Case No: C1/2003/0425

Neutral Citation No: [2003] EWCA Civ 716
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand,
London, WC2A 2LL

Friday 23rd May 2003

Before:

LORD JUSTICE SIMON BROWN
(Vice-President of the Court of Appeal Civil Division)
LORD JUSTICE WALLER
and
LORD JUSTICE KAY

- -

Between:

BLESSING EDORE	Appellant
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	Respondent

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Sibghatullah Kadri Esq, QC & Satvinder Juss Esq
(instructed by Ikie, Solicitors) for the Appellant
Ashley Underwood Esq, QC
(instructed by The Treasury Solicitor) for the Respondent

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Judgment
As Approved by the Court

Lord Justice Simon Brown:

1. Ms Blessing Edore, the appellant, is a citizen of Nigeria now aged 39. She has been in this country since her illegal entry here in 1990. She has two young children fathered by a married man, Mr Okadiegbo, a British citizen with a wife and three older children, also living here. It is the appellant's case that to return her to Nigeria as the Secretary of State proposes would infringe her (and her children's) right to family life under Article 8 of ECHR. The Secretary of State contends to the contrary that the appellant's return is necessary and proportionate in the interests of effective immigration control.

2. On 20 June 2002, on the appellant's appeal under s65 of the Immigration and Asylum Act 1999 ("the 1999 Act"), a special adjudicator, Mrs Frudd, allowed the appeal: she found that "removal of the appellant and her two dependent children would be disproportionate to the aim of preserving the integrity of immigration control pursuant to article 8 of ECHR".

3. On 29 January 2003 the IAT allowed the Secretary of State's appeal and reinstated his decision to issue and serve removal directions.

4. The appellant now appeals to this court with permission granted by Latham LJ in these terms:

> "It seems to me that this court should take the opportunity to consider the starred appeal of *Noruwa* and the way in which Adjudicators and the Tribunal should approach appeals in which proportionality is in issue."

5. Essentially two questions arise on the appeal: first, as suggested by Latham LJ, what approach should the independent appellate authorities bring to bear on a s65 appeal arising, as commonly such appeals do, in circumstances such as exist here. More particularly, if there is room for two views as to whether, in ordering the appellant's removal, the Secretary of State has acted proportionately and struck a fair balance between the competing interests in play, are the appellate authorities bound to dismiss the appeal or can they, if they prefer, substitute for the Secretary of State's decision one more favourable to the appellant? This first question is plainly one of some general importance. The second question arising is whether, whatever may be held to be the correct approach to its jurisdiction, the IAT was right on the facts of this particular case to have upheld the Secretary of State's decision to return the appellant and her children to Nigeria.

6. Before addressing either question it is convenient first to sketch in the facts of the case, noting as I do so that these have never been the subject of dispute.

7. The appellant entered the UK on 11 September 1990 on a visa valid for only 24 hours. In 1996 she met Mr Okadiegbo, an accountant by profession. He had just been naturalised and, as she knew, was a married man with three children, the eldest, Michael, being profoundly deaf. The appellant and Mr Okadiegbo planned a family and began to spend virtually every weekend together. After miscarrying several times in 1997 and 1998, on 29 May 1999 she bore him a son; on 11 October 2000, a daughter. He supports the family by giving her £200 per week for her council house rent and for the children's upkeep. He also buys them clothes and toys. She herself works as a cleaner, claiming family allowance but no other benefits. The children see their father every Saturday without fail. The love between them is mutual. He telephones the appellant every day and sometimes sees her and the children during the week. Were the appellant and her children to be returned to Nigeria their relationship with Mr Okadiegbo would end. He could not and would not leave his marriage to live with the appellant. He loves all his five children equally. He

feels particularly responsible for Michael. His wife is aware of his relationship with the appellant and has indicated that if he were ever to seek a divorce she would make it as difficult as possible for him to see the three children of the marriage.

8. Having recorded the facts essentially as I have just sought to summarise them, the adjudicator continued:

> "38. The two children are maintained by Mr Okadiegbo in the UK, but more importantly they appear to be dependent upon him emotionally as their father. He sees them regularly every week, at least once a week and is part of their lives. Even though they are still a tender age, he is a stable influence remaining in daily contact with them and their mother. … I find as a fact that there are substantial 'family ties' in this case and these children should not suffer because their father is in a complicated position with his wife and three children from his marriage.
>
> 39. Consequently I am satisfied that there would be an interference with the right to respect of private life and family life were the appellant and her children sent to Nigeria.
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> …
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> 42. I am conscious of the fact that the appellant has flouted immigration control and has had a relationship with a man who still lives with his wife and three children which has led to the birth of two children whilst her immigration status was uncertain. Against this I have to balance the facts of this particular case in terms of the interests of the appellant and her family. There is clearly a balance of public interest and private interest to be considered.
>
> 43. Having considered all of the evidence in this matter I find that it would be disproportionate in this particular instance to return the appellant to Nigeria together with her two dependent young children because of the severe effects which it would have upon the appellant and more particularly her two children who were born in the UK."

9. I turn now to the IAT's determination by which it concluded, first, that the interference with family life involved in returning the appellant and her children to Nigeria flowed rather from the father's decision not to live with them there rather than the Secretary of State's decision to return them and, secondly, that in any event the removal of the appellant and her two children to Nigeria would be proportionate. Let me at once set out the most directly relevant passages from the IAT's decision:

> "19. … [T]here is an interference if the children's father will not go to Nigeria but there is not if he is prepared to go. We do not accept in these circumstances that the interference follows automatically from the Secretary of State's decision; it follows naturally from the father's decision.

> 20. Given that what the adjudicator found were substantial family ties, she also found that there would be an interference of the right to private life and family life were the appellant and her children sent to Nigeria. This finding was only open to the adjudicator if she took no proper account of the father's choice, and we consider this was an error. We find on the particular facts of this unusual case that what would be the operative interference with family life in Nigeria is the father's choice to remain in the United Kingdom. Absent the father's decision, there is no free standing insurmountable obstacle to family life in Nigeria.
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> …
>
> 29. We differ from the adjudicator in her assessment of proportionality. In our view proportionality is not solely a question of fact, but is essentially a question of law, based on the facts.
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> 30. In this particular case the applicant came to the United Kingdom illegally and has made an application for asylum which has failed. Late in the day she makes an application to stay on the basis of a potential breach of her human rights and at all stages she has known of the precarious nature of her immigration status.
>
> 31. There is no proper reasoning in the adjudicator's determination for the conclusion that the applicant's children's would be adversely affected by removal, but we accept what must be inherent in looking the facts that the children would be going to a country where they were not born and have, we assume, never visited.
>
> …
>
> 33. There is a lack of any proper evidence before the adjudicator relating to the actual impact upon the children if they did have to live in Nigeria.
>
> 34. The family unit in question is not long established in the United Kingdom.
>
> 35. We take the view that the removal of the applicant and her two children to Nigeria would be proportionate."

10. I turn now to the first issue arising here: what is the correct approach to an appeal under s65 of the 1999 Act?

11. Clearly the starting point must be the statutory language in which the appeal jurisdiction is conferred on the adjudicator. So far as material s65 provides:

> "(1) A person who alleges that an authority has, in taking any decision under the Immigration Acts relating to that person's entitlement to

enter or remain in the United Kingdom, acted in breach of his human rights may appeal to an adjudicator against that decision …

(2) For the purposes of this Part …

(b) an authority acts in breach of a person's human rights if he acts, or fails to act, in relation to that other person in a way which is made unlawful by section 6(1) of the Human Rights Act 1998.

(3) Subsections (4) and (5) apply if, in proceedings before an adjudicator or the Immigration Appeal Tribunal on an appeal, a question arises as to whether an authority has, in taking any decision under the Immigration Acts relating to the appellant's entitlement to enter or remain in the United Kingdom, … acted in breach of the appellant's human rights.

…

(5) If the … adjudicator, or the Tribunal, decides that the authority concerned-

…

(b) acted in breach of the appellant's human rights, the appeal may be allowed on that ground."

12. Section 6(1) of the Human Rights Act 1998 provides

"It is unlawful for a public authority to act in any way which in incompatible with a Convention right."

13. Paragraph 21 of Schedule 4 to the 1999 Act, under the heading "Determination of Appeals", provides:

"(1) On an appeal to him under [the relevant Part], an adjudicator must allow the appeal if he considers -

(a) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case, or

(b) if the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently,

but otherwise must dismiss the appeal.

…

(3) For the purposes of sub-section (1), the adjudicator may review any determination of a question of fact on which the decision or action was based."

14. Paragraph 22(2) of Schedule 4 provides that:

> "The Tribunal may affirm the determination or make any other determination which the adjudicator could have made."

15. The effect of these provisions taken together is that a person may appeal to the adjudicator in respect of an immigration decision which he alleges is incompatible with his Convention rights and, if the adjudicator finds the alleged breach established, his appeal will be allowed, otherwise it will be dismissed. The fundamental question, therefore, is: does the decision under appeal infringe a Convention right?

16. Latham LJ referred in his grant of permission to "the starred appeal of *Noruwa*" - a decision of the IAT (presided over by Mr Ockleton, the Deputy President) numbered 00/TH/2345. Rather, however, than attempt any prolonged examination of that rather difficult determination, I am able instead to turn immediately to a recent unreported decision of Moses J in *Ismet Ala -v- Secretary of State for the Home Department* [2003] ECHC 521 (Admin) dated 19 March 2003 which for my part I have found enormously helpful on the very question we are now addressing, the nature of the adjudicator's jurisdiction on a s65 appeal. So helpful is it, indeed, that I propose to cite the relevant part of the judgment in its entirety, pausing only to note, first, that the proposal there was to remove the applicant to Germany under the Dublin Convention for the determination of his asylum claim (and any entry clearance application he might then make) and, secondly, that the challenge was in fact to the Secretary of State's decision to certify the alleged article 8 breach as manifestly unfounded under s72(2)(a) of the 1999 Act:

> "37. … If the only question is whether the balance between the need for effective immigration control and the undisputed family circumstances of a claimant should have been struck in favour of the claimant, is it open to an adjudicator to substitute his own decision for that of the Secretary of State?
>
> 38. The solution to the question is to be found, not in the nature of an adjudicator's jurisdiction but in the nature of the issue to be determined on appeal. The issue before an adjudicator would be whether the Secretary of State has acted in breach of the appellant's human rights (see Section 65(3) and Section 65(5)(b)). In the instant case the statutory question posed to the adjudicator by Sections 65(2)(b), (3) and (5)(b) is whether the Secretary of State has, in ordering the removal of the claimant, acted in breach of the claimant's rights enshrined in Article 8.
>
> 39. The Secretary of State's decision that the claimant should be returned to Germany for the determination of his asylum claim is an interference with his rights under Article 8.1. There is no dispute but that the Secretary of State's decision was taken in pursuance of a legitimate aim, namely effective immigration control. The issue

is whether the Secretary of State's decision was a proportionate response to the question whether such removal was justified in this particular case. The obligation upon the Secretary of State to act in a proportionate manner required him to strike a fair balance between the legitimate aim of immigration control and the claimant's rights under Article 8. In *Samaroo and Sezek v SSHD* [2001] UK HRR 1150 at para 24, 1161. Dyson LJ emphasised:-

> 'The striking of a fair balance lies at the heart of proportionality. In *Sporrong and Lonnroth v Sweden* [1983] 5 EHRR 35, para 69, the court said "The court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental right. … The search for this balance is inherent in the whole of the Convention." (See para 26 page 1161).

40. The jurisprudence of the European Court of Human Rights recognises that Article 8 affords the decision maker, the Secretary of State, a 'discretionary area of judgment' in striking the balance fairly between the conflicting interests of a claimant's right to respect for family life and effective immigration control. The Court of Appeal cited with approval Thomas J's recognition of the discretionary area of judgment in the context of Article 8 (see para 29). At paragraph 35 Dyson LJ said:-

> '… the function of the court in a case such as this is to decide whether the Secretary of State has struck the balance fairly between the conflicting interests of Mr Samaroo's right to respect of his family life on the one hand and the prevention of crime and disorder on the other. In reaching its decision the court must recognise and allow to the Secretary of State a discretionary area of judgment.'

He continued:-

> 'In my judgment, in a case such as this, the Court should undoubtedly give a significant margin of discretion to the decision of the Secretary of State. The convention right engaged is not absolute. The right to respect for family life is not regarded as a right which requires a high degree of constitutional protection. It is true that the issues are not technical as economic and social issues often are. But the Court does not have expertise in judging how effective a deterrent is a policy of defaulting foreign nationals who have been convicted of serious drug trafficking offences once they have served their sentences.'

41. It is true that this is not a case of deportation following a conviction (in Samaroo of drug offences). But it is a case where the Secretary of State is bound to be better placed to take a wider overall view as to what is needed to ensure that immigration control is effective.

42. It must be recalled that in Samaroo the Court of Appeal was concerned, not with the appellate jurisdiction of an adjudicator but with the role of the court on an application for judicial review. The adjudicator is not exercising the residual jurisdiction of judicial review. Still less is he in the position of the European Court of Human Rights which affords member states a margin of appreciation when considering whether a High Contracting Party is in breach of its treaty obligations under the Convention. The essential question is whether an adjudicator is entitled to substitute his own decision as to where the balance fairly lies.

43. The answer is to be found, in my view, in the recognition, acknowledged both by the European Court of Human Rights and the Court of Appeal, that the Convention itself, in the context of Article 8, affords the decision maker, the Secretary of State, a discretionary area of judgment. The test of proportionality posed by Article 8.2 is whether the decision maker has struck a fair balance. That test is not affected by the concept of margin of appreciation to be applied by the European Court of Human Rights nor by the nature of the Administrative Court's jurisdiction. As Dyson LJ pointed out:-

> 'The court has clearly said that the issue for it is to determine whether the deportation struck a fair balance between the relevant interests. That is what proportionality requires. In my view, the margin of appreciation does not affect the nature of the test to be applied or the question to be asked.' (Paragraph 24).

Similarly the question to be asked by an adjudicator, the test to be applied by him, in determining whether the Secretary of State has acted in breach of the claimant's rights under Article 8, remains the same as the test to be deployed by the Administrative Court or the European Court of Human Rights itself.

44. It is the Convention itself and, in particular, the concept of proportionality which confers upon the decision maker a margin of discretion in deciding where the balance should be struck between the interests of an individual and the interests of the community. A decision-maker may fairly reach one of two opposite conclusions, one in favour of a claimant the other in favour of his removal. Of neither could it be said that the balance had been struck unfairly. In such circumstances, the mere fact that an alternative but

favourable decision could reasonably have been reached will not lead to the conclusion that the decision maker has acted in breach of the claimant's human rights. Such a breach will only occur where the decision is outwith the range of reasonable responses to the question as to where a fair balance lies between the conflicting interests. Once it is accepted that the balance could be struck fairly either way, the Secretary of State cannot be regarded as having infringed the claimant's Article 8 rights by concluding that he should be removed.

45. So to conclude is not to categorise the adjudicator's appellate function as limited to review. It merely recognises that the decision of the Secretary of State in relation to Article 8 cannot be said to have infringed the claimant's rights merely because a different view as to where the balance should fairly be struck might have been reached.

46. This is not a recognition of an exercise of a discretion by the Secretary of State within the meaning of paragraph 21(1)(b) of Schedule 4 of the 1999 Act. The ground of appeal under Section 65 is not that the Secretary of State's discretion should have been exercised differently but that the Secretary of State has acted in breach of the claimant's human rights enshrined in Article 8. The concept of a discretionary area of judgment describes no more than an area within which two reasonable albeit opposite conclusions may fairly be reached.

47. Accordingly I conclude that an Adjudicator, on an appeal based upon Article 8, where there is no issue of fact, is concerned only with the question whether the Secretary of State has struck a fair balance between the need for effective immigration control and the claimant's rights under Article 8. In order to answer that question he is concerned only with the issue whether the decision of the Secretary of State is outwith the range of reasonable responses. This conclusion has the merit of support from a starred decision of the Immigration Appeal Tribunal in *Noruwa* (OOTH 2345 3 July 2001). There was much debate before me as to what appeared to be two conflicting paragraphs within that decision in paragraphs 47 and 54. But it is plain from another decision, not cited before me in *Baah* [2002] UK IAT 05998 at paragraph 39, chaired by the same deputy President, that the IAT's conclusion was the same as my own."

17. I have already described the IAT's decision in *Noruwa* as somewhat difficult. The following brief citations will illustrate why:

> "47. … So far as the human rights element of the claim is concerned, the Appellate Authority will be concerned with whether the

decision is shown to have been one which was outside the range of permissible responses"

> "54. If an appellant claims that a decision was disproportionate, that is a matter which he is entitled to bring to the Appellate Authority and which the Authority must determine. In doing so the Authority will examine all relevant material (going both to law and to the facts) and will reach its own conclusion. This is a genuine appeal, not merely a review of whether the Respondent's conclusion on proportionality was open to him. If the Authority reaches the conclusion that the decision was disproportionate, that is the end of the matter: the decision was unlawful and the appeal must be allowed."

> "56. In particular, the fact that an argument based on proportionality has been raised and has failed (because the decision was not outside the allowable area of discretion) does not of itself allow an Adjudicator or the Tribunal to intervene in the exercise of a discretion. Nor does it of itself allow the Adjudicator or the Tribunal to substitute its own discretion for that of the Respondent. That power only arises where the original decision involves the exercise of a discretion."

18. With regard to that final paragraph, the Tribunal had already stated in paragraph 49, rightly to my mind: "The issue of proportionality is a matter of judgment and balance, but not of itself a matter of discretion".

19. Insofar as some tension may be thought to arise between paragraphs 47 and 56 on the one hand and 54 on the other, Mr Ockleton's view was subsequently made plain, as Moses J pointed out, in paragraph 39 of the IAT's decision in *Baah*:

> "The question for us is whether or not the Respondent's decision is lawful under s6(1): that is to say whether it is proportionate. It is not open to us to substitute our own decision if the decision was within the allowable area of discretion allowed to the Respondent."

20. For my part I find Moses J's analysis in *Ala* entirely convincing and in the result conclude that, in cases like the present where the essential facts are not in doubt or dispute, the adjudicator's task on a human rights appeal under s65 is to determine whether the decision under appeal (*ex hypothesi* a decision unfavourable to the appellant) was properly one within the decision maker's discretion, ie was a decision which could reasonably be regarded as proportionate and as striking a fair balance between the competing interests in play. If it was, then the adjudicator cannot characterise it as a decision "not in accordance with the law" and so, even if he personally would have preferred the balance to have been struck differently (ie in the appellant's favour), he cannot substitute his preference for the decision in fact taken.

21. In *B -v- Secretary of State for the Home Department* [2000] ImmAR 478 Sedley LJ, giving the leading judgment in this court, said at paragraph 36:

> "I have no doubt that the Home Secretary's view that deportation was nevertheless merited was legitimately open to him …. But our public law … now has to accommodate and give effect to the requirements of EU law and through EU law [this was before the coming into force of the Human Rights Act 1998] of the European Convention. It means making up our own minds about the proportionality of a public law measure - not simply deciding whether the Home Secretary's or the Tribunal's view of it is lawful and rational."

22. I myself said at paragraph 47:

> "It was common ground before us that proportionality involves a question of law and that, on a statutory appeal of this nature, the court is required to form its own view on whether the test is satisfied, although, of course, in doing so it will give such deference to the Tribunal's decision as appropriately recognises their advantage in having heard the evidence. This task is, of course, both different from and more onerous than that undertaken by the court when applying the conventional *Wednesbury* approach. It would not be proper for us to say that we disagree with the Tribunal's conclusion on proportionality but that, since there is clearly room for two views and their view cannot be stigmatised as irrational, we cannot interfere. Rather, if our view differs from the Tribunal's, then we are bound to say so and allow the appeal, substituting our decision for theirs."

Ward LJ expressly agreed with both judgments.

23. In *Noruwa* the Tribunal considered *B* in the light of three later Court of Appeal authorities concerning the judicial review of decisions by the Secretary of State to remove individuals from the United Kingdom: *R (Mahmoud) -v- Secretary of State for the Home Department* [2001] 1 WLR 840; *R (Isiko) -v- Secretary of State for the Home Department* (C/2000/2939) and *Samaroo and Sezek -v- Secretary of State for the Home Department* [2001] UKHRR 1150 (although the latter case had not by then reached the Court of Appeal) and concluded that *B* had proceeded on the basis of a concession and should not be followed insofar as it indicated that the question of proportionality was a question of law. For my part I now readily accept that it is unhelpful to characterise the question of proportionality as one of law and certainly the approach which we adopted in *B* appears to me irreconcilable with that which by the terms of s65 Parliament has now dictated independent appellate authorities must take towards appeals from removal directions made by the Secretary of State and his officers. It is perhaps worth pointing out that *B* was decided at a time when, under s15(1)(a) and (7)(a) of the Immigration Act 1971, a decision to deport, as there, on the ground that such deportation was conducive to the public good was appealable directly to the IAT *on the merits.*

24. Having resolved the first issue in favour of the respondent I turn now to the second question arising on the appeal: was the IAT entitled on the facts of this case to have regarded the Secretary of State's decision to return the appellant and her children to Nigeria as striking a fair balance between the competing interests in play?

25. This question I can deal with altogether more briefly. In my judgment it was not. Although the Tribunal allowed the appeal against the adjudicator's decision on two separate grounds, Mr

Underwood QC very fairly recognises that neither ground is sustainable, at any rate by reference to the reasoning given. That the removal of the appellant and her children to Nigeria would interfere with their Article 8.1 rights is surely plain and indisputable and Mr Underwood does not seek to support the approach taken in paragraphs 19 and 20 of the Tribunal's determination (see paragraph 9 above). As for the Tribunal's view that removal here would be proportionate, the Tribunal seems to have allowed the appeal from the adjudicator's contrary view on the basis (see paragraph 31 of its determination) that "there is no proper reasoning in the adjudicator's determination for the conclusion that the applicant's children would be adversely affected by removal". I simply cannot follow that reasoning. On the contrary, the adjudicator seems to me to have explained perfectly plainly how the children would be adversely affected: they are "emotionally dependent" upon their father who provides "a stable influence" in their lives; if sent to Nigeria they would be permanently deprived of his love and support. What clearer or more convincing reasoning could one have for not imposing this separation upon them?

26. I recognise, of course, the flagrancy of the appellant's breach of immigration control and the precariousness of her presence in the UK whilst she was creating this new "family". So too did the adjudicator - see paragraph 42 of her determination set out in paragraph 8 above. I recognise also the need for effective immigration control. In the highly unusual circumstances of this case, however, it seems to me that there really is only room for one view as to how the balance between these competing interests should be struck and that is the view taken by the adjudicator who, of course, heard all the evidence in the case.

27. Mr Kadri QC asked rhetorically during the course of his submissions on the first part of the case what was the point of having a right of appeal under s65 if the appellate authorities' jurisdiction is as relatively restricted as Moses J found in *Ala* and as I for my part would hold it to be. The outcome to the present appeal surely provides the answer to that question. There will be occasions when it can properly be said that the decision reached by the Secretary of State was outside the range of permissible responses open to him, when in other words the balance struck by the Secretary of State is simply wrong. There may not be many such occasions but to my mind this certainly was one of them.

28. I would accordingly allow the appeal, set aside the decision of the IAT and reinstate that of the adjudicator.

Lord Justice Waller:

29. I agree.

Lord Justice Kay:

30. I also agree.

Order: Appeal allowed with costs.

Decision of IAT to be set aside and the decision of the Adjudicator dated 20 June 2002 to be restored.

Community Legal Service Assessment of Appellant's costs.

(Order does not form part of the approved judgment)