Neutral Citation Number: [2022] EWHC 1531 (QB)

Appeal No: QA-2021-000164

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
HHJ BAUCHER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/06/2022

Before :

MR JUSTICE CHOUDHURY

- -

Between :

FXJ	**Appellant**
- and –	
1) SECRETARY OF STATE FOR THE HOME DEPARTMENT **2) HOME OFFICE**	**Respondents**

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D Chirico & A Nicolau (instructed by **Wilsons Solicitors LLP**) for the **Appellant**
R Cohen (instructed by **Government Legal Department**) for the **Respondents**

Hearing date: Friday 11 March 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 11am on Monday 20 June 2022.

Mr Justice Choudhury :

1. The principal issue in this appeal is whether the Respondent owes a duty of care in tort to the Appellant in circumstances where a delay before withdrawing an appeal against a decision as to immigration status had exacerbated the Appellant's mental health condition thereby leading to his hospitalisation. Following a trial on liability, HHJ Baucher ("the Judge") sitting in Central London County Court held, inter alia, that no such duty was owed and dismissed the Appellant's claims for damages in negligence. Claims for misfeasance in public office and under s.3 of the *Human Rights Act 1998* were also dismissed. The Appellant appeals with permission against those decisions.

Factual Background

2. The trial proceeded on the basis of agreed facts, although there was some live remote evidence mainly for the purpose of exhibiting documentation.

3. The Appellant is a Somali national who has a well-founded fear of persecution in Somalia and has consequently been recognised as a refugee in the UK. He suffers from serious mental illness, including paranoid schizophrenia. The Appellant was convicted of robbery in 2007 and sentenced to 18 months' imprisonment, as a result of which the Respondent decided to make a deportation order against him. That deportation order was made once the Appellant's appeal rights had been exhausted, on or around 6 February 2009.

4. On 4 March 2009, the Appellant made further representations requesting that the Respondent revoke his deportation order. The Respondent refused those representations on 27 January 2014. That was the Respondent's final determination in this matter before litigation ensued.

5. The Appellant exercised his statutory right of appeal from that decision to the Immigration and Asylum Chamber of the First-tier Tribunal ("FTT"). The responded resisted the appeal.

6. On 15 May 2015, the FTT dismissed the Appellant's appeal. However, permission was granted to appeal to the Upper Tribunal ("the UT").

7. On 16 October 2015, the UT set aside the FTT's decision on the ground that it contained a material error of law, and set the matter down to be reheard in the UT. In directing the rehearing, the UT observed that it was "clear from the medical evidence that any ongoing delay in resolving this case is likely to be detrimental to the appellant's mental health".

8. The rehearing took place very promptly on 16 November 2015, and the UT allowed the Appellant's appeal by a decision promulgated on 4 December 2015. In an internal post-hearing note, the Respondent had acknowledged that the appeal would be allowed, in part on the basis of evidence which the Respondent had herself provided about the likely treatment in Somalia of people suffering from serious mental illness.

9. By an application dated 17 December 2015, the Respondent sought permission to appeal the UT's decision, first from the UT itself. That application was refused by the UT on 5 January 2016. The Respondent was entitled to renew its application for

permission to appeal directly to the Court of Appeal. The deadline for doing so was 10 February 2016. That deadline expired without any application to the Court of Appeal being lodged.

10. On 19 February 2016, the Appellant's solicitors entered into correspondence with the Respondent requesting that the Appellant be granted settled status "forthwith" following his successful appeal, and reminded the Respondent that the Appellant "suffers from serious mental health problems and the delay in granting him status is likely to have a detrimental effect on his mental health". In the absence of any substantive response, the Appellant's solicitors issued a pre-action letter on 1 March 2016.

11. On 15 April 2016, some two months after the expiry of the time limit, the Respondent filed an Appellant's Notice with the Court of Appeal with an application for an extension of time. The Judge's detailed findings as to the communications within the Respondent's department leading up to this point need not be set out in full here. Suffice it to say that Mr Chirico's summary of those findings as tending to demonstrate an "apparent breakdown in communication within the Respondent's offices, and between the Respondent and her legal representatives", is not unfair.

12. Although an appeal was lodged, file notes dated 26 and 27 April 2016 record the views of one of the Respondent's officers that "no further challenge [was] proposed" and that a "final sign off [was awaited] from Mike Wells". It appears therefore that the Respondent was considering withdrawing the appeal.

13. The appeal was reviewed by Mr Wells on 10 May 2016. Mr Wells appears to be a senior Home Office official with authority to "sign off" on the appeal, although his precise title is unclear. He concluded as follows:

> "I agree that we should not pursue this case. I have previously expressed concerns about the Home Office position with regards to Somalis with a mental illness. The UTT finding – extract below – is clear (a) that those with mental health disorders are often subject to humiliating conditions including that they are often chained; and (b) that the chaining of mental health patients amounts to inhuman and degrading treatment.
>
> As I have previously stated, unless we wish to challenge one or other of these findings it follows that Somalis whom we accept have serious mental health issues cannot normally be returned. There would have to be exceptional factors such as a strong family network in the Mogadishu area to have even a chance of overcoming that presumption that Article 3 applies.
>
> Given that, where we accept that a Somali has serious mental health issues and does not have a strong family support network in Mogadishu, I do not understand why we would not grant leave nor why we would incur taxpayers' money on futile attempts to deport."

14. Mr Wells' review resulted in the withdrawal of the appeal very shortly thereafter on 13 May 2016. On 19 May 2016, the Respondent wrote to the Appellant's solicitors confirming that the claimant would be granted leave to remain for 5 years. The Respondent granted the Appellant refugee status on 23 July 2016.

15. During the period leading up to the withdrawal of the Respondent's appeal, the Appellant's mental health had deteriorated, and on 18 May 2016 he was compulsorily hospitalised pursuant to s.2 of the *Mental Health Act 1983*. He remained in hospital for 43 days.

16. The Appellant lodged proceedings against the Respondent in the County Court in July 2017, seeking damages for breach of duty on the basis that:

    i) The Respondent has a duty of care to act with reasonable competence, diligence and in good faith to make decisions without unreasonable delay and to have regard to any particular vulnerabilities of any individual applicant;

    ii) The Respondent was also required to act in compliance with the European Convention on Human Rights ("ECHR");

    iii) In exercising that duty of care to the Appellant, the Respondent was required to have regard to his vulnerabilities, including, in particular, his mental illness and his status as an asylum-seeker.

    iv) In breach of that duty of care, the Respondent failed to take reasonable care in reaching its decisions as to the Appellant's status. In particular, the Respondent had failed to complete the process of reaching an informed decision on whether to appeal against the UT's decision, and implementing the UT's decision, with reasonable competence and without unreasonable delay, having regard to the Appellant's circumstances.

    v) Further or in the alternative, the Respondent acted illegally and with reckless indifference to the illegality of its actions and/or with reckless indifference to the probability of causing injury to the claimant.

The Judgment below

17. The question before the Judge was whether the Respondent was liable in tort, misfeasance or under the *Human Rights Act 1998* for the harm caused to the Appellant.

18. The Judge dealt first with the question of whether any duty of care was owed by the Respondent to the Appellant.

19. The Judge considered that in light of the pleaded issues, the first matter for her determination was whether the claim amounted to a claim by one litigant against another in respect of the conduct of that litigation or was based upon a duty of care arising in the exercise of statutory responsibility. The Judge considered that the "true relationship" between the parties was one of "litigation" [57]; that the Respondent had "determined the claimant's immigration status on 27 January 2014", following which "the entire matter rested with the progress of the claimant's appeals against that decision and its ultimate determination in the courts" [59]. The Judge considered that the "whole tenor of the claimant's pleaded claim and the allegations of breach of

alleged duty related entirely to the litigation process" and that there is "not one single allegation challenging the actual original decision to deport because that was the substance of the litigation" [62]. The Judge "rejected the [Appellant's] contention that the conduct of the litigation and the conduct of the decisions about the claimant's immigration status was so interlinked that the decision to pursue the appeal formed a part of defendant's immigration responsibilities from which it cannot be separated" [62].

20. Having concluded that the Respondent's true relationship with the Appellant at the material time was that of an opponent in litigation, the Judge concluded that the case was indistinguishable from the decisions in *Customs and Excise Commissioners v Barclays Bank* [2007] 1 AC 181 and *Business Computers International Ltd v Registrar of Companies* [1988] Ch 229, in which it had been held that there is no duty of care owed by one litigant to another as to the manner in which litigation is conducted. In particular, the Judge rejected the submissions: (i) that those authorities should be distinguished on the basis that they related to pure economic loss [66]; and (ii) that those authorities should be distinguished on the basis that they related to proceedings in which the parties were "entitled to treat the other side as opponents whom they wish to vanquish" (*Barclays* at [47]), whereas the Secretary of State's role in asylum and human rights appeals was materially different. The Judge therefore concluded that the Respondent did not owe a duty of care to the Appellant [71].

21. The Judge then turned, in the alternative, to consider whether the Respondent owed the Appellant a duty of care in the exercise of its "statutory responsibility for immigration" and, in particular, whether: (i) previous authorities in relation to this point remained good law in light of the decision of the Supreme Court in *Poole Borough Council v GN & another* [2020] AC 780; (ii) whether those authorities should be distinguished in any event in light of the fact that the present claim was a claim for personal injury rather than pure economic loss; and (iii) whether, in light of the *Poole* judgment, the fundamental question to be asked was whether the Respondent had harmed (rather than failed to protect) the Applicant.

22. As to these issues, the Judge concluded: (i) that "in reality the very basis upon which the claimant in this case seeks a remedy from the defendant has already been answered in the case of *Adiukwu* [2020] CSIH 47" [75]; (ii) that while *Adiukwu* is a Scottish case it is "persuasive" and "essentially on point" [75; 82]; (iii) that *Adiukwu* could not be distinguished on the basis that it was a case about pure economic loss or that the Respondent was aware of the likely impact of delay on the Appellant's mental health [84; 90]; (iv) that the principle derived from *Poole* was not "determinative of [the Appellant's] case" because the Judge was "satisfied that the pleaded allegations are directed at omissions" [86]; and (v) that the Respondent had done "nothing" to "justify the inference that she has assumed […] responsibility" [87].

23. Having rejected the claim that the Respondent owed the Appellant any duty of care, the Judge dealt, in the alternative, with the question whether any breach of a duty of care had been identified, concluding that it had not [92-93].

24. The Judge then turned to the claim in misfeasance and rejected it, holding that: (i) the pleadings "did not set out how any of [the] alleged acts were unlawful or how the officers are said to have been subjectively reckless" [100]; (ii) in any event "none of the matters of which [the Appellant] complains can properly be considered unlawful"

[103 - 105]; and (iii) the alleged conduct did not amount to subjective recklessness [106-108]. The Judge concluded [109] that:

> "[…] it is clear, whether through overwork or a change of handler, the matter could have been handled differently and with greater clarity and speed. However, that is, at worst, incompetence perhaps bordering on negligence. But that is not sufficient for the serious tort of misfeasance."

25. The Judge dealt finally with the Appellant's claim for damages for breach of his Article 8 rights. The Judge rejected the claim. Having referred to the approach to be taken in respect of Article 8 claims as set out by Lord Bingham in *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368 the Judge held that: (i) the claim as pleaded was directed only at delay rather than at the impact on the Appellant's mental health [117]; (ii) the delay was "only five months" and he could not "now, through his submissions, try and turn the argument from the period to its affect [sic] to somehow avail the claimant of a cause of action under the Human Rights Act"; and (iii) in any event, any interference was justified by the "important public interest in immigration control, the deportation of offenders and parties being able to seek permission to appeal" [119].

Grounds of Appeal

26. There are six grounds of appeal, which are, in summary, as follows:

    i) Ground 1 - The Judge erred in fact and law in concluding that the Appellant's claim in negligence related "entirely" to the Appellant's conduct of "the litigation process" rather than to the Respondent's "immigration responsibilities" and in concluding that the "true categorisation of the parties' relationship at the time of the alleged negligence" was "one of litigation".

    ii) Ground 2 - Even if or to the extent that the Judge was correct to identify the true categorisation of the parties' relationship at the relevant time as 'one of litigation' the Judge erred in law in concluding that the Respondent owed no duty of care to the Appellant;

    iii) Ground 3 - the Judge erred in concluding that the Respondent did not owe the Appellant a duty of care when exercising her statutory responsibilities for immigration;

    iv) Ground 4 – the Judge erred in finding in the alternative that even if a duty of care did arise, there was no breach of that duty

    v) Ground 5 – the Judge erred in dismissing the claim of misfeasance; and

    vi) Ground 6- the Judge erred in dismissing the claim under Article 8, ECHR.

27. Although Mr Chirico in his oral submissions commenced with Ground 3, it is convenient to deal with each of these grounds in turn, commencing with Grounds 1 and 2.

Grounds 1 and 2 – Error in categorisation of relationship as one of parties in litigation.

Submissions

28. Mr Chirico submits that the Judge erred in categorising the relationship between the parties as one of "litigation". He submits, firstly, that it is, as a matter of principle and of fact, impossible to separate the Respondent's litigation steps from those steps taken in discharging her continuing responsibility to decide upon the Appellant's immigration status. The Respondent had an ongoing power to revoke the deportation order and the Judge was wrong to say that once a determination had been made in respect of the Appellant's status in January 2014, the relationship was solely that of parties in litigation. The Respondent's casework department remained in continued correspondence with the Appellant's representatives even after January 2014 as to whether or not leave to remain should be granted and there was no basis for the Judge drawing the "bright-line" distinction that she did in respect of the Respondent's status after that date.

29. Even if the Judge had been correct in characterising the relationship as one of parties in litigation, the approach established in *Barclays*, whereby no duty of care is owed by parties in litigation, cannot apply here where the Respondent's status is not that of an ordinary opponent in adversarial litigation. The Respondent's objective in such litigation is not to "vanquish" her opponent; instead, the Respondent has a "shared interest" with the Appellant in achieving the right outcome consistent with the Respondent's responsibilities under the law and the ECHR. Mr Chirico further submits that in any event the rule set out in *Business Computers* and approved in *Barclays* relates to pure economic loss whereas the present claim is for personal injury in respect of which the reasonable foreseeability of harm is "usually enough … to generate a duty of care": *Barclays* at [31] .

30. Mr Cohen acknowledges that the Respondent's immigration duties do not cease upon the parties entering into litigation. However, those ongoing duties do not displace the principle that there is no duty of care between parties in litigation. Whilst the relationship in this context is not purely adversarial, that is not enough; the relationship is sufficiently adversarial for the principle to apply notwithstanding any "shared interest" in respect of the outcome. There are alternative mechanisms, inherent in the procedural rules governing litigation, to afford parties protection against unreasonable conduct of litigation without imposing on them a duty of care to each other, which would give rise to the highly undesirable consequence of litigation about litigation.

Grounds 1 and 2 - Discussion

31. In *Business Computers*, the issue was whether a defendant company was liable in tort to the plaintiff company in circumstances where an incorrectly addressed petition resulted in a winding up order being made against the plaintiff causing damage to its business. In holding that no duty of care was owed by one litigant to another as to the manner in which litigation was conducted, Scott J (as he then was) noted (at 241 B) that:

> "… safeguards against impropriety [as to the manner in which litigation is conducted] are to be found in the rules and procedure that control the litigation and not in tort."

32. That decision was approved in *Al-Kandari v JR Brown & Co* [1988] QB 665, 675 where Bingham LJ said: "In the ordinary course of adversarial litigation a solicitor does not owe a duty of care to his client's adversary". *Business Computers* was also cited with approval by the House of Lords in *Barclays*. In *Barclays*, the Commissioners had sought damages in negligence against the bank for failing to prevent payments out of accounts held by two companies that had been subject to the terms of a freezing order obtained by the Commissioners. It was held that the Bank did not, in these circumstances, owe any duty to the Commissioners to take reasonable care to comply with the terms of the injunction. That was principally because it was not considered to be fair, just and reasonable to impose any such duty of care on the Bank: [66] per Lord Rodgers. In response to a submission by Counsel for the Bank that the Bank should be seen as being on the side of its customers in the dispute against the Commissioners and as such owed no duty of care to the Commissioners, Lord Rodgers said as follows (at [47]):

> "47 I do not find the analogy compelling. When parties embark on contested court proceedings, even under the rules of procedure in force today, they are entitled to treat the other side as opponents whom they wish to vanquish. So they do not owe them a duty of care: *Business Computers International Ltd v Registrar of Companies* [1988] Ch 229. Equally, when the parties employ solicitors and counsel to act for them in the proceedings, in general, those representatives owe no duty of care to the other side: *Al-Kandari v J R Brown & Co* [1988] QB 665, 675f—h per Bingham LJ. But, as the narrative of events shows, Barclays did not represent their customers in their dispute with the commissioners. In reality, they were no more on the companies' side in that dispute than the companies' butchers, bakers or candlestick-makers."

33. Thus, the general principle and well-established starting point is that one party to litigation does not owe the other a duty to take reasonable care in the issuing or conduct of proceedings, and that parties have adequate protection against unreasonable conduct in the rules of procedure governing the proceedings. The question is whether, as Mr Chirico submits, the fact that one party is a public authority with an ongoing responsibility for immigration control, and where it would be inapt to describe the role of the Respondent in litigation with a person seeking leave to remain as one where she would seek to "vanquish" her opponent, renders the general principle inapplicable. In my judgment, the general principle is not rendered inapplicable here.

34. The mere fact that one party to litigation is a public authority cannot be determinative; it is noteworthy in this regard that in *Business Computers* the other party to the litigation was also a public authority. A public authority's role in litigation, whilst not directly equivalent to that of a private party, is still sufficiently adversarial to render the relationship inapt for the imposition of any duty of care in relation to steps taken in that litigation. A public authority, whether resisting or initiating proceedings in relation to another party, has a legitimate interest in achieving the outcome for which the framework of litigation exists and in respect of which there are rules of procedure designed to afford protection to parties against unreasonable conduct by the other party.

35. The language of "vanquishing" one's opponent, deployed by Lord Rodgers in *Barclays* was not intended to define the character of litigation to which the principle (namely that there is no duty of care owed to an opposing party in litigation) applies; rather, it was merely a colourful way of describing (in response to an ambitious analogy drawn by Counsel) the fact that in all adversarial proceedings, there will be a successful and an unsuccessful party each with its own interests. That applies as much to the Respondent seeking to appeal against a decision of the UT as it does to a claimant suing a defendant in court. It is the system of procedural rules governing the respective proceedings that provides protection against unreasonable conduct of such litigation and not the law of tort. In *Jain v Trent Strategic Health Authority* [2009] 1 AC 853, in which the House of Lords held that no duty of care arose where a strategic health authority had made an *ex parte* application for the cancellation of a care home's registration based on a "slipshod" investigation, Lord Scott said as follows:

> "35 My Lords, the cases in this second line of authority, including the *Martine* case 20 BMLR 51, which I regard as having been rightly decided, establish, in my opinion, that where the preparation for, or the commencement or conduct of, judicial proceedings before a court, or of quasi-judicial proceedings before a tribunal such as a registered homes tribunal, has the potential to cause damage to a party to the proceedings, whether personal damage such as psychiatric injury or economic damage as in the present case, a remedy for the damage cannot be obtained via the imposition on the opposing party of a common law duty of care. The protection of parties to litigation from damage caused to them by the litigation or by orders made in the course of the litigation must depend upon the control of the litigation by the court or tribunal in charge of it and the rules and procedures under which the litigation is conducted."

36. This passage also contains the answer to Mr Chirico's suggestion that the principle established in *Business Computers* applies only where there is pure economic loss. As Lord Scott makes clear, the principle applies whether the proceedings involve "personal damage such as psychiatric injury or economic damage as in the present case". Mr Chirico submits that the reference to "personal damage" is necessarily obiter (given that *Jain* was a case of economic damage). However, the principle, namely that the protection of parties to litigation from physical or economic damage caused to them by litigation steps is afforded by the rules and procedures of the relevant tribunal, is broadly stated by the House of Lords and would appear to be one of general application. The "line of authority" being considered by Lord Rodgers in *Jain* and which led to the conclusion set out above, included *Elguzouli-Daf v Comr of Police of the Metropolis* [1995] QB 335, in which the Court of Appeal held that the Crown Prosecution Service owed no general duty of care to a particular defendant in their conduct of a prosecution of him: per Steyn LJ, at p 348, "In the absence of a specific assumption of responsibility lawyers engaged in hostile civil litigation are not liable in negligence to the opposing party". It is noteworthy that *Elguzouli-Daf* was itself a case in which the claim included a reference to "anxiety and distress" caused by negligent prolongation of detention. It is inconceivable therefore that the Lord Scott did not intend the statement of principle in [35] of *Jain* to be of general application to cases involving both types of damage.

37. It must of course be acknowledged that there are differences between litigation between private parties and that involving public authorities; the ongoing duty of candour in judicial review proceedings is an example. However, this is no more than a further rule governing the conduct of parties to the proceedings in a particular type of litigation; it does not mean that the parties thereby cease to be in a predominantly adversarial relationship. Even where human rights issues are at play, the proceedings between a public authority and an applicant may be considered sufficiently adversarial for the normal rules governing other litigation to apply. In *Rahman v Secretary of State for the Home Department* [2005] EWCA Civ 1826, the Court of Appeal said as follows about the procedure of the (then) Asylum and Immigration Tribunal:

> "14. I recognise that the procedure of the AIT is predominantly adversarial, but the AIT must, I think, put themselves in a position to decide the real issues in the case. In my view it is part of the Secretary of State's public responsibility to assist in that task. It is unsatisfactory, in a context touching on issues such as refugee status and claims under the European Convention on Human Rights, that the relevant tribunal should go on the bare burden of proof." (Emphasis added)

38. In *R (Secretary of State for the Home Department) v First-Tier Tribunal (Immigration and Asylum Chamber)* [2018] UKUT 243 (IAC), an issue arose as to whether litigation privilege applied to proceedings in the FTT. The UT (UTJ Rintoul) said as follows:

> "44 … Proceedings in the First-tier Tribunal are sufficiently adversarial in nature to give rise to litigation privilege. Although there may be extreme instances where legal advice privilege and, possibly, litigation privilege have no bearing on the issue to be decided (e.g. to protect human life: Brown), the mere fact that human rights issues are in play does not mean litigation privilege has to be balanced against those issues. In the circumstances of this particular case, (subject to what is said below) the applicant was entitled to rely on litigation privilege. No adverse inference could be taken as a result of that claim. The fact that the applicant had disclosed certain information pursuant to her duty of candour -and that this information formed part of a document in respect of which litigation privilege was claimed – did not constitute a reason for thinking the applicant had not complied fully with that duty…"

39. These cases indicate that whilst differences do exist where a public authority is involved in litigation, the fundamental adversarial character of the litigation is not entirely displaced. Similarly, it seems to me that the proceedings here are sufficiently adversarial, notwithstanding the immigration and human rights context, for the *Business Computers* principle to apply. Mr Chirico relies on two cases in support of the proposition that asylum cases fall into a separate category and that the *Business Computers* principle should not apply. The first is *E and R v Secretary Of State for the Home Department* [2004] QB 1044, in which the Court was asked to consider whether a mistake of fact on the part of the tribunal in refusing to admit evidence, should give rise to a ground of appeal against the refusal:

> "66 In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area…"

40. Mr Chirico submits that appeals in the immigration context are an area where there is a "shared interest" in achieving the correct outcome and that the Judge erred in characterising the relationship as one of adversarial litigation. In a similar vein, reliance was placed on the following passages in *MN (Somalia) v Secretary of State for the Home Department* [2014] 1 ELR 2064, where the issue was whether the UT had erred in treating guidance on language reports as determinative rather than merely persuasive:

> "25 Secondly, there is no presumption that the procedure will necessarily follow the adversarial model which (for the time being at least) is the hallmark of civil court procedures. In a specialist tribunal, particularly where parties are not represented, there is more scope, and often more need, for the judges to adopt an inquisitorial approach. This has long been accepted in respect of social security benefits (see Kerr v Department for Social Development [2004] 1WLR 1372, paras 61—63, where Baroness Hale spoke of the process of benefits adjudication as "inquisitorial rather than adversarial . . . a co-operative process of investigation in which both the claimant and the department play their part"). However, there is no single approach suitable for all tribunals. For example, in a major case in the tax or lands tribunals, the sums may be as great, and the issues as complex, as in any case in the High Court, and the procedure will be modelled accordingly.
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> …
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> 31 There is another important aspect to cases such as the present. The higher courts have emphasised the special responsibility carried by the tribunals in the context of asylum appeals. It is customary in this context to speak of the need for "anxious scrutiny" (following R v Secretary of State for the Home Department, Ex p Bugdaycay [1987] AC 514, 531, per Lord Bridge of Harwich). As a concept this is not without its difficulties, but I repeat what I said in R (YH) v Secretary of State for the Home Department [2010] 4All ER 448, para 24:
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> > "the expression [anxious scrutiny] in itself is uninformative. Read literally, the words are descriptive not of a legal principle but of a state of mind: indeed, one which might be thought an 'axiomatic' part of any judicial process, whether or not involving asylum or human rights. However, it has by usage acquired special significance as underlining the very special human context in which such cases are brought, and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been

> properly taken into account. I would add, however, echoing Lord Hope [in R (BA (Nigeria)) v Secretary of State for the Home Department [2010] 1AC 444, para 32], that there is a balance to be struck. Anxious scrutiny may work both ways. The cause of genuine asylum seekers will not be helped by undue credulity towards those advancing stories which are manifestly contrived or riddled with inconsistencies."
>
> 32 Similar considerations in my view impose a special responsibility on the Secretary of State and those representing her to ensure that the evidence presented to the tribunal is adequately supported. So in this case Lord Eassie rejected the suggestion that it was enough for the Secretary of State to provide the interview tapes to the Appellants, leaving them to obtain their own expert advice. He said, at para 66:
>
> > "as a matter of principle, it is the Secretary of State who invokes the purported expert evidence for her purposes in order to impugn the honesty of the Appellant. In accordance with all normal rules of procedure it must therefore be for her to establish, by active demonstration of the appropriate expert qualification, the worth of the evidence upon which she relies to counter the testimony of the Appellant."
>
> For the Secretary of State Mr Lindsay QC, as I understood him, did not challenge this statement of principle. In my view, he was right not to do so."

41. Mr Chirico's submission is that the "shared interest" that the Respondent had in achieving the right outcome, the need for anxious scrutiny in such cases, and the special responsibility on the Respondent to ensure that evidence presented to the tribunal is adequately supported, all combine so as to alter the character of proceedings to something other than the type of adversarial litigation to which the *Business Computer* principle may be applied. Powerfully though those submissions were made, I cannot accept that that is the effect of the authorities. In my judgment, proceedings between the parties, even in the asylum and immigration context, are, as the Court of Appeal held in *Rahman*, "predominantly adversarial". The Respondent may well have a "shared interest" with the other party in achieving the correct result, and in doing so will be subject to the duties of candour and cooperation, as well as a special responsibility to ensure that evidence presented to the tribunal is not unsupported. However, that does not alter the fundamental characteristic of the relationship as an adversarial one. Each party will still be entitled to rely, for example, on litigation privilege, and the statements of case of each side will set out their respective positions, which may conflict, and on which there will need to be adjudication, rather than there being an entirely inquisitorial process. The fact that some tribunal proceedings, for example those concerning social security benefits where applicants tend to be unrepresented, may be more inquisitorial in nature does not mean that other proceedings in the FTT and the UT must be non-adversarial. There is nothing in the authorities to which I was referred that would support that broad proposition, and it would, in any event, be inconsistent with the clear observation of the Court of Appeal in *Rahman* that proceedings involving asylum and immigration matters are predominantly adversarial.

42. The principal contention under Grounds 1 and 2 is that the Judge erred in characterising the parties' relationship as one of parties in litigation. In my judgment, there was no error and the Judge was entitled to characterise the relationship in the way that she did (albeit the Judge may have strayed by appearing to describe the relationship as exclusively one of litigation). The parties were in litigation following the issuing of proceedings after the Respondent's decision refusing to grant leave to remain in January 2014. The fact that the Respondent had an ongoing responsibility for immigration control in respect of the Appellant does not alter that position. Indeed, if it were the case that the existence of an ongoing public law power or duty in respect of a person nullified what would otherwise be a litigation-based relationship, then there would be few, if any, instances of a public authority ever being in such a relationship. The Commissioners in *Business Computers* and the SHA in *Jain* would have retained ongoing duties and powers in respect of their opposing parties despite the ongoing litigation between them. That did not mean that the relationship, insofar as the litigation was concerned, was something other than that of parties engaged in adversarial litigation. The public authorities' two roles as litigant and decision-maker are not mutually exclusive.

43. Insofar as the public authority resorts to unlawful or unreasonable conduct in its capacity as litigant in asylum and immigration proceedings, there are alternative mechanisms in place, including the duties just mentioned, to protect parties, and which obviate the need for any duty in tort to be imposed in addition.

44. In all the circumstances, the Judge was not wrong in characterising the relationship as being one of parties in litigation. Furthermore, having so concluded, there was no error in the Judge's application of the well-established principle in *Business Computers* precluding any duty of care between opponents in such litigation.

45. Grounds 1 and 2 of the appeal therefore fail and are dismissed.

Ground 3 – Error in concluding that there was no duty of care in exercising statutory responsibility for immigration

Submissions

46. The claim was also put below on the basis that a duty of care existed in relation to the Respondent's statutory responsibilities as an immigration controller. The Judge accepted the Respondent's submission, based on the decisions in *Mohamed v Home Office [2011] 1 WLR 2862*, *W v Home Office* [1997] Imm AR 302 and *Advocate General for Scotland v Adiukwu* [2020] SLT 861, that there was no concurrent duty of care in tort in the discharge of those statutory responsibilities. Mr Chirico submits that the decision of the Supreme Court in *N & another v Poole Borough Council* [2020] AC 780 requires the Court, in determining whether a duty of care exists, to ask whether the conduct to which a duty is said to relate is an 'action' ("making things worse") or an 'omission' ("failing to make things better"), and that it is only where there is a pure omission that something further (such as a voluntary assumption of responsibility) is required before a duty is imposed. It is further submitted that the approach in *Poole* means that one cannot simply apply the decisions in *Mohammed* and *W* so as to conclude that no duty of care in tort arises out of the exercise of a statutory duty. Alternatively, *Mohammed* and *W* should have been distinguished on the basis that they relate to pure economic loss and false imprisonment respectively. The Judge is said to

have erred in following those cases and the decision of the Court of Session (Inner House) in *Adiukwu*. Mr Chirico submits that in accordance with *Poole*, the Judge ought to have treated this as an 'actions' case as opposed to an 'omissions' case (thereby contradicting her own conclusion at [62] that this case was all about actions); had the Judge done so she would have been driven to conclude that there was a duty of care. Here there was a deliberate decision on the part of the Respondent to lodge a futile appeal in the knowledge that any delay in determining the Appellant's leave status was likely to result in a worsening of his mental state.

47. Mr Cohen submits that *Adiukwu* is a closely analogous case. Although not binding on this Court, its reasoning is highly persuasive and ought to be followed. In any event, the essential complaint in this case is that the Respondent took too long to grant leave to remain; that is to say, she took too long to confer a benefit and make things better. This was therefore an omissions case and the fact that the Respondent lodged an appeal does not affect the analysis. There was no other factor such as the assumption of responsibility that could give rise to the existence of a duty of care.

Ground 3 – Discussion

48. The decisions of the Supreme Court in *Robinson v Chief Constable of West Yorkshire Police* [2015] UKSC 2 and *Poole* have clarified the approach to be taken in determining whether there is a duty of care, particularly where a public authority is concerned. Lambert J in *DFX & others v Coventry City Council* [2021] EWHC 1382 reviewed those decisions (amongst others) and helpfully set out at [169] to [173], the following distillation of the relevant legal principles:

> "169. In determining the existence or otherwise of a duty of care in the three cases, Lord Toulson and Lord Reed applied the orthodox common law approach and the established principles of law. What follows is a distillation of the key general principles drawn from those cases. It is intended to provide the uncontroversial backdrop to the issues which I must decide in this case.
>
> > i) At common law public authorities are generally subject to the same liabilities in tort as private individuals and bodies. Accordingly, if conduct would be tortious if committed by a private person or body, it is generally equally tortious if committed by a public authority. It follows therefore that public authorities are generally under a duty of care to avoid causing actionable harm in situations where a duty of care would arise under ordinary principles of the law of negligence (Robinson at [33]).
> >
> > ii) Like private individuals, public authorities are generally under no duty of care to prevent the occurrence of harm. In Michael , Lord Toulson said at [97]: "English law does not as a general rule impose liability on a Defendant (D) for injury or damage to the person or property of a claimant (C) caused by the conduct of a third party (T): Smith v Littlewoods Organisation Ltd [1987] A.C. 241 . The

fundamental reason as Lord Goff explained is that the common law does not generally impose liability for pure omissions. It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else".

iii) The distinction between negligent acts and negligent omissions is therefore, as Lord Reed said in Poole at [28] of fundamental importance. Lord Reed reflected that the distinction to be drawn could be better expressed as a "distinction between causing harm (making things worse) and failing to confer a benefit (not making things better) rather than the more traditional distinction between acts and omissions, partly because the former language better conveys the rationale for the distinction drawn in the authorities and partly because the distinction between acts and omissions seems to be found difficult to apply".

iv) Public authorities do not therefore owe a duty of care towards individuals to confer a benefit upon them by protecting them from harm, any more than would a private individual or body, see Robinson at [35]. Lord Reed continues at [36] "That is so, notwithstanding that a public authority may have statutory powers or duties enabling or requiring it to prevent the harm in question". The position is different if, on its true construction, the statutory power or duty is intended to give rise to a duty to individual members of the public which is enforceable by means of a private right of action. If, however, the statute does not create a private right of action, then "it would be to say the least unusual if the mere existence of the statutory duty (or a fortiori, a statutory power) could generate a common law duty of care". It follows that public authorities like private individuals and bodies generally owe no duty of care towards individuals to prevent them from being harmed by the conduct of a third party.

v) The general rule against liability for negligently failing to confer a benefit is subject to exceptions. The circumstances in which public authorities like private individuals and bodies may come under a duty of care to prevent the occurrence of harm were summarised by Tofaris and Steel in "Negligence Liability for Omissions and the Police" 2016 CLJ 128. They are: (i) when A has assumed responsibility to protect B from that danger; (ii) A has done something which prevents another from protecting B from that danger; (iii) A has a special level of control over that source of danger; or (iv) A's status creates an obligation to protect B from that danger.

170. I pause here to note that, in Poole , Lord Reed explained that in Anns there had been a departure from "traditional understanding" that public bodies, like private individuals, did not generally owe a duty of care to confer the benefits. As Lord Toulson said in Michael at [105] although the Anns two stage formula had been stated in terms of general application, it had particular implications for public authorities because of their wide range of duties and responsibilities likely to be caught by the first stage foreseeability requirement. Lord Reed noted in Poole that, even though the decision in Anns had been disapproved in 1991, its reasoning had remained influential until Stovin v Wise [1996] A.C. 923 ; Gorringe v Calderdale MBC [2004] 1 W.L.R. 1057 , in which Lord Hoffmann gave judgments heralding (as Lord Reed was later to express it) the "return to orthodoxy". Both cases are relevant to the Defendant's submissions.

171. Stovin and Gorringe were claims against highway authorities for failing to prevent harm caused by third party motorists. In the case of Stovin , a bank of earth on the corner of a junction impeded the view of motorists exiting the road. The council had statutory powers which would have enabled the necessary work to be done and there was evidence that the relevant officers had decided in principle that it should be done. British Rail, which owned the obstructing land had been contacted and its civil engineer had agreed with the council's divisional surveyor that the junction should be realigned. An expert report had been obtained and the cost of removal of the mound had been discussed. However, the Defendant had simply done nothing more. When a motorist collided with a motorcycle whom she had been unable to see, she claimed a contribution from the highway authority for its negligence in failing to remove the bank of earth. In Gorringe , a claim was brought against the local authority for its failure to warn motorists by appropriate signage of a dip in the road which had prevented a motorist from seeing an oncoming bus. Following a collision with a bus, the claimant brought proceedings against the local authority.

172. Both actions failed, the court finding that the public law duties in s.41 of the Highways Act 1980 and s.39(2)(3) of the Road Traffic Act 1980 which were not in themselves enforceable by a private individual in an action for breach of statutory duty, did not give rise to a parallel duty of care at common law to take appropriate corrective measures.

173. In Stovin , Lord Hoffmann reasserted the importance of the distinction between harming the claimant and failing to confer a benefit typically by protecting the claimant from harm. He observed that the liability of a public authority in tort in the case

> of positive acts was in principle the same as that for a private individual, but it may be restricted by its statutory powers and duties. In relation to failures to perform statutory duties Lord Hoffmann remarked that if such a duty does not give rise to a private right to sue for breach, it would be unusual if it nevertheless gave rise to a duty of care at common law which made the public authority liable. Even more emphatically, in Gorringe , Lord Hoffmann said at [32] "Speaking for myself, I find it difficult to imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has power (or a public law duty) to provide".

49. I respectfully agree with that distillation. There is a fundamental distinction to be drawn between cases where the public authority can be said to have caused harm (making things worse) and where it has failed to confer a benefit (not making things better). Mr Chirico's submission is that the present case was one where the Respondent had engaged in a positive act (by lodging a futile appeal) that had made things worse and that this was not (as the Judge had found) a case of failing to confer a benefit (by granting leave to remain within a reasonable period) or a "pure omissions" case. Mr Chirico fairly accepted that if he is wrong about that and this is an omissions case, then the appeal on this ground must fail because there is no suggestion here that the Respondent had assumed responsibility or created a source of danger as would ordinarily be required where there is a failure to protect a party from harm: see *Poole* at [65]. The first question to be determined therefore, is whether there was any error in characterising this as an omissions case.

50. The distinction between acts and omissions is often difficult to apply (and was part of the reason for Lord Reed's formulation in *Poole* of 'making things worse' and 'not making things better'). Indeed most conduct relied upon as amounting to negligence can be said to comprise a series of acts and omissions. However, it is by considering the purpose of the distinction that one is able to come to a common sense conclusion as to which side of the line the impugned conduct falls. As Lord Reed said in *Robinson*:

> "4. The distinction between careless acts causing personal injury, for which the law generally imposes liability, and careless omissions to prevent acts (by other agencies) causing personal injury, for which the common law generally imposes no liability, is not a mere alternative to policy-based reasoning, but is inherent in the nature of the tort of negligence. For the same reason, although the distinction, like any other distinction, can be difficult to draw in borderline cases, it is of fundamental importance. The central point is that the law of negligence generally imposes duties not to cause harm to other people or their property: it does not generally impose duties to provide them with benefits (including the prevention of harm caused by other agencies). Duties to provide benefits are, in general, voluntarily undertaken rather than being imposed by the common law, and are typically within the domain of contract, promises and trusts rather than tort. It follows from that basic

> characteristic of the law of negligence that liability is generally imposed for causing harm rather than for failing to prevent harm caused by other people or by natural causes. It is also consistent with that characteristic that the exceptions to the general non-imposition of liability for omissions include situations where there has been a voluntary assumption of responsibility to prevent harm (situations which have sometimes been described as being close or akin to contract), situations where a person has assumed a status which carries with it a responsibility to prevent harm, such as being a parent or standing in loco parentis, and situations where the omission arises in the context of the defendant's having acted so as to create or increase a risk of harm.
>
> 5. The argument that most cases can be equally analysed in terms of either an act or an omission, sometimes illustrated by asking whether a road accident is caused by the negligent driver's act of driving or by his omission to apply the brakes or to keep a good lookout, does not reflect the true nature and purpose of the distinction, as explained above. The argument was answered by Lord Hoffmann in Stovin v Wise [1996] AC 923, 945:
>
> "One must have regard to the purpose of the distinction as it is used in the law of negligence, which is to distinguish between regulating the way in which an activity may be conducted and imposing a duty to act upon a person who is not carrying on any relevant activity. To hold the defendant liable for an act, rather than an omission, it is therefore necessary to be able to say, according to common-sense principles of causation, that the damage was caused by something which the defendant did. If I am driving at 50 miles an hour and fail to apply the brakes, the motorist with whom I collide can plausibly say that the damage was caused by my driving into him at 50miles an hour."

51. The Judge in the present case relied upon two matters in concluding that this was an omissions case rather than one involving a positive act: the first was the pleaded allegations which she considered were directed at omissions rather than actions; the second was that the situation was akin to that in *Adiukwu* and amounted to the failure to confer on the Appellant the benefit of leave to remain status.

52. In my judgment, the Judge was not wrong to come to the conclusion that she did. The principal allegation in the Particulars of Claim is that "Due to the negligence of the Defendant …, there was a delay of over 5 months, from the final determination of the Upper Tribunal allowing his appeal, in granting C leave to remain in the United Kingdom…" The Particulars of Breach refer to failures to have in place adequate systems for communication, a failure to operate systems adequately and promptly, and failing to act with reasonable competence and expedition. As to the lodging of the appeal, which is now the focus of Mr Chirico's submission that this was a claim based on an "act" rather than an "omission", reference is made in the pleadings to the failure to ensure that a full and informed decision had been taken as to the merits of an appeal and/or whether there was serious intention of pursuing an appeal on the merits prior to

the lodging of that appeal. It is clear from this brief summary of the pleaded case that the claim was based primarily on allegations of inaction or omission giving rise to undue delay in the grant of leave to remain, which is the principal complaint. There is no express suggestion that the harm was caused by the mere act of lodging the appeal. The Judge was, in these circumstances, clearly entitled to conclude that the pleaded claim was directed at omissions rather than actions.

53. Mr Chirico submits that the Judge's conclusions as to the pleaded case are inconsistent with her earlier findings (at [62]) "that the reality is that … his entire claim in these proceedings relate (sic) to the actions of the defendant's employees in their handling of his appeal." This is a pedantic point which does not withstand scrutiny. It is clear that in [62] the Judge was referring to the Respondent's "actions" generally (in the context of considering the conduct being complained of) and was not doing so in the specific context of analysing whether the Respondent's conduct amounted to actions or omissions for the purposes of determining whether there is a duty of care.

54. The Judge did not rely on the pleaded case alone: she went further and "stood back" in order to assess what this case was really all about. She considered that, as in *Adiukwu*, this was a claim about a failure to confer a benefit. In my judgment, she was not wrong to do so.

55. In *Adiukwu*, the pursuer had claimed damages in respect of loss and damage suffered as a result of the SSHD's failure, over a period of 20 months, to issue her with a "status letter" confirming leave to remain following the decision of the UT that the refusal of LTR status was unlawful. It can be seen that there are parallels with the present case, albeit the delay in *Adiukwu* was substantially longer and the damages claim appeared to be based on purely economic loss. At [54], Lord Glennie, giving the lead judgment of the Court, considered the judgment in *Poole* and said as follows at [54(2)]:

> "(2) Neither private individuals nor public bodies generally owe a duty of care to confer benefits on others: [Poole] at p.1489, para.28. The distinction is drawn between causing harm, as in making things worse, and failing to confer a benefit, as in not making things better. This terminology conveys the rationale better than the traditional distinction between acts and omissions: and see also Robinson per Lord Reed at p.759, para.69 points 4 and 5. In the present case the duty allegedly owed by the Home Secretary is, in this terminology, a duty to confer a benefit by granting discretionary leave to remain and providing a status letter enabling the pursuer to access employment and/or benefits."

56. Similarly, in the present case, the duty upon the Respondent was the duty to grant leave to remain. That was the benefit which the Appellant complains was not conferred upon him promptly and which led to the loss and damage claimed. The lodging of the appeal prolonged the period over which that failure was not conferred; however, the lodging of the appeal cannot be viewed as an isolated act that caused harm, and nor was the case below put in that way. To view the lodging of the appeal as a culpable "action" would be to ignore the purpose of the distinction identified in *Robinson* and *Poole* between a positive act that makes things worse and a failure to confer a benefit. If the purpose is, as stated in *Robinson* (at [69(5)], citing from Lord Hoffman in *Stovin v Wise* [1996] AC

923, 945), to distinguish between regulating the way in which an activity may be conducted and imposing a duty to act upon a person who is not carrying on any relevant activity, it becomes clear that the damage alleged in this case is said to have been caused by the Respondent's failure to comply with the duty to act, in this case by granting leave to remain. The damage is not caused by the act of lodging an appeal in an unregulated way. There was nothing about the act of lodging the appeal, however unmeritorious it may have been, that would have been likely, in the usual course of matters, to create a source of danger. The situation is entirely different from that involving an activity, such as driving or conducting an arrest on a public street, which could give rise to some danger if conducted carelessly.

57. I acknowledge that *Adiukwu* is merely persuasive and not binding on this Court. However, the factual similarities with the present case and the detailed analysis undertaken by the CSIH as to the duty of care lend it particular weight. Mr Chirico's skeleton argument suggested that insofar as the Judge below followed *Adiukwu* she was wrong to do so and that *Adiukwu* should not be followed. However, there was no specific oral submission that *Adiukwu* was itself wrongly decided. In my judgment, Mr Chirico was correct not to pursue that point. *Adiukwu* is plainly a further instance of the Courts (in this instance the CSIH) acknowledging the clarity ushered in by the judgments in *Michael*, Robinson and *Poole*. As stated emphatically by Stuart-Smith LJ in *Tindall v Chief Constable of Thames Valley Police* [2022] EWCA Civ 25, "The law [in relation to the duty of care owed by public authorities] is not in a state of flux. On the contrary, the law is settled by successive decisions that are binding upon this court".

58. The Judge's reliance upon *Adiukwu* also confirms that she did in fact ask herself the correct question as identified in *Poole*, namely whether this was a case of making things worse or of failing to confer a benefit. At [78] and [86] of the Judgment, the Judge refers expressly to [54] in *Adiukwu*, in which Lord Glennie cites the *Poole* test, and then goes on to state expressly (at [86]) that, "… as in *Adiukwu*, it is the failure to confer a benefit – to grant him his immigration status"

59. Mr Chirico sought support from the decision in *Essex Police v Transport Arendonk BvBa* [2020] EWHC 212 (QB), in which Laing J (as she then was) held, on an application to strike out, that there was a triable case that the Police were liable for damage caused by a third party to a vehicle that had been left in a layby all night after the driver had been taken into custody. However, Laing J had held no more than that it was not unarguable that the police in the circumstances of that case might owe the Respondent a duty of care: see [88]. That decision does not assist in the assessment of whether the present case was one of causing harm or failing to confer a benefit.

60. Mr Chirico further submitted that to the extent that the Judge treated *Mohammed* and *W* as still representing the law notwithstanding the subsequent judgment in *Poole*, she erred in law. The significance of this point is somewhat diminished once it is properly understood that, as set out above, the Judge did in fact apply the *Poole* approach in determining whether there was a duty of care. Although the Judge referred in the final sentence of [86] to the *Poole* case as not being determinative, that would appear to be in response to a submission that in effect, it was determinative, rather than being indicative of any failure to apply the *Poole* approach. It would be wrong to read the judgment as amounting to such a failure given the reference in the immediately preceding sentence to the "failure to confer a benefit" which forms part of that very approach.

61. As to *Mohammed* and *W*, the Judge acknowledged that the decision in *Adiukwu* does suggest that those cases "are of diminished relevance". It was not wrong to say, as the Judge did, that the principles derived from those earlier authorities continue to have application. In *Mohammed*, it was held that the SSHD does not owe a common law duty of care to applicants for leave to remain to avoid maladministration in the exercise of her power to grant leave to remain. Sedley LJ said as follows at [12]:

> "While common law negligence can occur in the course of exercising a statutory duty or power (a gas meter reader lighting a cigarette, as was suggested in the course of argument, or an environmental health officer breaking the restaurant's china), it cannot on principle occur in the actual discharge of the function and may well be inconsistent with or contra-indicated by the statutory scheme. … Save in particular circumstances unlike those we are concerned with, the common law has not recognised a concurrent duty of care outside or alongside the statutory framework, even if there is no other means of claiming damages…".

62. As a starting point in the analysis of whether a duty of care is owed by a public authority, that statement remains correct, and is reflective in my judgment of the second of the three summary principles set out by Lord Reed at [65] in *Poole*:

> "65 It follows (1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived; (2) that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and (3) that public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation." (Emphasis added)

63. Whilst Sedley LJ does go on to consider the *Caparo* test (*Caparo Industries plc v Dickman* [1990] 2 AC 605) that does not render the general starting point incorrect. The decisions in *Robinson* and *Poole* did not overrule *Caparo*, but sought to clarify the circumstances in which the *Caparo* analysis would be appropriate:

> "64 *Robinson* did not lay down any new principle of law, but three matters in particular were clarified. First, the decision explained, as *Michael* had previously done, that *Caparo* [1990] 2 AC 605 did not impose a universal tripartite test for the existence of a duty of care, but recommended an incremental approach to novel situations, based on the use of established

> categories of liability as guides, by analogy, to the existence and scope of a duty of care in cases which fall outside them. The question whether the imposition of a duty of care would be fair, just and reasonable forms part of the assessment of whether such an incremental step ought to be taken. It follows that, in the ordinary run of cases, courts should apply established principles of law, rather than basing their decisions on their assessment of the requirements of public policy…"

64. Furthermore, as stated at [34] of *Poole*, whilst the reasoning in some earlier decisions may have been superseded by later developments, that does not mean that the conclusions reached therein were necessarily incorrect:

> "34 … Confusion also persisted concerning the effect of *Caparo* until clarification was provided in Michael and *Robinson*. The long shadow cast by *Anns* and the misunderstanding of Caparo have to be borne in mind when considering the reasoning of decisions concerned with the liabilities of public authorities in negligence which date from the intervening period. Although the decisions themselves are generally consistent with the principles explained in *Gorringe* and later cases and can be rationalised on that basis, their reasoning has in some cases, and to varying degrees, been superseded by those later developments."

65. In my judgment, the decision in *Mohamed* can be said to fall within that category of judgments that are generally consistent with the correct principles, even if the reasoning has been outmoded.

66. As to *W*, the Court of Appeal held that no claim lay in negligence against the SSHD in circumstances where W had wrongly been held in immigration detention because of a crass administrative error about his ability to establish his country of origin:

> "The process whereby the decision-making body gathers information and comes to its decision cannot be the subject of an action in negligence. It suffices to rely on the absence of the required proximity. In gathering information, and taking it into account the defendants are acting pursuant to their statutory powers and within that area of their discretion where only deliberate abuse would provide a private remedy. For them to owe a duty of care to immigrants would be inconsistent with the proper performance of their responsibilities as immigration officers. . ."

67. Whilst the reasoning in *W* for excluding a duty of care could similarly be said to be somewhat outmoded in the light of recent developments, the statement that a duty of care would not be consistent with the discharge of statutory responsibilities is also consistent with the second of Lord Reed's summary principles in *Poole* at [65]. However, even if the relevance of *W* and *Mohammed* is now diminished in the light of recent developments, it cannot be said that the Judge was wrong in her approach, because she did, as set out above, apply the *Poole* approach. Having done so, she

considered that the Respondent did not owe any duty of care. That conclusion cannot be said to be wrong. This ground of appeal therefore fails and is dismissed.

Ground 4 – Error in finding in the alternative that there was no breach of duty.

68. At [92] to [93] of the Judgment, the Judge went on to consider whether any breach of duty was established by the evidence. She commenced by noting that this issue was not addressed to any great extent in Mr Chirico's written or oral submissions. The same may be said of this issue on appeal. In fact, Ground 4 was not developed orally at all.

69. Three arguments are developed in the Skeleton Argument. The first is that any conclusions on breach would have to be revisited in light of the error made in concluding that there was no duty of care. As I have concluded there was no error in that respect, this point falls away.

70. Mr Chirico's second point is that the Judge failed to grapple with the evidence that the ultimate decision-maker in this case (Mr Wells) had considered that any attempt to deport the Appellant would be futile and unlawful. However, the Judge clearly had this evidence in mind, having referred to it expressly at various points in the Judgment, including at [46] and again at [92]. The Judge was entitled to reach the findings that she did. The Appellant's argument is, in effect, little more than an expression of disagreement with those findings. That does not provide a proper basis for appeal or for saying that the Judge was wrong.

71. Mr Chirico's third and final point under this Ground is that the Judge had "overstated" her findings in stating that there is "simply no evidence" that there was an inadequate system of communications and that there was "no evidence" that the Respondent failed to act expeditiously. Once again, this amounts to little more than disagreement with findings which the Judge was entitled to reach. It is suggested that those conclusions were inconsistent with the following conclusions at [109] reached in relation to the claim of misfeasance:

> "…but when I stand back and review the case file, it is clear, whether through overwork or a change of handler, the matter could have been handled differently and with greater clarity and speed. However, that is, at worst, incompetence perhaps bordering on negligence, but that is not sufficient for the serious tort of misfeasance."

72. In my judgment, there is no inconsistency at all. The Judge clearly did not consider that the failings, even taken at their worst, crossed the line into negligence. That is entirely consistent with a conclusion that there was no evidence to support a conclusion that there was, in the tortious sense, a breach of duty in relation to systems and speed of communication.

73. This ground fails and is dismissed.

Ground 5 - Misfeasance

74. The Appellant had claimed that the Respondent and/or her officers knew or were recklessly indifferent to the illegality of their actions in issuing then withdrawing a

purported application for permission to appeal to the Court of appeal given that (amongst other matters) the appeal was unmeritorious and attempts to deport were "futile". The Judge rejected that claim, which was considered to be insufficiently particularised and as not disclosing any matters that could properly be said to be unlawful. Mr Chirico acknowledged at the outset that whilst the pleaded case refers to the SSHD herself, the allegation of subjective recklessness cannot apply to her. Apart from that, very little was said about this Ground of Appeal in oral submissions. I deal therefore with the arguments as they appear in the skeleton argument.

75. The first contention is that the Judge was wrong to treat the Appellant's claim as insufficiently particularised. However, as the authorities make abundantly clear, an allegation of misfeasance must be pleaded and proved with care, particularly in relation to the element of subjective recklessness. In *London Borough of Southwark v Dennett* [2007] EWCA Civ 109, May LJ stated:

> "The whole thrust of the Three Rivers case was that … mere reckless indifference without the addition of subjective recklessness will not do. This element virtually requires the claimant to identify the persons or people said to have acted with subjective recklessness and to establish their bad faith. An institution can only be reckless subjectively if one or more individuals acting on its behalf are subjectively reckless and their subjective state of mind needs to be established."

76. Given those requirements, the Judge was plainly correct to conclude that the pleaded case was inadequately particularised in order to establish the serious allegation of misfeasance. The Particulars of Claim fail to set out how any individual officers are alleged to have been subjectively reckless or acted in bad faith.

77. The second contention is that the Judge was wrong to conclude that the matters alleged under this head of claim could not properly be considered "unlawful". However, the Judge listed the various matters that were said to be unlawful (at [102]) and considered that the majority of them amounted to litigation steps in relation to a proposed appeal, which, even taken at their highest could not sustain an allegation of unlawful conduct. Given the paucity of the pleaded case on misfeasance, that was a conclusion that was plainly open to the Judge to reach. It is significant in this context that the email which the Appellant regards as crucial, namely the email from Mr Wells indicating that attempts to deport were futile, post-dated the issuing of the appeal. It is difficult to see how Mr Wells' view could retrospectively render the earlier act (by other officers) of lodging an appeal unlawful or an act of subjective recklessness.

78. The final point made is that the Judge erred in requiring the Appellant to do more than was already pleaded in order to make good the allegation of subjective recklessness. This point is closely related to the first and is without merit for the same reasons. The law is clear that such allegations must be pleaded and proved with care.

79. Ground 5 fails and is dismissed.

Ground 6 – Breach of Article 8

Submissions

80. The pleaded Article 8 claim was very brief and stated that the Respondent's "…delay in implementing C's grant of status amounted to an interference in his right to respect for his private life (including his mental integrity)…" and that such interference was "unjustified (because arbitrary and therefore disproportionate)". Damages were claimed in respect of that breach of his Article 8 rights pursuant to s.6 of the *Human Rights Act 1998*.

81. The Judge rejected that claim, finding that the delay in this case was not substantial and insufficient to "engage a breach of Article 8". In the alternative, it was held that any interference with Article 8 rights was justified.

82. Mr Chirico submits that the Judge erred in that she failed to adopt a structured analysis of the Article 8 claim in accordance with the guidance set out in *R (Razgar) v SSHD* [2004] 2 AC 368 at [17]. That failure led to errors in the analysis and in particular as to the interference with the right, namely the damage to mental health, that had to be justified in order for the interference to be lawful. Given the agreed facts that the delay and the decision to bring the appeal against the UT's decision had contributed significantly to the length and severity of the Appellant's schizophrenic relapse, the Judge would inevitably have found that the interference did fall to be justified, and that she would have had to engage in a proper analysis of proportionality which did not occur here.

83. Mr Cohen submits that *Razgar* was taken into account, but that the Judge was entitled in the circumstances of this case to move directly to the key question which was whether the delay was such that the interference was disproportionate and therefore unjustified. On that footing, the Judge was entitled to conclude that the delay of 5 months was not substantial and that there was no breach of Article 8 rights. Mr Cohen made a further submission (in his written argument) that it is questionable whether a failure to grant status can even amount to a breach of Article 8 at all. Reliance is placed on the judgment of the European Court of Human Rights in *Hoti v Croatia* (63311/14) at [123], the effect of which is that the obligation on the State is to have in place a sufficiently robust system for the grant of status and an appellate system, such that the Article 8 right is not engaged where a mere 5 months passes without status being granted.

Ground 6 - Discussion

84. I can dispense quickly with Mr Cohen's argument that Article 8 potentially cannot be engaged at all in these circumstances. In *Mohammed*, Sedley LJ agreed with the SSHD's concession in that case that delay in the granting of settled status does raise a "triable case under article 8". It has also been held that "Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity" and that "reliance may in principle be placed on article 8 to resist an expulsion decision, even where the main emphasis is not on the severance of family and social ties but on the consequences for his mental health of removal to the receiving country. The threshold of successful reliance is high, but if the facts are strong enough article 8 may in principle be invoked.": see *Razgar* at [8] and [9]. In the same judgment at [10], Lord Bingham states:

> "10…[T]he rights protected by article 8 can be engaged by the foreseeable consequences for health of removal from the United Kingdom pursuant to an immigration decision, even where such removal does not violate article 3, if the facts relied upon by the applicant are sufficiently strong".

85. Article 8 could therefore be engaged in the context of removal decisions although the threshold for a successful claim is high.

86. At [17] in *Razgar*, Lord Bingham said as follows:

> "17. In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8 , these questions are likely to be: (1) will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life? (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8? (3) If so, is such interference in accordance with the law? (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others? (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

87. Whilst these questions relate to the specific context of a proposed removal that is resisted, they can clearly be adapted to deal with the specific conduct and interference in a particular case. The conduct which is said to give rise to the interference here is the delay in granting status following the UT's judgment. The interference in question is the effect on the Appellant's mental health occasioned by that delay.

88. The Judge acknowledged the "significance of those questions" in *Razgar* but considered that they did not need to be "determined in that format for the purpose of this cause of action". In my judgment, whilst the questions could be adapted to suit the particular circumstances before the Court, the essential structure of the analysis as adumbrated by Lord Bingham ought generally to be followed as it does no more than take one through the various elements that need to be considered under Article 8. The Judge decided to short-circuit that analysis and moved straight to a consideration of delay and whether it was, in the circumstances, substantial. The question is whether, by doing so, the Judge erred in law. There may be circumstances where circumventing the sequential analysis and moving straight to the question of justification may be appropriate: that may be so where, for example, there was no dispute that there was an interference. Whilst there was agreement in the present case that the delay had resulted

in an exacerbation of the Appellant's mental ill health, it was not, on the face of it, agreed that that amounted to an interference with Article 8 rights. In these circumstances, the Judge did err in short-circuiting the analysis. The Judge focused on delay and rejected Mr Chirico's submission that the interference in question was the effect of the delay on the Appellant's mental health. In doing so, the Judge said:

> "Mr Chirico cannot now, through his submissions, try and turn the argument from the period [of delay] to its affect (sic) to somehow avail the claimant of a cause of action under the *Human Rights Act*. On any consideration, five months was a short period and I am satisfied that period of delay does not engage a breach of Article 8."

89. There are two flaws in that analysis: first, Mr Chirico was not seeking through his submissions to "turn the argument" from delay to the effect of that delay. It had clearly been pleaded that the delay in implementing the Appellant's grant of status "amounted to an interference in his right to respect for his private life (including his mental integrity)". Thus the *effect* of the delay, i.e. the consequences for the Appellant's mental health, was always part of his case under Article 8. Following a structured approach would have enabled the Judge to identify the distinction between the act complained of (i.e. the delay) and the resultant interference with Article 8 rights (i.e. the effect on the Appellant's mental health). Second, the phrase, "does not engage a breach of Article 8" conflates two separate issues: the first being whether Article 8 is engaged by reason of the alleged interference; and the second being whether Article 8 is breached, which requires a consideration of whether any interference was justified.

90. However, the failure to take a structured approach to the analysis would not warrant any interference by the appellate court if it transpires that the ultimate conclusion reached was plainly and unarguably correct. It seems to me that, notwithstanding the flaws identified above, the Judge's analysis was, as Mr Cohen submits, essentially focused on the question of justification and whether the effect of delay amounted to a proportionate means of achieving a legitimate aim. That question was considered by the Judge, albeit very briefly, in the penultimate paragraph of the Judgment, which provides:

> "119. Even if I am wrong I am satisfied, in any event that any interference would be justified. There is important public interest in immigration control, the deportation of offenders and parties being able to seek permission to appeal so at (sic) to engage Article 8(2)."

91. This is a decision in the alternative to what has gone before; in other words, if the Judge was wrong that there is no engagement or interference with Article 8 rights, the Judge considered whether that interference was justified. Having determined that the delay of five months was "a short period", the Judge's conclusion that the interference was justified "so as to engage Article 8(2)", amounted to a truncated and somewhat infelicitous way of stating that the delay and its consequential effects amounted to a proportionate means of achieving the legitimate aim of having effective immigration control systems with rights of appeal for both parties. In any lawful system of immigration control, an adverse decision or an appeal against a positive decision, would be likely to result in anxiety and stress for affected individuals, and delays in the

relevant processes would be likely to add to that stress. However, delays are an occasional unavoidable feature of any system dependent on individual decision-making. The Judge was entitled to conclude that the effect of delay, which was not substantial or serious, was not disproportionate.

92. Mr Chirico submits that the conclusion on justification was inadequate because it is based on "generalities" (namely the important public interest in the deportation of offenders) rather than on the evidence that the attempts to deport were considered by the Respondent's own chief decision-maker as "futile, unlawful, and waste of tax payer's money". I do not accept that submission. Having a system of immigration controls in place (including the deportation of offenders) with appeal rights for both parties is undoubtedly a legitimate aim. The fact that the aim is expressed in high-level and general terms is neither surprising nor unlawful. Furthermore, the pleaded case on Article 8 merely complains that the interference was "unjustified (because arbitrary and disproportionate)"; it makes no reference expressly to Mr Wells' views as giving rise to arbitrariness or disproportionality. Indeed, given that the principal complaint was, as the Judge found, about delay, it is reasonable to infer that it was that factor (i.e. delay) that was complained about as being arbitrary and disproportionate. The Judge's clear conclusion was that the delay was relatively short, and, it may be inferred, that delay and/or its effect was not disproportionate. Furthermore, given that Mr Wells' email resulted in the withdrawal of the appeal within a matter of days of the email being sent, it can hardly be said that the content of that email contributed significantly to the allegedly disproportionate delay.

93. Mr Chirico's final complaint is that by stating that Article 8(2) was not engaged, the Judge asked herself the wrong question. There is nothing in this point: the Judge clearly intended to state that the interference was justified within the meaning of Article 8(2). The infelicitous reference to the language of "engagement" does not render that conclusion incorrect.

94. For these reasons, it is my judgment that although the reasoning and approach were flawed, the Judge's ultimate conclusion that there was no breach of Article 8 was not wrong. This Ground of Appeal therefore also fails and is dismissed.

Conclusion

95. For these reasons, and notwithstanding Mr Chirico's elegant submissions, this appeal fails and is dismissed.