



Neutral Citation Number: [2023] EWHC 282 (KB)

Case No: QB-2020-001364

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/02/2023

Before:

Mrs Justice Lambert DBE

Between:

Simon Aruchanga

Claimant

- and -

Secretary of State for the Home Department

Defendant

Benjamin Hawkin (instructed by **TNA Solicitors**) for the **Claimant**
Christian Howells (instructed by **Government Legal Service**) for the **Defendant**

Hearing dates: 10 April 2022 and 29 November 2022

Approved Judgment

This judgment was handed down remotely at 2pm on 10 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Lambert:

1. The claimant seeks damages for breach of a common law duty of care by the defendant in failing to supply him with confirmation of his refugee status. He alleges that as a consequence of the breach of duty he suffered loss of immigration benefits including accommodation benefits and welfare benefits, which in turn have caused him personal injury in the form of an exacerbation of post-traumatic stress disorder (originally caused by his witnessing atrocities in Rwanda). He was subject to deportation and for a period he was detained pending deportation. The pleadings further include: a claim for breach of the Human Rights Act 1998 arising from the same facts which, it is alleged, amount to a failure by the defendant to act compatibly with the claimant's rights under Article 8 of the ECHR; and a claim under the Data Protection Acts. The defendant applies to strike out the claims on the grounds that they disclose no reasonable cause of action and/or that they amount to an abuse of the court's process.

The Claim

2. The Amended Particulars of Claim dated 25 March 2022 contain a lengthy summary of the claimant's immigration history. There is only sparse analysis of those facts. However from the factual chronology and the disclosed documents I take the following key points relevant to the claims.
3. In May 1995, the claimant arrived in the United Kingdom from Rwanda. He claimed asylum on entry. His asylum application is dated 8 May 1995 and is made in the name of Simon Karuchanga. The application recorded his alias as "Everson Chituka." The Amended Particulars of Claim are silent as to whether the claimant personally filled out the application, or it was completed on his behalf. In other words it is not clear whether the reference to the surname Karuchanga was a mistake and, if so, on whose part. The asylum application was granted in December 1997. The grant letter was addressed to, and concerned, "Simon Karuchanga AKA Everson Chituka." The letter recorded that: *"you have been recognised as a refugee in the United Kingdom under the United Nations Convention Relating to the Status of Refugees of 28 July 1951 and its Protocol of 1967. You are granted leave to enter the United Kingdom until 31 December 2001. Passports of recognised refugees are not endorsed with conditions of stay and you should keep this letter carefully as your authority to remain in the United Kingdom. Shortly before the end of your 4 years' leave to remain you can apply for indefinite leave to remain."* The letter informed the claimant that, as someone upon whom refugee status had been conferred, he was free to take up a job without the need for permission from the Department of Employment or the Home Office and that he was free to use the National Health Service and the social services and access other help provided by local authorities.
4. In 1999, the claimant's house was burgled and his personal effects stolen. The stolen items included his Home Office documentation confirming his refugee status.
5. On 22 February 1999, the Probation Service wrote to the defendant informing her that the claimant was serving a term of imprisonment for burglary and handing stolen goods. It requested clarification of the claimant's immigration status for deportation purposes. The Probation Service queried whether the claimant had applied for political asylum in May 1995 and if so whether he had been given refugee status and leave to remain. The

Approved Judgment

defendant responded that inquiries had returned a “no trace.” It is not clear whether the inquiries were made in the name of Simon Aruchanga, or Simon Karuchanga.

6. The Amended Particulars of Claim assert that there were three further occasions between 2000 and July 2001 when the claimant (or someone on his behalf) wrote to the defendant seeking a replacement status document. No response was made to any such request.
7. In December 2002, the defendant issued a deportation order and the claimant was then detained under Schedule 3, Immigration Act 1971. The claimant appealed the decision to deport, referring to having claimed asylum immediately upon his entry to Britain in 1995 and stating his fears for his safety should he be returned to Rwanda. For various administrative reasons, it appears that the appeal was overlooked and so remained pending until early 2007. In July 2007, shortly before the hearing of the appeal, the defendant withdrew the decision to deport the claimant. The issue concerning the claimant’s refugee status therefore remained unresolved.
8. In April 2018, the claimant was sentenced to a further term of imprisonment, this time for a period of 18 months. In August 2018, the defendant made a further decision to deport the claimant. He was informed that he had no legal basis of stay in the United Kingdom and that there was no evidence to support his claim of having been granted refugee status in 1997 with exceptional leave to remain. In September 2018, the claimant was detained. He was released from detention in March 2019.
9. On 15 April 2019 the defendant wrote to the claimant stating that she was considering revoking his refugee status. She wrote that: “*In your case, you arrived in the United Kingdom (UK) on 7 May 1995 and claimed asylum immediately on arrival. By letter dated 31 December 1997 you were informed that you had been recognised as a refugee and granted leave to remain until 31 December 2001. ... As your convictions have made you subject to deportation your immigration status has come under review. Consequently your refugee status must be reviewed before any further consideration can be given to your deportation.*”
10. The context of this letter is not clear from the pleadings or the disclosure, but it is, so far as the claimant is concerned, a significant document. It is the first occasion upon which the defendant appears to accept that the claimant had been recognised as a refugee and granted refugee status in 1997 with leave to remain (at least until 2001). This was the confirmation that the claimant had been seeking repeatedly throughout the course of his immigration history. It is also the basis of the claim in negligence.
11. The Amended Particulars of Claim grapple with the circumstances in which a public authority may owe a duty of care in negligence in the discharge of its public law functions by referring to the need to engage the general principles of the law of negligence and, in particular, to apply the three-stage test in *Caparo Industries Ltd v Dickman* [1990] 2 AC 605. The pleadings refer to, and recite, paragraphs 65 and 73 of *Poole Borough Council v GN and Another* [2019] UKSC 25 and the more recent case of *R(Husson) v SSHD* [2020] EWCA Civ 329.
12. The claim in negligence was amplified by Mr Hawkin for the claimant in written and oral submissions in the following way.

Approved Judgment

13. Mr Hawkin submits that the class of individuals to whom such a duty of care might be owed was relatively small and easily capable of identification by the defendant. He submits that, it is the defendant who has accorded those persons a special status defined in both domestic and international law. He submits that, by granting that group of individuals refugee status, the defendant has assumed responsibility in respect of that status, not least because only the defendant is able to grant such status. As pleaded: *“All manner of public bodies, institutions, organisations, officials and individuals from whom a refugee in the UK will require assistance or may have dealings – including but not limited to local authorities, the Social Services, the Department of Work and Pensions, employers, landlords, colleges, the Police, the Courts, the Prison Service and the Probation Service - are wholly reliant on the Defendant’s statements in this regard, and such statements will be treated as definitive.”*
14. Mr Hawkin submits that if refugee status, once given, is not confirmed when requested then a range of losses and injury are foreseeable, including loss of income, accommodation and at its most extreme, refoulement. In all of the circumstances it is equitable to owe a duty of care to that class of individuals. He finally submits that I should be slow to strike out the claim given that it was well established that the circumstances in which public authorities may owe a common law duty of care is an evolving area of law. See *Husson* at [63] where Simler LJ referred to *“The circumstances in which a public authority, when exercising statutory functions, may be held liable in negligence gives rise to complex questions in what is an evolving area of law. The question whether this is a case in which the respondent merely has statutory powers or duties... or whether responsibility was in fact assumed here, is not straightforward and may depend on a greater exploration of the particular facts”*
15. The defendant submits that neither the pleadings nor the further arguments deployed by the claimant establish the existence of a duty of care at common law. Mr Howells makes two key points. First he submits that no rights or entitlements flow from the fact that the claimant enjoys refugee status. Refugees have rights under the 1951 Convention Relating to the Status of Refugees only where they are “lawfully staying” in the UK which means that they have leave to enter or remain in accordance with domestic law: see *R (ST) v Secretary of State for the Home Department* [2012] UKSC 12 at [33], [40] and [49]. When not lawfully staying in the UK then the only right which the refugee enjoys is against refoulement. In these circumstances, there can have been no assumption of responsibility by the defendant in respect of the claimant’s rights as a refugee, as from 2001 he had no such rights (save in respect of refoulement).
16. Second, the defendant submits that the claimant could, at any stage, have applied for leave to remain. The absence of documentation concerning his refugee status did not pose any legal impediment to such an application. If the application were refused, then the claimant would have been able to pursue his case through the tribunal system, just as he did in 2005 when he applied for British Citizenship.
17. Mr Howells makes the further point that the defendant was under no statutory duty to issue any replacement leave to enter documents. He submits that the only requirement is for the defendant to notify the claimant of the decision in writing. This requirement was satisfied. It was then for the claimant should that written notification be lost to prove on any subsequent occasion that he had been granted leave to enter the country. He also observes that the claim is limitation barred given that the claimant’s leave to remain terminated in 2001.

Decision

18. It seems to me that, properly analysed, the first (and central) question posed in the application is whether it is arguable that the defendant owed the claimant a common law duty of care in negligence to confirm his refugee status when such confirmation was sought either by the claimant or by a third party. Although Mr Howells interprets the claimant's case as one in which it is said that the defendant has, or may have, assumed responsibility in respect of immigration benefits flowing from right to remain, the claim is more limited and focused upon a duty to confirm refugee status. At paragraph 21 of the Amended Particulars of Claim, the position is made clear: "*It is contended that the defendant owed a common law duty of care to the claimant, ...to provide him with a replacement refugee status/leave to remain document, or to otherwise confirm or acknowledge his status (whether to himself, his representatives or to other relevant third parties)..*"
19. With this question in mind, I remind myself, as did Simler LJ in *Husson*, that the threshold test for permitting the claim is one of arguability only. I take into account that although some disclosure has taken place, that there may yet be further disclosure and, critically, there has yet been no examination of the facts. In this case there is no dispute that the statutory scheme giving immigration and other powers to, and imposing duties upon, the defendant does not create a statutory cause of action that sounds in damages. It is common ground that for damages to be available the claimant must establish that the delay in confirming his refugee status is recognised in tort. In this context, I take into account as Simler LJ again observed in *Husson* at [42] that the question of whether the law imposes a tortious duty of care in respect of the exercise of statutory duties by a public authority is "*notoriously difficult*", involving as it does an evolving area of law. I bear these points in mind when considering the competing arguments.
20. Both counsel accept that this is a case in which it is being alleged that the defendant failed to confer a benefit, rather than a case in which, by reason of some positive act by the defendant, the claimant suffered harm. As such, both accept that (adopting the analysis in *Poole*) one of the factors to which I should have regard is whether the defendant has, by granting the claimant refugee status, voluntarily assumed responsibility for confirming the claimant's refugee status if an inquiry is made.
21. In this context I take into account that the defendant is the only body able to grant the claimant (or anyone) refugee status. Further, on the basis of the documents which I have seen, it appears that the only record available to, and accessible by, the claimant concerning his refugee status is the statement contained in the letter which he is sent by the defendant: there is no record available to him elsewhere (such as by an endorsement to his passport) and the letter stating that refugee status had been granted recorded that the letter constitutes the claimant's "*authority to remain in the United Kingdom.*" Given these facts, it seems to me to be at least arguable that the defendant, having granted refugee status, assumes responsibility for confirming the same given its importance to the claimant as a means of proving that he had lawful leave to remain in the UK, and the reasonable reliance placed upon the document by the claimant.
22. Approaching the question in a slightly different way and adopting the three-stage approach set out in *Caparo* (as qualified by *Poole* and the cases referred to in *Poole* in the context of tortious claims against public bodies) I find that it is arguable that the

Approved Judgment

claimant may suffer damage which is reasonably foreseeable: it is, arguably, reasonably foreseeable that the claimant's immigration status may be at risk in the absence of confirmation, given the burden upon him to prove that he has lawful leave to remain. He may be subject to deportation or to detention pending deportation. I find it arguable that there was a sufficient relationship of proximity between the defendant and the claimant, given that only the defendant is able to confer refugee status and the document remains, apparently, the only written proof of status.

23. The question of whether it is fair, just and reasonable to impose a duty of care upon the defendant to the claimant to confirm that status is more difficult. I have seen no evidence from the defendant on the point. I bear in mind that the defendant did, in fact, apparently (although this may be subject to a factual inquiry at trial) seek to establish the claimant's status, such that the duty asserted may in reality prove to be a duty to maintain accurate and accessible records. However, I find that the third limb of *Caparo* is arguable, albeit only just, particularly given that it is not argued (so far) by the defendant before me that there is any risk of a welter of claims being brought.
24. I therefore decline to strike out the claim in negligence. I accept Mr Howells' submission that the rights and entitlements which form the basis of the claim are ones which flow from the leave to remain not the refugee status itself. I also accept that, from 2001, the claimant may not have had lawful leave to remain. But, I bear in mind that, on the claimant's case, attempts were made to confirm his immigration status before his lawful leave to remain had expired in 2001. It may be argued that the fact that his immigration/refugee status had not been confirmed by the defendant before 2001 caused or contributed to the failure to seek or obtain indefinite leave to remain. I accept, as Mr Howells submits, that no application for leave to remain was made by the claimant and that such an application might have been made. These matters are, of course, relevant to breach, but the defendant acknowledges that the burden was on the claimant to prove his status and I am left wondering how that burden was to be discharged, in the face of the defendant's refusal or inability to acknowledge the decision made in 1997.
25. For these reasons, I am satisfied that the defendant's application to strike out the claim in negligence should fail. In reaching this decision I am simply concluding that it is arguable. As to the merits of the claim at trial, I harbour considerable reservations. The claimant must establish that it is fair, just and reasonable to impose a duty of care in circumstances such as those presented in this case. No evidence from the defendant has yet been served on this topic, and a detailed examination of the facts may demonstrate that there has been no voluntary assumption of responsibility. Setting aside however the hurdles which the claimant must overcome in establishing the existence of a duty, there remain the difficulties in proving breach of duty. The claim for refugee status was made and granted in the name of Simon Karuchanga. Even if this was a slip of the immigration officer's pen on the claimant's arrival in 1995, the fact remains that the letter of 31 December 1997 was addressed to and concerned Simon Karuchanga. It is not suggested that, if there was an error by the Immigration and Nationality Department, this was pointed out by the claimant to the defendant. Given the difference in names, the fact that the defendant could not identify the claimant, may well have been wholly understandable. Nor should the defendant's claim that the action is statute-barred be underestimated. So far, the Amended Claim raises no arguments or facts upon which the court would be likely to disapply the primary

Approved Judgment

limitation period, save that the defendant's failure to reveal his refugee status is an ongoing and continuing failure. This, in itself, would not prevent the claimant from having brought an action much earlier.

26. For these reasons, I decline to strike out the claim in negligence. The additional claims (under the Human Rights Act 1998 and the Data Protection Acts) are closely linked to the negligence action. It seems to me that they stand or fall together. As such, I decline to strike out those actions. There is however an obvious and close link between the two sets of litigation which this claimant has brought. In addition to the three claims in this action QB-2020-001364 he has brought litigation (Claim No F00MY704) seeking damages for unlawful detention. The claims are already being case managed together. In my view the actions should be consolidated and one set of lawyers instructed. I will receive submissions from the parties concerning the terms of the Order including how to give effect to these observations.
27. Finally, the claimant has made an application for anonymity in these proceedings. The basis upon which that anonymity is sought is that: there are proceedings elsewhere in which anonymity is granted as a matter of course; there are good health reasons why anonymity should be granted; the claimant's experiences in Rwanda were distressing; and he would be at risk of harm should he be returned to Rwanda. I refuse the application. These proceedings have been ongoing since April 2020. There are linked proceedings in the County Court which have been ongoing since 2020. No application for anonymity has been made before October 2022. No application is made limiting access to court documents and so, anonymity going forward would serve a limited purpose. Although it is said that there are good health reasons why anonymity should be granted, I have the benefit of reading medical reports which do not appear to substantiate such a claim. Finally, this claim concerns the claimant's experiences in Rwanda, only peripherally. To the extent that this changes, then the decision on anonymity can be reviewed.