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Judgment: approved by the Court for handing down | *Delivered:* **06/02/2014**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Salad's (Fowsiya) Application [2014] NIQB 37

IN THE MATTER OF AN APPLICATION BY FOWSIYA SALAD FOR JUDICIAL REVIEW

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TREACY J

Introduction

[1] The applicant is a Somalian National from a minority tribe and a refugee who was granted asylum in the United Kingdom in 2011. She challenges a decision of the Home Office dated 17 December 2012 whereby a fee of $3200 was levied in respect of her family's application for family reunion in order to join her in the UK. Neither the applicant nor her family can discharge this application fee and the respondent has refused to waive same thereby debarring the applicant's family from having their application considered by the respondent.

Background

[2] The applicant fled Somalia as a member of a minority clan subject to persecution from the majority clans in Somalia. Unfortunately, the applicant became separated from her family and they fled to Ethiopia where they remain to this day. The applicant fled to the UK and claimed asylum, was granted refugee status and limited leave to remain on 12 August 2011. The applicant's family in Ethiopia consists of her mother, Shamso Omar Ahmed and her siblings Abdul Aziz Salad, Habon and Farhiyo Salad. The applicant seeks family reunion with these family members in the UK.

[3] The applicant remains in contact with her family in Ethiopia by way of telephone as regularly as she can afford it. Her last contact with her family was on 4 January 2013. When the applicant resided in a care home she had frequent weekly

contact by telephone as the care home provided the calling facilities. The applicant has also sent some limited financial provision to her family in Ethiopia by way of money transfers.

[4] In order to seek reunion with her family in the UK the applicant completed an application form which was forwarded by her solicitor to her family members at an address in Ethiopia. This was then presented by the family to the British Embassy in Abbis Ababa on or about 17 December 2012. On presentation a British Embassy official advised them that they would have to pay an application fee of $3,200 for the application to be accepted and processed. As refugees from Somalia the family could not afford to pay the fee since they have little disposable income and the applicant is in a similar position.

Order 53 Statement

[5] The applicant sought the following relief:

> "(a) an Order of Certiorari to quash the impugned decision;
>
> (b) an Order of Mandamus to compel the respondent to waive any applicable fee and accept the application for determination on its merits;
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> (c) an Order of Mandamus to compel the respondent to consider the application outside of the Immigration Rules given the compelling compassionate circumstances of this case;
>
> (d) a declaration that the impugned decision was unlawful, ultra vires and of no force or effect and contrary to article 8 ECHR and section 6 of the Human Rights Act 1998;
>
> ..."

[6] The grounds on which the relief was sought included:

> "(a) The decision was unlawful as an error of law as it appears to have applied the Immigration and Nationality (Cost Recovery Fees) Regulations 2011 which were revoked by the Immigration and Nationality (Cost Recovery Fees) Regulations 2012 ("the 2012 Regulations) and which came into force on 6 April 2012. The impugned decision was made on or about 17 December 2012 and therefore ought

to have been governed by the 2012 Regulations. The 2012 Regulations permit waiver of any standard fee relating to entry clearance as a parent or other dependent relative pursuant to Schedule 1, Table 5 at 5.1. As such the Secretary of State has discretion under the 2012 Regulations as to whether or not a fee can be waived in any given case.

(b) The decision was unlawful in so far as the respondent has fettered their own discretion in respect of application fees per the 2012 Regulations. The respondent has not considered, adequately or at all, whether or not the application fee should be waived in this case. There has therefore been no exercise of discretion.

(c) The decision was unlawful as in breach of section 6 of the Human Rights Act 1998 in so far as the decision was contrary to the applicant's right to private and family life protected by article 8 ECHR. The decision to impose a fee that cannot be paid and which rendered the application as invalid clearly interferes with the applicant's family life. The respondent must demonstrate that this interference is proportionate in all the circumstances. The respondent has not even considered the applicant's rights under article 8 ECHR. The decision is not proportionate given the circumstances of the applicant's case.

(d) The decision was unlawful as in breach of section 55 of the Borders, Citizenship and Immigration Act 2009 in so far as the respondent has failed to consider the applicant's best interests adequately or at all. The applicant was a child at that time the application was made.

(e) The decision was unlawful as the respondent failed to consider and/or apply their own "Evidential Flexibility" policy document at the time of the impugned decision or when responding to the application's pre-action correspondence.

(f) The respondent failed to take into account, adequately or at all, a number of relevant facts including:

(i) Their own "Evidential Flexibility" policy document.

(ii) The applicant's personal circumstances and background.

(iii) The applicant's status as a minor at the time of application and decision.

(iv) The applicant's limited financial means.

(v) The applicant's family's limited financial means.

(vi) The compelling compassionate circumstances in this case.

(vii) The possibility of the application being considered "outside" of the Immigration Rules."

Statutory Framework

[7] The power to charge fees for an application in connection with immigration is contained in s51 of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act") which provides:

> "(1) The Secretary of State may by order require an application or claim in connection with immigration or nationality (whether or not under an enactment) to be accompanied by a specified fee.
>
> (2) The Secretary of State may by order provide for a fee to be charged by him, by an immigration officer or by another specified person in respect of—
>
> (a) the provision on request of a service (whether or not under an enactment) in connection with immigration or nationality,

(b) a process (whether or not under an enactment) in connection with immigration or nationality,

(c) the provision on request of advice in connection with immigration or nationality, or

(d) the provision on request of information in connection with immigration or nationality.

(3) Where an order under this section provides for a fee to be charged, regulations made by *the Secretary of State* –

(a) shall specify the amount of the fee,

(b) may provide for exceptions,

(c) may confer a discretion to reduce, waive or refund all or part of a fee,

(d) may make provision about the consequences of failure to pay a fee,

(e) may make provision about enforcement, and

(f) may make provision about the time or period of time at or during which a fee may or must be paid. [emphasis added]

[8] Section 5.1 of Table 5 of the Immigration and Nationality (Cost Recovery Fees) Regulations 2012 ("the 2012 Regulations"), provides the Secretary of State with a general power to waive any visa fee. Table 5 of Schedule 1 contains the following general waiver:

> "No fee is payable in respect of an application where the Secretary of State determines that the fee should be waived."

Arguments

[9] In response to the respondent's general criticism that the applicant could make a fresh application and rely on the further material that was not before the original decision-maker the applicant argued that the respondent should have re-considered their decision in the light of that material on foot of these judicial

review proceedings. The respondent was fully aware of that information and could – at any stage – have reviewed the impugned decision [really just the issue of whether or not fees should be waived] in the light of all the material before the Court.

[10] The respondent conceded that they considered the wrong Regulations in respect of the impugned decision making reference to the 2011 Regulations instead of the 2012 Regulations. But what is clear from both the 2011 and 2012 regulations is that the relevant discretion is a broad one vested in the Secretary of State.

[11] The applicant submitted that in respect of the impugned decision, there was no evidence whatsoever of discretion being considered and insofar as the review letter was an attempt to rescue that situation then it too was deficient. The review letter does not tell the applicant anything as to how the respondent exercised discretion in her case. The obligation to make this explicit is all the more compelling given the breadth of the discretion contained within the regulations. It is not sufficient, the applicant submitted, to set out the relevant provision which shows that there is discretion - the respondent must go further and actually show how they have considered that discretion in the particular circumstances of the applicant's case.

[12] The applicant submitted that the respondent failed, contrary to statutory duty, to properly consider her welfare/best interests when making the impugned decision on 17 December 2012 at which point in time the applicant was a minor. Under s55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act") the respondent was obliged to have regard to the need to safeguard and promote the welfare of the applicant – as a child directly affected by the impugned decision. Further by s55(3) the respondent was obliged to have regard to relevant guidance. That relevant guidance was published under the title *"Every Child Matters"* and provides some definition as to what is required in order to *"safeguard and promote"* the welfare of affected children:

- Protecting children from maltreatment.
- Preventing impairment of health, including mental health, and development.
- Ensuring children are growing up in circumstances consistent with provision of safe and effective care.
- Undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully.

[13] The applicant referred to ZH (Tanzania) v SOSHD [2011] 2WLR 1326 and ALJ & Ors [2013] NIQB 88 and submitted that, contrary to the principles enunciated in ZH (Tanzinia), there was no evidence at all to show that at the time of the impugned decision there was any consideration given to her welfare and best interests. No affidavit evidence was provided in respect of the impugned decision, in order to

deal with this issue. The respondent's replying affidavit conceded that there is no specific reference to s55 in respect of the original impugned decision or in the "review" of that decision carried out by Miss Breen and says that this is a matter of substance rather than form. The respondent then stated that it was of little or no consequence because the applicant was nearly 18 at the time of the original impugned decision.

[14] The applicant took issue with the respondent's approach to this issue. Referring to ALJ & Ors the applicant said it was quite clear that in general terms it was to be expected that a decision-maker would expressly determine what was in a child's best interests *before* considering any countervailing factors that would justify acting in contradiction of those best interests. This strongly supports the need for some degree of *"form"* to be given to such considerations. In this case there is neither "form" nor "substance" to the original decision. The issue is simply not addressed at all. It is not just that there is no mention of s55, there is no mention of the applicant's welfare/best interests even in the most general sense. The applicant was and remains a particularly vulnerable person given her status as a refugee and formerly a child in care [known to the Home Office at the time] and given her mental health issues [now known to the Home Office]. In addition there was no consideration of the application of the *"spirit"* of the s55 duty in respect of the applicant's younger siblings, who remain children. This appears to be contrary to the respondent's own policy in *"Every Child Matters"* at para 2.34:

> "The statutory duty in section 55 of the 2009 Act does not apply in relation to children who are outside the United Kingdom. However, UK Border Agency staff working overseas must adhere to the spirit of the duty and make enquiries when they have reason to suspect that a child may be in need of protection or safeguarding, or presents welfare needs that require attention."

[15] Further, the applicant argued that the respondent had misdirected itself as to the operation of s55 which does not admit of any diminution/dilution of the duty as a child approaches the age of 18. The terms of the statute, section 55(6), define child as a person under the age of 18. As such the applicant in December 2012 was just as entitled to have her welfare properly considered as if she was 7 even though she was 17 at that time. While the question of what is in a child's best interests and the impact of countervailing factors will be highly influenced by the age of the child it is not permitted, under the Act, to adopt a dramatically different approach which, as advocated by the respondent, is to say that s55 doesn't *really* apply to those who are nearly 18 contrary to the terms of the statute. The respondent is under the same duty to firstly consider what is in the best interests of a child whether the child is aged 2, 7 or 17. In this case there was no determination of that issue or any consideration given to the countervailing factors that might apply nor any attempt to weigh up all those issues in coming to the impugned decision.

[16] The applicant argued that it follows that the original decision was contrary to the requirements of Art 8 ECHR insofar as the impugned decision, which clearly had a direct impact on the family life of the applicant, was not made *"in accordance with the law"* [as contrary to s55] and is thereby in contravention of Art 8(2) ECHR and is unlawful by s6 of the Human Rights Act 1998.

[17] In addition the applicant submitted that Art8 was breached substantively by the impugned decision and referred the judgement of Sales,J in Sheikh [2011] EWHC 3390 (Admin):

> "(7) Reflecting these considerations, an implied obligation under Article 8(1) will only be found where the court "has found a direct and immediate link between the measures sought by the applicant and the latter's private and/or family life": *Botta v Italy (1998) 26 EHRR 241* , paras. [33]-[35]. A court will be slow to find an implied positive obligation which would involve imposing on the State significant additional expenditure, which will necessarily involve a diversion of resources from other activities of the State in the public interest: see, e.g., the rejection of the implied obligation argument by the ECtHR in its admissibility decision in Sentges v The Netherlands, ECtHR, decision of 8 July 2003 (denial of assistance in the form of provision of a life-transforming robotic arm for a severely disabled person); also see *Draon v France (2006) 42 EHRR 40* , paras. [105]-[108] (Grand Chamber);
>
> (8) On the other hand, the fact that the interests of a child are in issue will be a countervailing factor which tends to reduce to some degree the width of the margin of appreciation which the state authorities would otherwise enjoy. Article 8 has to be interpreted and applied in the light of the UNCRC: see In re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27; [2011] 2 WLR 1326 at [26]. However, the fact that the interests of a child are in issue does not simply provide a trump card so that a child applicant for positive action to be taken by the state in the field of Article 8(1) must always have his application acceded to (for example, the applicant in Sentges was a child); see also In re E (Children) at [12] and ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4; [2011] 2 WLR 148 at [25] (under Article 3(1) of the UNCRC the interests of the child are a primary consideration – i.e. an important matter –

not *the* primary consideration). It is a factor relevant to the fair balance between the individual and the general community which goes some way towards tempering the otherwise wide margin of appreciation available to the State authorities in deciding what to do. In the present context, the age of the child and the closeness of their relationship with the other family members in the United Kingdom are likely to be important factors which should be borne in mind (if, e.g., a very young child has just been separated from his mother, with whom he has a close relationship in the ordinary way, that is likely to indicate a strong interest for that child in restoring family life with the mother);

(9) In the context of charging fees for consideration of an application for entry clearance for a family member, it is fair and proportionate to the legitimate interests identified in Article 8(2) of "the economic well-being of the country" and "the protection of the rights and freedoms of others" (i.e. other users of the immigration system and taxpayers generally) for the state authorities to focus attention primarily on the ability of the applicant (even if the applicant is a child) and his sponsor and family members to pay the relevant fee, as policy OPI 216 does. If there is no great difficulty in them raising funds to pay the fee, there will be no tenable case for an implied obligation under Article 8(1) for the applicant to be exempted from paying the fee. In such a case it cannot be said that there is a "direct and immediate link" between the waiver of the fee and respect for family life (Botta and Draon); nor that the fair balance between the interests of the individual and the interests of the general community requires the state authorities to forego collecting the application fee. Putting the same point positively, the collection of the fee would fall within the wide margin of appreciation to be accorded those authorities (even after adjustment in light of Article 3 of the UNCRC if the interests of a child are in issue);

(10) But in a case where the claimant, sponsor and family can show that they have no ability to pay the fee, it will in my view be necessary to assess in broad terms the strength and force of the underlying claim which is to be made. If, upon undertaking such an exercise, it can be seen that the claimant may well have

> a strong claim under Article 8 involving an aspect of the interests protected by that provision of particularly compelling force — supporting his claim to be allowed to enter the United Kingdom to develop or continue his family life with other family members already here — and that insistence on payment of the fee will set that claim at nought, then in my view an obligation may arise under Article 8 for the Secretary of State to waive the fee (or for the court to order the Secretary of State to waive the fee). In doing this, the Secretary of State and the court are not bound to take the claimant's asserted case at its highest, as on a summary judgment application, as Mr Armstrong submitted. They are entitled to subject the case to critical evaluation to determine its true underlying strength and the true force of the particular Article 8 interest being asserted. If it is a strong underlying case concerning a compelling interest under Article 8(1), then (by contrast with the position under sub-paragraph (9) above) it can be said that there is a "direct and immediate link" between the waiver of the fee and respect for family life and that the fair balance between the interests of the individual and the interests of the general community does require the state authorities to forego collecting the application fee. Putting the same point negatively, the collection of the fee would not then fall within the margin of appreciation to be accorded those authorities (especially, in the case of a child, after adjustment in light of Article 3 of the UNCRC);
>
> (11) In a marginal case, falling between the types of case referred to in sub-paragraphs (9) and (10) above, where the claimant, sponsor and family may be able to raise the money for the application fee but it may take some time for them to do so, the strength and force of the underlying Article 8 case will again be important, as will the assessment of the financial resources available and how long the making of the application might have to be delayed in order for the necessary funds to be raised."

[18] The applicant submitted that she had no ability to pay the application fee of $3200 given that she had just come out of care, was in education, a refugee and was in receipt of benefits. The applicant's family being asylum seekers/refugees in Ethiopia were also not able to discharge this fee. The applicant said it was therefore necessary for the Home Office to assess, in broad terms, the strength and force of the

underlying claim which was to be made. The applicant submitted that her claim to be reunited with her family was a strong one in all the circumstances given that she was separated from her family while still a child and later secured refugee status in the UK and could not reasonably be expected to give that status up in the UK to return to Ethiopia to live with her family. There was therefore a direct and immediate link between the waiver of the fee and respect for the family life at issue and as such Art 8 was breached by the refusal to waive the fees in this case.

[19] The applicant asserted that the respondent failed in the original decision and upon review to consider their own policy adequately or at all. The policy at issue is known as the "*Evidential Flexibility*" policy document. The applicant submitted that the impugned decision [and indeed the review of that decision] failed to consider the possibility of evidential flexibility. In particular, the respondent failed to consider whether or not they should ask the applicant to provide further evidence regarding her [or her family's] lack of means.

Discussion

[20] The internal guidance from the Border Agency dealing with entry clearance fees is contained at tab 2 of the exhibits. In a section of the document under the title "ECB6.6 Issue of gratis visas" it is stated:

> "The expectation is that all applicants seeking a visa to enter the UK or Crown Dependencies will pay the appropriate fee. Visa operations are an essential part of the UK's immigration control and it is government policy that *where possible,* fees charged for services should cover the cost of providing them, to reduce the burden on the taxpayer.
>
> [The document then sets out the material provisions of the Immigration and Nationality (Cost Recovery Fees) Regulations 2011 noting also that the provisions of the guidance apply to all fees including those covered by the Fees Regulations.]
>
> Para 11(c) provides that "No fee is payable by the applicant in relation to an application referred to in regulation 10 where … (c) the Secretary of State determines that the fee should be waived". The *guidance* then states that 11(c) will apply *only* to cases where there are "***the most exceptional compelling and compassionate circumstances***".

[21] The italicised portion of the guidance purports to put a substantial gloss on the discretion that the Secretary of State was, by statutory regulation, invested with.

The response to the pre-action protocol letter does not refer to this test, it does not appear in the application form and is not mentioned in any publicly available guidance that the court has been made aware of. This may constitute an additional reason as to why this decision cannot stand because it may involve the erection of a higher hurdle than the Regulations mandate or, at the very least, the introduction of a new test which neither the applicant nor her legal advisors would have been aware of.

[22] The test that has been introduced is not a feature of the relevant Regulations but of the internal guidance. The applicant and her legal advisors would not have been aware that that was the test which was being applied. The Regulations simply state that no fee is payable where the Secretary of State determines that the fee should be waived.

[23] The material conclusion of the court is as follows. The relevant form contains no reference to the possibility of waiver of the standard fee, nor has the court been shown any guidance made available to applicants indicating the existence of a discretion or its contours. The internal guidance exhibited to Ms Evans' first affidavit says that the expectation is that all applicants seeking a visa to enter the UK or Crown dependencies will pay the appropriate fee. Visa operations are an essential part of the UK's immigration control and it is government policy that, where possible, fees charged for services should cover the costs of providing them to reduce the burden on the tax payer. Regulation 11 of the Immigration and Nationality (Cost Recovery Fees) Regulations 2011 stated:

> "11. No fee is payable by the applicant in relation to an application referred to in Regulation 10 where-
>
> (a) ...
>
> (b) ...
>
> (c) The Secretary of State determines that the fee should be waived."

[24] But the guidance as it is referred to earlier goes on to say para 11(c) will apply only to cases where there are most exceptional compelling and compassionate circumstances specifically relating to the payment of the fee.

[25] The relevant rule states that no fee is payable when the Secretary of State determines that the fee should be waived. The internal guidance however places a substantial gloss on the exercise of the Secretary of State's discretion. This test which has to be met is not published and interestingly is not referred to at all in the response to the pre-action protocol letter. So it appears that until these proceedings were brought and the respondent filed its affidavit evidence that the existence of this

test was undisclosed. This was not part of the applicant's case.I leave that point to one side as I am able to decide the case on grounds that were pleaded.

[26] The court has no evidence from the person who made the impugned December decision, indeed his or her identity is apparently unknown, and there is no evidence that the decision maker appreciated that there was a discretion or gave any consideration to its exercise.

[27] Para 6 of Ms Evans' first affidavit said:

> "It is important to recall that the Visa Application Centre on 17 December 2012 only had the information provided in the VAF 4A Family Settlement and Family Reunion Forms. These applications did not fall into any category that should be accepted as an application without the fee being paid. Most significantly the applicant and her family failed to adduce any evidence that would have led the decision maker to conclude that there were any compelling compassionate circumstances advanced as to why the fee should be waived."

[28] Ms Evans was not the decision maker either in December or in February but this particular paragraph does betray an error in so far as it says that there was not any evidence of compelling compassionate circumstances. In my view that is simply not so. There was evidence from the application form that the applicant and her family members were Somali refugees and were therefore unlikely to be in a position to pay such a substantial fee even leaving aside the fact that the applicant in these judicial review proceedings was herself, a minor at the time.

[29] Against that background it seems to me that the impugned decision of December cannot stand. So far as the February decision is concerned, the only material in relation to the February decision is the letter of 20 February 2013. We do not have any affidavit from Ms Breen who took that decision. The February letter in my view simply does not engage with the claim that as refugees from Somalia with little disposable income that they were unable to pay the fee. Indeed, the final paragraph of the letter of 20 February says as follows:

> "I have reviewed the information you have submitted and I have re-examined the information supplied, but I have upheld the original decision by the Visa Application Centre to impose a fee. Your client's family do not qualify under the Family Reunion route and therefore cannot have gratis applications."

[30] If Ms Breen exercised any discretion we are left completely in the dark as to how or why it was exercised in the manner that it was. The final paragraph which I

have just read is conclusionary, devoid of reasoning and infected with a material error, namely that because the applicant's family did not qualify under the Family Reunion route that they therefore could not have a gratis application. That is a material error because of course they could have had a gratis application if the Secretary of State of State exercised her discretion to waive the fee in this case.

[31] It is unclear to me whether this official appreciated that she, on the Secretary of State's behalf, had a discretion much less that it was conscientiously exercised.

[32] Accordingly, for the above reasons I accede to the application and quash the impugned decisions.