Neutral Citation Number: [2020] EWCA Civ 329

Case No: C2/2019/1561

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Upper Tribunal Judge King
JR/6642/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 March 2020

Before :

LORD JUSTICE MCCOMBE
LADY JUSTICE NICOLA DAVIES
and
LADY JUSTICE SIMLER

- -

Between :

HANS HUSSON	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Russell Wilcox (instructed by **Dylan Conrad Kreolle Solicitors**) for the **Appellant**
Mr Richard Evans (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates: 18 February 2020

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Approved Judgment

Lady Justice Simler :

Introduction

1. Mr Husson, a Mauritian national, was granted limited leave to remain in the UK in May 2016, with the right to work during his period of limited leave. A biometric residence permit (referred to below as a "BRP") confirming his entitlement to work should have been sent to him within a matter of weeks. It was not sent to him until more than two years later. He sought to challenge the delay by an application for judicial review but was refused permission to do so. One of the questions he sought to raise on judicial review was whether the delay was unlawful and gives rise to a claim for damages. This appeal challenges the refusal to permit him to advance this case at a substantive judicial review hearing.

2. The impugned decision was made by Deputy Upper Tribunal Judge King (UTJ King), who refused permission at an oral hearing. His oral reasons were transcribed and approved. Subsequently in a written decision dated 17 June 2019 (which is worded differently), UTJ King set out his reasons for refusing permission, concluding so far as material: first, there is no jurisdiction to consider an action for damages for breach of a duty of care or breach of statutory duty in the circumstances of this case; and secondly, although there may be a cause of action for damages for breach of human rights, to mount such a claim it was necessary to establish a deprivation of the right to work altogether, which the appellant could not show as he had the right to work clearly endorsed on his passport. Further, on the evidence, UTJ King did not find it arguable that the appellant had established a prima facie case to support a claim for damages flowing from the loss of work.

3. The appellant challenges these conclusions as wrong in law. First, in relation to the human rights based claim, Mr Russell Wilcox contends on his behalf, that there was clear evidence that he was denied any real prospect of employment since his passport was not in fact endorsed with the right to work, and there was sufficient evidence of consequent financial loss to establish an arguable case. Secondly, it was arguable that the unlawful delay could found a claim for damages resulting from the respondent's negligence in issuing the BRP so late, particularly in circumstances where the appellant contends the respondent voluntarily assumed responsibility for issuing it within an agreed time-frame. Thirdly, by reference to the reasons given orally at the hearing (as set out in the approved transcript), UTJ King was wrong to exercise discretion against the appellant at the permission stage. If the application was arguable, it should have been permitted to proceed, and the decision to exercise discretion to refuse relief if appropriate, should have been taken at the substantive hearing.

4. The appeal is resisted. On behalf of the respondent, Mr Richard Evans now accepts that the appellant's passport was not endorsed with the grant of leave to remain or the right to work and that the passport was not a document which would have been acceptable to any employer as demonstrating the appellant's right to work. Nonetheless, and in summary, he contends that in circumstances where the appellant no longer seeks a public law remedy as part of his judicial review claim, there is no jurisdiction to award damages. In any event, he submits the judge was both entitled and correct to conclude that there was no arguable prima facie case to support a claim for damages for alleged breach of the appellant's human rights. Further, no arguable duty of care arose. Finally,

the judge did not refuse to exercise a discretionary remedy. Rather, he concluded that no arguable prima facie case to support a claim for damages had been established.

5. Accordingly the issues on this appeal are as follows:

   i) Whether there is in fact no jurisdiction to award damages in this case because no public law remedy is sought.

   ii) If there is jurisdiction, did the appellant establish an arguable claim of breach of his human rights with sufficient evidence of loss to support his damages claim?

   iii) Is it arguable that an actionable duty of care arises in the circumstances of this case?

   iv) Did the judge refuse to exercise a discretionary remedy at the permission stage?

The Facts

6. The appellant is a national of Mauritius. He came to the UK as a visitor on 25 July 2004 when aged 17, and applied for (and obtained) leave to remain ("LTR") as a student nurse, which was thereafter extended until 30 November 2007. In 2008 he applied for LTR under articles 3 and 8 of the European Convention on Human Rights ("the Convention"). His application was refused.

7. On 20 February 2010 he married a British citizen, Ramnial Nirvashi, and they had a British child.

8. The appellant challenged the refusal of LTR, seeking reconsideration and making further representations, then by means of judicial review lodged on 2 September 2013. It is unnecessary to describe the detail of the proceedings, save to say that permission was refused at each stage and they reached the Court of Appeal in late 2015.

9. By consent, terms having been agreed by the parties, the permission to appeal hearing was vacated and the respondent agreed to pay the appellant's reasonable costs of the judicial review proceedings. Since it is important to the appellant's case on voluntary assumption of responsibility, I set out the recitals to the consent order made by Tomlinson LJ dated 26 November 2015 as follows:

> "UPON the respondent offering on the 17 November to consider the appellant's submissions of 4 December 2012 in writing;"
>
> UPON the appellant offering on the 18 November to submit updated further representations in writing by post, such representations to be submitted within six weeks of the date of sealing this order;
>
> UPON the respondent agreeing on the 18 November to consider the appellant's submissions of 4 December 2012 and any updated written representations referred to above and provide a new decision within three months of receipt of those further representations, absent any special circumstances;

> UPON the appellant's application for oral renewal of his application for permission to appeal having been listed for the 18 November 2015;
>
> UPON that hearing being agreed to be vacated in light of the parties' agreement…".

10. Thus, the respondent agreed to reconsider the appellant's position, together with any further representations and material he wished to rely on, and provide a new decision within three months of receiving the appellant's further representations.

11. By letter dated 20 May 2016, within the agreed three month period, the respondent reconsidered the application and decided to grant the appellant 30 months LTR under D-LTRP 1.2 and Appendix FM (in other words, on family life grounds) of the Immigration Rules. The LTR grant was valid until 20 November 2018. Additionally, the letter of 20 May 2016 explained,

> "What this means for you
>
> A Biometric Residence Permit (BRP) will be sent to you under separate cover. We have endorsed your BRP with limited leave to remain in the United Kingdom for 30 months.
>
> If you have not already received it, it should reach you shortly. You should receive your permit within 7 working days. A leaflet will accompany the permit which will give you more information about it.
>
> However, if you do not receive the permit within 10 working days of the date of this letter or you find a mistake on your permit, please use the service at www.gov.uk/brp..."

The appellant's passport was returned under cover of a letter dated 26 May 2016 but he did not receive a BRP within the 7-10 day time frame set out, or at all, until very much later.

12. The appellant attempted to use the service identified in the letter to submit an online application for a BRP, but without success. By emails on various dates in July, August and October 2016 he notified the respondent that his BRP had not arrived. Automated email responses were sent suggesting that somebody from the BRP management unit would contact him. Again, this appears to have been without success.

13. By letter dated 13 November 2017, the appellant set out his failed attempts to obtain a BRP and continued, "*I have waited over a year but yet in vain, no contact or any application has been received. Without the permit, I am restricted to great work opportunities, travelling with my family and the right to qualify for my gas safety course which is pending*."

14. Finally, the respondent issued the promised BRP on 19 June 2018. The appellant was not given any explanation for the lengthy delay, and the respondent has still not provided any explanation for it.

15. The BRP states: "*Leave to Remain. Work Permitted*". It gives an expiry date of 20 November 2018 in line with the LTR grant.

16. The appellant lodged a judicial review claim form in the Upper Tribunal (IAC) on 8 October 2018.

17. Since it is relevant to the question of jurisdiction raised by the respondent, it is necessary to set out the grounds for and relief sought by the judicial review application in a little more detail. The grounds accompanying the application said the following:

    i) Ground one: illegality and irrationality in failing to grant the correct leave to remain in the UK as contained in the rules and statute - in other words a challenge to the failure to grant 30 months as opposed to five months leave when issuing the BRP;

    ii) Ground two: inordinate and unreasonable delay in failing to issue a correct BRP;

    iii) Ground three: breach of a statutory duty and breach of a court order in failing to implement a court order within a specified period;

    iv) Ground four: failure to respond to the pre-action protocol letter within the 14 day statutory period.

18. The appellant sought the following relief in section 7 of the claim form:

    i) In relation to the first ground, he sought an order quashing the decision to issue the BRP valid from 18 June 2018 to 20 November 2018 only; a declaration that he ought to have been granted leave to remain for 30 months from the date the BPR was issued; and a mandatory order requiring the respondent to reconsider the decision to issue the BRP for 5 instead of 30 months.

    ii) In relation to the second and third grounds (with which this court is broadly concerned) he sought a declaration that the grant of leave ought to have prompted the respondent to issue the BRP within three months; and a declaration entitling the appellant to "*damages for undue hardship, deprivation of a right to take up employment in the UK, loss of earnings which forced [him] to take a loan and credit from friends that he is now unable to pay back and this adversely affected him and with considerable distress*."

19. Permission was refused on the papers by UTJ Bruce by an order dated 24 April 2019.

20. The appellant renewed his application at an oral hearing which took place on 14 June 2019. As set out above, permission to apply for judicial review was refused. In relation to the challenge to the expiry date of the BRP, UTJ King found nothing unreasonable or unlawful in that expiry date which was intended to correspond with the existing period of limited LTR.

21. I have summarised UTJ King's decision on the damages claim above. In short, he concluded there was no jurisdiction to consider an action for damages in relation to breach of a duty of care or statutory duty. However he concluded there may be a cause of action under the Human Rights Act 1998. Assuming that to be so, he was, however,

far from satisfied that any such breach had arisen since the appellant's right to work was clearly endorsed in his passport. Further, he was not satisfied that there was credible evidence of loss resulting from the lack of a BRP: the only evidence adduced by the appellant in support of his contention that he was unable to work is a letter from Prema Construction Ltd dated 21 May 2018; and evidence of debt and court orders predated the grant of LTR on 20 May 2016 and could not therefore have resulted from the failure to supply a BRP. In other words the appellant had not established a prima facie case for damages flowing from his inability to work.

22. The appeal is limited to a challenge to the refusal to grant permission in relation to the appellant's damages for unlawful delay claim. Leave to appeal was granted by Arnold LJ on 11 December 2019. He did not understand the appellant to be pursuing his claim that the BRP should have been issued as valid for 30 months from the date of issue but made clear in any event that he was not granting permission on that basis.

23. Against that factual background I turn to address each of the issues raised by the appeal in turn.

Issue one: was there jurisdiction to award damages in this case by reference to a public law remedy also sought?

24. The High Court's power to award damages on an application for judicial review is set out at s.31(4) of the Senior Courts Act 1981 which provides:

> "(4) On an application for judicial review the High Court may award to the applicant damages, restitution or the recovery of a sum due if –
>
> (a) the application includes a claim for such an award arising from any matter to which the application relates; and
>
> (b) the court is satisfied that such an award would have been made if the claim had been made in an action begun by the applicant at the time of making the application."

25. The Upper Tribunal's power to award such damages is found at s.16(6) of the Tribunals Courts and Enforcement Act 2007 and is in similar terms. However, s. 16(1) provides that it only applies "*in relation to an application to the Upper Tribunal for relief under s.15(1)*". Section 15(1) sets out the public law remedies that can be granted by the Upper Tribunal. Accordingly, for there to be an award of damages under s. 16, there must be an application for one of the public law remedies set out in s. 15(1) (namely a mandatory order, a prohibiting order, a quashing order, a declaration or an injunction).

26. Section 16(6) then provides:

> "(6) The tribunal may award to the applicant damages, restitution or the recovery of a sum due if –
>
> (a) the application includes a claim for such an award arising from any matter to which the application relates, and

> (b) the tribunal is satisfied that such an award would have been made by the High Court if the claim had been made in an action begun in the High Court by the applicant at the time of making the application."

27. Mr Evans submits that although the appellant's original application for judicial review sought a number of public law remedies (principally he submits, directed at the challenge to the five month validity period of the BRP from 19 June 2018 to 20 November 2018), these remedies are no longer pursued. Further, although a declaration is sought in relation to the unlawful delay, he submits that this is merely to further the only remedy now sought, which is damages and cannot be a public law remedy in and of itself. In these circumstances, and since the Upper Tribunal's powers pursuant to s.16(6) do not operate where no public law remedy is sought, there is no jurisdiction for an award of damages only to be made on judicial review. He submits that conclusion is reinforced by reference to CPR Rule 54.3(2) which provides that a claim for judicial review may include a claim for damages, but may not seek such a remedy alone. Although it has no direct application in the Upper Tribunal, it is reflected in s.16 and applies by analogy.

28. I do not accept the factual premise on which Mr Evans' submission is built. Although it is clearly the case that the appellant no longer pursues the five month validity ground or the public law remedies attached to that ground, he continues to seek declaratory relief in relation to the alleged unlawful delay in issuing the appellant's BPR. It seems to me that in the absence of a concession by the respondent that the delay was unlawful, the appellant remains entitled to pursue this remedy. Moreover, a declaration that the delay was unlawful is not academic if it is the foundation for a damages claim. In these circumstances, it seems to me that the appellant continues to seek a public law remedy in addition to his damages claim and the jurisdiction point taken on behalf of the respondent falls away and is not a good ground for dismissing his judicial review claim.

Issue two: is there an arguable claim for damages for breach of human rights with sufficient evidence to support it?

29. The appellant's case is that permission ought to have been granted under this ground because there was sufficient evidence to establish that he suffered financial loss as a result of the unlawful delay: there was a letter from a prospective employer refusing employment solely on the basis of not being able to provide a BRP. The letter should not have been viewed in isolation, and was indicative of the wider context in which the appellant found himself, effectively denied the ability to work, repay his outstanding loans/debts, or adequately provide for his young family. Significantly, Mr Wilcox relies on the fact that UTJ King accepted there may be a cause of action for damages for breach of human rights in certain circumstances, and wrongly concluded on a false factual basis that no such circumstances are present here in the absence of *"a deprivation of the right to work altogether"*. As is now conceded, the appellant had no relevant right to work stamped in his passport. He was, in practice, totally prevented from working. Further, there are other factors (including the debt and the support for his family) that cumulatively give rise to an arguable interference with article 8 rights in this case.

30. Against that, Mr Evans relies (as did UTJ King) on R (Atapattu) v SSHD [2011] EWHC 1388 (Admin) to support UTJ King's conclusions that there was no arguable violation

of article 8 nor any sufficient evidential basis for founding a claim for damages. He relies on Atapattu at [149] to [150], where Stephen Morris QC, sitting then as a Deputy High Court Judge, held:

> "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 Arappatu's right to respect for his private life."

31. Mr Evans emphasises that the cases referred to in Atapattu establish a high threshold. Not only is there is no human right to employment, but there can only be a violation of article 8 where an individual has been deprived of the right to work altogether. For example, in Sidabras the applicant could not work at all in the public sector and in Smirnova the applicant was deprived of the ability to work at all. In this case, although Mr Evans now accepts (contrary to the respondent's case below) that the appellant had no proof of his right to work in the absence of a BRP, nonetheless he was not deprived of the right to work as he could have left the UK and obtained employment in Mauritius. Moreover, he submits UTJ King was correct to find that the appellant had not sustained any loss as a result of being unable to work. He relies on the absence of any witness statement detailing how the appellant or his family's article 8 rights were violated; and the fact that the debts relied on arose before the grant of LTR.

32. I prefer the submissions of Mr Wilcox on this point and have concluded that the appellant has an arguable case for judicial review on this ground. My reasons are as follows.

33. Article 8 ECHR provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is 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, of the for the protection of the rights and freedoms of others".

34. Under section 8 of the Human Rights Act 1988 the power to award damages is provided for as follows:

> "(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
>
> (2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.
>
> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including –
>
> (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
>
> (b) the consequences of any decision (or that or any other court) in respect of that act,
>
> the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.
>
> (4) In determining –
>
> (a) whether to award damages, or
>
> (b) the amount of an award,
>
> the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 11 of the Convention."

35. To establish a breach of his article 8 rights, the appellant must establish an interference with the exercise of his right to respect for his private and family life that has had such serious consequences as to engage the operation of article 8. At the permission stage he had to show this was arguable. There is no suggestion by the respondent that the delay in issuing the BRP pursued a legitimate aim and was proportionate, so the only question under this heading is whether the consequences to the appellant of the respondent's

delay falls within the scope of his private/family life under article 8(1) and meets the threshold of an arguably sufficient interference with it.

36. Although there is no direct authority which establishes that a right to work is of itself protected by article 8, and article 8 does not give a right to choose or pursue a particular occupation, the Strasbourg authorities referred to 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. I accept that the threshold is high.

37. Damages for breach of a Convention right may be awarded under s. 8 of the Human Rights Act 1998 where that is necessary to afford just satisfaction to a person who has suffered loss as a result. There are many cases where an award of damages will not be necessary to afford just satisfaction because a finding of a violation of the Convention right, and the fact that remedies are available on judicial review which will bring about an end to the violation, may constitute just satisfaction. However, as was made clear in Anufrijeva v Southwark LBC [2003] EWCA Civ 1406, [2004] QB 1124 (at [59]) where the established breach has clearly caused significant pecuniary loss, this will usually be assessed and awarded.

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.

40. It is true, as Mr Evans submits, 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, it seems to me in agreement with Mr Wilcox, 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.

41. For all these reasons I consider that UTJ King was wrong to dismiss the application for permission to apply for judicial review on this ground, and would allow the appeal on this ground. The parties agreed if that was the court's conclusion, permission to apply for judicial review should be granted and the judicial review claim remitted to the Upper Tribunal to be determined at a substantive hearing on that basis.

Issue three: is it arguable that there is an actionable duty of care that supports a claim for damages for negligence in the circumstances of this case?

42. The question whether the law imposes a tortious 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 as Lord Browne-Wilkinson observed in X (Minors) v Bedfordshire County Council [1995] 2 AC 633, at 735B-E, no single principle has been found capable of being formulated as applicable to all cases. This is an area in which "*an intense focus on the particular facts and on the particular statutory background …. is necessary*" (see Gorringe v Calderdale Metropolitan Borough Council [2004] UKHL 15, at [2]; [2004] 1 WLR 1057). It may also be relevant that this case is concerned only with economic loss, although neither party addressed the court on this aspect.

43. There is no dispute that the statutory scheme giving immigration powers to and imposing duties on the respondent does not create a statutory cause of action that sounds in damages. It is common ground that for damages to be available here the appellant must establish that the unlawful delay also constitutes a recognised tort or breach of contract.

44. In Gorringe Lord Hoffmann held at [23]

> "23. Since the existence of the statutory power is the only basis upon which a common law duty was claimed to exist, it seemed to be relevant to ask whether, in conferring such powers, Parliament could be taken to have intended to create such a duty. If a statute actually imposes a duty, it is well settled that the question of whether it was intended to give rise to a private right of action depends on the construction of the statute . . . If the statute does not create a private right of action, it would be, to say the least, unusual if the mere existence of the statutory duty could generate a common law duty of care."

At [32] he said,

> "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. . . ."

45. However, he made clear at [38] that the appeal in Gorringe was concerned only with an attempt to impose upon a local authority a common law duty to act based solely on the existence of a broad public law duty. He continued,

> "38. … We are not concerned with cases in which public authorities have actually done acts or entered into relationships or undertaken responsibilities which give rise to a common law duty of care. In such

> cases the fact that the public authority acted pursuant to a statutory power or public duty does not necessarily negative the existence of a duty. A hospital trust provides medical treatment pursuant to the public law duty in the 1977 Act, but the existence of its common law duty is based simply upon its acceptance of a professional relationship with the patient no different from that which would be accepted by a doctor in private practice. The duty rests upon a solid, orthodox common law foundation and the question is not whether it is created by the statute but whether the terms of the statute (for example, in requiring a particular thing to be done or conferring a discretion) are sufficient to exclude it. …"

46. Whether or not the public authority voluntarily assumed responsibility has been regarded as critical to the question whether a duty of care was owed in a number of subsequent cases (see for example Rowley v Secretary of State for Work and Pensions [2007] EWCA Civ 598, [2007] 1 WLR 2861, at [51] to [55]).

47. More recently these principles were reviewed and restated by the Supreme Court in Poole Borough Council v GN and another [2019] UKSC 25. Lord Reed, Deputy President, with whom the other members of the court agreed, held at [63] to [65] as follows:

> "63. Most recently, the decision of this court in 2018 in the case of *Robinson v Chief Constable of West Yorkshire Police* drew together several strands in the previous case law. The case concerned the question whether police officers owed a duty to take reasonable care for the safety of an elderly pedestrian when they attempted to arrest a suspect who was standing beside her and was likely to attempt to escape. The court held that, since it was reasonably foreseeable that the claimant would suffer personal injury as a result of the officers' conduct unless reasonable care was taken, a duty of care arose in accordance with the principle in *Donoghue v Stevenson* [1932] AC 562. Such a duty might be excluded by statute or the common law if it was incompatible with the performance of the officers' functions, but no such incompatibility existed on the facts of the case. The court distinguished between a duty to take reasonable care not to cause injury and a duty to take reasonable care to protect against injury caused by a third party. A duty of care of the latter kind would not normally arise at common law in the absence of special circumstances, such as where the police had created the source of danger or had assumed a responsibility to protect the claimant against it. The decision in *Hill v Chief Constable of West Yorkshire* was explained as an example of the absence of a duty of care to protect against harm caused by a third party, in the absence of special circumstances. It did not lay down a general rule that, for reasons of public policy, the police could never owe a duty of care to members of the public.
>
> 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* 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. Secondly, the decision re-affirmed the significance of the distinction between harming the claimant and failing to protect the claimant from harm (including harm caused by third parties), which was also emphasised in *Mitchell* and *Michael*. Thirdly, the decision confirmed, following *Michael* and numerous older authorities, that public authorities are generally subject to the same general principles of the law of negligence as private individuals and bodies, except to the extent that legislation requires a departure from those principles. That is the basic premise of the consequent framework for determining the existence or non-existence of a duty of care on the part of a public authority.
>
> 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."

48. Lord Reed considered the width of the principle of voluntary assumption of responsibility, quoting from the speech of Lord Devlin in Hedley Byrne v Heller that such an assumption of responsibility would arise in circumstances in which, but for the absence of consideration, there would be a contract, and continuing, "*... I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care. ... Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility*."

49. Lord Reed then referred to the decision of the House of Lords in Customs and Excise Comrs v Barclays Bank plc [2006] UKHL 28; [2007] 1 AC 181, where the question was whether the bank had assumed responsibility to the Commissioners to prevent payments out of an account, by virtue of having been served with freezing orders and to Lord Hoffmann's speech at [38] and [39] where he concluded that a duty of care is ordinarily generated by something which the defendant has decided to do (giving a reference, supplying a report, managing a syndicate, making ginger beer); but in the same way as a common law duty of care cannot be derived directly from a statutory

duty, a statutory duty cannot itself generate a common law duty of care, and likewise "*... as it seems to me, you cannot derive one from an order of court*."

50. Lord Reed continued,

> "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*."

51. In the immigration context Mr Evans submits that it is significant that in neither W v Home Office [1997] Imm AR 302 (CA), Home Office v Mohammed [2011] EWCA Civ 351, nor Atapattu (see above) did the courts accept that a common law cause of action in negligence arose. In Mohammed for example, Sedley LJ, held:

> "24. … whatever the reason, a faute lourde system of state liability in damages for maladministration, of the kind that has worked well in France for more than a century, is not on the cards in the United Kingdom. Apart from the limited private law cause of action for misfeasance in public office and the statutory causes of action in EU law and under the Human Rights Act, there is today no cause of action against a public authority for harm done to individuals, even foreseeably, by unlawful acts of public administration. The common law cause of action in negligence coexists with this doctrine and may on occasion arise from acts done or omissions made in carrying out a public law function; but it may not impinge on the discharge of the function itself, however incompetently or negligently it is performed."

52. He went on to emphasise the role of the Parliamentary Ombudsman in offering an alternative remedy:

> "25. As to this, however, there is frequently, though not always, recourse in the modern state to the independent judgment of an ombudsman. As I said earlier, this too can be relevant to the question whether the common law ought by increment to afford a remedy. ...
>
> 26. It is common ground in the present cases that complaints such as those of the claimants fall within the Parliamentary Ombudsman's remit. They have not yet gone that far because they are being considered

> internally. This is not a statutory process but a voluntary preliminary step. If it affords just satisfaction, well and good. If not, the claimants can invite the Ombudsman to adjudicate and to recommend a payment of compensation. ..."

53. I accept as Mr Wilcox submits however, that there was no suggestion in either W or Mohammed of the Secretary of State having voluntarily assumed responsibility in the manner envisaged in this case. Similarly, the absence of an assumption of responsibility was an important factor in the refusal to find a duty of care had arisen in Atapattu, where the judge accepted the first two stages of the test set out in Caparo Industries plc v Dickman [1990] 2 WLR 358 were met but concluded that it would not be fair, just and reasonable to impose a common law duty of care on the defendant in part because of the absence of any voluntary assumption of responsibility.

54. On the basis of the principles summarised above, Mr Wilcox submits that by entering into the consent order of 26 November 2015, the respondent agreed in good faith, and thereby voluntarily assumed responsibility, to reconsider and give the appellant an *effective* decision on his application for LTR within three months of receiving the appellant's 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.

55. Mr Wilcox submits that although the respondent was exercising powers under a statutory scheme, what distinguishes this case is the fact that the respondent voluntarily assumed responsibility for making an effective decision within a specified period. The respondent need not have done so, but once the respondent chose to, responsibility must then be taken for the subsequent failure promptly to issue a BRP. He submits this voluntary assumption of responsibility makes it fair, just and reasonable that a duty of care should be held to have existed as between the respondent and appellant and that the former should be held liable to the latter for the material consequences of the negligent failure to discharge that duty. Moreover, as before, there is a sufficient evidential basis to establish that the losses suffered by the appellant in the more than two years he was without his BRP subsequent to the grant of LTR were considerable, and included, in practice, depriving him of the right to work altogether.

56. Mr Evans resists those submissions and supports the conclusion of UTJ King on this ground. He relies on the judgments of this court in W and Mohammed as demonstrating that there is no free standing private law right to damages against the Secretary of State in cases of delay such as this. There are compelling reasons of public policy for that and a duty of care would be inconsistent with the proper performance of the public duty performed by immigration officers. He relies on the fact that a similar conclusion was reached in Atapattu. Furthermore, Mr Evans relies on Jama v Ministry of Justice [2012] EWHC 533 (QB) where Kenneth Parker J held in the context of a claim for negligent detention, that under the third step in the Caparo approach to duty of care, public policy considerations dictated that no cause of action in negligence would lie in that case (see especially [65] and [66]).

57. As for voluntary assumption of responsibility, Mr Evans submits that the consent order simply required a reconsideration decision within three months of any fresh representations and that obligation was complied with by the respondent. He acknowledges that this submission is contradicted by paragraph 13 of the respondent's acknowledgement of service which concedes failure to comply with that order. However, he contends that this document is poorly drafted: as a matter of fact there was an effective decision within the specified time limit in the consent order and in any event, paragraph 15 of the acknowledgement of service draws back from the concession. He submits that the respondent's decision to grant LTR gives rise to enforceable rights to reside in the UK and was an effective decision in all the circumstances. The failure to issue a BRP promptly does not undermine the effectiveness of that decision. Moreover, he submits that the appellant could have sought to enforce the consent order.

58. I have found the question raised by this ground of appeal difficult to resolve and have changed my mind more than once in the course of my considerations. I have 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, but the question at this stage is whether his case is an arguable one.

59. Adopting the three stage approach set out in Caparo (as qualified by Robinson and Poole in the context of negligence claims against public bodies), the appellant may well have an arguable case on foreseeability of harm and the necessary proximity between him and the respondent. Without deciding these questions, I can see the force of the argument that it was foreseeable that a prolonged failure to issue a BRP would mean the appellant would be unable to obtain employment; 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, such that the circumstances potentially justify imposing liability on the respondent.

60. More difficult however, are the questions at the third stage: whether there was a voluntary assumption of responsibility; and whether it is fair, just and reasonable to impose a duty of care in this case?

61. First, and foremost in Mr Wilcox's argument, is whether there has been a voluntary assumption of responsibility. Leaving aside the question whether the terms of the order were in fact breached (an issue on which I have some sympathy with the arguments of the respondent, but which seems to raise an arguable question in this case), 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.

62. Secondly, and in any event, it seems to me that imposing a duty of care in circumstances such as these may be regarded as having adverse practical consequences and as being

inconsistent with the proper performance of the respondent's statutory functions. It 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 by Mr Wilcox that such schemes do not provide adequate alternative redress.

63. I remind myself that the threshold at this stage is one of arguability. The circumstances in which a public authority, when exercising statutory functions, may be held liable in negligence gives rise to complex questions in what is an evolving area of law. The question whether this is a case where the respondent merely has statutory powers or duties, and could have prevented the appellant's harm by exercising them to supply a BRP promptly (so that no duty of care arises); or whether responsibility was in fact assumed here, is not straightforward and may depend on a greater exploration of the particular facts. It is in circumstances such as these that the courts have shown an understandable reluctance (as reflected in the authorities to which I have referred) to strike out claims as disclosing no reasonable (or arguable) cause of action, instead favouring leaving the individual facts of the case to be determined so that the evolution of the law can be based on actual factual findings.

64. For all these reasons, and despite my reservations, I am just persuaded that UTJ King was wrong in effect to strike out this case at the permission stage and ought to have granted permission on this ground too.

Issue four: did UTJ King refuse a discretionary remedy at the permission stage?

65. This ground depends on an argument that in his oral transcribed reasons (though not in his later written reasons), UTJ King refused to exercise a discretionary remedy at the permission stage. Given my conclusions on the earlier grounds, it is unnecessary to address this ground in detail. However, and in short, it seems to me that is not what the judge was doing, and neither his oral nor his written reasons (which must take precedence) reflect such an approach. I agree with Mr Evans that UTJ King simply held that the appellant had not established a prima facie case to support a claim for damages. The written reasons clearly reflect that conclusion (as Mr Wilcox agreed); but it seems to me that read as a whole, the oral reasons reflect it too.

66. This ground of appeal is accordingly dismissed.

Conclusion

67. If my Lord and my Lady agree, for the reasons set out above I would therefore allow the appeal on what are the first and third grounds.

68. As the parties agreed, if this were to be the court's conclusion, permission to apply for judicial review would be granted on this basis. The application would be remitted to the Upper Tribunal to determine at a substantive judicial review hearing:

    i) Whether the delay in issuing the appellant with a BRP was unlawful, and if so the period of unlawful delay?

ii) Whether and if so to what extent the appellant suffered loss consequent on that unlawful delay?

iii) Whether the unlawful delay breached the appellant's article 8 rights and he should be compensated for any established pecuniary (or non-pecuniary) loss in damages?

iv) Whether the respondent owed the appellant a common law duty of care and was negligent in performing it, causing the appellant loss for which he should be compensated in damages?

69. If the appellant were to be found to be entitled in principle to damages, it would perhaps be wise for the Upper Tribunal to consider the most appropriate forum for the damages assessment. I understand the mechanics of transfer to (say) the county court may be convoluted (requiring transfer to the Queen's Bench Division first). In the alternative, assessment by a suitable Deputy Upper Tribunal Judge might be the solution.

Lady Justice Nicola Davies

70. I agree.

Lord Justice McCombe

71. I also agree.