CO/9531/2009

Neutral Citation Number: [2010] EWHC 2775 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 13 October 2010

B e f o r e:

MR JUSTICE OUSELEY

- - - - - - - - - - - - - - - - -

Between:
THE QUEEN ON THE APPLICATION OF ELMI

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

- - - - - - - - - - - - - - - - -

Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

- - - - - - - - - - - - - - - - -

Mr Nicholson Appeared On Behalf Of The **Claimant**
Mr Singh (Mr Wastell For Judgment) Appeared On Behalf Of The **Defendant**

- - - - - - - - - - - - - - - - -

J U D G M E N T

1. **MR JUSTICE OUSELEY:** Alia Abdulle Mohammed is a Somali citizen who came to the United Kingdom from Ethiopia in November 2006, aged 16. She was recognised as a refugee by the Secretary of State for the Home Department in March 2007. On 10 October 2007 the three claimants, also Somalis living in Ethiopia, made their first attempt to obtain entry clearance in Addis Ababa to join her in the UK. The first claimant is her mother and the other two are half sisters by the same mother.

2. This application is concerned with the question of fees. The claimants attack the lawfulness of the decision that fees were payable, and the time taken to decide whether fees were payable for the applications. There is some dispute about whether any decision was actually made but the decision challenged is dated 22 May 2009. The claimants seek to quash it and to have their application for exemption under discretionary powers determined according to law.

3. The case has been bedevilled by changes in guidance, regulations, responsible department, policy and practice. The letter of 10 October 2007 from the claimants' solicitors, Wilson and Co, to the consular section of the embassy at the British Embassy in Addis Ababa was handed in in person by the claimants. It asked for their applications for entry clearance to be accepted without a fee. The applications were said to be exempt under paragraph 7.4.5 of the Diplomatic Service Procedures then in force:

> "7.4 - Gratis visas
>
> Entry clearances should be issued gratis to the following categories;
>
> ...
>
> 5) Destitute persons;
>
> 6) Refugees and their pre-flight dependants, recognised as such by the Home Office".

4. The application for exemption was supported by a short paragraph in the letter of 10 October 2007 as follows:

> "We submit that the applicants are destitute. They are Somali refugees living illegally in Ethiopia in inadequate accommodation and with inadequate food and medical care. They are dependant on the sponsor, who herself saves money out of her minimal welfare benefits in the UK. As a result the applicants simply cannot pay three application fees even at the rate noted above".

That rate was the long term non-settlement fee of £200.

5. There was another ground put forward for exemption, which does not advance matters. It contended that the claimants themselves were refugees.

6. The fee instruction in the Diplomatic Service Procedures then in force also permitted the Head of Mission the cautious exercise of a residual discretion not to charge for a visa. It is unnecessary to go in detail into the legislative basis for the Diplomatic Service Procedures but the powers in relation to fees were contained in the Consular Fees Regulations 1981 and a subsequent Consular Fees Order 2007. The powers of decision in relation to fee exemption were given to Entry Clearance Officers.

7. The basis upon which entry clearance was sought was under what Wilsons described as the wider Family Reunion Policy, which it took from chapter 16 of the Diplomatic Service Procedures, which reads as follows:

> "Dependant children over the age of 18 and other dependant relatives (eg mother, father, brother, sister etc) do not qualify for Family Reunion under this section of the Rules. However if there are compelling compassionate circumstances which warrant consideration of the application 'outside of the Rules' ECOs have discretion to refer applications to the Home Office for a decision on compassionate grounds. However, ECOs must be satisfied that the applicant was genuinely dependant on the sponsor before his flight to seek asylum".

There was a brief description of the basis upon which it was said that the claimants were dependants of the 15 year old before she left Ethiopia.

8. It appears, though there is no direct evidence of this and the action of the Entry Clearance Officer is not directly challenged, that the ECO refused to accept the application without the £500 fee payable by each of them for a settlement application. Wilsons, in their letter of 28 January 2008, asked the Entry Clearance Manager to accept the applications without a fee or with no more than the £200 long term non-settlement fee being paid. The applications, the letter said, were to be resubmitted. No reply was received to this letter. On 3 April 2008, Wilsons chased the application and enclosed a further copy of their 28 January 2008 letter. Nothing was heard.

9. On 1 April 2008 the law had changed. The Consular Fees Order 2008 removed the earlier ECO power to waive fees for destitutes. The Immigration and Nationality Fees Regulations 2007 SI number 1158 had been made under section 51 of the Immigration, Asylum and Nationality Act 2006. Those regulations did not contain any power for the Secretary of State to waive fees. The Amendment Regulations 2008, S.I 544, in regulation 20B(1)(c), provided for a fee of £515 to be payable in respect of an application for entry clearance for settlement. The power to waive a fee in regulation 20C provided that:

> "No fee is payable in respect of an application referred to in regulation 20B where -
>
> ...
>
> (b) It is for the purpose of Family Reunion under part 11 of the Immigration Rules; or

(c) The Secretary of State determines that the fees should be waived".

So it became the Secretary of State for the Home Department and not the ECO who had the power to waive fees in respect of an application for Family Reunion outside part 11 of the Immigration Rules. That, as I shall come to, is the application that was made.

10. The Immigration and Nationality Fees Regulations 2009 and 2010 are in the same terms, though the relevant regulation was respectively Regulation 26 and Regulation 25.

11. At some point before July 2008 further entry clearance guidance general instructions were issued. Chapter 16 contained a warning that:

> "The policy on Family Reunion is currently being revised and the guidance in this chapter is not up-to-date. Staff should refer to recently issued interim guidance".

I have not been shown any interim guidance. The position in respect of "other dependant relatives" remained as it had been. The only relevant provision for the waiver of fees in chapter 7 was that fees should be waived "where the Secretary of State has directed that the fees should be waived" (7.4.3). The ECO continued to have a residual discretion to waive fees in two limited categories of case irrelevant to this action.

12. From 13 October 2008 further guidance was in force but subject to the same warning in relation to Family Reunion. It said:

> "Other dependant relatives.
>
> Dependant children over the age of 18 and other dependant relatives (eg mother, father, brother, sister etc) do not qualify for Family Reunion under this section of the Rules. However, ECOs should accept applications (gratis) from those mentioned above for consideration. ECOs must not refuse to accept these applications or request applicants to withdraw any applications in this category
>
> •If you are satisfied that the applicant was genuinely dependant on the sponsor before the flight to seek asylum and;
>
> •There are compelling compassionate circumstances, which warrant consideration of the application outside of the Rules ECOs have discretion to refer applications via the HO referrals mailbox NCC2 for a decision on compassionate grounds.
>
> If you are not satisfied that there are compelling compassionate circumstances, then the applications should be refused. The notice of refusal should make it clear as to why you are not satisfied that there were any compelling compassionate circumstances which warranted referral for a decision outside of the Immigration Rules".

The basis upon which Family Reunion could be granted to "other dependant relatives" was thus the same as it had been and required referral to the Home Office. But it also required the ECO to form a view on all the merits of the claim in order to know whether to refer the application to the Home Office. Only the Home Office could make the definitive decision on whether compelling and compassionate circumstances existed. The difference between the guidance issued on 13 October 2008 and the preceding guidance was in the reference to the application being received gratis.

13. Meanwhile, the Secretary of State had issued no policy guidance about how he was to exercise his waiver power under the Amendment Regulations of 2008, unless 13 October 2008 Entry Clearance Guidance General Instructions could be taken to be such. That would be a misinterpretation of the facts. What was going on, in fact, was described in evidence given to Black J in QB v Secretary of State for the Home Department [2010] EWHC 483 Admin, another case concerning immigration fees. Until a draft policy came into existence in March 2009, finally approved in September 2009, and practice between draft and final version appears to have been somewhat variable, there was, according to a Senior Executive Officer in the United Kingdom Border Agency:

> "A continuance of the common sense approach that if an applicant claimed not to be able to afford the fee then there was an examination of who was to meet the cost associated with the application. This would include the financial circumstances of any UK sponsor and who would be paying the air fare. This examination was to establish whether any waiving of the fee (and by association the use of public funds) was appropriate in the circumstances."

14. The next letter from Wilsons to the Consular and Visa section of the British Embassy in Addis Ababa was dated 20 November 2008. It referred to the Entry Clearance Guidance of 13 October 2008, pointing out that it said that an application of the sort which the claimants wished to make was now to be received without fee. They sought confirmation that no fee would now be required. Finally, on 5 December 2008 a reply was received from the Home Office UKBA/British Embassy Addis Ababa, for the names of both bodies are printed on the letter head, signed by the Entry Clearance Assistant. It said that the Entry Clearance Manager had reviewed the correspondence in this case and that if the applicants were able to provide evidence that they were each genuinely dependant on the sponsor before the flight to seek asylum the Entry Clearance Manager would be prepared to accept the applications without fee. Thus encouraged Wilsons sent such information as they had to persuade the Entry Clearance Manager that the three claimants had been dependant on the sponsor before her flight, notwithstanding that she was 15 at the time. But their hopes were dashed by letter of 23 December 2008, on the same dual headed paper, saying that the Entry Clearance Manager was "awaiting general guidance on gratis applications from UKBA". A reply was expected in January 2009. Wilsons chased them for a reply on 9 January 2009. No reply was forthcoming.

15. On 7 May 2009 the Entry Clearance Guidance was updated. It repeated that what it said about Family Reunion was being reviewed but on "other dependant relatives" it

expressly now only said that "this content is under review". The fee waiver position was the same. The only relevant paragraph was that fees were to be waived where the Secretary of State had directed that they should be.

16. On 18 May 2009 Wilsons issued a pre-action protocol letter to the UKBA. It challenged the delay in or refusal to accept the applications without fee. This at last provoked a reaction. A decision was issued dated 22 May 2009. It referred to Entry Clearance Guidance on Family Reunion, but dealing only with Family Reunion within the Immigration Rules, saying that the parents and siblings of a minor recognised as a refugee were not entitled to Family Reunion. That is of course correct so far as part 11 of the Immigration Rules goes. The letter concluded:

> "Your clients attempted to submit an application for Family Reunion, as you can see [from] our guidance highlighted above your clients [do] not qualify for Family Reunion. Your clients are welcome to submit a settlement application for which a fee would have to be paid, there is no longer a destitute provision for Entry Clearance applications".

17. There are two subsequent policy changes of relevance. On 18 September 2009 the Secretary of State adopted a policy that the power to direct the waiver of fees would only apply where the minster has "specifically authorised the waiver of fees for a particular group of applicants" (see paragraph 16 of QB above). This would not have been of any assistance to the claimants as it did not contemplate waiver in any individual case such as that of the three claimants here. On 9 July 2010 the Secretary of State announced, in Operational Policy Instruction 216, that she would only waive fees in cases:

> "Where there are the most exceptional compelling and compassionate circumstances specifically relating to the payment of the fee".

There was no discretion to waive visa fees for any reason other than those listed. Officials had no discretion to waive visa fees for any other reason than those listed in the fees legislation. I shall return to that.

18. This is a decidedly unhappy saga. Mr Nicholson for the claimants contends that the defendant has unlawfully refused to consider the claimants' applications for entry clearance without a fee and has delayed unreasonably in reaching a decision on whether to accept the applications without a fee. He submitted that Regulation 20C, and its successors, had always provided the Secretary of State with a power to waive fees as the Diplomatic Service Procedures and Entry Clearance Guidance had envisaged, and that is what the claimants had been asking the Secretary of State to do all along. There had been unreasonable delay and that had not been caused by the claimants who had responded with the information which the Secretary of State or Entry Clearance Officer had required but which the latter had not considered timeously. The delays had permitted the basis upon which fee waivers were considered to move against the claimants, which was unfair. It is to be noted, as Mr Singh for the Secretary of State pointed out, that the claim did not challenge the lawfulness as such of the rejection of the application by the ECO in Addis Ababa on or about 10 October 2007. Mr

Nicholson said that the grant of permission permitted him to challenge the delay by reference to the delay in dealing with the application as from that date, however. Mr Nicholson also submits that the requirement to pay and the power to waive payment of fees engaged Article 8 ECHR in a case such as this and the Secretary of State should approach the exercise of his powers and the timing of his decision with that in mind.

19. Mr Singh submitted that the claim had no point, since the Secretary of State had already agreed to consider the applications against his current policy, that is to say that of 9 July 2010, to a strict timetable and that was all that the claimants could hope for from success in these proceedings. The claimants' claim was fundamentally flawed. They had asked for Family Reunion, to which they were not entitled, and after 1 April 2008 an application of the sort which they made, if it was something else, required a fee. They had not made an application after 1 April 2008 to the Secretary of State for fee exemption and he was the only person who could grant it. They had instead continued to ask the ECO for fee waiver but he had no power to grant that exemption. The claimants were not complaining about the lawfulness of the rejection of their applications in October 2007 or about anything before 1 April 2008, save that the passage of time was part of the total period which created what was said to be the unreasonable delay.

20. I first need to consider what substantive visa application the three claimants put forward. I then need to consider whether a fee waiver application was made and, if so, to the right person and I need to consider whether a basis was put forward for the exercise of whatever power to waive a fee might have existed at the time the issue was being considered.

21. The substantive visa application was clear from the letter of 10 October 2007 and, in my view, from other subsequent letters. It did not claim to be within the Family Reunion Policy set out in part 11 of the Immigration Rules. It was made because the Family Reunion sought was on the basis that the claimants were said to be "other dependant relatives" who had been genuinely dependant upon the sponsor before her flight to the UK in 2006 and there were compelling compassionate circumstances. This is a specifically recognised form of application for entry clearance, albeit that it is one outside the Immigration Rules. It is a category defined by criteria as an exception to the Immigration Rules. It is the Secretary of State who has created the definition of them.

22. Second, I reject the argument of Mr Singh, elegantly put though it was, that because the Entry Clearance Officer is not the Secretary of State for the Home Department, and because no application for the exercise of his discretion was ever made to the Secretary of State, no complaint could be made in this case that the Secretary of State had not considered the application for fee waiver or had been unreasonably slow in dealing with an application; none, it was said, had ever been made to him. I recognise that making an application to the wrong department cannot confer a power on the department which lacks it. But the reality is, as Mr Singh accepted in argument, in practice an application for a fee exemption in respect of an entry clearance application which had to be considered by the ECO would naturally be sent to the ECO rather than to a separate department, especially as issues common to both might arise. In practice, as Mr Singh

accepted, the ECO, if not entitled to consider the waiver application, would pass it on to the right person or would point the applicant in the right direction.

23. The law and practice in relation to fee exemption and who could decide the issue is quite a technical area and, over the period with which this case is concerned, was changing rapidly at the behest of the Secretary of State. What Mr Singh accepted reflected the sensible and courteous practice which would normally be followed. Many applicants for visa entry clearance could not be expected to know the ins and outs of these changes, and indeed even experienced immigration solicitors such as Wilsons were not privy to the internal workings of the Secretary of State for the Home Department and could only deal with the Entry Clearance Guidance as published, whatever limitations it might be said to have. It is, in these circumstances, quite unrealistic to regard the application for fee exemption as being other than addressed to the Entry Clearance Officer or to the other person who was entitled to deal with it if the Entry Clearance Officer was not entitled to deal with it. It is obvious that there was an implicit request that it be forwarded if there had been a change in personnel. There was a sensible and legitimate expectation, both in a legal and non-legal sense, that the Secretary of State or ECO would ensure that the waiver application was forwarded to the appropriate person or that the applicant would be at least told that the person to whom it had been sent was no longer the right person. That did not happen.

24. In any event, in this case the technical purity of Mr Singh's argument, that there were two distinct bodies, is further weakened by the fact that by the end of December 2008 the UKBA and the ECO were replying as one body on note paper bearing both names. Further, the response by the Secretary of State, putting it broadly, to the pre-action protocol letter does not suggest that the wrong person has been asked about fee exemption but rather that he is dealing with the matter even though it was addressed to the wrong person. The argument is further weakened by the fact that none of Wilsons correspondence was ever answered by it being said that the wrong person had been addressed or by the Secretary of State or Entry Clearance Officer saying that the application had no longer anything to do with him.

25. I conclude that an application for fee exemption was made to the Entry Clearance Officer in October 2007 and to the Entry Clearance Officer and Secretary of State in January, April and November 2008, and in May 2009. The silence in correspondence encouraged the belief that the application would be forwarded to and considered by the right person even if it had been incorrectly addressed.

26. So, there was an application for Family Reunion outside the Rules and there was an application for fee exemption made to an appropriate body, directly or indirectly, throughout this process.

27. I turn to the third aspect. The terms of the application for fee exemption varied according to what Wilsons thought was the appropriate basis. Initially this was the claimant's destitution. Then they sought to apply the current Entry Clearance Guidance which, albeit subject to a warning as to how up-to-date it was, was not accompanied by any indication as to what the up-to-date position might be, whether by interim guidance or any announcement as to what the Home Office Policy in relation to its statutory

discretion was. It does not seem to me to matter whether the precise powers in Regulations 20C, 26C or 25C were quoted in the letter or as to precisely how the application for fee exemption was formulated. What matters in relation to an application for fee exemption is this:

(1) The nature of the underlying visa or entry clearance application should be clear so that it is possible to see whether a fee is payable and whether a fee exemption may be available;
(2) That it is clear that an application for fee exemption is being made;
(3) That an evidential basis for the fee exemption is provided; and
(4) That a fee waiver power exists, even if it changes over time.

Of course if a fee exemption application is made and relevant evidence is not provided, it is to be hoped that the department would tell an applicant what at least the target of any evidence should be.

28. Here, each of those requirements was in fact satisfied. There was a letter and subsequent correspondence which, in my judgment, made perfectly clear what the substantive application was. At all stages a fee exemption application was made and at all stages there was an evidential basis put forward, whether destitution or dependency and compelling compassionate circumstances, upon which the power to waive fees might bite, and of course a fee waiver power did exist at all times, though its terms varied.

29. If the relevant test had been that set out in the Entry Clearance Guidance of 2008, the claimants directly tried to address it, and that was the only specific power which had been published apart from the Secretary of State's general discretion and the 2008 Amendment Regulations and subsequently. If the only power was that of the Secretary of State to direct waiver, the material provided in relation to destitution and Entry Clearance Guidance was material which could be capable of warranting consideration in relation to the Secretary of State's power. If the power was that seemingly broader discretion in the regulations, or the so-called common sense basis until 18 September 2009, the claimants had made the application sufficiently clearly for the Secretary of State to know that an application for fee exemption had been made under whatever power was available, and the claimants had in fact provided material which warranted consideration under whichever regulation, policy or guidance was current at any time when the Secretary of State might get round to considering the application. The material was never so weak or so far off target that it could simply be ignored or be said to be incapable of warranting the exercise of the discretion.

30. The fact that the Secretary of State's common sense approach in relation to the discretionary power and the regulations was unknown to the claimants cannot work against them. This approach had never been published. If the published guidance is said not to be accurate but nothing else has been provided, the obvious inference is that the power exists to waive fees within uncertain or unknown boundaries. But that plainly leaves a broad discretion under the regulation as the only publicly knowable power, if the Entry Clearance Guidance is not to be relied on. That emphasises my view that the material provided by the claimants was capable of engaging the exercise of the broad statutory discretion in the regulations.

31. Accordingly, in my judgment, the position is this. The refusal to accept the applications in 2007 was a reviewable decision and the ECO failed to consider whether or not fees should be waived on the ground of destitution, the then relevant ground which he should have considered. But that decision of itself is not challenged. There was no decision on the application repeated on 28 January 2008, and repeated again on 3 April 2008, until at best 5 December 2008 but by that time the basis upon which fee exemption was sought had changed. It could no longer be sought simply on the basis that the claimants were destitute, it could no longer be waived by the Entry Clearance Officer. So, from 28 January 2008 the application should have been considered to see if the claimants were destitute; from 3 April 2008 the claimants should have been told that the ECO was not considering the application for fee exemption and that it was a matter now for the Secretary of State's discretion. That remained the position until the UKBA letter of 22 May 2009. The ECO and UKBA said nothing about that in their joint but contradictory letters of 5 December and 23 December 2008. There was no mention of the proper basis upon which fees could be waived or of the changed and uncertain, and in part undisclosed, policy background. Instead one answer led the claimants briefly to believe that Wilsons had correctly identified the relevant policy, subject to the brief elaboration in the 5 December 2008 letter. The reference to waiting for general guidance in January, in the letter of 23 December 2008, never led to a correcting reply or to further information. Save for the enquiry in January 2009, which was met with silence, nothing was done until the previous correspondence was summarised in the pre-action protocol letter leading to the apparent decision of 22 May 2009.

32. In my judgment, no answer has in fact ever been given to the substantive visa application that was made on 20 October 2007, notwithstanding the terms of the 22 May 2009 letter. The 22 May 2009 letter rejects the application for entry clearance on the basis that it is an application for Family Reunion which cannot succeed within the Immigration Rules. But that simply side steps the real nature of the application. The original letter of 10 October 2007 is quite clear, and all subsequent correspondence is wholly consistent with it, whether dealing with the substance of the application or in respect of fee exemption. Entry clearance was sought on a recognised basis with defined criteria but one falling outside the Immigration Rules.

33. Not merely has the application for Family Reunion never been answered but the application for fee exemption in relation to that application has never been answered. Although the claimants treat the letter of 22 May 2009 as an answer, in reality it does not deal with the point raised in the applications over so long a period. If the letter at 22 May 2009 is an answer to the substantive application and to the visa applications it is a misconceived answer because it does not grapple with the questions which the applications actually raise. It deals with a substantive application which was not made and deals with a fee application on the same misconceived basis, without addressing the power in the regulations. I do not regard it as a persuasive answer to say that the Secretary of State was not asked for the exercise of a broad discretionary power in the regulations and so he was not bound to consider exercising them.

34. Clearly it is not for the court to decide what the answer should be, either in relation to the substantive application or in relation to the application for fee exemption, but, in my

view, it is appropriate to quash the decision of 22 May 2009 because it fails to deal with the applications. It follows that an order of mandamus requiring the applications to be considered, starting with the fee exemption application, would be appropriate.

35. Mr Nicholson puts his case forward, however, on the basis also that there was unreasonable delay. Even if the decision of 22 May 2009 was an answer to the applications, there has, in my judgment, been unreasonable delay by the Secretary of State in this case. The application in January 2008 should have been decided in 2008, though not necessarily by 1 April 2008. The delay in deciding the application had become unreasonable by the time of the pre-action protocol letter. As I said, I reject the defence that no application was made to the Secretary of State and the Secretary of State was entitled to treat it as having been made to somebody who was legally irrelevant for these purposes. On any view, the technical shifts in fee regulations in the substantive basis for fee exemption or waiver, and in the body to which applications should be addressed, took place without the Entry Clearance Officer or the Secretary of State stating what was happening, whether generally or in specific correspondence. Had the position been made clear to the claimants the specific powers would have been addressed, if that was all that in truth was holding up the consideration of the applications. Instead, the language of the correspondence from the Entry Clearance Officer/UKBA in December 2008 was positively misleading and the long silences did not suggest that the application had been made to the wrong person. No help, even the courtesy of a reply apart from those two letters, was forthcoming from the ECO/UKBA over this long period. The attention of the claimants was never drawn to the relevant policy, whether unpublished and unformulated or published. The Secretary of State was doing no better, in my judgment, than simply sitting on the applications between 28 January 2008 and 27 May 2009. The delay in deciding the application for fee exemption was unreasonable and unlawful. I say nothing more about any other qualities which it lacked.

36. The unlawfulness reflects the fact as well that this was an application for fee waiver in respect of Family Reunion. The claimants may not have a good case for Family Reunion, they may not have a good case for fee exemption, and there are obvious problems whatever is the appropriate test, but the fee application should have been dealt with on its merits much earlier than 22 May 2009, if that can be regarded as a letter dealing with it.

37. The real point, however, in this case is a different one. It is an obvious problem, particularly since the Secretary of State has said in open correspondence that she is willing to reconsider -- in my view to consider -- the application for fee exemption but only on the basis of her current policy. The Secretary of State contends that the proper basis for the Secretary of State to consider or reconsider her decision on the fee exemption application is the 9 July 2010 policy statement, which the claimants say creates a difficult hurdle for them to surmount. As I have said, it is not for the court to tell the Secretary of State what the outcome should be of her consideration of the fee waiver application, but it is not right for the court not to say how the Secretary of State should approach it as a matter of law.

38. The claimant's argument on this aspect, which is the crucial aspect, was quite limited. The claimants do not say that the decision should be taken by the Entry Clearance Officer by reference to the destitution test; quite rightly so, since the ECO has no power to make such a decision and destitution is no longer of itself a test he could apply. As Mr Singh submitted, it is not the law that, where a decision has not been made or is required to be re-taken, the law or policy governing the application is fixed at what it was at the time of the application if the law or policy has moved on (see Odelola v Secretary of State for the Home Department [2009] UKHL 25 [2009] 1 WLR 1230 dealing with changes to the Immigration Rules). This illustrates the point but it is one of general application. It can also be seen in EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41 [2009] 1 AC 1159. It is clear from this case that when a decision has to be taken or re-taken it is taken by reference to the policy or law in force when the decision is to be taken. There is no principle that, where there has been unreasonable delay, the decision should be made by reference to the policies or circumstances prevailing at the time when the decision should have been made.

39. Mr Nicholson recognised that there were real difficulties in saying that the relevant law or policy should be that in force at the latest point at which the decision should lawfully have been made. He accepted that in the absence of an allegation of abuse of power, which could not be made out here, the principles, perhaps debatable principles, in Rashid v Secretary of State for the Home Department [2005] EWCA Civ 744 could not apply.

40. The relevant policy cannot be that relied upon in the letter of 20 November 2008 because of the qualification to the policy and the fact that that does not represent the policy of the decision maker. It may be unfair in a general sense for a government department to have noised abroad so misleading a document but no prejudice has been suffered in consequence and it was introduced with a warning.

41. The relevant regulations give to the Secretary of State a very broad discretion and she currently has a policy, as she is entitled to have, of not granting fee exemption in a case such as this, except in the most exceptional compelling and compassionate circumstances specifically relating to the payment of the fee. The claimants cannot rely on any other policy, including the so-called unpublished common sense policy, that is to say the consideration of individual merits, evolving and adopted between April 2008 and 18 September 2009 during which time the applications should have been decided. There is no basis for displacing the general principles to which I have referred. The decision must be made by the relevant body on the basis of the law and policy at the time it makes the decision.

42. I add these observations: (1) even under a policy of consideration on the individual merits, it was legitimate, and I believe that this is how the Secretary of State's policy was evolving between 2008 and 2009, for the Secretary of State to have a policy or adopt an approach to individual merits of saying that merits have to be strong enough to amount to the most exceptional compelling and compassionate circumstances in relation to the fee. The gain in practice, therefore, of consideration by reference to the unpublished policy is negligible compared to the current position.

43. However, (2) even under the current policy the Secretary of State cannot exclude from consideration matters which fall outside his policy or exceptional circumstances in individual cases without unlawfully fettering her general discretion under Regulation 25C. This may mean that the difference between the two is not as great as Mr Nicholson feared. I have referred to the part of the policy that says officials have no discretion to waive fees for any other reason than those listed in the fees legislation. That may be a warning directed to officials and it may an be alert to the difficulty which a claimant may face, but insofar as that is a statement that the Secretary of State will close her mind in the exercise of a broad discretionary power to factors which are relevant to the exercise of a broad discretionary power, the Secretary of State has fettered her discretion unlawfully. I do not suppose that that is how that passage should be read.

44. (3) since to refuse to consider, even on an exceptional basis, special factors which might warrant a favourable decision to the claimants outside the scope of the policy would be an unlawful fetter on the broad discretion, the Secretary of State would be obliged in considering or reconsidering this matter to consider representations that she should now exercise her discretion under the 2010 regulations in favour of the claimants by reference to these factors:

45. (i) they were, and are, destitute, if that is the position, and should have had a decision in their favour by 1 April 2008;

46. (ii) delay in making the decision on fee exemption, delayed a decision on the merits for a long time in a Family Reunion case;

47. (iii) the proper public objectives of taking fees in respect of applications for settlement from those abroad may not always mean that that should necessarily be insisted on where the system has failed to work as intended, as has plainly happened here. The Secretary of State will need to consider any matter relevant to the exercise of a broad discretionary power and cannot lawfully simply say that if a matter does not go to the operation of the strict policy it must be ignored whether by an official or by her.

48. I quash the decision of 22 May 2009 and I think it appropriate in this case to order that the Secretary of State consider the application for fee exemption and the application for the substantive visa if she decides that fee exemption should be issued.

49. MR NICHOLSON: Thank you, my Lord. Rising to seek your view as to the matter of costs, I understand from the body of your judgment that you have quashed the decision of 20 May and found that the delay was unlawful. In those circumstances I would regard myself as entitled to request that you should consider granting costs to the claimants.

50. MR JUSTICE OUSELEY: Yes. The problem with this case is -- what you have just said, Mr Nicholson, I entirely accept. The problem with this case is the correspondence. The Secretary of State, as Mr Singh put the matter to me, was willing to reconsider the matter to save the expense of a court hearing and was willing to do it reasonably promptly, there is nothing wrong with the timetable. So the only real issue

was an issue which neither party really addressed, there is a little bit from each of you, but it is in fact the only issue that was truly live in this case which is, is the Secretary of State entitled to consider it on the basis of 25C and the policy, which you say has moved against you, or was the Secretary of State entitled to, or obliged to, consider it on some different basis? The Secretary of State has essentially succeeded in those points. The Secretary of State is entitled to consider it on the basis of Regulation 25 and the policy. In considering that, I have dealt with a point which, in my view, is right, although it is not a point you raised and it is not a point I canvassed with Mr Singh, but it seems it me that it is inevitably right that the Secretary of State cannot have a discretion and then say I will consider no circumstances at all beyond those that are set out in my policy, because that suffers from the drawback of elevating policy into law and it is very basic propositions. But in those circumstances it actually seems to me you are closer to a stand off. I have been a little critical of the Secretary of State, I think, obviously, justly so, but the point made by Mr Dove in his granting of permission was that you are fully entitled to bring these proceedings, the delay warranted the start of proceedings, and it may be that you should be entitled to some of your costs but I wonder, after the offer was made on whenever it was --

51. MR WASTELL: 21 September, my Lord, page 136 of the bundle.

52. MR JUSTICE OUSELEY: It was rejected I think --

53. MR WASTELL: The following day, my Lord.

54. MR JUSTICE OUSELEY: It may be after that it should be no order as to costs.

55. MR NICHOLSON: My Lord, I suspect that is almost certainly the correct order in the light of everything you have said and, I think, in the light of the nature of the judgment, so I am grateful, my Lord.

56. MR JUSTICE OUSELEY: Mr Wastell?

57. MR WASTELL: You will notice I am not Mr Singh.

58. MR JUSTICE OUSELEY: I had cottoned on to that.

59. MR WASTELL: He is detained elsewhere. My Lord, my instructions are that, overall, taking into account the offer that was made on 21 September, the appropriate order would be no order as to costs in the case at all. As you pointed out the Secretary of State cannot consider it under a policy that no longer exists in the absence of Rashid type principles, but there is no pre-supposition in this case that the Secretary of State would have unlawfully fettered her discretion had she considered it. So the offer on 21 September is fairly and squarely in the terms that you have found today. Since the majority of costs were incurred after that date, in terms of the preparation for this hearing, my submission is that the appropriate order would be no order as to costs overall.

60. MR JUSTICE OUSELEY: Yes. Thank you.

61. I am going to make an order that the Secretary of State pay the claimant's costs up to and including 22 September but none thereafter. Thereafter each side to bear its own costs. It seems to me that this is an instance where the claimants were entitled to seek the assistance of the court to get the Secretary of State to face up to the applications. The pre-application protocol correspondence yielded a very unsatisfactory response which did not betoken any assistance. Proceedings were then inevitable and the claimants should have their costs up to the point at which the open offer was made. Thereafter, I think it would be wrong for the Secretary of State to have to pay the costs of the claimants having the satisfaction of a formal order, or rather having a formal judgment which says critical things about the Secretary of State's procedures.

62. The Secretary of State does not seek costs, rightly, from the claimants, but the claimants have gained little to warrant the Secretary of State paying their costs of the proceedings after that consent order. In my judgment, the appropriate order after the proposed consent order was rejected on 22 September this year is that the each side should bear their own costs. That is the order I make.

63. MR NICHOLSON: My Lord, if I could just point out that the claimants are legally aided, so I think I need to ask for a detailed assessment of their publicly funded costs.

64. MR JUSTICE OUSELEY: Yes. You may have that detailed assessment.

65. MR NICHOLSON: Thank you very much, my Lord.

66. My lord, if I could just ask you one more matter, we would greatly value a transcript of your judgment and I believe that unless I ask you to authorise that, Smith Bernal will not do one.

67. MR JUSTICE OUSELEY: I do not know whether that is right or wrong, but anyway, you want a transcript. You have to pay, I think.

68. MR NICHOLSON: Yes, we do.

69. MR JUSTICE OUSELEY: You have to pay and a transcript will be prepared, yes.

70. MR NICHOLSON: Thank you very much.