Neutral Citation Number: [2025] EWHC 189 (KB)

**Appeal No: QA-2022-000043**

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**

**ON APPEAL FROM SENIOR COURTS COSTS OFFICE**
**Order of Costs Judge Brown made on 11 February 2022**
**Case No. SC-2021-APP-001507**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/01/2025

**Before** :

**MRS JUSTICE HILL**

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**Between :**

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| **STEVEN MLUNDIRA** | **Appellant / Claimant** |
| **- and -** | |
| **THE SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Respondent / Defendant** |

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**Ahmad Badar** for the **Appellant**
**Rupert Cohen** for the **Respondent**

Hearing date: 2 December 2024
Costs submissions: 3 and 4 December 2024
Further transcript and submissions: 21, 22 and 28 January 2025

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 31st January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HILL

**Mrs Justice Hill:**

## Introduction

1. This is an appeal against the order of Costs Judge Brown ("the Judge") made on 11 February 2022, by which he ordered the Appellant to pay 80% of the Respondent's costs for two interim applications that had been dismissed, and summarily assessed those costs at £1,440. Permission was granted after an oral hearing on 13 October 2023.

2. The Appellant was represented at the appeal hearing by Ahmad Badar, adopting the skeleton argument of Jay Gajjar, and the Respondent by Rupert Cohen. I am grateful to them all for their clear and focussed submissions.

3. I was provided with bundles of documents for the appeal from both parties, as well as the original bundle that had been before the Judge. This contained certain documents that were not in the appeal bundles and which were of some assistance in explaining the chronology of events that had led to the Judge's order. However as noted at [25] below the key transcript was missing from the appeal bundle, which has led to some delay in this judgment being finalised and handed down.

## The factual background

4. The Appellant was the Claimant in judicial review proceedings that were commenced on 13 May 2020, by which he challenged a period of immigration detention along with various notices including a notice of liability of removal as unlawful.

5. By Lang J's 20 October 2021 order, the claim was resolved in the Appellant's favour, and the Respondent was ordered to pay the Appellant's reasonable costs, to be assessed if not agreed.

6. The Appellant's sister, Ivy Okedia, was assisting him with the costs issues. On 3 November 2021 she emailed the Respondent with details of the costs he was claiming for the judicial review proceedings in the sum of £9,578.50. On 10 November 2021 she sent the Respondent his counsel's fee notes. The Appellant was keen to progress matters, but the Respondent's costs draftsperson, Alice Lennard, indicated that she was without instructions.

7. On 2 December 2021 the Appellant sought to commence detailed assessment proceedings. Ms Okedia served the Respondent with an N252 notice of commencement, seeking £9,958.50. This was accompanied by counsel's fee notes and Lang J's order. No bill of costs was sent.

8. Ms Lennard responded later that afternoon indicating that the Respondent considered that the Appellant's counsel's fees were excessive and unreasonable, and making an offer of settlement. The Appellant did not accept this.

9. On 21 December 2021 Ms Lennard emailed the Appellant pointing out that no bill of costs had been served, in breach of CPR 47.6(1)(b) (see [26] below). The Respondent sought a stay of the detailed assessment proceedings; requested that the Appellant serve a compliant bill of costs within 21 days; and proposed that she have a further 21 days to respond. Ms Lennard indicated that if the Appellant did not agree to these terms, the

Respondent would make an application to strike out the detailed assessment proceedings.

10. The Appellant refused to agree. Ms Okedia replied stating "I will not stop the proceedings. You are obliged to file a Point of Dispute, therefore raise any disputes you may have and your reasons. And, I will address them as such".

11. Ms Lennard suggested that Ms Okedia might not have understood her previous email and proposed a telephone call to discuss matters. Ms Okedia replied that she had understood. She stated that the threat of an application to strike out the detailed assessment proceedings was an abuse of process, for which the Respondent could be liable in wasted costs.

12. On 23 December 2021 the Respondent served an application notice, seeking an order striking out the detailed assessment proceedings on the basis that a bill of costs had not been filed. At the same time the Respondent filed "holding" Points of Dispute, addressing only counsel's fee notes, in the absence of a proper bill from the Appellant.

13. Just after midnight on 23 December 2021 the Appellant served a bill of costs which had been signed on 30 November 2021 and insisted that finalised Points of Dispute be served by 12 pm on 24 December 2021.

14. Just before 12 pm on 24 December 2021, Ms Lennard emailed Ms Okedia querying why the bill had not been served when it was signed on 30 November 2021; proposing that the Respondent have until 14 January 2022 to serve Points of Dispute of 14 January 2022; and indicating that the Respondent would be seeking the costs that had been wasted by the need to make the 23 December 2021 application.

15. The Appellant did not accept this proposal. Rather, on 30 January 2022 the Appellant filed an application seeking summary judgment on, or strike out of, the Respondent's 23 December 2021 application. He also made a series of allegations of misconduct by the Respondent's representatives and sought to invoke the court's costs powers in relation to misconduct under CPR 44.11(1).

16. On 14 January 2022 the Appellant served a fresh bill, which was further amended on 4 February 2022.

17. On 16 January 2022 the Appellant served a fresh notice of commencement seeking £14,480.

18. On 4 February 2022 the Respondent served Points of Dispute.

19. On 7 February 2022 the Respondent wrote to the Appellant inviting him to agree a consent order regularising the two notices of commencement and providing for the future conduct of the assessment. The Appellant did not agree.

20. On 11 February 2022 both parties' applications came before the Judge. The Respondent relied on the statement from Ms Lennard dated 23 December 2021 made in support of the strike out application. The Appellant relied on a statement from Ms Okedina dated 6 February 2022; and statements from himself and Mikhail Okedina (his brother in law) dated 7 February 2022. These statements made a series of allegations of professional

misconduct by Ms Lennard, including the assertion that she was not properly authorised to conduct the costs proceedings.

21. The Judge heard and dismissed both strike out applications. He ordered the Appellant to pay 80% of the Respondent's costs, and summarily assessed the figure for those costs at £1,440. That is the order the Appellant appeals.

## The Judge's reasons

22. The Judge's reasons for the order were set out in a short *ex tempore* judgment, (see [2025] EWHC 95 (SCCO)), as follows:

> "1. In this case I think it is fairly clear from the outset that the email that was sent initially was not a bill of costs. I say that because I understand that work was being done on a bill of costs at the time, which was subsequently served, I am told, before the application itself was made.
>
> 2. It seems to me clear that the email does not constitute a proper bill of costs, not least because it lacks the signature and certification, as required, quite apart from the other matters that are set out in Practice Direction. I did not understand [counsel for the Appellant] in fact really seriously sought to argue against the point.
>
> 3. I do have some sympathy for a litigant in person trying to deal with these rules, and they are not necessarily that straightforward. However as I understand it, on the claimant's part, (at least) those assisting them, they did seem to understand the rules and the need for a bill of costs, if I understand the position correctly.
>
> 4. Be that as it may, the response from Mr Leonard, on behalf of the defendant, was to, as I understand it, the claimant's sister-in-law or sister,
>
> > "Dear Ivy, I hope you are well. (inaudible 1.39.14) have you not attached any form of bill of costs, which is a breach of CPR 47.6(1). This failure means that you have not properly or validly commenced detailed assessment proceedings. We invite you to the following –
> >
> > 1. Agree an immediate stay to the detailed assessment to be served compliant with costs within the next 21 days.
> >
> > 2. Allow the defendant a further 21 days from service of the bill to serve points of dispute.
> >
> > In the absence of your agreement to the above, we will make an application to strike out these proceedings. Please respond before the end of business tomorrow."

Then the response to that was,

> "I will not stop the proceedings, you're obliged to file the points of dispute and therefore raise any points of dispute you may have and your reasons, so I will address them as such."

5. A further (email?) was then sent,

> "Dear Ivy. Thank you for your email. Respectfully, I don't think you fully understand my previous email. Would you be open to a telephone conversation (and then a number was given). I look forward to hearing from you."

6. That was the 21 December and then nothing came back, and an application was made to strike out these proceedings.

7. There has been much argument about whether the email was compliant, and various other arguments about this matter. It seems to me the defendants were right to say this is not a proper bill, a bill does require certification. It might have been of more assistance to provide a little bit more detail as to why it was not compliant. However I do not accept Mr Okedia's suggestion that it was not appropriate to engage in a telephone call. I think a telephone call would have been a sensible thing to do (and engaging with the point the Defendant had made).

8. Further, what is somewhat extraordinary is that when a bill was served, and it seems to me the defendants did not really take issue with it, there was has still been continuing argument about much of this, when it seems to me had a more sensible approach been taken, we might have had a very short hearing to deal with the costs, with very little at stake. However, we have gone up and down dale, all over the place. Indeed, I think at one stage reliance was made on a case called *Long* which, to my mind, has no impact. It was floated [in argument?] as to what was meant by the terms of 47.6 (there was disagreement as to the meaning and effect of 47.6), which seems to be, in any event, relatively clear.

9. In these circumstances, sympathetic as I am to the difficulties that litigants in person face, the Claimant must pay at least a substantial proportion of these costs.

10. It would be relatively harsh judgment to say, well, the application should have asked for an unless order rather than a stay (as is argued), but I think there is something broadly in that for some reason, and that this has caused matters to become much more emotive. I am not sure that fault necessarily lies entirely with the defendants in relation to that matter, but it might have made it clear, and it seems to me sensible if it would have made it clear that an unless provision would go in (?was an option), which would fully explain exactly what was required in terms of

> a bill, in circumstances where the claimants might not have known it. I think that a deduction can be made costs on account of this but it is modest.
>
> 11. I think the other matter I have to bear in mind is the application for summary judgment is completely, in my view, misconceived. I am afraid that there is no real response to that.
>
> 12. I am going to say that the claimant pay 80 per cent of the defendant's costs. That is therefore my order in relation to costs, and that 80 per cent covers all of the costs. I intend now to assess those costs".

23. The Judge returned to the issue of who should pay the costs in his judgment assessing the level of those costs, thus:

> "1…As I have already said, I do have some sympathy for a litigant in person facing an order which made costs subject to detailed assessment proceedings. I believe that I have addressed that matter. The difficulty I have already addressed however is that notwithstanding the defects/problems with the Bill were pointed out to Ms Okedia, I think, in emails, the claimant continued to maintain his claim initially and not to engage with the defendant about the defects. In this matter he has raised a large number of other things, including a misconceived application.
>
> 2. Various allegations have been made, which…are really somewhat extraneous to the issues that are at large or in issue. There is something in also the point that some of the work supposedly wasted is not truly wasted because it was used in relation to the points of dispute.
>
> 3. However, nonetheless, notwithstanding the offer/s of an attempt to compromise it or a way forward, these were rejected and my concern is, as Mr O'Connor pointed out, by insisting that points of dispute were served, as indeed was the case, the defendant was then exposed to the possibility that the claimant might apply for a default costs certificate. This was not, in other words, a party saying that it did not understand, that it needed some assistance. Further, a wholly misconceived application has been made.
>
> 4. My view, nonetheless, is that whilst I do think some significant costs have been incurred by the defendant with multiple witness statements and the like, the sheer amount of time spent in relation to what seems to me an utterly simple and straight forward issue does seem to me disproportionate and unreasonable, in part. I have to, however, make allowances for the fact that this application…has been much more strenuously fought on both sides really than might have been anticipated.
>
> 5. I think the appropriate award to make is £1,800 inclusive of everything before the application of the 20 per cent. I do think ultimately, notwithstanding all those matters, the costs are disproportionate to a straightforward matter…".

24. The Judge refused permission to appeal and the transcript of his reasons records the following:

> "I recognise…that feelings run high in relation to this and that is, perhaps, entirely understandable. However, I have to consider here the stance that was taken in these costs proceedings. To my mind, notwithstanding no strikeout order was ultimately made, the question I have to ask is was it reasonable to make an application of that sort. To my mind, it plainly was because of the threat of a default costs certificate with all its uncertainties".

25. The Judge also recorded the following written reasons for refusing to grant permission to appeal on the face of the order:

> "1. No real prospect of success and no other substantial reasons for granting permission.
>
> 2. As explained in the hearing whilst I am understanding of the difficulties dealing with the procedures associated with a detailed costs assessment nevertheless in this particular case, as I explained, the Defendant's attempts to give assistance were rejected and Points of Dispute were insisted upon. This insistence exposed the Defendant to the possibility of a Default Costs Certificate. Given (as I found) no proper Bill of costs had been served it was plainly reasonable and necessary for an application to be made by the Defendants to the Court (albeit one that might also have made clear that unless order would be appropriate). Thereafter a compliant Bill of Costs was served. The Claimant ought to have served a compliant bill in the first place without the need for an application (their insistence on Points of Dispute being served, amongst other things, showed a degree of understanding about the procedure and sophistication). At the very least those acting for the Claimant ought to have engaged in discussion about the Defendant's concerns and not insisted that Points of Dispute were served.
>
> 3. Thereafter and once a compliant Bill had been served the Claimant failed to respond reasonably to the proposals made by the Defendant to avoid a hearing or reduce the dispute. Indeed further allegations and arguments were pursued (in large part by Mr. Okedina himself) that failed (such as the argument that the they had served proper a bill in the first instance).
>
> 4. In all the circumstances, even making full allowances for the fact that I did not strike out the proceedings and for any complexity associated with the matter, it seems to me that the Claimant had clearly acted unreasonably and that some order for costs in the Defendant's favour

> (albeit discounted) was inevitable and in any event within my discretion".[1]

## The legal framework

*(i): Detailed costs assessment proceedings*

26. By CPR 47.6:

> "47.6—(1) Detailed assessment proceedings are commenced by the receiving party serving on the paying party—
> (a) notice of commencement in the relevant practice form;
> (b) a copy or copies of the bill of costs, as required by Practice Direction 47; and
> (c) if required by Practice Direction 47, a breakdown of the costs claimed for each phase of the proceedings…
>
> (3) A person on whom a copy of the notice of commencement is served under paragraph (2) is a party to the detailed assessment proceedings (in addition to the paying party and the receiving party)".

27. PD47 underscores this by providing at paragraph 5.2 that on commencing detailed assessment proceedings, the receiving party "must serve on the paying party and all the other relevant persons the following documents - (a) a notice of commencement in Form N252; (b) a copy (or, where paragraph 5.A4 applies, copies) of the bill of costs". PD47 makes detailed provision for the contents of a bill at paragraphs 5.7-paragraph 5.22.

28. By CPR 47.9:

> "(1) The paying party and any other party to the detailed assessment proceedings may dispute any item in the bill of costs by serving points of dispute on—
> (a) the receiving party; and
> (b) every other party to the detailed assessment proceedings.
>
> (2) The period for serving points of dispute is 21 days after the date of service of the notice of commencement.
>
> (3) If a party serves points of dispute after the period set out in paragraph (2), that party may not be heard further in the detailed assessment proceedings unless the court gives permission.
> …

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[1] When the appeal was heard in December 2024 the appeal bundle did not contain the transcript of the Judge's judgment on cost as set out at [22] above. Rather, it only contained the transcript of the judgment on the level of those costs and the order, as referred to at [23]-[25]. Neither party had identified this defect. It was necessary for the court to make arrangements for the further transcript to be obtained and for the parties to be given the opportunity to make any further submissions they wished on it.

> (4) The receiving party may file a request for a default costs certificate if—
> (a) the period set out in paragraph (2) for serving points of dispute has expired; and
> (b) the receiving party has not been served with any points of dispute."

29. By CPR 47.11:

> "(1) Where the receiving party is permitted by rule 47.9 to obtain a default costs certificate, that party does so by filing a request in the relevant practice form.
>
> (2) A default costs certificate will include an order to pay the costs to which it relates."

30. By PD47, paragraph 10.1 a request for the issue of a default costs certificate must be made in Form N254 and must be signed by the receiving party or his legal representative. Paragraph 10.2 provides that a default costs certificate will be in Form N255.

*(ii): The general approach on appeal*

31. Under CPR 52.21(3), the appeal court will allow an appeal where the decision of the lower court was "(a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court".

32. The White Book 2024 at paragraph 52.21.5 explains that "wrong" in CPR 52.21(3)(a) means that the court below (i) erred in law or (ii) erred in fact or (iii) erred (to the appropriate extent) in the exercise of its discretion.

33. CPR 52.21(2) provides that every appeal is limited to a review of the decision of the lower court unless (a) a practice direction makes different provision for a particular category of appeal; or (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

*(iii): Appeals against decisions with respect to costs*

34. The Court of Appeal has stated on a number of occasions that appeal courts should adopt "a conservative approach" when considering costs appeals: the White Book 2024 at 52.1.14.

35. In *SCT Finance v Bolton* [2002] EWCA Civ 56 at [2] Wilson LJ observed that an:

> "an appeal…in relation to costs…is overcast from start to finish by the heavy burden faced by any appellant in establishing that the judge's decision falls outside the discretion in relation to costs conferred upon him under rule 44.3(1) of the [CPR]. For reasons of general policy, namely that it is undesirable for further costs to be incurred in arguing about costs, this court discourages such appeals by interpreting such discretion very widely".

36. The "conventional approach" to costs appeals is that:

> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors in the scale": *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507 at 1523, per Lord Woolf MR, citing *Roache v News Group Newspapers* [1998] EMLR 161 at 172.

37. In *Straker v Turner Rose* [2007] EWCA Civ 368 at [2] Waller LJ reiterated the general principle that an appellate court "will be loath to interfere with the discretion exercised by a judge in any area". However, "so far as costs are concerned that principle has a special significance". This is because "[t]he judge has the feel of a case after a trial which the [appellate court] cannot hope to replicate and the judge must have gone seriously wrong if this court is to interfere"

38. The fact that an appeal court would have come to a different decision to that of the judge is neither here nor there; rather it has to conclude that the judge's decision was "perverse": *Abdulle and others v Commissioner of Police of the Metropolis* [2015] EWCA Civ 1260 at [25]-[28], per Lewison LJ.

*(iv): Reasons*

39. An *ex tempore* judgment should not be the subject of a narrow textual analysis. As Lord Hoffman explained in *Piglowska v Piglowski* [1999] 1 WLR 1360 at 1372G-H:

> "The exigencies of daily court room life are such that reasons for judgment will always will be capable of having been better expressed. This is particularly true of an unreserved judgment…These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself".

40. In respect of reasons more generally, in *English v Emery Reimbold* [2002] 1 WLR 2409 at [30] the Court of Appeal held that:

> "Where no express explanation is given for a costs order, an appellate court will approach the material facts on the assumption that the judge will have had good reason for the award made. The appellate court will seldom be as well placed as the trial Judge to exercise a discretion in relation to costs. Where it is apparent that there is a perfectly rational explanation for the order made, the court is likely to draw the inference that this is what motivated the judge in making the order".

## The parties' positions in overview

41. Upon the grant of permission, the Appellant was ordered to file revised grounds of appeal drafted by counsel. He advanced three grounds of appeal to this effect:

> **Ground 1**: The Judge failed to rationally or properly apply CPR 44.2(2)(a), given that the Appellant had successfully defended the Respondent's application to strike out the Appellant's detailed assessment proceedings (**"the 'successful party' ground"**);
>
> **Ground 2**: The reasons given by the Judge for awarding the Respondent her costs of £1,440 were perverse given that her application was premature (**"the 'prematurity' ground"**); and
>
> **Ground 3**: Further or alternatively, the Judge's decision was plainly wrong (**"the 'plainly wrong' ground"**).

42. The Respondent did not file a Respondent's Notice, despite the order granting permission requiring her to do so, but set out her position in counsel's skeleton argument. She contended that the Judge was right to make the order he did, for the reasons he gave.

## Ground 1: The 'successful party' ground

43. Under CPR 44.2(2)(a), 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. However, under CPR 44.2(2)(b), the court may make a different order.

44. The Appellant's central contentions under this ground were that the Judge had failed to indicate in his judgment that he had adopted the general rule in CPR 44.2(2)(a) as the starting point for his analysis; and that he had failed to take into account adequately or at all the fact that the Appellant was the successful party in that the Respondent's 23 December 2021 application had been dismissed.

45. It is right to note that the Judge did not expressly refer to CPR 44.2(2)(a). However in my judgment, this is a situation to which the principle set out in *Piglowska* at 1372G-H [39] above applies. CPR 44.2(2)(a) is an absolutely fundamental rule in respect of costs. It is so well known that it is safe to assume that any judge dealing with costs issues will be aware of it. That is especially so here, given that the Judge is a highly experienced specialist costs judge. On that basis, I do not consider that the fact that the Judge did not refer in terms to CPR 44.2(2)(a) assists the Appellant.

46. Moreover, I am not persuaded that the Appellant was properly regarded as the successful party under CPR 44.2(2)(a) when the case is looked at in the round. As a matter of form, both applications had been dismissed: neither party had won or lost either of them. As a matter of substance, the fact that the Respondent's application was dismissed does not mean that it was not properly brought. On the contrary, for the reasons explained in further detail under Ground 2 below, the Respondent was entirely justified in making the application. Moreover, it appears likely that it was the Respondent's application which prompted the Appellant to serve his bill.

47. In any event, a perfectly permissible reading of the Judge's reasons is to the effect that he did regard the Appellant as the successful party under 44.2(2)(a), but considered that

there were a range of reasons, as explained further under [62]-[63] below, that justified him in departing from the general rule, under 44.2(2)(b). That was an unassailable approach.

48. I therefore do not accept that the Judge failed to rationally or properly apply CPR 44.2(2)(a).

## Ground 2: The 'prematurity' ground

49. The Appellant contended that the Respondent's 23 December 2021 application was premature because the deadline for the Appellant to file his bill of costs was not until 21 January 2022, such that the requirement for the Respondent to file Points of Dispute had not been triggered. On that basis, as at 23 December 2021, the Respondent was not at risk of the Appellant making an application for a default costs certificate under CPR 47.9, or of any such application succeeding. Further, he argued that if and when he applied for a default costs certificate, it would have been open to the Respondent to oppose such an application.

50. With respect, this submission flows from a misunderstanding of the relevant rules.

51. As noted at [26] above, CPR 47.6(1)(a) provides that detailed assessment proceedings are commenced by the receiving party serving on the paying party a notice of commencement in the relevant practice form. The Appellant had done that.

52. The Judge was right to find that he should have served a bill of costs with the notice of commencement under CPR 47.6(1)(b). However, notwithstanding that defect, CPR 47.9(2) (at least arguably) had the effect of requiring the Respondent to serve points of dispute within 21 days of service of the notice of commencement, or be at risk under CPR 47.9(3) of being denied the right to be heard further in the detailed assessment proceedings.

53. In those circumstances the Respondent was entirely justified in applying to strike out the Appellant's defective detailed assessment proceedings. This was a proactive step, intended to protect the Respondent's position. There is no basis for asserting that she should have waited to see if an application for a default costs certificate was made.

54. The suggestion that she could simply resist such an application again reflects a misapprehension of the rules: the granting of a default costs certificate is a purely administrative function, performed on a request without notice to the paying party (CPR 47.11). If such a certificate had been issued in this case, the Respondent would then have been put to the trouble of applying to set it aside.

55. She was entirely justified, as the Judge found, in making the 23 December 2021 application, to avoid this potentially more problematic situation occurring. The application was not premature.

56. The fact that the Appellant served a bill of costs after the 23 December 2021 application was made does not mean that the application was not justified in the first place. Moreover, the correspondence indicates that the Appellant did not agree to the Respondent's suggestions to regularise the proceedings, and avoid the need for a hearing of the application.

57. For all these reasons the Judge did not err in failing to find that the Respondent's application was premature.

## Ground 3: The 'plainly wrong' ground

58. The Appellant's core contention under this ground was that the Judge's order was wrong because of the prematurity argument. I have rejected this for the reasons given under Ground 2.

59. In oral submissions reliance was placed on the fact that the Appellant was a litigant in person, with vulnerabilities due to health issues and who had been involved in contentious litigation with the Respondent involving the deprivation of his liberty.

60. Those factors were all present. However the Judge was well aware of them and indeed specifically referred to the fact that he was affording the Appellant some latitude in light of them. Moreover the documentation provided by the Appellant, perhaps because of the assistance he was receiving from his sister and brother-in-law, indicates a relatively extensive familiarity with the relevant legal provisions and case law, as the Judge recognised. I therefore accept the Respondent's submission that he was a vulnerable litigant in person, with access to some support on the law. Accordingly, I find no error in the Judge's approach to this issue.

61. Further, under CPR 44.4(4) in deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including the conduct of all the parties.

62. Here, the Judge was fully entitled to take an adverse view of the Appellant's conduct. He had (i) refused to engage with the Respondent when the latter asked for a telephone call so that she could explain her position on 21 December 2021, before the application was made; (ii) refused to engage with the Respondent's sensible proposals in her 21 December 2021 email; (iii) refused to engage with her 7 February 2022 letter, which made sensible proposals for the future conduct of the proceedings; (iv) continued to threaten to make applications for wasted costs and asserted that the Respondent's position was an abuse of process, when it plainly was not; and (v) did all of these things despite failing to serve a bill of costs which meant that the entirety of the detailed costs proceedings were defective.

63. The Judge was also justified in describing the Appellant's 31 January 2022 application as "misconceived". It was an otiose application in that it sought by way of remedy the dismissal of the Respondent's application, which could have been achieved simply by the Appellant simply opposing the application at the hearing. However it also made a series of allegations of misconduct against the Respondent's representatives which did not appear sustainable.

64. These were all points taken into account by the Judge when coming to his decision. He explained his reasons in commendable detail. They could not be clearer. His decision was an entirely appropriate one that fell squarely within his broad discretion with respect to costs. It was not plainly wrong. On the contrary, I consider that it was right. Accordingly, there is no basis for an appeal court to intervene, applying the legal framework set out at [31]-[38] above.

## Conclusion on the appeal and costs

65. Accordingly, for all these reasons, the Appellant's appeal is dismissed. The Judge's order stands.

66. The Appellant is therefore the unsuccessful party on the appeal. Under CPR 44.2(2)(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. The Appellant sought to persuade me to make a different order, as permitted under CPR 44.2(b), namely no order for costs. He relied on the Respondent's conduct in the failure to comply with the court's order dated requiring a Respondent's Notice.

67. In my judgment this is a relevant factor. Had the Respondent set out her case in a Respondent's Notice upon the grant of permission there is some possibility that the appeal would have been resolved between the parties. However, this is not so serious a failing as to lead to an order that the Respondent recovers no costs. Rather, it can be reflected in a reduction of those costs, as a relevant factor under CPR 44.2(4)(a). The reduction should only be modest, given that I consider there is only a very small prospect that earlier provision of the Respondent's Notice would have resolved matters. The reduction I make is 10%.

68. The Respondent's schedule of costs sought the figure of £5,107.20. The Appellant sought to persuade me that the 6.5 hours of solicitor time and counsel's fees (reflecting 22 hours work at London A Panel counsel rates) were disproportionate and excessive given the nature of the appeal. Those submissions are hard to sustain when the costs the Appellant himself claimed were substantially higher than the Respondent's, at £9,506.60. I do not consider that the figures claimed by the Respondent were disproportionate and excessive in any event.

69. As the Respondent highlighted in the submissions in costs, it is necessary to consider proportionality when assessing costs, under CPR 44.3(5). One aspect of proportionality is whether the level of costs bears a reasonable relationship to the sums in issue in the proceedings: CPR 44.3(5)(a). This appeal was about an order in the sum of £1.400. Applying the proportionality concept in the course of his submissions the Respondent proposed a cap on costs of £5,000. I accept this proposition. Although the argument was advanced in the context of responding to the Appellant's application for costs against the Respondent if he succeeded on the appeal, it applies to both parties.

70. Accordingly, I order that the Appellant pays the Respondent's costs, summarily assessed in the sum of £4,596.48. This figure allows for the 10% reduction in the Respondent's costs referred to at [67] above, and meets the need for proportionality described at [69].

71. For these reasons the appeal is dismissed. The Appellant is ordered to pay the Respondent the original figure of £1,440 ordered by the Judge; together with the Respondent's costs in the sum of £4,596.48; within 21 days.