Neutral Citation Number: [2023] EWHC 1260 (KB)

Case No: QB-2020-000334

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/05/2023

Before :

SIR NIGEL SWEENEY
(Sitting in Retirement)

- -

Between :

AUDI DAMA MASOZERA JOHNSON	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Dylan Conrad Kreolle Solicitors for the **Claimant**
Andrew Deakin (instructed by **GLD**) for the **Defendant**

Hearing dates: Date of Judgment

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 26 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SIR NIGEL SWEENEY

Sir Nigel Sweeney :

Introduction

1. On 21 - 23 July 2021 I presided over the liability only trial in this case. Given the Claimant's abandonment of his claims for personal injury, and misfeasance in public office, the ultimate issues for determination were:

(1) Unlawful detention / false imprisonment arising out of the Claimant's immigration detention between 16 February 2014 and 19 June 2015 (a period of some 489 days) in reliance, variously, on *DN (Rwanda) v Secretary of State for the Home Department* [2020] UKSC 7 (unlawful deportation order); *Hardial Singh 1* (intention to deport), and *Hardial Singh 2 & 3* (detention for a reasonable period / sufficient prospect of removal within a reasonable period)

(2) Harassment arising out of the conduct of the attempted removal of the Claimant to Uganda over a two-day period between 9 and 11 December 2014.

2. The Defendant admitted that, because officials had omitted to carry out what should have been the Claimant's first detention review, his detention in the period from 17 March 2014 to 10 April 2014 had been unlawful. Otherwise, the Defendant contested all the Claimant's allegations.

3. In my judgment (see [2022] EWHC 3120 (KB)) I noted the admitted period of unlawful detention, but otherwise wholly rejected the Claimant's case – see paras 11 & 12 of the judgment for an index of the matters with which I dealt, and para 227 for my overall conclusion. I required counsel (see para 228) to draft a suggested Order to encompass any necessity for further skeleton arguments in relation to damages and costs (envisaging that those issues would be decided on the papers, rather than at a further hearing).

4. The resultant Order, which was sealed on 3 February 2023, included the following:

> "(1) The Claimant's claim for unlawful detention between 16 February 2014 and 19 June 2015 be dismissed, save for the period 17 March 2014 – 10 April 2014, which the Defendant admits was unlawful.
>
> (2) The Claimant's claim for harassment be dismissed.
>
> (3) The parties are to file and serve skeleton arguments to address the following issues (or such of the following issues that remain in dispute):
>
> a. Whether the Claimant would have been lawfully detained between 17 March 2014 and 10 April 2014 in any event.
>
> b. Whether the Claimant is entitled to substantial or nominal damages.

> c. If the Claimant is entitled to substantial damages, the quantum of such damages; and
>
> d. The costs of the determination of those issues.
>
> (4) The skeleton arguments are to be filed and served sequentially……..
>
> (5) After the completion of the filing and serving of the skeleton arguments, the issues will be determined on the papers…….".

5. in addition to the trial materials, I have been provided with the following documentation:

(1) Written Submissions on Cost on behalf of the Claimant (21 pages) dated 14 January 2023.

(2) An accompanying bundle, filed by the Claimant, containing:

(i) Statements of Costs (pages 1-16).

(ii). Background documents (pages 17-256).

(3) Claimant's Skeleton Argument as ordered by the sealed Order (1 page) dated 6 February 2023.

(4) Secretary of State's submissions on remedy and costs (9 pages) dated 10 March 2023.

6. There is no dispute that it is appropriate for me to consider and rule upon both damages and costs without the expense of a further hearing.

7. The Claimant's position is, in summary, that he criticises the Defendant's conduct of the case in a number of respects and:

(1) Seeks his costs of:

(i) The Defendant's application for a witness summons dated 19 July 2021 (in relation to Mr Duncan Pearce) in the sum of £1,020.

(ii) His own application for specific disclosure sealed on 29 June 2021 (£17,999).

(iii) His own application for a witness summons (in relation to Mr Duncan Pearce) 29 June 2021 (£2,238.00).

(iv) His own cost of the case (approved budget) in the sum of £154,280.00.

(2) Makes no submission in relation to whether, in any event, he would have been lawfully detained between 17 March 2014 and 10 April 2014; whether, in the result, he is entitled to substantial or nominal damages; and, if entitled to substantial damages, the quantum of such damages – taking the position that he leaves those issues in my hands, and arguing that, therefore, there is no need to incur any additional cost to determine those matters.

8. Whilst accepting some of the criticisms made by the Claimant, the Defendant's position is, in summary, that:

(1) Save for an admission by the Defendant that officials had failed to carry out the Claimant's first detention review, such that he had had been unlawfully detained between 17 March 2014 and 10 April 2014, the Court had comprehensively rejected the Claimant's case and had found for the Defendant on all the grounds of claim that had been pursued to trial and thus, there being no reason to depart from the general principle that costs will follow the event, and in the ordinary way, the Defendant should be awarded reasonable costs – to be subject to detailed assessment, if not agreed.

(2) In so far as the Defendant's conduct can be criticised that should, at most, be reflected in a limited percentage reduction of the costs awarded in his favour.

(3) In any event, the Court should order that the payment of a Costs Order made against the Defendant by Ellenbogen J on 25 May 2021 should be set off against the Court's general award of costs in favour of the Defendant.

(4) Against the background of the Court's conclusion that the Claimant's detention in the periods immediately before and after the period from 17 March 2014 to 10 April 2014 was lawful, the Court can be satisfied that the Claimant would have been lawfully detained if the mandatory review had taken place, and that therefore the Claimant is entitled to no more than nominal damages for that period, and the Defendant is entitled to his costs of the submissions in regard to it.

Outline History

9. Both sides seek to rely on aspects of the history of the case, which I outline below.

10. The Claimant's Letter Before Claim, which was served on 27 January 2020, along with a Part 36 offer for settlement, indicated that the issues included whether his detention under the Immigration Act from 14 February 2014 until his release on 19 June 2015 (494 days) was unlawful, false imprisonment, and /or a breach of Article(s) 5 & 8 ECHR, which entitled to him to damages under the tort of false imprisonment. His claim, it was asserted, gave rise to the following non-exhaustive causes of action – false imprisonment, trespass to the person, conspiracy to injure, conspiracy to use unlawful means, misfeasance in public office, negligence, and breaches of Articles 5 & 8 ECHR. It was further asserted that, in December 2014, the Claimant had been subjected to an unlawful "*botched forced removal*" to Uganda, during the course of which he had been physically assaulted – being "*tortured to the brink of suicide….assaulted whilst in restraints and as a direct result had one of his front teeth knocked out…*", and that whilst at Entebbe Airport had been "*denied food and water for an extended period of around 10 hours*". It was also asserted that the Claimant had been subjected to unlawful discrimination on grounds of his race, as well as harassment, cruelty, and bad faith. It was further indicated that the Claimant sought general, special, aggravated, and exemplary damages. The letter also identified various categories of documents, including the systems log (GCID notes) in relation to the Claimant, the Claimant's medical records in prison, and correspondence between the Defendant and the Ugandan High Commission, sought disclosure of them, and continued: "…..*We should like to see if it is possible to resolve, or at least narrow, any issues by ADR. We consider the appropriate means of ADR to be negotiation, though please let us know if you contend any other method to be suitable. Accordingly, we hope that you will comply with your obligations under the pre-action protocol and act on our invitation to negotiate within this framework. Should you decline*

to do so we do reserve the right to refer to this, and further relevant correspondence, when seeking any orders that may be necessary from the Court, on case management and also in connection with the costs of any specific application and, indeed, the matter generally"

11. The Claimant issued proceedings on 29 January 2020. In the Claim Form (which was served on 5 March 2020) he claimed in respect of:

"…[the] *tort of false imprisonment for (494) days without lawful authority, trespass to the person, conspiracy to injure / conspiracy to use unlawful means, discrimination based on the assumed Ugandan race, misfeasance in public office for his unlawful detention and attempted forced deportation on 09 December 2014 to Uganda before returning him to the UK on 11 December 2014 upon his rejection by the Ugandan authorities as not their citizen". D*amages "*not exceeding £750,000 but not less than £150,000"* were sought.

12. The Defendant did not negotiate and, on 17 March 2020, indicated (in the Acknowledgement of Service) that it was intended to defend all of the claim.

13. On 28 April 2020 the Defendant served an application to strike out the claim. That application was dismissed, with costs, on 11 June 2020.

14. On 31 July 2020, the Claimant served Draft Amended Particulars of Claim in which it was indicated, in summary, that he sought declarations and damages (including aggravated and exemplary damages) arising out of his unlawful immigration detention and/or unlawful detention under a deportation order, for the continued unlawful detention and/or harassment that he suffered in the course of his attempted removal to Uganda, and for the continued unlawful detention that he had suffered upon his return to the United Kingdom – covering, in total, the period from 14 February 2014 to 19 June 2015, or for periods therein.

15. The Defence was served on 9 October 2020. In para 50 the Defendant admitted that, because of the absence of the required Review, the Claimant's detention in the period from 18 March 2014 to 10 April 2014 had been unlawful. In closing at trial that was corrected by a day to the period from 17 March 2014 to 10 April 2014. Nothing turns on that correction. The remainder of the claim was disputed.

16. In a subsequent Directions Questionnaire, the Claimant indicated a willingness to attempt settlement, whereas the Defendant indicated the reverse.

17. In November/ December 2020 the parties agreed Directions, which were approved and sealed on 11 February 2021. They included that disclosure by list was to be completed by 4pm on 29 January 2021; that any requests for inspection were to be made by 12 February 2021; and that, unless objected to, any such inspection was to be facilitated within 14 days thereafter – i.e. by 26 February 2021. The exchange of witness statements was to be on 19 March 2021 and the trial was ultimately fixed for 8 June 2021. The parties' budget was also agreed. At that stage, there was no indication that the Defendant would be calling six witnesses.

18. The Defendant provided a disclosure list by the due date. However, later disclosures were to show that a considerable number of documents were not included when they should have been. In any event, the Claimant requested all the listed documents for inspection, but they were not provided.

19. On 2 March 2021 the Claimant wrote to the Defendant pointing out that the failure to provide the requested documents in time was a serious and significant breach of the agreed Directions, which required the Defendant to seek relief from sanctions within 7 days. The following day, the Defendant replied – apologising for the delay, and explaining that the documents in the case were extensive and needed to be checked for redactions (which were almost complete). The Defendant requested an agreed extension of 14 days (to 12 March 2021) to provide the disclosure documents, and an agreed extension of 28 days (to 16 April 2021) for the exchange of witness statements. It was asserted that neither extension would affect the trial date. Ultimately, the extensions were agreed.

20. On 12 March 2021 the Defendant disclosed (electronically) a mass of documentation which, the Claimant asserts, when printed out double sided, came to over 6,000 pages - which took some 80 hours to analyse. The Claimant asserts that only some 500 pages transpired to be relevant, and underlines that there were, for example, no GCID notes.

21. On 14 April 2021, the Defendant made a written application for an extension of time in which to file and serve witness evidence and for the trial date to be vacated for some three months. On 16 April 2021, not having received an order to extend the time, the Claimant served his witness statement. The Claimant responded to the Defendant's application in a witness statement dated 28 April 2021.

22. By consent, the application was considered on the papers, without a hearing, by Ellenbogen J who, on 25 May 2021, ordered, amongst other things, that time for the parties to file and serve copies of the signed statements of themselves, and of all witnesses on whom they intended to rely, and all notices relating to evidence, be extended, retrospectively, to 4pm om 18 June 2021; and that oral evidence would not be permitted at trial from a witness whose statement had not been served in accordance with the order, except with permission from the Court; that the trial listed on 8 June 2021 be vacated, and relisted in the window between 1 and 30 July 2021; and, by consent, that the Defendant pay the Claimant's reasonable costs incurred as a result of the Defendant's application.

23. On 28 May 2021 the Defendant provided more documents by way of disclosure – some of which had been provided before. In an email response later that day, the Claimant complained about the duplication of disclosure and the continued absence of the disclosure of materials such as the full GCID notes in relation to the Claimant, the EU Letter upon which it had been sought to remove him to Uganda in December 2014, and the underlaying policy in relation to such letters. The Claimant reminded the Defendant of the basics of Standard Disclosure and indicated that if the materials sought were not provided within 7 days, he would be making an application for specific disclosure to the Court, and that the issue of costs would be raised, together with the possibility that the Defendant's conduct in defending the claim would form part of the claim of misfeasance in public office. The Defendant responded that, due to the COVID pandemic, staff were not attending the

office, and that therefore the Government Legal Department ("GLD") was unable to print the documents, to place them in chronological order, and to remove duplicates in the normal way.

24. On 4 June 2021 the Defendant sent two emails to the Claimant. The first indicated that the correct GCID notes were now in the possession of the GLD and were being checked for redactions. The second attached the GCID notes and apologised for the mix up and the delay in providing them.

25. On 10 June 2021 the Defendant disclosed, for the first time, Detention Reviews in relation to the Defendant that had taken place in November 2014, February, March, and June 2015; further internal emails relating to March 2014, an email dated 9 January 2015 and an email chain dated February 2016; the Deportation Order made in relation to the Defendant on 7 February 2014, and the letter dated 11 April 2014 to the Defendant giving reasons for the Order. It was also stated that the Claimant's medical records were awaited, along with the EU Letter, and that they would be sent as soon as they were received.

26. On 14 June 2021 the Claimant responded, asserting that, at every stage of the process, he had had to keep writing to the Defendant to seek disclosure of documents (such as the full GCID notes, and the EU Letter and biodata used to remove the Claimant in December 2014) leading to additional costs. Misfeasance was again raised, and the possibility of seeking costs on an indemnity basis was mentioned. It was made clear that, failing receipt of the EU Letter, biodata, and the EU Letter policy within 7 days, an application for specific disclosure would be made. Also on 14 June 2021, the Defendant disclosed some 5 pages of medical records in relation to the Claimant from Heathrow IRC, covering the period from March 2015 to June 2015, and indicated that enquiries were being made in relation to the Claimant's other medical records.

27. On 16 June 2021 the Defendant disclosed medical records relating to the examination of the Claimant at Harmondsworth on 11 December 2014 - after his return from Uganda.

28. On 17 June 2021 the Defendant disclosed an email dated 10 June 2014 from the Defendant to the Ugandan High Commission, attaching a copy of the Claimant's expired Ugandan passport, and asking if the Claimant could be removed to Uganda on an EU Letter, and the High Commission's reply the following day – to the effect that it had no objection to such a removal, but that it would be appreciated if they could have a look at the physical passport as the detail on the biodata page looked suspect, because it was an old passport. (The passport was eventually taken to the Ugandan High Commission on 8 December 2014, where it was verified and from which it was collected the following day – see paras 40 & 56 of the trial judgment).

29. On 18 June 2021 (which was the ultimate due date) the Defendant served six witness statements and exhibits. Five of the six were by escorts who had been responsible for the removal and return of the Claimant in December 2014, and the other was from Sharon Buckle (from the Defendant's FNO Returns Command). At that stage there was no statement from Mr Pearce (a paramedic – sometimes referred to as Mr Pierce) who had been the sixth escort. The Defendant underlines that, in her statement, Ms Buckle repeated the acceptance that officials had failed to carry out the Claimant's first detention review, and that therefore his detention between (17) March

2014 and 10 April 2014 had been unlawful, but that nevertheless the Defendant made no attempt to explore settlement with the Claimant in the face of that concession, even at a nominal value.

30. On 23 June 2021 the Defendant disclosed her 2014 / 2015 best practice statement / policy documentation in relation to removing Ugandans on EU Letters, and the Claimant notified the Defendant of his intention to apply for specific disclosure – providing a draft Application Notice, draft Order, witness statement (which set out a history of disclosure and service in the proceedings), and a detailed Schedule of Undisclosed Documents – which included the EU Letter and documentation used in removing the Claimant to Uganda on 9 December 2014; the notes, reports and witness statement of the paramedic escort Duncan Pearce; certain documents referred to in the witness statement of the Defendant's witness Sharon Buckle, including ongoing activity around engagement with the Ugandan authorities; and "*the remaining CID notes*". Wide-ranging searches were also sought, and the Defendant was provided with a draft witness summons in relation to Mr Pearce.

31. On 29 June 2021 the Defendant was served with sealed copies of the application for specific disclosure, and the witness summons.

32. On 6 July 2021 the Defendant disclosed the witness statement of Mr Pearce (which was dated that day) stating that he had agreed to attend Court. The following day, the Defendant also applied for a witness summons to compel Mr Pearce's attendance, and for permission to call him as an additional witness.

33. In the overall result, the creation of the trial bundles was delayed.

34. In the afternoon of 20 July 2021, which was the day before the trial was ultimately due to begin, and in admittedly late response to the Claimant's application for specific disclosure (see para 4 of the trial judgment), the Defendant disclosed 298 pages of fresh evidence – which included the Minute of a meeting on 25 September 2014 between representatives of the Defendant and the Ugandan High Commission during which there had been discussions about the withdrawal of Ugandan citizenship for those who had been living in the UK since childhood, the use of EU Letters, and the pre-verification of nationality before removal (see para 45 of the trial judgment).

35. On 21 July 2021, when the trial began, with trial bundles, the Claimant indicated (see para 5 of the trial judgment) that, on pragmatic grounds, he would not press his application for specific disclosure and that nor would he oppose the Defendant's application to call Mr Pearce, that thus the case could proceed to trial, but that (in due course) he would seek costs in relation to both applications. I refused the Claimant's application to amend the Amended Particulars of Claim in relation to misfeasance in public office – as a result of which the Claimant abandoned reliance on misfeasance. Also on 21 July 2021, the Defendant's September 2014 Country Returns Documentation Guide was disclosed.

Submissions

36. As to the legal principles, the Claimant submits, in summary, that:

(1) By reference to various aspects of CPR 44.2, whilst the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, that involves the Court first identifying the successful party and, having done so, only then considering whether there is a reason to depart from the general rule – in connection with which, taking into account all the circumstances (including the conduct of the parties, whether a party has succeeded on part of its case, even if not wholly successful, and any admissible offers) the Court has a very wide discretion as to whether costs are payable by one party to another; the amount of those costs, and when they are paid. The conduct of the parties includes their conduct before and during the proceedings; compliance or otherwise with the Practice Direction in relation to Pre-Action Conduct and any relevant pre-action protocol; whether it was reasonable to raise, pursue, or contest a particular action or issue; conduct in the pursuit of a particular action or issue; and the exaggeration of a claim, or part of it.

(2) By reference to various aspects (including paras 6, 8, 9, 15 & 16) of the Practice Direction in relation to Pre-Action Conduct and Protocols, the Court expects the parties (before commencing proceedings) to have exchanged sufficient information to understand each other's position; to make decisions as to how to proceed; to try to settle the issues without proceedings; to consider a form of ADR; to support the efficient management of the proceedings; and to reduce the costs of resolving the dispute. As part of that, the parties are expected to disclose key documents relevant to the issues in dispute, and to consider whether negotiating or some other form of ADR might enable them to settle their dispute without commencing proceedings. Litigation should be a last resort and, if commenced, the parties should continue to consider the possibility of reaching a settlement. If (as here) proceedings have been commenced to comply with a statutory time limit before the parties have followed the pre-action requirements, the court may order a stay whilst they do so. In the event of non-compliance, the Court may, amongst other things, deprive a successful party of some or all of his costs - if the unsuccessful party is able to show that the successful party acted unreasonably in refusing ADR, and having regard to all the circumstances of the case – citing *Halsey v Milton Keynes General NHS Trust; Steel v Joy* [2004] 4 AER 920. Thus a Defendant at fault may be ordered to pay the whole, or part, of the costs of the proceedings; to pay costs on an indemnity basis; or to pay interest on any awarded sum of money for a specified time at a higher rate (not exceeding 10%) than would otherwise have been awarded.

(3) Overall, and by reference to *M v London Borough of Croydon* [2012] EWCA Civ 595, the Court is required to consider whether the case falls into one of three categories – namely that:

(i) The Claimant has been wholly successful (whether following a contested trial or pursuant to a settlement) in which case he should recover his costs unless there is some good reason to the contrary.

(ii) The Claimant has been partly successful (whether following a successful trial or pursuant to a settlement) in which case the Court will normally consider how reasonable the Claimant was in pursuing the unsuccessful part of the claim, how important that was in comparison with the successful claim – with there being, in such situations, a positive case for there being no order as to costs.

(iii) There has been some compromise which does not actually reflect the Claimant's claims, in which case, where the Court is unable to gauge whether there is a successful party, there is an even more powerful argument that the default order should be no order for costs.

37. As to the facts, the Claimant relies on various aspects of the Outline History above, including (all dates 2021):

(1) The refusal of the Defendant to negotiate.

(2) The nature of the materials provided for inspection on 12 March, the asserted irrelevance of the great majority of them, and the duplication of many of them.

(3) The various late disclosures / service by the Defendant – for example on 28 May, 4 June, 10 June, 14 June, 16 June, 17 June, 23 June, 6 July, 20 July, and 21 July.

(4) The importance of a number of the documents disclosed or served late.

(5) The various warnings given by the Claimant in correspondence (see above and the bundle) as to the consequences in costs.

38. As to the merits, the Claimant submits, amongst other things, that:

(1) By reference to *Lumba* [2011] UKSC 12, the key point is that the tort of false imprisonment is actionable per se - regardless of whether the individual suffers any harm.

(2) The history of the case shows that there was a very serious abuse of power which was relevant to the circumstances of the Claimant's detention. Therefore, even if nominal damages are awarded, it should be with the Claimant's costs to reflect the Secretary of State's breach and public law error. To award costs otherwise would be to reward the Defendant's unlawful act.

(3) It was not suggested in *Lumba* that, if nominal damages are awarded, the Claimant has lost and is to pay the Defendant's costs, rather (by reference, in particular, to the speeches of Lord Collins and Lord Dyson) the reverse.

(4) As shown by the Amended Particulars of Claim, the Claimant's case in relation to unlawful detention / false imprisonment was simple and straightforward – he sought damages that he was unlawfully deprived of his liberty between 16 February 2014 and 19 June 2015, or for periods therein. At para 1 of the trial judgment, I referred to that as his principal claim. His claim for misfeasance was dropped and, therefore, the fact that he failed to succeed "*on other subordinate points such as harassment*" does not translate, in any way shape or form, to a loss. Neither can it be argued that it inflated the costs. The Claimant has succeeded on both liability and damages – whether the quantum be £1,000 (as in *Lumba*) or £1.

(5) The circumstances of this case are unique.

(6) The Defendant had "*failed to cover herself in glory*" in view of her conduct before and during the proceedings - in that she failed to consider ADR; rather than engage in pre-action conduct, she chose to pursue an application to strike out; there is nothing to suggest that she ever considered narrowing the issues, or the reduction of time and cost; there were multiple and monumental breaches of the rules – including deliberate attempts to withhold or doctor disclosure. In the result, the Claimant had been severely prejudiced. Indeed, if the material had been supplied in time the Claimant would have achieved a different outcome. In contrast, the Claimant had made all efforts to bring himself within the relevant rules.

39. The Defendant variously underlines that:

(1) The claims made in the Claimant's Claim form, and the amount of damages then sought (which included an element of damages for personal injury) were extensive.

(2) By the time the liability only trial began on 21 July 2021, the issues had crystalised (as set out in the trial judgment), the claim for personal injury had been abandoned., and the Claimant had decided not to further pursue his application for specific disclosure, or his claim for misfeasance in public office.

(3) Save for the admission that officials had failed to carry out the Claimant's first detention review, such that he had been unlawfully detained between (17) March 2014 and 10 April 2014, the Defendant had contested all the allegations.

(4) The Court had comprehensively rejected the Claimant's case and, save for noting the admitted unlawful detention, had found for the Defendant on all the grounds of claim.

(5) Two issues remain outstanding, namely:

(i) The costs of the liability only trial.

(ii) Whether the Claimant is entitled to substantive damages for the admitted period of unlawful imprisonment and, if so, the quantum of such damages, and the determination of the costs of the quantum issues.

40. As to the costs of the liability only trial, the Defendant submits that:

(1) By reference, for example, to CPR 44.2(2)(a), it is trite law that costs will follow the event, save where the Court has reason to depart from that general principle, and there is no reason to depart from it in this case. Rather, the Defendant succeeded on all grounds and, in the ordinary way, should be awarded reasonable costs - to be subject to detailed assessment, if not agreed.

(2) The Claimant's submissions confuse the question of who is entitled to costs in principle, and on what basis, with questions of the quantum of those costs and irrelevant substantive points going to liability (which the Court should ignore) when the Court's function is to determine the costs of the liability trial in principle and, if the parties are unable to agree those costs, the matter will need to proceed to detailed assessment. It is neither appropriate, nor possible, for me to carry out my own detailed assessment.

(3) In relation to the Claimant's criticisms of the Defendant's conduct:

(i) It is correct that the Defendant rejected the Claimant's offer of ADR, but the Defendant was entirely vindicated in doing so, and there is no basis for finding that to have done so was unreasonable. *Halsey* (above) provides no support for the Claimant, rather it weighs heavily in the Defendant's favour – see para 13 of the judgment:

"*In deciding to deprive a successful party of some or all of its costs on the grounds that he refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. In our view the burden is on the unsuccessful party to show why there should be a departure from the general rule. The fundamental principle is that such departure is not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR".*

(ii) It is also correct that, in the Directions Questionnaire, the Defendant indicated no wish to attempt settlement. However, given the nature of the claims, there was no

reasonable route to settlement. Again, the Defendant was entirely vindicated in adopting that position.

(iii) The criticism of the Defendant's late disclosure of various items is well founded. There were delays in disclosing, for example, the GCID notes and, having identified further material the Defendant provided it to the Claimant late in the process – in particular the 298 page bundle disclosed in the afternoon of 20 July 2021. However, it is not open to the Claimant now to argue in relation to costs that he was severely prejudiced and that had the late material been provided earlier he would have achieved a different outcome. The Claimant made no application to adjourn, the material was not excluded, and there is no basis to go behind the trial judgment and to seek to re-argue the merits at this stage. Rather, the late disclosure did not cause extra expense to be incurred, and should not be reflected in any costs award against the Defendant.

(iv) Further, and albeit that it is accepted that repeats of documents were included in the disclosure, it is not accepted that excessive amounts of irrelevant material were disclosed. As explained on 28 May 2021, due to the COVID pandemic staff were not attending the office, and therefore the GLD was unable to print the documents, to place them in chronological order, and to remove duplicates in the normal way. In any event, service of duplicate documents is not unusual and nor was the volume of material for a case such as this, and there is no basis upon which such disclosure could warrant reversing the usual order for costs.

(v) Whilst it is also accepted that there were delays in the provision of witness evidence, they are not relevant to the issue of costs. As to the Defendant's application to extend time for service and to vacate the trial hearing date, Ellenbogen J has already made an order for costs in favour of the Claimant, and the Claimant consented to the calling of the additional witness (Mr Pearce) at trial.

(vi) The Claimant's approach, to the effect that, because the Defendant made no offer of damages, despite conceding a period of unlawful detention, the Claimant was "*entitled and rightly so to pursue his claim to the end*", and that as the tort of false imprisonment is actionable *per se,* even if nominal damages are awarded "*it is nominal damage awarded with costs to reflect the Secretary of State's breach and public law error. To award costs otherwise will be to reward the Secretary of State's unlawful act"* is misconceived, in that:

> (a) Whilst the Claimant was plainly entitled to continue his claim following the admission of a period of unlawful detention, the question for the Court when assessing costs is "who won the liability trial?", and there can be no question that the Defendant won. If the Claimant had accepted the position as stated in the Defence there would have been no liability trial, leaving damages for the admitted period of unlawful detention to be assessed as the sole outstanding issue. Instead, the Claimant had required the Defendant and the Court to grapple with wide-ranging issues at significant expense before losing on all points in issue.
>
> (b) The suggestion that the Claimant should be awarded costs "*to reflect the Secretary of State's breach"* (i.e. that costs should be treated as a kind of damages) on the basis of an admitted period of unlawful detention is contrary to basic principle and inconsistent with the logic of *Lumba* (above).

(vii) *M v Croydon* (see para 36 (3) above) is concerned with cases in the Administrative Court which settle on all issues save for costs and is therefore of only the most limited

relevance. In any event, the essence of the decision is that costs should be awarded to the successful party, and in this case the Defendant won on all contested points.

41. In addition, it is not accepted that the Defendant's conduct was "appalling".

42. Ultimately, it is submitted that the Defendant's conduct does not justify a departure from an orthodox order that costs follow the event in this case. However, to the extent that the Defendant's conduct can be criticised, that should be reflected in a limited percentage reduction of the costs awarded in the Defendant's favour. In any event, the Defendant invites the Court to order that the costs payable to the Claimant under Ellenbogen J's 25 May 2021 Order be set off against the overall award to the Defendant.

43. As to damages for the period of admitted unlawful detention, the Defendant proceeds on the basis that the issue remains live, but that the Claimant has chosen to make no submissions on the point. The Defendant submits that the Court must now decide whether the Claimant would have been lawfully detained between 17 March 2014 and 10 April 2014 in any event, such that he is entitled to nominal damages only; and, if not, the quantum of damages.

44. In relation to the first question, the Defendant underlines that the Claimant was first detained under immigration powers on 16 February 2014; that following the making of a deportation order against him on 17 February 2014 his file was faxed for reallocation and appears to have been lost in transit, such that no detention review took place, as was required, on 17 March 2014; that the file was located on 1 April 2014; that a detention review was carried out on 10 April 2014; and that it was determined that the Claimant should remain in detention – so as to effect his removal from the UK, because he was likely to abscond if given temporary admission or release, and because he carried a high risk of public harm and a risk of further offending.

45. The Defendant submits that the same reasons plainly applied as at 17 March 2014; that the Court has already found that the Claimant remained continuously detained from 11 April 2014 to 19 June 2015; and that therefore the Court can be satisfied that the Claimant would have been lawfully detained between 17 March 2014 and 10 April 2014 had the mandated review taken place. In the event of such a finding, the Defendant invites the Court to find that the Claimant is entitled to no more than nominal damages for that period, and that the Defendant is entitled to the costs of his submissions on the issue.

46. In the event of a finding that, if the 17 March 2014 review had taken place, the Claimant would not have been detained, the Defendant submits that an award of some £8,500 would be appropriate.

The Merits

47. I agree with the Defendant that the Court's function is to determine the costs of the case/trial in principle and that, if the parties are not able to agree those costs, the matter will need to proceed to detailed assessment. It is neither appropriate nor possible for me to carry out my own detailed assessment.

48. It is, in my view, obvious, that, having won on all the ultimately contested issues, the Defendant was the successful party, and that there is no reason to depart from the general rule that the unsuccessful party pay the costs of the successful party. The Claimant's attempts to argue to the contrary are, for the reasons advanced by the Defendant (see e.g. para 40 above) misconceived. The Claimant's only success was as to his unlawful detention from 17 March 2014 to 10 April 2014, which had been admitted (all bar the first day) months before trial in the Defendant's Defence – in circumstances where, if the mandated review had taken place, it would have resulted in the detention being lawful. In the result, I can see no basis upon which to order that the Claimant be awarded his own cost of the case. In particular, whilst there were issues in relation to disclosure (of which more below) they did not render the trial or its outcome unfair or unjust. Indeed, notwithstanding the lateness of aspects of the disclosed and served materials, there was (sensibly) no objection by the Claimant to the commencement of the trial on its ultimately due date, and there were no issues in relation to the use of all the materials.

49. In the result, and overall, I refuse the Claimant's application for his own cost of the case and award the Defendant his cost of the case/trial – subject to detailed assessment, if not agreed.

50. I can see no tenable basis upon which to exercise my discretion to award the Claimant his cost of the applications for a witness summons in relation to Mr Pearce. However, and despite making every allowance in the Defendant's favour for the pandemic, there were significant problems (which should not have happened) with the timing of aspects of service and disclosure – see the outline history above. Albeit that, in the end, those issues did not adversely affect the trial or its outcome it was, in my view, reasonable for the Claimant to chase the Defendant in relation to them in correspondence and, ultimately, to make the application for specific disclosure, which (eventually) resulted (amongst other things) in the disclosure of the 298 page bundle the afternoon before the trial was due to begin, In the result, in the exercise of my discretion, and rather than trying to estimate a percentage reduction in the overall award made in favour of the Defendant, I award the Claimant his reasonable cost of his application for specific disclosure – subject to detailed assessment, if not agreed.

51. As to the issues in relation to the admitted period of unlawful detention. Against the background of the findings made in the trial judgment, and in particular the findings that the periods of detention immediately before 17 March 2014, and immediately after 10 April 2014, were lawful, I have no doubt that, if the mandated review had taken place, the Claimant would have been lawfully detained between 17 March 2014 and 10 April 2014. In the result, the Claimant is entitled to no more than nominal damages, which I award, for that period. Equally, and albeit that the Claimant has chosen not to incur costs of his own in relation to those issues, it was entirely reasonable for the Defendant to make submissions in their regard. Therefore, as he has been successful, I award the Defendant his reasonable costs of his submissions on the issues – to be the subject of detailed assessment, if not agreed.

52. Finally, I order that the costs payable to the Claimant under Ellenbogen J's Order of 25 May 2021, and the costs payable to the Claimant in relation to his application for specific disclosure, be set off against the awards (above) made in favour of the Defendant.

Conclusion

53. For the reasons set out above:

(1) I refuse the Claimant his cost of the case/trial.

(2) I award the Defendant his cost of the case/trial.

(3) I find that, had the mandated review taken place, the Claimant's detention during the period from 17 March 2014 to 10 April 2014 would have been lawful.

(4) I award the Claimant nominal damages for that period.

(5) I award the Defendant the cost of his submissions in relation to that period.

(6) I refuse the Claimant his cost of the witness summons applications in relation to Duncan Pearce.

(7) I award the Claimant his reasonable cost of his application for specific disclosure.

(8) All the awards of costs are subject to detailed assessment, if not agreed.

(9) I order that the costs payable to the Claimant under Ellenbogen J's Order of 25 May 2021, and the costs payable to the Claimant in relation to his application for specific disclosure, be set off against the awards (above) made in favour of the Defendant.

54. The parties to provide the Court with a draft Order within 14 days of the judgment being handed down.