary of State –

a) That the circumstances of the case are of a description specified in regulations made by the Secretary of State, and

b) That it would be unfair or otherwise inappropriate to enforce liability in respect of the arrears."

29. In paragraph 6 of his skeleton argument (363) Mr Fraczyk helpfully picks his way through the labyrinth which is the Regulations. I accept that Regulation 13G of the Child Support (Maintenance of Payments and Arrears) Regulations 2009 in its current version is the relevant provision. It provides:

"The circumstances of the case specified for the purposes of section 41E (1) (a) of the 1991Act are that –

a) The person with care has requested under section 4(5) of that Act that the Secretary of State ceases to act in respect of arrears;

……..

f) the non-resident parent has been informed by the Secretary of State that no further action would ever be taken to recover those arrears."

30. At the heart of Mr Fraczyk's case and the basis for his submission that the Grounds of Appeal are without merit is his step by step analysis of section 41E in paragraph 17 of his skeleton argument (368). He says that, given section 41E was not in force and there was no power to remit arrears in 2007, it is impossible to contemplate an expectation on the part of the father that that would be so, whatever the terms of the apparent declaration. He says that the first limb of the section is not satisfied in respect of either a) or f) of the Regulation. Neither did the mother, at the material time in 2019, make the relevant request (quite the contrary) nor did the CMS indicate or even suggest that no further action would be taken (quite the contrary). In those circumstances the value judgement based evaluation in the second limb did not come into play, but in any event, would have been exercised in favour of enforcement.

31. He submits that once it is shown that section 41E is not satisfied so that there is no basis to extinguish arrears, then the approach under section 32A is inevitably to proceed to enforcement. Essentially, he argues, there is no active discretionary element.

32. Ms Wrottesley's approach is disarmingly straightforward. First, she says that the imposition of the RDO was simply wrong in fact and in law as she says there was no debt or arrears to enforce. She says any liability was extinguished and cannot be revived. Next, on a quasi public law basis she submits the actual decision was irrational and that no reasonable authority in possession of all the facts would take such a decision. Next, she says, there was an inadequate and/or flawed investigation given the uncertain and controversial nature of the factual background. Finally, she attacks the specific exercise of discretion in this case.

33. Resolution of this case has not been straightforward as there is no direct authority or even general judicial guidance. It is highly likely that if there was such authority then those instructing Mr Fraczyk would know as the Secretary of State is always a party. The statutory provisions receive passing reference as Mr Fraczyk explains (363) but no more. I was referred to R (Kehoe) v Secretary of State for Work and Pensions [2006] 1 AC 42 (HL) for a general overview and comments in the speeches about the policy behind the CSA. It plainly supports Mr Fraczyk's point that the emphasis is on the role of the Secretary of State and the agencies rather than leaving child support as a private matter between parents. However, beyond that it offers no particular assistance.

34. I am most grateful to counsel for their wide ranging and thoughtful submissions on paper and orally. I have not rehearsed all of them in this judgment but have reflected upon them in coming to my decisions.

35. I reject without hesitation Mr Fraczyk's submission that this is straightforwardly and obviously a case without merit. It seems to me that it has obvious underlying merit and is complex. It has required scholarship and application on the part of counsel and, I hope, careful thought by me.

36. I will set out my conclusions on the merits shortly but for the purpose of the preliminary matters I can say that I consider the application/appeal has merit.

37. As I have indicated already, although I have personal sympathy with WJ's position, his failure to address the issue accurately or expeditiously has created a delay of more than 5 weeks. It is not a long period in itself, particularly given the chronological background of the case generally, but is nearly twice the period allowed under the Rules and so is significant. However, given the underlying

merit, the interplay with the LSDO and the lack of any additional prejudice over and above the normal, there are, I am quite satisfied, strong reasons for granting relief from sanctions and allowing the extension of time sought. It is important, in my view, that this case is resolved on its merits rather than as a result of a procedural default.

38. I reject Ms Wrottesley's argument that the Court has no power to strike out an Appellant's Notice in these circumstances. I did not understand her to persist with the point vigorously. The power exists but I decline to exercise it. It is essentially an academic application in the overall context of the case as I heard full argument and have looked at matters compendiously in this judgment. The application was made to emphasise the Secretary of State's principal argument that the father's application/appeal lacked any merit and so deserved summary treatment. I have already said that I regard the case as difficult and with underlying merit. In my judgment it is far preferable, as I have done, to look at the matter in the round and take all relevant matters into account. All of the points relied upon in support of the application to strike out are capable of deployment on the appeal itself and so nothing is lost. Therefore, I refuse the application to strike out the Appellant's Notice.

39. I have already touched upon the procedural code governing appeals in this class of case. I need not lengthen this judgment by full citation but I have reminded myself of the terms of FPR 30 and, in particular, Rules 30.3, 30.10, 30.11 and 30.12. In addition, I have considered Practice Direction 30A and, in particular, paragraphs 9.13 to 9.30.

40. Permission to appeal is required and the well-known test is that there is a real prospect of success. That hurdle is not unduly high and has been characterised as an arguable point which is something more than merely fanciful. For the many reasons already given I am quite satisfied that there is much to be considered here. I do not accept Ms Wrottesley's first argument that there is in fact no debt or arrears at all because they were disposed of in 2007 or they are unrecoverable because of some form of estoppel. That is not, in my judgment, realistically arguable. However, in relation to the balance of her arguments, I consider that they, individually and cumulatively, have a real prospect of success. Therefore, I grant permission to appeal in respect of the Grounds of Appeal (13) with the exception of Ground 1(a). Put shortly, I accept Ms Wrottesley may argue that the decision and thus the order was wrong and procedurally unjust.

41. Having granted permission, I must now rehear the case. The analogy with the Crown Court is unhelpful as the approach of the original decision-maker and now me is not to hear evidence in a formal forensic setting but to take account of all the relevant material and exercise a discretion.

42. I have already rejected Mr Fraczyk's restrictive approach to my task. It not sufficient merely for me to consider the lawfulness of the original decision and whether it was open to the decision maker. That would be to import a Judicial Review approach to the task which is contraindicated by the word "re-hearing" and has no support elsewhere in the Rules. Plainly I cannot adopt an approach that is wider that permitted to the original decision maker but equally I am not limited to the same considerations if there are, in my judgment, other relevant factors.

43. In paragraphs 25 and following of his skeleton argument (42), Mr Fraczyk sets out why he says the decision was lawful and carried out using a correct procedure. Issue may be taken with some of the underlying factual assertions but the fundamental point of lawfulness is not realistically open to challenge. The conduct of the scheme and the correctness of the procedure is not highly contentious. What is really at the heart of the dispute is whether a proper investigation occurred and whether the discretion to enforce was properly undertaken.

44. In my judgment, there are fundamental flaws in the approach adopted and give rise to what I find, with respect to Mr Fraczyk's detailed arguments, is the misconceived response to this appeal. The explicit emphasis on section 41E demonstrates to my mind how focus has shifted to that provision and away from section 32A.

45. I have no hesitation in finding that the rigorous test laid out in section 41E is not satisfied. I have sympathy with any argument based upon the second limb but that simply does not arise. This provision which had no place in the thinking in 2007 sets very specific qualifying criteria. I am satisfied that, whatever happened in 2007, in 2019 the mother wished for the arrears to be collected and the father had not been assured that they never would be. Thus, I find that the decision-maker was correct to find, as do I, that the arrears had not been extinguished and were capable of recovery.

46. The logic of Mr Fraczyk's argument fails, in my judgment, at the next stage. He contends that having found that there are recoverable arrears and that no extinguishment has occurred either directly or implicitly under section 41E, then

the decision to enforce is inevitable or administrative. To put it another way, he contends that once the parent with care requests or demands recovery, the Secretary of State is duty bound to enforce the collection. The difficulty of that submission, in my judgment, is that it runs counter to the very policy that is so firmly emphasised, namely that Parliament has entrusted this exercise to the CMS rather than leave it as a private matter between parties. If this argument is correct then the only provision of significance is section 41E and the apparent discretion under section 32A is illusory. In my judgment, that cannot be correct. If Parliament had intended that to be the case, the statutory provisions could have said so but, of course, they do not. It seems to me that the weakness in the Secretary of State's response is to be seen in the way Mr Fraczyk is driven to put his argument, which involves a straining of natural language and a denial and emasculation of a discretion which is written into the statute.

47. There is a tension in paragraph 22 (41) of Mr Fraczyk's skeleton argument where he acknowledges the existence of the discretion but suggests that the Court should not usurp the role of the CMS or, presumably in an appellate context, substitute its own discretion.

48. Interestingly, in my judgment, it is conceded that the decision-maker is entitled to have regard to a range of factors, including, amongst others, the history, the liable person's behaviour and "any other relevant information". The list is sensible and broad. There is no reasonable basis, in my judgment, to limit that to simply the choice of enforcement procedure. The items mentioned are much more apt for a merits based discretionary exercise and I am quite satisfied that that is what s32A contains.

49. To the extent that the decision in this case was taken or appears to have been taken within those narrow parameters, it was exercised wrongly and it follows that proper and relevant information was not weighed in the balance. I am satisfied that no attention was paid to the history or to the impact of the matters which occurred in 2007. In my judgment, they plainly have a relevance even if they are not sufficient to deliver the knockout blow of section 41E. What is also troubling is the approach to the declaration and the apparent lack of proper investigation. It gives rise to an irreconcilable factual dispute. I accept it is not reasonably capable of resolution by a decision-maker in the Department processing these claims, but it seems to have been set aside in terms of relevance either because of the denial of the mother which may have been accepted (although why and on what terms is not set out) or because it was thought to have no bearing on the current exercise, as pre-dating the power to extinguish arrears.

50. In looking at the matter afresh I am satisfied that this appeal must be allowed and whether I am exercising the discretion in the course of a rehearing or having allowed the appeal, it is now open to me and I must take account of all relevant matters to come to a conclusion under section 32A.

51. My thinking has been developed at some length in the course of this judgment and so detailed further analysis is unnecessary. However, as a transparent cross check of my decision it is probably helpful to set out the principal points for and against.

52. In favour of making a RDO are the following:

a) the unco-operative and irregular payment history

b) by definition, the arrears occurred while NW was in his mother's care and AW had a duty to pay

c) the arrears were never (and until recently were not capable of being) extinguished

d) there is no limitation period or other bar to collection

e) the policy arguments

f) the mother's request to collect the arrears

g) the clear advice to AW that arrears may be collected later, thus precluding any expectation on his part

h) the non-availability of section 41E as a basis for extinguishing the arrears.

53. The points against are:

a) NW is now 31

b) receipt of the sums represents an effective windfall for AG (or possibly NW although there is no evidence of this)

c) notwithstanding the lack of a limitation period, the extreme passage of time

d) this was initiated by an approach to AG by the CMS – there is nothing to suggest she would have pressed for repayment otherwise

e) the factual issue of the authenticity of the declaration, which it would be unfair to resolve against AW both generally and as it would involve a finding of serious

potentially criminal deception – the terms on their face, if genuine, were clear if not an absolute legal impediment

f) the circumstances of the suspension of activity up to and including 2007

g) the removal of the charging order

h) the assumption of care by AW of NW and the contribution he made to his welfare

i) notwithstanding the clear terms of the correspondence reserving the right to collect arrears, the understandable expectation on behalf of AW that all issued had been laid to rest

j) the apparent lack of investigation into AW's assertions and circumstances by the CMS.

54. Naturally these points are not exhaustive and I have taken account of all the circumstances of the case. The balance is not an easy one to strike as there are powerful points to be made both ways. However, stepping back, I find that the points against making the order substantially outweigh those in favour. I decline to make a RDO in this case accordingly.

55. Under paragraph 9.29 (a) (i) of PD30A, my power is confined to affirming or setting aside the original decision. I have set the decision aside and declined in my discretion to make the order afresh. There are perhaps good policy reasons for not importing yet further variables into the system. Thus, there is no appellate power to vary the arrears or limit the time of collection to a specified period thus reducing the amount collectable. No doubt it can be said, as I have found, if there

is no section 41E extinguishment why should that power be created by the back door? I do understand that point. It would not have made a difference here as the discretion fell decisively as I have described. I can however envisage other cases where a more nuanced decision might be the most just. The management of arrears in, for example, financial remedy cases upon divorce is often encountered.

56. I could, of course, have remitted the matter to the Secretary of State for reconsideration under paragraph 9.29 (a) (ii). That would have involved considerable delay, expense and uncertainty and would have been highly undesirable. Given my power of rehearing and the availability of all the relevant material together with the expert arguments I regard myself as being in an entirely suitable position, to take the decision and that is what I have done.

57. Accordingly, I grant relief from sanctions and an extension of time, I dismiss the application to strike out the Appellant's Notice, I grant permission to appeal (limited as I have described), I allow the appeal, I set aside the RDO and I exercise my discretion afresh to decline to make a RDO in this case.

58. I was not addressed on the issue of costs at the conclusion of the argument. My preliminary view is that the Respondent should pay the Appellant's costs of the appeal on a standard basis subject to detailed assessment. However, if either party wishes to make any other application in relation to costs or otherwise, they should exchange and submit written representations within 28 days of receipt of this judgment and I will make any consequential orders on paper.