R (Hans Husson) v Secretary of State for the Home Department [2020] EWCA Civ 329

Russell Wilcox

1 Chancery Lane

Abstract

R (Hans Husson) v Secretary of State for the Home Department (2020) considered the arguability of a claim in damages for the respondent's 30-month delay in issuing the appellant with a biometric residence permit (BRP). A BRP is required in order for a grantee of leave to remain (LTR) to secure employment. It should have been issued immediately or very soon after the appellant was granted LTR but was not. On those facts, the Court of Appeal found, first, that it was arguable the appellant had been entirely or very substantially deprived of the ability to undertake work, that this was the correct test to apply when considering potential breaches of Article 8 of the European Convention on Human Rights in such circumstances, and that it was also arguable that such a breach would require an award of damages to provide 'just satisfaction'. Secondly, the court found arguable for the purposes of establishing a claim in negligence that the respondent had assumed responsibility to make a timeous decision under the terms of a previous consent order.

Key Words: damages, immigration negligence claims, Article 8 loss of earnings claims, assumption of responsibility

In the case of *R (Hans Husson) v Secretary of State for the Home Department* (2020) the Court of Appeal was tasked with deciding two questions of some significance. The first of those questions related to whether or not it was arguable, on the facts of the case before the court, that the appellant, Mr Husson, was entitled to damages under section 8 of the Human Rights Act 1998 with reference to Article 8 of the European Convention on Human Rights (ECHR) on the basis of violation of his family and private life. The second question, the more finely balanced one, was whether those same facts gave rise to a claim against the Secretary

of State in the tort of negligence on the basis of a claimed underlying assumption of responsibility.

It is important to note that the court was dealing with these questions against the standard of arguability only and was not determining the question of liability to damages in substance since this was an appeal against a refusal by the Upper Tribunal (Immigration and Asylum Chamber) to grant Mr Husson permission to bring a substantive application for judicial review. Nevertheless, in the course of so doing, the court was still required to wrestle with the case law as it related to each question and to reach conclusions which are likely to be widely cited in subsequent litigation.

The occasion for Mr Husson's appeal arose out of the circumstances surrounding his grant, in May 2016, of 30 months' limited leave to remain (LTR) in the United Kingdom, which carried with it a right to work. In line with this grant, Mr Husson should have been granted a biometric residence permit (BRP) within a matter of weeks confirming his entitlement to work, but the permit was not issued and sent to him until more than two years later, on 19 June 2018. Mr Husson sought to challenge that delay by an application for judicial review, in part on the basis that such a delay was unlawful and gave rise to a claim for damages against the Secretary of State.

At first instance, Mr Husson was refused permission to bring his application on the papers and then subsequently, upon renewal, at an oral hearing before Upper Tribunal Judge King (UTJ King) in June 2019. In the circumstances of Mr Husson's case, UTJ King felt that the tribunal simply had no jurisdiction to consider a claim for a breach of duty of care or statutory duty. Whilst the judge accepted that there may be a cause for damages for breach of human rights, relying on what was said in the case of *R (Atapattu) v Secretary of State for the Home Department* (2011), he found that to mount such a claim it was necessary to establish a deprivation of the right to work altogether, which Mr Husson could not do in light of the respondent's assurance the Mr Husson would have had the right to work clearly endorsed in his passport upon its return following his grant of LTR. UTJ King also commented on the paucity of the additional evidence furnished by Mr Husson to establish loss flowing from his alleged inability to work, which did not even include a witness statement detailing the same.

An important feature of this case as the arguments developed was the historic background to Mr Husson's eventual grant of LTR in May 2016. Mr Husson, a national of Mauritius, first came to the United Kingdom as

a visitor in July 2004. He then obtained LTR as a student nurse, which was extended until November 2007 after which he applied for and was refused LTR under Articles 3 and 8 of the ECHR. In February 2010 he married a British citizen and they had a child together. Thereafter, Mr Husson sought to reopen the refusal of LTR by way of a request for reconsideration, the making of further representations and, finally, by issuing judicial review proceedings (on 2 September 2013). Permission to apply for judicial review was refused, and in due course those proceedings found their way to the Court of Appeal in late 2015. Eventually the parties agreed to settle proceedings by way of agreement, the terms of which were set out in the recitals to a consent order made by Tomlinson LJ dated 26 November 2016. In so doing, the respondent agreed to reconsider Mr Husson's application together with any further representations he wished to rely upon within three months of their receipt.

By a letter dated the 20 May 2016, within the agreed three-month period, the respondent reconsidered Mr Husson's position and granted him a period of 30 months LTR valid until 20 November 2018. The letter added that a BRP would be sent separately within seven working days, but that if it had not arrived within 10 days Mr Husson should follow up with the respondent. On 26 May 2016, Mr Husson's passport was returned to him, but despite his numerous attempts to chase the respondent, he was not sent the promised BRP until 19 June 2018. No explanation was given for the delay.

Contrary to what had been submitted before UTJ King, by the time the matter came before the Court of Appeal, the respondent accepted that Mr Husson's passport would not, in fact, have been endorsed with the grant of LTR and that, consequently, his passport would not have been a document which would have been acceptable to an employer demonstrating his right to work. This was a significant factual concession, which served considerably to weaken the respondent's case in relation to Mr Husson's damages claim for breach of human rights. As mentioned above, reliance in the Upper Tribunal had been placed on the case of R *(Atapattu) v Secretary of State for the Home Department* (2011). Atapattu concerned the prolonged retention of a merchant seaman's passport after its submission as part of an entry clearance application. The parties did not dispute that the relevant paragraphs of *Atapattu*, as set out by the Court of Appeal in its judgment, were an accurate summary of the law:

> 149. Under the ECHR, there is no express right to work and there is no right to choose a particular profession (Thlimmenos cited at §46 Sidabras). In my judgment, Sidabras was a case, where on the facts, the applicants were wholly or very substantially deprived of the ability

> to work altogether. Furthermore it involved other effects on private life, going well beyond the ability to pursue one own particular chosen career, including public embarrassment as being former KGB officers. (I note in passing that R (Countryside Alliance v Attorney General [2008] 1 AC 719 Lord Bingham described Sidabras as a 'very extreme case on the facts' and that the applicants were 'effectively deprived of the ability to work' altogether). The position in Smirnova was even more extreme. The effect of retention of the passport not only precluded all work, but affected almost every reach of daily life in Russia.
>
> 150. In the present case, whilst Mr Atapattu's ability to pursue his chosen occupation of merchant navy seaman was hampered, there is no evidence that, for the time in which he was deprived of his passport, he was unable to work at all. … Nor is there any evidence that the withholding of his passport had any other particular effects on the ability of Mr Atapattu to enjoy his private life, on his relations with other human beings or on his personal development. Article 8 does not give a right to choose one's particular occupation or to pursue it once chosen. The retention of the passport did not interfere with Mr Atapattu's right to respect for his private life.

Despite its concession, however, the respondent continued to argue on appeal that permission was rightly refused here in light of the high threshold established by the cases referred to in *Atapattu* and on the basis that the respondent's failure to issue Mr Husson with a BRP had not deprived him of the right to work in the relevant sense as he could still have left the United Kingdom and obtained employment in Mauritius. It also pointed to the limited evidence provided by Mr Husson to establish any loss flowing from being unable to work or detailing how it otherwise had interfered with his or his family's Article 8 rights.

In rejecting these arguments, Simler LJ, giving judgment for the court, focused in upon the question of whether or not the consequences to Mr Husson of the respondent's delay in issuing him with a BRP fell within the scope of his private and/or family life under Article 8(1) of the ECHR and met the threshold of interference with it.

Whilst it was recognized that there is no direct authority establishing that a right to work is of itself protected by Article 8 of the ECHR, it was accepted that the authorities cited in *Atapattu* 'demonstrate that where an individual is wholly or substantially deprived of the ability to work altogether, Article 8(1) is at least arguably engaged' (paragraph 36). Further, the case of *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, [2004] QB 1124 (paragraph 59) was authority for the proposition that, in determining whether or not to award damages under section 8 of the Human Rights Act 1998 to afford just satisfaction, 'where the established

breach has clearly caused significant pecuniary loss, this will usually be assessed and awarded' (*Anufrijeva v Southwark LBC* 2004: 37).

In relation to the circumstances in which Mr Husson found himself, Simler LJ stated:

> 38. It is now conceded as a matter of fact, that without a BRP or a stamp in his passport evidencing the right to work, the appellant was unable to take up any lawful employment in the UK because he would not be able to satisfy a UK employer of his entitlement to work lawfully. In those circumstances, the only basis on which it is now argued that there was not a total deprivation is by reference to the possibility of the appellant returning to Mauritius to work there.
>
> 39. It seems to me that as a matter of real world practicality, the appellant was prevented altogether from securing employment during the period of delay. It is unrealistic to expect him to have returned to Mauritius in a period when he expected to receive a BRP at any moment, had the right to remain here by reason of his family life here, and had the right to work here. Moreover, leaving the UK would have involved leaving behind his British wife and child.

With respect to the contention that the evidence of loss provided by Mr Husson was insufficient, she went on to observe:

> 40. It is true … that the evidence of loss of employment and the chance of earnings is very limited, and the appellant did not even produce a witness statement setting out the efforts he made to obtain employment and/or a schedule of his estimated earnings losses. However, be that as it may, in circumstances where the respondent's own policy documents make good this aspect of the appellant's case in the sense that no employer could lawfully have employed him in the UK, it is an inevitable inference that he was deprived of all employment opportunities that were available. Moreover, the Prema Construction rejection letter (purely because he had no BRP) establishes an arguable basis (at the very least) that he suffered some pecuniary loss. There is also evidence of the arguably harsh impact this had on the appellant's ability to enjoy his private and family life given the debt into which he had fallen, with the inference that he was unable to support his wife and young child. As for the fact that his debts accrued before the grant of his LTR … that there was, again, at least arguably, an ongoing and accumulating debt, which coupled with the inability to earn a living to reduce and/or discharge it, or to avoid county court judgments being entered against him, made the impact all the more harsh.

The court found a much harder question to answer: whether or not the facts of Mr Husson's case gave rise to a claim for damages in negligence against the respondent? The central issue was, of course, whether those facts supported an actionable duty of care towards Mr Husson on the part

of the respondent. It was rightly recognized at the outset that imposing a duty of care,

> in respect of the exercise of statutory powers or the performance of statutory duties by a public authority is notoriously difficult … [and that there was no suggestion that] the statutory scheme giving immigration powers to and imposing duties on the respondent [creates] a statutory cause of action that sounds in damages (paragraphs 42 and 43).

Central to Mr Husson's argument was rather that a common law duty of care had arisen in his favour on the basis of the respondent having voluntarily assumed responsibility, as recorded in the recitals to the consent order of 26 November 2015, to reconsider and give him an *effective* decision on his application for LTR within three months of having received his updated written representations:

> An effective decision in this context meant if the decision was positive, it would be followed promptly by the issue of a BRP. However, by granting LTR, but failing to issue a BRP, the decision taken by the respondent was not an effective decision and, as well as being unlawful, represented a failure by the respondent to discharge the responsibility voluntarily assumed to the appellant (paragraph 54).

In a brief and selective consideration of the jurisprudence touching upon these questions, Simler LJ recognized that, particularly subsequent to Lord Hoffman's comments in the case of *Gorringe v Calderdale Metropolitan Borough Council* (2004: paragraph 2), the issue of '[w]hether or not a public authority voluntarily assumed responsibility has been regarded as critical as to whether a duty of care was owed' (paragraph 46) She quoted paragraph 73 of Lord Reed's judgment in the recent case of *Poole Borough Council v GN & Another* (2019) providing an up-to-date summary of the position, and making it clear that operation of a statutory scheme does not preclude the assumption of responsibility sufficient to give rise to a duty of care:

> 73. There are indeed several leading authorities in which an assumption of responsibility arose out of conduct undertaken in the performance of an obligation, or the operation of a statutory scheme. An example mentioned by Lord Hoffmann is *Phelps v Hillingdon*, where the teachers' and educational psychologists' assumption of responsibility arose as a consequence of their conduct in the performance of the contractual duties which they owed to their employers. Another example is *Barrett v Enfield*, where the assumption of responsibility arose out of the local authority's performance of its functions under child care legislation. The point is also illustrated by the assumption of responsibility arising from the provision of medical or educational services, or the custody of prisoners, under statutory schemes. Clearly the operation of a

> statutory scheme does not automatically generate an assumption of responsibility, but it may have that effect if the defendant's conduct pursuant to the scheme meets the criteria set out in such cases as *Hedley Byrne and Spring v Guardian Assurance plc*.

It was recognized that whilst, in the immigration context, the cases of *W v Home Office* (1997), *Home Office v Mohammed* (2011) and *Atapattu* had each rejected the contention that a common law cause of action in negligence against the Secretary of State arose, none of those cases specifically dealt with claims that the Secretary of State had voluntarily assumed responsibility in the manner suggested by Mr Husson. Indeed, in the case of *Atapattu* 'the absence of an assumption of responsibility was an important factor in the refusal to find a duty of care had arisen' (paragraph 53). In contrast, in Mr Husson's case, the respondent, whilst exercising powers under a statutory scheme, went on voluntarily to assume responsibility for making a decision under that scheme within a specified period. The respondent need not have undertaken to do so, but once it did, Mr Husson's argument was that it became fair, just and reasonable to hold a duty of care existed between the parties, and that the respondent should be held liable 'for the material consequences of the failure to discharge that duty' (paragraph 55).

In disposing of this ground, Simler LJ was candid as to the difficulties she had encountered in resolving the arguments before her; though she admitted to having 'grave doubts as to the prospects of the appellant establishing that a duty of care was owed by the respondent in the circumstances of this case' (paragraph 58), however, she concluded that the ground did ultimately reach the threshold of arguability. In so doing, she adopted the three-stage approach set out in *Caparo Industries plc v Dickman* (1990) as qualified by later cases in the context of negligence claims against public bodies. With respect to the first two stages of foreseeability of harm and proximity, she recognized the force both in Mr Husson's contention that his inability to work during the prolonged period of delay in issuing him with a BRP was foreseeable, and 'that having been granted LTR he was a member of a specific group identified as entitled to the prompt issue of a BRP to enable him to do so' (paragraph 59). She was, in consequence, able to see the potential justification on these bases for imposing liability on the respondent.

Her hesitation came when considering questions at the third stage of *Caparo*: namely, whether there was, in fact, a voluntary assumption of the responsibility by the respondent; and whether, in light of that, it would was fair, just and reasonable to impose a duty of care upon it? In relation to the first of these questions, she had the following to say:

> Leaving aside the question whether the terms of the order were in fact breached … the conduct said to have generated the duty here was the agreement recorded in the recitals to the consent order, to make an effective decision within three months. I am doubtful that a common law duty of care can be derived from such an agreement given to support a consent order of the court. Moreover, it seems to me that the decision to reconsider the appellant's further submissions in his changed family situation, is one the respondent may have been bound to take under paragraph 353 of the Immigration Rules (fresh representations) as part of the respondent's statutory function and public law obligations. On the other hand, as Lord Reed observed in Poole, there are several leading authorities in which an assumption of responsibility arose out of conduct undertaken in the performance of an obligation, or the operation of a statutory scheme (paragraph 61).

With respect to the second and wider question, her doubts centred upon considerations of policy or the practical consequences of imposing a duty of care in the circumstances. To her mind, these may well be sufficiently adverse such as to be 'inconsistent with the proper performance of the respondent's statutory functions' (paragraph 62). Indeed:

> [i]t might discourage the respondent from agreeing to reconsider fresh representations rather than contesting judicial review claims. It may also be (though I have doubts about the viability of any real remedy) that there is an alternative avenue for achieving redress by means of the relevant Ombudsman scheme as the respondent contends, though I recognise the force of the arguments advanced … that such schemes do not provide adequate alternative redress.

Nevertheless, her ultimate reason for allowing the appeal also on this ground was not only the complexity of the questions arising 'in what is an evolving area of law', but also that the question of 'whether responsibility was in fact assumed here … may depend on a greater exploration of the particular facts', such that it would be better to leave the 'individual facts of the case to be determined so that the evolution of the law can be based on actual factual findings' (paragraph 63).

Whilst the jurisprudential issues raised by the Court of Appeal's attempt in *Husson* to grapple with the existence and/or extent of negligence liability in relation to immigration matters are arguably the more complex and interesting, and whilst the later stages of Mr Husson's litigation promise to throw up further answers to the questions they raise, it is likely that the court's more significant findings relate to Mr Husson's damages claim for breach of his human rights, and, in particular for breach of his Article 8 rights.

Husson roundly approves the test contemplated in *Atapattu* by Mr Stephen Morris QC that where a claimant can show that he has very

substantially been deprived of the ability to work, and consequential loss can be established on the facts, he will be entitled to pecuniary compensation as '*just satisfaction*' under section 8 of the Human Rights Act 1998. Compensation for loss of earnings could inevitably be quite significant in individual cases, and, in terms of quantum, could come to rival the sums awarded in unlawful detention actions. Moreover, given the 'hostile environment' which has been part of government immigration policy for some time now, there are many instances in which LTR (together with its associated right to work) has been refused and/or cancelled only to be reinstated on appeal at some later stage. To what extent the consequences of a wrongful decision by the Secretary of State may now give rise to a claim for compensatory damages in light of *Husson* is likely to become a question of some significance. Finally, over the past three to four years, there has been a spate of cases in which the Secretary of State has cancelled LTR on the basis of allegations of fraud. The most notorious of these cancellations, numbering in the tens of thousands, relate to allegations of the fraudulent procurement of English language test certificates for the purposes of satisfying certain immigration application qualifications (*SM and Qadir (ETS – Evidence – Burden of Proof)* (2016); and *Majumder v SSHD* (2016)), but parallel allegations have also been made in relation to discrepancies between income declarations to HMRC and the Home Office in the context of paragraph 322(5) of the Immigration Rules (*R (Shahbaz Khan) v Secretary of State for the Home Department* (2018)). The evidential bases of such allegations have come under sustained attack and the case law relating to them continues to evolve apace (*MA (ETS – TOEIC testing) Nigeria* (2016) and *Balajigari & Ors v SSHD* (2019)).[1] Given the gravity with which the courts have always treated allegations of fraud improperly, or incorrectly, made, it is quite possible that the loss of earnings that have resulted in these cases could draw particular inspiration from the *Husson* judgment.

The author would like to point out that he was Counsel for Mr Husson and has written this Note in his personal capacity.

Legislation Cited

European Convention on Human Rights

Human Rights Act 1998

Immigration Rules

[1] See also *R (Ahsan) v SSHD* (2018); and *R (Khan) v SSHD* (2018)

Cases Cited

Anufrijeva v Southwark LBC [2003] EWCA Civ 1406

Anufrijeva v Southwark LBC [2004] QB 1124

Balajigari & Ors v SSHD [2019] EWCA Civ 673

Barrett v Enfield London Borough Council [2001] 2 AC 550

Caparo Industries plc v Dickman [1990] 2 AC 605

Hedley Byrne & Spring v Guardian Assurance plc [1994] UKHL 7, [1995] 2 AC 296

Home Office v Mohammed [2011] EWCA Civ 351

Gorringe v Calderdale Metropolitan Borough Council [2004] UKHL 15; [2004] 1 WLR 1057

MA (ETS – TOEIC testing) Nigeria [2016] UKUT 450 (IAC)

Majumder v SSHD [2016] EWCA Civ 1167

Phelps v Hillingdon LBC [2001] 2 AC 619

Poole Borough Council v GN & Another [2019] UKSC 25

R (Ahsan) v SSHD [2018] HRLR 5

R (Atapattu) v Secretary of State for the Home Department [2011] EWHC 1388 (Admin)

R (Countryside Alliance) v Attorney General [2008] 1 AC 719

R (Hans Husson) v Secretary of State for the Home Department [2020] EWCA Civ 329

R (Khan) v SSHD [2018] EWCA Civ 1684

R (Shahbaz Khan) v Secretary of State for the Home Department [2018] UKUT 00384 (IAC)

Sidabras & Another v Lithuania (App nos 55480/00 and 59330/00) [2004] ECHR 55480/00

SM and Qadir (ETS – Evidence – Burden of Proof) [2016] UKUT 229 (IAC)

Smirnova v Russia (App Nos 46133/99 and 48183/99) [2003] ECHR 46133/99

W v Home Office [1997] Imm AR 302 (CA)