AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2021:000130

[2022] IESC 51

O'Donnell CJ
Dunne J
O'Malley J
Baker J
Hogan J

Between/

G.E.

Plaintiff/Respondent

and

THE COMMISSIONER OF AN GARDA SÍOCHÁNA, THE GOVERNOR OF CLOVERHILL PRISON, THE MINISTER FOR JUSTICE AND EQUALITY, THE ATTORNEY GENERAL AND IRELAND

Defendants/Appellants

JUDGMENT of Mr. Justice Gerard Hogan delivered the 2nd day of December 2022

I.

Introduction

1. This appeal raises a novel and important issue in respect of the award of general damages for the tort of false imprisonment. This Court has been asked to determine the

following question: in circumstances where a plaintiff can establish that he or she has been unlawfully detained, can a defendant defeat any consequential claim for compensatory damages if it can be shown that had the plaintiff not been *unlawfully* detained, he or she could and would have been *lawfully* detained? If that question can be answered in the affirmative, then it is suggested that the plaintiff in those circumstances is confined to an award of nominal damages only.

2. This was the general issue that arose before the United Kingdom Supreme Court in *R (Lumba) v. Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245. In that case the UK Supreme Court held that in such circumstances, a plaintiff should not be entitled to compensation for a loss of liberty which the plaintiff would in any event have suffered irrespective of the defendant's wrong. Instead, the UK Supreme Court held the plaintiff in such a case would only be entitled to nominal damages, unless the circumstances were such as to give rise to a claim for exemplary or punitive damages.

3. The defendants in this appeal contend that this so-called *Lumba* principle ought to be adopted in this jurisdiction. They accept that there is no direct authority on this issue in this jurisdiction but argue that the *Lumba* principle is consistent with the well-established principles governing the law of damages. The plaintiff disputes this, contending that the defendants' account of the law both misinterprets the elements of the tort of false imprisonment and would, if correct, fail to afford sufficient weight to the importance of the right to personal liberty as protected by the Constitution.

4. The High Court accepted the plaintiff's analysis in a judgment delivered by Faherty J. dated 9 May 2018: [2018] IEHC 293. The defendants then sought to appeal the High Court's decision directly to this Court by way of leapfrog appeal, but this Court refused to grant leave: [2019] IESCDET 72. The defendants accordingly

appealed instead to the Court of Appeal which upheld the decision of the High Court in its judgment delivered by Murray J. on 16 April 2021: [2021] IECA 113, [2021] 2 ILRM 441. This Court then granted leave to appeal the Court of Appeal decision by way of Determination dated 15 February 2022: [2022] IESCDET 20.

II.

The Background to the Appeal

5. The plaintiff, G.E. ("Mr. E.") is a non-national who arrived in Ireland in 2008 and sought asylum in the State. He originally claimed to be from Sierra Leone, although there is much evidence to suggest that he is in fact Nigerian. This application for asylum was refused in the same year and the plaintiff subsequently applied for subsidiary protection. During the period in which this application was still pending, the plaintiff was arrested on 1st August 1 2011. He had left the State and then re-entered by bus from Northern Ireland. He was refused permission to land in the State pursuant to ss. 4(3)(e), (g) and (h) of the Immigration Act 2004 and arrested pursuant to s. 5(2) of the Immigration Act 2003 ("the 2003 Act").

6. The plaintiff was then detained overnight in Dundalk Garda Station on foot of a detention order directed to the Member in Charge of the station. This order was stated to be made in exercise of the powers conferred on the Minister for Justice and Equality by s. 5(2) of the 2003 Act. On the following day, the plaintiff was released and then immediately re-arrested and detained on foot of a fresh detention order made out to the Governor of Cloverhill Prison, which was made out on the same basis and by the same officer as the first.

7. On 9th August 2011, the applicant applied to the High Court pursuant to Article 40.4.1° to enquire into the legality of his detention. The High Court held that it was lawful and this decision was appealed to this Court. This Court reversed this finding

and ordered the plaintiff's release: see [2011] IESC 41. In the period while this appeal was pending, G.E.'s application for subsidiary protection was refused by the Minister for Justice and Equality.

8. This Court's finding of illegality lay in the form of the warrant used to ground the plaintiff's detention. The Court ruled that the detention order was defective as it should have recorded the fact that the plaintiff had been refused permission to land and, moreover, that it should also have recorded that the reason for the arrest and detention of the plaintiff was that the immigration officer in question had reasonable cause to suspect that the plaintiff was a non-national who had been unlawfully in the State for a continuous period of less than three months. Because the warrant recorded neither of these requirements, the detention was held to be unlawful.

9. The decision of this Court was delivered at 12:40 pm on 26th August 2011. At 3 pm on that day the plaintiff was released from Cloverhill Prison. Immediately following that release, the plaintiff was re-arrested and detained on foot of a further detention order. That order contained the requisite information that had been absent from the first two such orders. On 30th August 2011, the plaintiff applied to the High Court for a further enquiry into the lawfulness of his detention. He relied in that regard upon the failure of the first, second and third defendants to release him promptly on foot of the order of the Supreme Court of 26th August 2011.

10. That inquiry came before me when I was still a judge of the High Court. I found that the delay in releasing the plaintiff on 26th August 2011 was unlawful, and that the plaintiff ought to have been released at 1:15 pm rather than 3 pm (see [2011] IEHC 351). I determined that as a result the plaintiff had been deprived of his constitutional right to liberty for that period, although I also held that the violation was inadvertent. I also found that the subsequent detention on foot of the new order was not unlawful and,

moreover, determined that from 2th August 2011 there was an intention on the part of the defendants to remove the plaintiff from the State and to return him to Nigeria. The plaintiff remained in detention until 22nd September 2011 when he was released.

III.

The claim for false imprisonment: the High Court and Court of Appeal proceedings

11. The plaintiff subsequently brought a plenary action before the High Court in which he claimed damages for false imprisonment and/or breach of his right to liberty for the period from 1 August to 26 August and including the period from 12:40 pm to 3 pm on 26 August 2011. The trial lasted three days. In her judgment in the High Court Faherty J found in favour of Mr. E., holding that he had been unlawfully detained. She also found for the plaintiff in respect of the contention that the *Lumba* decision cannot be said to reflect the law in this jurisdiction. She accordingly rejected the defendants' underlying premise that the plaintiff's period of false imprisonment should be considered as a lesser infringement of the constitutional guarantee to personal liberty since it only came about because of omissions of a technical nature.

12. Critically, however, Faherty J. further held that the plaintiff's deprivation of his liberty for some twenty-six days could not be remedied by an award of nominal damages, as urged by the defendants. She accordingly awarded the sum of €7,500 in respect of the false imprisonment. In arriving at this conclusion Faherty J. expressly took into account the credibility deficits in the plaintiff's evidence, such that the amount of damages actually awarded was less than it might otherwise have been.

13. The Court of Appeal upheld the High Court's decision in a comprehensive and detailed judgment delivered by Murray J. from which I have derived the greatest assistance. On the principal issue regarding the UK Supreme Court decision in *Lumba,*

Murray J. in his judgment agreed with the High Court's conclusion that the plaintiff ought to be entitled to compensatory damages. He considered in the first instance that *Lumba* fitted "clumsily" into the counterfactual model that typically applies in the context of the 'but for' test. This is because, he explained, the circumstances that arise in the *Lumba* case presumes a circumstance in which the loss incurred by the deprivation of liberty is avoided through the hypothesis that an entirely new event should be put into the factual matrix. Murray J.'s reasoning was that the wrong in such circumstances is not merely subtracted from the factual context – as might be seen in a typical 'but for' scenario – but rather is replaced with a non-wrongful act by the entity which acted unlawfully, that hypothetical non-wrongful act being used to eliminate the loss that the actual wrongful act caused.

14. Murray J. considered that such a construct was not one that could be identified in any line of authority. He also made the point that although the proposition that a plaintiff is only entitled to nominal damages in the circumstances of *Lumba* was accepted by the High Court of Australia in *Lewis v. Australian Capital Territory* [2020] HCA 26, that Court rejected the approach to the 'but for' test which was adopted by the Court of Appeal of England and Wales in *Parker v. Chief Constance of Essex Police* [2019] 1 WLR 2238 which itself applied the *Lumba* principle.

15. The upshot of Murray J.'s analysis of *Lumba* and *Lewis* was that, in his view, for the defendants to succeed in the essential argument advanced by them, "it must be the case *both* that Irish law recognises a legal rule precluding the recovery of general damages for unlawful detention based upon a counterfactual analysis, *and* that in conducting that analysis this is a principle that in some way presumes legality". This, he said, requires some consideration of the "history, scope and object" of the tort of false imprisonment and in particular the nature of the tort as it applied in this jurisdiction

both at the time of the foundation of the State and the adoption of the Constitution. In this respect, and following an analysis of the case-law, Murray J. observed that ([2021] 2 ILRM 441 at 469):

> "…the award of damages in a claim of this kind is intended to reflect not merely the loss consequently occasioned to the plaintiff's freedom, but also the insult arising from the illegality that attends it. The adjective in the description of the cause of action does not, on this basis, merely identify its elements. It also proclaims the interests an award of compensation is intended to protect. If that is correct, it becomes very difficult to see how a rule that requires the court to ignore the illegality in its assessment of damages for the tort can be reconciled with the essential objective of the cause of action."

16. Murray J. also made the further point that (at 473):

> "…in fixing on a case by case basis the award of compensatory damages to be made in favour of an individual plaintiff whose liberty has been unlawfully constrained, a court is entitled to take account of the conduct of the plaintiff giving rise to the detention and of the fact that the illegality may in consequence have been technical or procedural in nature. There will be cases in which a plaintiff in this situation may end up obtaining a low award. However, there is a fundamental and critical difference of principle between a rule which demands that compensation be determined on the basis of a fiction that ignores an essential aspect of the tort, and the acknowledgment that the court enjoys a flexibility in assessing damages to take account of the circumstances in which the wrong was committed. As a result, the starting point is that the plaintiff in this situation is entitled to some compensatory damages. Any other

conclusion ignores the illegality that lies at the core of the cause of action."

17. Murray J.'s conclusions in this regard was therefore that the *Lumba* decision would introduce a new 'but for' causation into this jurisdiction that, to his mind, was not identifiable in any line of authority and which, moreover, negated the essence of the tort of false imprisonment insofar as it did not acknowledge the fact that the tort is the response of private law to the insult caused by the illegality of detainment. His reasoning was that ([2021] 2 ILRM 441 at 483) "rather than putting the plaintiff in the same position he would have been in had the breach of his constitutional right not occurred, the analysis urged by the defendants calculates damages on a basis that ignores a central feature of the breach – its illegality."

18. Murray J. accepted, however, that the adoption of a new rule of causation for the tort of false imprisonment could in theory be justified. He saw the logic, for example, of the argument that allowing a plaintiff to obtain damages for a loss that he would have incurred anyway is not consistent with the *general* operation of the compensatory principle. That being said, Murray J. observed that neither authority nor principle supports the contention that this is an overarching principle that must apply in all situations at common law, or as a matter of constitutional law. He considered in the case of the tort of false imprisonment that it would, indeed, be a mistake to assume that such a principle can be applied with unyielding rigidity. He stressed that this was because the application of the compensatory principle and rules of 'but for' causation that underlie it would operate to undermine – in the case of the tort of false imprisonment – "the foundation of a cause of action which is directed to compensating for a loss of freedom imposed without lawful authority and for which a loss of freedom with lawful authority cannot be a valid surrogate.": [2021] 2 ILRM 441 at 482.

19. Murray J. then turned to the critical question of whether the courts in this jurisdiction could – if logic and principle prevailed – develop the tort of false imprisonment in the way suggested in *Lumba* and the various authorities from other jurisdictions applying or modifying it. He noted in the first instance that since there exists a common law remedy in respect of the tort of false imprisonment and this is the mechanism by which the State has clearly implemented its obligation arising under Article 40.3.1° of the Constitution to defend and vindicate by an award of damages the right of the citizen not to be deprived of his or her liberty save in accordance with the law – it is not possible to obtain damages for violation of the right of personal liberty outside the framework of that tort. Murray J. then made the further, fundamental point that, in his view, the power of the courts to intervene so as to reduce the scope of that protection and the reach of the remedies that carry with it must be constrained. This, he reasoned, reflects the similar limitation on the courts' jurisdiction to create new causes of action in the case of constitutional breaches save in the case of basic ineffectiveness.

20. Murray J.'s conclusions can be found at paragraphs 147-153 of the Court of Appeal judgment: see [2021] 2 ILRM 441 at 495-496. Critical to this appeal are his conclusions that: (i) the State has never recognised the 'but for' test of causation applied in *Lumba* in calculating damages in actions for false imprisonment; (ii) the 'but for' test as applied in *Lumba* negates the essence of the cause of action of the tort of false imprisonment insofar as it ignores a central feature of the breach – the illegality. He considered, therefore, that the 'but for' test in *Lumba* was not a constitutionally permissible construct; (iii) the adaptions of the *Lumba* principle seen in various other authorities and jurisdictions do not avail the defendants here because the trial judge made no finding as to what *would* have happened had the plaintiff not been detained on the basis of the flawed order; and (iv) Article 50 of the Constitution does not permit the

Court to reduce the scope of the tort of false imprisonment, this being the province of the Oireachtas which bears the obligation to defend and vindicate the right of personal freedom and discharges this obligation through the common law tort of false imprisonment.

21. The State defendants have appealed against this decision, essentially on the basis that both the High Court and the Court of Appeal should have followed the *Lumba* approach.

V.

The submissions of the parties

22. The main thrust of the defendants' case is that where a plaintiff who has been falsely imprisoned has suffered no loss or damage for the simple reason that his imprisonment was substantively justified and inevitably would have occurred without the irregularity had the authorities been aware of it, the plaintiff should only be entitled to nominal damages. In the present case it is the defendants' submission that – contrary to what was found by the Court of Appeal – the plaintiff would have "inevitably" been lawfully detained had the authorities been aware of the defective nature of the detention order. The defendants contend that the Court of Appeal erred in its approach to the facts in this respect, as it did not take into account the fact that the arrest was lawful. The lawful arrest is, they say, a critical feature of this case because it follows that there was never any prospect of the plaintiff's release. According to the defendants, following his arrest, either the plaintiff would be accepted into custody (as did happen) or the Garda Member in Charge would have challenged the form of the detention order. In both events, it is argued, the plaintiff would have remained in detention.

23. In these circumstances it is the defendants' submission that the plaintiff should be entitled only to nominal damages. The defendants accept that there is no direct

authority for this proposition. Nevertheless, they contend that such a submission accords with well-established principles governing the law of damages. They maintain, in particular, that the Court of Appeal was wrong in its conclusion that compensatory damages must be awarded in the case of false imprisonment to reflect the illegality of the detention. They say that there is no decided case prior to modern times that supports this conclusion and certainly no well-established principle to this effect that can be found prior to 1937. On the contrary, the defendants submit that there *are* authorities which indicate that the *Lumba* principle is not novel and is consistent with the orthodox principles governing damages, such as *Barnett v. Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428. The defendants reject the Court of Appeal's reliance on the case-law regarding the 'user principle', arguing that this concept is restitutionary in nature and reflects a "judicial willingness to disgorge a defendant of any benefit they have obtained from the infringement of a right". The defendants submit that there is no restitutionary element in the present case.

24. The defendants also reject the Court of Appeal's conclusion that Article 50 of the Constitution precludes it from refusing an award of compensatory damages. In this regard the defendants submit that, insofar as Article 50 does restrict developments in the common law, it can only do so in respect of well-established principles. The defendants submit that the principle advanced by the Court of Appeal – namely that a court must award compensatory damages for the tort of false imprisonment to mark the illegality of the detention – is not so clearly established and settled that it is caught by Article 50. The defendants further argue that while there is no authority dealing with false imprisonment directly, there is authority demonstrating that the fact that a wrong consists of a breach of constitutional rights does not entitle the particular plaintiff to compensatory damages if, in fact, he or she has suffered no loss or damage.

Accordingly, it is the defendants' view that nominal damages and declaratory relief are sufficient to defend and vindicate a constitutional right and, indeed, are sufficient in the circumstances of the present case.

25. The plaintiff adopts both the conclusions and the reasoning of the Court of Appeal. In essence, the plaintiff contends that the *Lumba* decision was a significant change in English common law and that the High Court and Court of Appeal were correct to recognise the danger of importing it into Irish law. The plaintiff considers that the full vindication of his constitutional rights requires the court to provide some form of compensatory damages, necessitating a rejection of *Lumba*. The plaintiff also contends that if the defendants' argument prevails, it is unclear how exactly the decision in *Lumba* would operate, in particular in respect of the burden and standard of proof. It is the plaintiff's submission that the fact that such issues are left open demonstrates the magnitude of the changes brought about by *Lumba* and the fact that the principle developed therein was novel. Finally, the plaintiff strongly refutes the defendants' suggestion that his detention would have been "inevitable" had the authorities been aware of the defect in the detention order. The plaintiff argues that there is no evidence in this case of what would have happened had the error in the detention order been understood, and, indeed, the plaintiff goes on to posit a number of alternatives as to how things might have proceeded.

VI.

The nature of the tort of false imprisonment

26. There have been perhaps surprisingly few decisions of this Court concerning the scope of the tort of false imprisonment. The novel issue presented in this appeal accordingly requires us to consider the matter from first principles.

27. Given that this tort was part of the common law inheritance carried over by Article 50.1 of the Constitution, the starting point perhaps is to look at the state of the law on 29 December 1937 or as near to that date as the relevant case-law will allow. A classic definition of the tort of false imprisonment was given by His Honour Judge Fawsitt in *Dullaghan v. Hillen* (1957) Ir Jur Rep. 10, at 15:

> "False imprisonment is the unlawful and total restraint of the personal liberty of another, whether by constraining him to go to a particular place or confining him in a prison or police station or private place or by detaining him against his will in a public place. The essential element of the offence is the unlawful detention of the person or the unlawful restraint on his liberty. The fact that a person is not actually aware that he is being imprisoned does not amount to evidence that he is not imprisoned, it being possible for a person to be imprisoned in law, without being conscious of the fact and appreciating the position in which he is placed, laying hands upon the person of the party imprisoned not being essential. There may be an effectual imprisonment without walls of any kind. The detainer must be such as to limit the party's freedom of motion in all directions. In effect, imprisonment is a total restraint of the liberty of the person. The offence is committed by mere detention without violence."

28. As McMahon and Binchy observe in their magisterial textbook, *The Irish Law of Torts* (Dublin, 2013) (at 911), these comments of Judge Fawsitt represent "an admirably succinct statement of the principal features of the tort." There is no real question here concerning the unlawful detention of the plaintiff. Such was found by Faherty J. in her very careful judgment in the High Court and these findings of fact remain unappealed

29. The central issue presented by this appeal is rather the nature or basis of damages payable in respect of actions for false imprisonment in circumstances where the respondents contend that the plaintiff has suffered no real loss. Here, the State says that Mr. E. has suffered no real loss because if, for example, the s. 5(2) warrant authorising his detention had contained the appropriate recitals, he could and would have been lawfully detained. This is in essence a version of the "but for" argument which prevailed before the UK Supreme Court in *Lumba*. It is thus said that the plaintiff has thereby lost nothing as a result by reason of the unlawful detention and the State's illegality is not therefore the cause of any loss which Mr. E has suffered and which is compensatable in anything other than nominal damages.

30. I may say immediately that the judgment of Murray J. for the Court of Appeal contains a powerful, comprehensive and scholarly analysis of *Lumba* and the various other relevant authorities which address this issue. There is accordingly little point in revisiting these issues in any detail in this judgment as no weak words of mine could possibly improve on what has been said on this point in the Court of Appeal. I shall content myself by saying that I agree generally with the analysis found in the judgment of Murray J.

31. In the context of this appeal, I consider that it is, however, unnecessary for me to express any view as to whether the courts are bound by the general contours of the tort as it was carried over in 1937 by Article 50.1 of the Constitution or whether the adoption of the "but for" principle would involve what Murray J. described as an impermissible form of re-theorising of the tort of false imprisonment. I take this view because I consider that this issue – at least as presented in this appeal – is essentially one relating to quantum of damages for false imprisonment. In essence, it reduces itself to this: could it ever be appropriate to award purely nominal damages to someone who

has genuinely and actually been deprived of their liberty by reason of the illegal actions of the State or its agents? (In this regard I put to one side instances of purely technical examples of false imprisonment as nominal damages may possibly be appropriate in those type of cases.)

32. Curious as it may seem, the starting point for any inquiry in this respect lies perhaps in the very origins of the common law itself. Ever since the era of the Medieval Yearbooks, trespassory torts such as false imprisonment, assault and battery were all regarded as actionable *per se*, regardless of whether the plaintiff had suffered any harm. Thus, "injuries to person or property…were matter for the writ of trespass…and (from the thirteenth century onwards) the later and more comprehensive writ of trespass on the case": see Pollock, *The Law of Torts* (5th.ed., London, 1897) at 13. As Lord Griffiths observed in *Murray v. Ministry of Defence* [1988] 1 WLR 692 at 703:

> "The law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable even without proof of special damage."

33. Thus, for example, the prankster who locks the door of a university lecture room and then opens it before any of the students thus temporarily locked inside actually realises that they have been detained is nonetheless guilty of the tort of false imprisonment. Since, however, none of the students in this example would have suffered any real loss of liberty, the damages payable would nonetheless be purely nominal.

34. By contrast in the present case Mr. E undoubtedly suffered loss and damage in the sense that he was actually deprived of his liberty for over three weeks. Normally the unlawful detention of a plaintiff for this period would sound in substantial damages. And so, as I have already indicated, the question thus becomes whether the award of damages

should be reduced in these circumstances to what amounts to nominal damages by reason of what is said was the technical nature of the illegal detention and that "but for" the technical omissions of the recitals which this Court determined are required by the s. 5(3) detention order Mr. E. would have been lawfully detained during this period.

VII.

The decision of the UK Supreme Court in *Lumba* and that of the High Court of Australia in *Lewis*.

35. In *Lumba,* a majority of the UK Supreme Court considered that the damages to be awarded should be so reduced. The *Lumba* majority proceeded on the basis that the damages in English tort law were essentially *compensatory* in nature and – or so the majority reasoned – a plaintiff was not entitled to be compensated for an illegal detention where he had suffered no real loss. In this respect the *Lumba* majority rejected the very notion of what was described as "vindicatory damages." As Lord Dyson explained ([2012] AC 245 at 281-282):

> "The question here is simply whether, on the hypothesis under consideration, the victims of the false imprisonment have suffered any loss which should be compensated in more than nominal damages. Exemplary damages apart, the purpose of damages is to compensate the victims of civil wrongs for the loss and damage that the wrongs have caused. If the power to detain had been exercised by the application of lawful policies…it is inevitable that the appellants would have been detained. In short, they suffered no loss or damage as a result of the unlawful exercise of the power to detain. They should receive no more than nominal damages."

36. Other members of the majority in *Lumba* spoke in similar terms. Before proceeding further, however, it may be convenient also to note that the High Court of

Australia reached a broadly similar conclusion in *Lewis v. Australian Capital Territory* [2020] HCA 26. This was a case where, it seems, the appellant's sentence in respect of a serious assault had been converted from one of periodic detention into full time detention. That decision of a sentencing board was held to be invalid because it was held the board could not establish that the appellant had been duly served with notice of the proposed alteration to the sentence.

37. The High Court of Australia accepted the broad parameters of *Lumba*, thereby rejecting the notion of vindicatory damages. In essence, just as in *Lumba*, the plaintiff could – or, depending on your point of view, would – have been lawfully detained had appropriate procedures been followed.

38. Yet within the four judgments of the Court (Kiefel C.J. and Keane J.; Gageler, Gordon and Edelman JJ.) there are some subtle (but important) differences and not all aspects of the "but for" counterfactual assumed in *Lumba* were endorsed. It is again probably unnecessary for me to parse the various judgments in exhaustive detail, as Murray J. has already performed that task in his comprehensive judgment for the Court of Appeal. It is sufficient to point to some of the views expressed on this point by Gaegler, Gordon and Edelman JJ. Thus, for example, Edelman J. differed from the approach taken by Lord Kitchin in *Lumba*. For Lord Kitchin it was sufficient that the plaintiff "could" have been lawfully detained, whereas Edelman J. stressed that this is in itself was not enough to justify a purely nominal award of damages: his lawful detention would have to have been inevitable had appropriate procedures been followed for purely nominal damages to be awarded.

39. For my part, I respectfully take a different view to the decisions in *Lumba* or, for that matter, in *Lewis*. I consider that vindicatory damages are indeed an established feature of the common law tradition, at least so far as trespassory torts such as false

imprisonment are concerned. Furthermore, such is in principle also required by the very words of Article 40.3.2° of the Constitution which requires the State "in the case of injustice done" to "vindicate the life, person, good name and property rights of every citizen." False imprisonment which is accompanied (as in this case) by the true and actual deprivation of liberty will impact on the person and (depending on the circumstances) may affect his or her good name. Accordingly, the scope of the remedies provided in respect of the tort of false imprisonment must thus be construed in the light of these constitutional guarantees.

40. I propose to return to this point at a later stage, but it may be convenient to commence with the common law.

The vindicatory nature of damages for false imprisonment

41. Since many of these terms are used in a promiscuous and ill-defined way by both judges and by the textbook writers alike, it is important to be clear on what is meant by both nominal damages and vindicatory damages in this context. In *Redmond v. Minister for the Environment (No.2)* [2006] 3 IR 1 at 7, Herbert J. said that nominal damages are not "be considered to be in any sense, derisory or contemptuous." Herbert J. then quoted with approval the following dictum of Lord Halsbury LC in *Owners of the Steamship Mediana v. Owners of the Lightship Comet* [1900] AC 113 at 116:

> "…'nominal damages' is a technical phrase which means that you have negatived anything like real damages, but that you are affirming by your nominal damages that there is an infraction of a legal right…"

42. By contrast, so far as vindicatory damages are concerned, I mean damages which are not nominal, but which are nonetheless intended to mark the importance of the right which has been infringed. In this respect they differ from exemplary damages

the award of which is generally confined to those cases where the tortfeasor has personally acted oppressively or recklessly or in a high-handed way. The vindicatory element of any damages award is not itself a separate head of damages in the way that, for example, exemplary damages or special damages are, but the sum awarded by way of compensation rather reflects the desire to vindicate the importance of the right which has been infringed.

43. As Murray J. noted in his judgment, it is "not hard to identify language in the judgments – and outcomes in the case-law – supporting this thesis": [2021] 2 ILRM 441 at 469. In *Dumbrell v. Roberts* [1944] 1 All ER 326, at 329 Scott LJ said that it was in public interest that "sufficient damages should follow in such a case in order to give reality to the protection afforded by the law to personal freedom." Likewise, in *Kuchenmeister v. Home Office* [1958] 1 QB 496 at 513 Barry J. held that an award of damages should mark "the very precious right of liberty". The comments of O'Donnell L.J. in *Petticrew v. Chief Constable of the RUC* [1988] NI 192 at 204 are also instructive: "any detention even for a very short period is not insignificant and deserves something more than nominal damages."

44. This point was also made in a series of other Northern Irish cases. Thus, for example, in *Oscar v. Chief Constable of the RUC* [1992] NI 290 at 319 Hutton LCJ said that the "unlawful detention of a citizen is a grave matter and a person unlawfully detained is entitled to proper compensation." In *Dodds v. Chief Constable of the RUC* [1998] NI 393 MacDemott LJ said that a 24-hour period of false imprisonment should normally attract an award of between £4,000 to £5,000 depending on the circumstances. The judge contrasted the case of a person wrongfully arrested as a result of a legal technicality as opposed to a person who is wrongfully arrested although his innocence is nonetheless clear. The latter claimant would, MacDemott LJ said, obviously receive

greater damages than the former. And in *Douglas v. Chief Constable of the RUC* [2001] NIQB 37 Coghlin J awarded £2,000 to a "completely innocent" plaintiff who had endured a "very harrowing experience" as a result of his false imprisonment by the police.

45. Pausing at this point, I would respectfully agree with the comments of the dissent in *Lumba* on this issue. As Lord Walker observed ([2012] 1 AC 245 at 308):

> "The common law has always recognised that an award of more than nominal damages should be made to vindicate an assault on an individual's person or reputation, even if the claimant can prove no special damage. (See *Mayne & McGregor on Damages*, 18th ed. (2009) paras 42-008 to -009)."

46. Lord Walker had earlier said ([2012] 1 AC 245 at 304-305):

> "It is a species of trespass to the person and as such a tort actionable without the need for proof of special damage. The notion that no more than nominal damages should ever be awarded for false imprisonment by the executive arm of government sits uncomfortably with the pride that English law has taken for centuries in protecting the liberty of the subject against arbitrary executive action."

47. Likewise Lord Brown commented ([2012] 1 AC 245 at 353):

> "In my opinion, however, there is a very real difference between a detainee who is in fact unaware of being under physical restraint (perhaps because he is asleep or because he simply does not know that the door has been locked) and a detainee who is fully aware of his loss of freedom. To award the latter nominal damages only, on the basis that, even had he been dealt with lawfully he would still have been deprived of his freedom anyway, is really to say that he was in

truth rightly in detention. That seems to me very different from saying that he was wrongly imprisoned but happily unaware of it."

48. I cannot but agree with these sentiments. It seems to me that this is a consistent theme running through all of the pre-*Lumba* decisions from the various UK jurisdictions: they all recognise that the award of damages for false imprisonment has a vindicatory element. For good measure the pre-*Lumba* textbook writers were all of the same view. Thus, for example, *Clerk and Lindsell on Torts* (17th. Ed., 1995) commented (at 12-30) that where "liberty has been interfered with damages are given to vindicate the claimant's rights even though no pecuniary damage has been suffered." Likewise *McGregor on Damages* (18th ed., 2009) stated (at 37-103) that in both false imprisonment and defamation cases damages "by way of vindication are included in the heads of damage are made" and that "an element of vindication will sometimes makes its appearance in damages for false imprisonment."

49. The authorities from this jurisdiction are in the same vein. Thus, for example, in *Walshe v. Fennessy* [2005] IESC 51, [2005] 3 IR 516, a substantial award of damages of €100,000 for false imprisonment following her wrongful arrest by Gardai was upheld by this Court in view of the fact the plaintiff had "suffered great humiliation as a result of her ordeal": see [2005] 3 IR 516 at 547 per Kearns J. In *Walsh v. Ireland,* Supreme Court, 30 November 1994, this Court awarded IR£25,000 to a person who had been arrested as a result of a mistaken identity and who had spent a relatively short period in custody as a result. In *Raducan v. Minister for Justice and Equality* [2011] IEHC 224, [2012] 1 ILRM 419 I awarded a plaintiff the sum of €7,500 in respect of three days' detention following her unlawful arrest and detention at Dublin Airport.

50. An even earlier example is supplied by the decision of this Court in *Gildea v. Hipwell* [1942] IR 489. Here the High Court in the exercise of its bankruptcy

jurisdiction under s. 72 of the Bankruptcy (Ireland) Act 1872 had originally ordered that the plaintiff be committed to Mountjoy Prison in respect of his contempt of the bankruptcy order. The plaintiff was, however, committed instead to imprisonment in Sligo Prison. Following an application for his release under Article 40.4.2° of the Constitution, Gavan Duffy J. held that the plaintiff could not be lawfully detained in a place of detention other than in the prison specified by the High Court by virtue of its powers under that section. He therefore ordered his release: *The State (Gildea) v. Hipwell* [1942] IR 485.

51. The plaintiff then sued for false imprisonment in respect of what had amounted to 15 days unlawful detention. The action came on before Martin Maguire J. and a jury. The jury provisionally awarded the sum of £13 16s 6d., but in a reserved judgment Martin Maguire J. held that for various reasons the detention was lawful. On appeal, however, this Court took a different view, holding that the detention of the plaintiff in Sligo Prison – as distinct from Mountjoy Prison – was unlawful. It followed that the plaintiff was entitled to damages for false imprisonment.

52. The jury had awarded just under £14 damages, including special damages (being the unrecovered solicitor and client legal costs in respect of the Article 40 inquiry) of just over £13 11s 6d. This Court evidently agreed that this award – amounting to some 5 shillings general damages – was inadequate, with Sullivan C.J. saying ([1942] IR 489 at 506): "If the appellant desires a new trial on the issue of damages I think that he is entitled to it, and that the finding of the jury on that issue should be set aside and a new trial directed." As Murray J. observed in his judgment for the Court of Appeal, this conclusion was "consistent only with the belief that a fresh jury was entitled to award more than the nominal sum for general damages that seemed to form the basis for the first award": see [2021] 2 ILRM 441 at 471. Yet this was a

clear case where the plaintiff *could* plainly have been lawfully detained: the High Court had, after all, directed his committal to prison for contempt.

53. From this review of the authorities – which I do not pretend is necessarily exhaustive – it can be seen that at common law damages in false imprisonment cases have nearly always contained a vindicatory element. To put this another way, an award of nominal damages in respect of the false imprisonment of the plaintiff in the present case would seriously devalue both the importance of the right of personal liberty and the tortious remedy of false imprisonment.

54. So far as the constitutional element is concerned, it is true that in *DF v. Garda Commissioner* [2014] IEHC 213 I held that the tort of false imprisonment gives full and complete effect as a remedy in respect of the State's Article 40.3.1° obligation to defend and vindicate the constitutional right to liberty, so that a claim for damages for violation of the constitutional right to liberty added nothing to that claim. It followed that it was not possible to obtain damages for any violation of personal liberty outside of the parameters of the tort of false imprisonment.

55. This conclusion was, however, premised on the understanding that any damages awarded would be sufficient – in the very words of the Constitution itself – to vindicate the wrong done. Save, perhaps, where the false imprisonment in question is purely technical or fleeting, given the inherent gravity of the tort of false imprisonment the constitutional obligation to vindicate the right to liberty is not satisfied by the award of purely nominal damages. Any other conclusion would simply be inconsistent with the judicial obligation to uphold the rule of law and to vindicate the constitutional rights of the victim of the tort.

56. I should say in passing that this conclusion is itself consistent with the reasoning of this Court in *Simpson v. Governor of Mountjoy Prison* [2019] IESC 81,

[2020] 3 IR 113 at 152-155, where MacMenamin J. expressed doubt regarding the need for the desirability of creating a new head of vindicatory damages. But he clearly recognised that the court should adopt what he described as an "equitable" approach to damages. This included factors such as gravity of the breach: this was intended to reflect "that the seriousness of the violation requires more than a mere declaration": see [2020] 3 IR 113 at 154. This is just another way of saying – as MacMenamin J. fully accepted – that compensatory awards may have a vindicatory element to them.

57. None of this is to say that substantial awards must inevitably be made in the wake, for example, of every order for release under Article 40.4.2° of the Constitution. For a start, any such decision under Article 40.4.2° is not *res judicata* so far as the legality of the detention is concerned. A decision to release an applicant simply amounts to a finding that the detainer could not *then* justify the detention to the satisfaction of the High Court, possibly because, for example, the underlying warrant was defective as happened in cases such as *Miller v. Governor of Midland Prison* [2014] IEHC 176. It would not follow, however, that the defendant could not *a later stage* demonstrate by way of defence to the false imprisonment that the detention was in fact lawful. In some other cases a statutory defence to a damages claim – such as that provided to Gardai by s. 50 of the Constabulary (Ireland) Act 1836 when they act "in obedience" to a judicially sanctioned warrant – may be available even where the detention is in fact unlawful.

58. There may also be other circumstances in which a variety of other defences, immunities and quasi-immunities – whether arising from the common law or statute – might be deployed against any claim for damages in respect of a warrant providing for the arrest of a named person where that warrant subsequently proves to be defective. As this, however, does not arise in the present case it is unnecessary to consider this question any further.

VIII.

The personal conduct of the plaintiff and the award of damages

59. Yet independent of these cases, the personal conduct of the plaintiff has always been relevant to the assessment of damages in respect of acknowledged legal wrongs, whether for false imprisonment or otherwise. A good example is supplied by the *McCord v. Electricity Supply Board* [1980] ILRM 153. Here the seal of a domestic electricity meter had been tampered with. Although "the finger of suspicion pointed to the plaintiff", both he and his wife – who were the relevant householders – denied all knowledge of any interference with the meter: see [1980] ILRM 153 at 159, per Henchy J. The ESB asked the plaintiff to sign a document to this effect and to be responsible "to pay by suitable instalments an amount to be agreed for the unrecorded current use." The plaintiff refused, however, to do this. As Henchy J. put it ([1980] ILRM 153 at 159):

> "In all the circumstances and regardless of strict legal rights, the plaintiff's decision not to agree to the reasonable terms offered and to choose instead to subject his wife and family to the cruel conditions they must have suffered from living in a house without any electricity must be stigmatized as irresponsible, unconscionable and unreasonable."

60. Henchy J. went on, however, to hold that the Board had misconstrued its contractual powers. It had no power to disconnect in circumstances where the plaintiff had denied any knowledge of the interference with the meter. It followed that the disconnection was unlawful and in breach of contract. But this did not mean that the plaintiff was entitled to damages ([1980] ILRM 153 at 163):

> "If the plaintiff had not been guilty of contributory negligence, or he had taken all reasonable steps to mitigate the damage, he would have to be awarded a substantial sum for damages. But he was plainly guilty of contributory negligence under s. 34(1) of the Civil Liability Act 1961. By taking the reasonable steps of putting his signature to a non-incriminating document which would leave him with only a liability to pay on reasonable and extended terms, for the electricity consumed, he could have prevented his disconnection. Notwithstanding the Board's misconstruction of its powers, the real source of the plaintiff's damages is to be found in his unreasonable refusal to comply with a reasonable request."

61. While the facts of *McCord* are admittedly remote from the present case, it points nevertheless to one underlying principle which, to some degree, it shares with this appeal. This was a case where the ESB *might* lawfully have disconnected the electricity supply, but by reason of legal error on its part, it did not in fact do so. While this Court acknowledged that the wrongful disconnection of an electricity customer would normally sound in significant damages, the plaintiff's intransigence and unreasonable behaviour led a majority of this Court to the conclusion that no award of damages should be made.

62. It is true that *McCord* concerned a breach of contract and the present case concerns a trespassory tort which is one of strict liability not involving negligence. But for all the reasons which I gave in my judgment for the Court of Appeal in *Savickis v. Governor of Castlerea Prison (No.1)* [2016] IECA 310, [2016] 3 IR 268 at 281-284, I consider that the express language of s. 2 (defining a "wrong") and s. 34 (dealing with contributory negligence) of the Civil Liability Act 1961 ("the 1961 Act") makes it clear that the contributory negligence rules apply to *all* civil wrongs (including all torts and

breaches of contract) and not just simply the tort of negligence. All of this is to say that the personal conduct of a plaintiff *can* be relevant when it comes to assessing damages, even in respect of the tort of false imprisonment.

63. It may be convenient at this point to set out the text of s. 34(1) and s. 34(2)(c) of the 1961 Act so far as material. Section 34(1) provides that:

> "Where, in any action brought by one person in respect of a wrong committed by any other person, it is proved that the damage suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff….(in this Part called contributory negligence) and partly by the wrong of the defendant, the damages recoverable in respect of the said wrong shall be reduced by such amount as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant…."

64. Section 34(2)(c) provides that "for the purpose of sub-section (1) of this section", the plaintiff's failure

> "…to exercise reasonable care for his own protection shall not amount to contributory negligence unless that damage results from the particular risk to which his conduct has exposed him…."

65. It will be seen that these provisions envisage an extended definition of the term contributory negligence. Indeed, the use of the term "contributory negligence" in this context is something of a misnomer, because there is no need at all for the plaintiff to be guilty of negligence at all in the ordinary legal sense of that term for the section to apply. Contributory negligence in the sense understood by s. 34 of the 1961 Act may apply even though, for example, there could be no sense in which the plaintiff's conduct would amount to a separate cause of action in negligence. Rather, contributory negligence in this extended sense is designed to reflect a state of affairs where the

plaintiff's own carelessness or inattentiveness or, indeed, unreasonable behaviour has helped to bring about the loss which he or she has suffered.

66. The award of damages in respect of a civil wrong may accordingly be reduced in accordance with s. 34 of the 1961 Act in order to take account of the personal conduct of a plaintiff where this is material to the circumstances of the commission of the tort in question. This is clearly true of the plaintiff in the present case.

67. The plain fact of the matter is that the plaintiff did manifest a "want of care" within the meaning of s. 34(1) of the 1961 Act and, furthermore, he "failed to exercise reasonable care for his own protection" within the meaning of s. 34(2)(c). He showed a want of care in that he well knew that he was a migrant in the State with an uncertain – even precarious – status. He compounded his difficulties by unilaterally leaving the State without the Minister's permission. Having travelled to Northern Ireland he then sought to re-enter the State in circumstances where he had no obvious legal entitlement to do so. To that extent this conduct is squarely within the scope of s. 34(2)(c) of the 1961 Act in that the damage resulted "from the particular risk to which his conduct has exposed him."

68. Viewed objectively this conduct cannot be regarded as otherwise than amounting to a want of care or a failure to exercise reasonable care for his own protection within the meaning of s. 34 of the 1961 Act. His irregular conduct rendered him liable to be arrested under the Immigration Acts. This, of course, did not entitle the Gardai to behave illegally or to detain him pursuant to a defective warrant. But neither can it be said that Mr. E. is in the position of, *e.g.*, the plaintiff in *Walsh v. Ireland,* who was the victim of mistaken identity.

69. All of this simply means that applying the principles of contributory negligence (in the wider sense of that term captured by s. 34(1) and s. 34(2)(d) of the 1961 Act),

Mr. E. cannot be entitled to the full measure of damages for false imprisonment as if he had done nothing to bring about this state of affairs.

70. Another example along these lines is supplied by cases involving wrongful dismissal. These cases show that the fact that a plaintiff might *lawfully* have been dismissed had, for example, proper procedures been followed does not affect the ultimate conclusion that a particular dismissal was indeed wrongful. The plaintiff's conduct is nonetheless relevant in any assessment of damages.

71. This is illustrated by the decision of this Court in *Carvill v. Irish Industrial Bank Ltd*. [1968] IR 325. Here it was held that the plaintiff had been wrongfully dismissed from his employment and that the defendant could not rely on acts of alleged misconduct which subsequently came to light to provide retrospective justification for that decision. As O'Keeffe J said ([1968] IR 325 at 346):

> "…an employer cannot, as a defence to an action for wrongful dismissal, rely on an act of misconduct on the part of his servant which was unknown to him at the time of his dismissal, unless the act is of so fundamental a character as to show a repudiation of the contract of employment by the servant. This does not mean that the employer is without rights in respect of the misconduct. He can, in my view, rely on it as a ground for reduction of the damages, and in a proper case the result may be to reduce the damages to the point of extinction."

72. The final example is supplied by the decision of McWilliam J. in *Garvey v. Ireland (No.2)* [1979] ILRM 266. In that case the plaintiff was the former Garda Commissioner who had been summarily dismissed by the Government. No reasons were given for that decision. In *Garvey v. Ireland (No.1)* [1981] IR 75 (which was decided in 1979 in advance of the subsequent decision of McWilliam J. in *Garvey (No.2)*) this Court held that this dismissal was invalid as general fairness of procedure

and the protection of his constitutional rights required the giving of reasons. After that decision the matter was remitted to the High Court for the assessment of damages.

73. In *Garvey (No.2)* McWilliam J. rejected most claims for damages but he did go on to award the plaintiff what even then was a relatively small amount of damages (IR£500) (which is now equivalent to about €2,750 under present monetary conditions) to reflect the arbitrary and oppressive conduct of the Government. The judge explained this relatively small sum by saying, however, that a "similar injury would, to a large extent, have been sustained by the plaintiff had he been lawfully removed from office." This is perhaps the closest the Irish courts have ever come to what might be termed *Lumba*-style reasoning, even though there was, in fact, no suggestion of confining the award in that case to purely nominal damages.

74. It is unnecessary to express any view as to the correctness of this decision: McWilliam J. reduced the damages because he thought that the plaintiff would have suffered a similar injury had he in fact been lawfully removed from office. But this, with respect, surely begs the question as to whether the plaintiff could lawfully have been removed had due process been properly observed.

75. At all events, what these cases show is that the general conduct of the plaintiff is relevant in the assessment of damages in respect of the wrongful conduct of a defendant, even in the case of the tort of false imprisonment. It does not, for example, follow that a plaintiff whose detention is rendered unlawful by reason of legal error should necessarily obtain the same amount in damages as the entirely innocent plaintiff who has been wrongfully detained as a result of some fundamental misunderstanding. General principles of law such as contributory negligence and the duty to mitigate one's loss may have a relevance – depending on the circumstances of each case – to the final damages award.

76. Yet what cannot happen is that the illegality of the detention is simply marked by the award of nominal damages. Article 40.3.1° and Article 40.3.2° of the Constitution oblige the courts as the judicial arm of the State to vindicate the right to liberty in an appropriate fashion. The award of nominal damages in respect of anything but the most technical or fleeting instances of false imprisonment would seriously devalue the tort of false imprisonment and would be inconsistent with the rule of law-based democratic State envisaged by Article 5 of the Constitution and the vindicatory obligations found in Article 40.3.1° and Article 40.3.2°.

77. As Faherty J. put it in her judgment in the High Court (at paragraph 67):

> "…the fact of the matter is that the plaintiff was wrongfully deprived of his liberty for some twenty six days, a deprivation which was not in due course of law, as required by the Constitution, and which, to my mind, cannot be remedied by an award of €1.00 as urged by counsel for the defendants."

78. I entirely agree with these sentiments upon which I could not improve. To that extent, therefore, I would, as I have already indicated, respectfully disagree with the majority of the UK Supreme Court in *Lumba.* I would therefore reject the principal basis of the State's appeal in the present case.

IX.

The cross-appeal

79. It remains to deal only with the cross-appeal. Mr. E. contends that the award of €7,500 made by Faherty J. was inadequate in the circumstances of his twenty-six days of unlawful detention.

80. It is clear from the findings of fact carefully made by Faherty J. in the High Court that there was no oppressive conduct on the part of the Gardai or any other State authorities. She also found that there were material discrepancies in Mr. E.'s evidence.

He had originally claimed in his account to the Refugee Appeals Tribunal to have been from Sierra Leone, yet it seemed that during the course of his asylum interview he knew little about the affairs of that country. The evidence suggested that he in fact had more contacts with and knowledge of Nigeria than he did of Sierra Leone. This was also reflected in the two separate landing cards he filled out following his arrival in the State from Northern Ireland on 1 August 2011. The first stated that he was from Sierra Leone, whereas the second stated that he was Nigerian. Although, for example, a telephone contact found on his mobile telephone seemed to suggest that his mother was living in Nigeria, Mr. E. maintained that this person was an elderly Nigerian asylum seeker who he had met in Cork and who had since returned to Nigeria.

81. It is unnecessary for the present purposes to rehearse all this detail as it is summarised at paragraphs 79 *et seq*. in the judgment of Faherty J. in the High Court. She found that the plaintiff had been less than forthcoming regarding his nationality or his explanations regarding his Nigerian contacts. His account as to why he had different residential addresses in Ireland was equally found to be unsatisfactory: see paragraph 83. Nor did she find his account of his country of origin or the existence of his Nigerian telephone contacts or how he had disposed of his Sierra Leonean identity documents to be satisfactory: see paragraphs 94 and 95. These were all findings which Faherty J. was fully entitled to make, and they are unchallenged so far as this appeal is concerned.

82. The plaintiff did, however, give unchallenged evidence that he had never been in prison before and had found this to be an upsetting experience: see paragraph 94 of the judgment of Faherty J.

83. Faherty J ultimately concluded (at paragraph 96) that:

> "…taking account of the credibility deficits in the plaintiff's evidence, the court sets the compensation for the tort of false imprisonment over twenty six days,

and for the injury caused to the plaintiff as a result, specifically his unchallenged evidence as to the effect prison had on him, at €7,500."

84. For my part, I cannot say that this award is inadequate in the circumstances. It is clear that Faherty J. awarded a sum which, while in some respects restrained and even modest, was nonetheless not insignificant compensation for unlawful detention. There is no doubt but the plaintiff's conduct – specifically his lack of credibility in dealing with both the Gardai in August 2011 and his evidence before the High Court itself – was a significant factor in contributing to a reduction in the final award of damages.

85. Viewed objectively, the plaintiff's behaviour in these respects can only be regarded as unreasonable and unsatisfactory. Just as in, for example, *McCord,* Faherty J was fully entitled as a consequence to reduce the overall damages award. Putting this another way, but for this behaviour the sum which might otherwise have been awarded would doubtless have been appreciably higher.

86. I would therefore dismiss the cross-appeal.

X.

Conclusions

87. It remains simply to summarise my conclusions.

88. First, I entirely agree with both Faherty J. in the High Court and Murray J. in the Court of Appeal that, save perhaps for purely technical and fleeting instances of false imprisonment, an award of damages for false imprisonment will normally (and should) contain an element of vindicatory damages. Any other conclusion would not only devalue the remedy of false imprisonment, but it would also take from the inherent importance of personal liberty and respect for the rule of law, key ingredients in any free and democratic society. To that extent, I would respectfully differ from the majority view of the UK Supreme Court in *Lumba*.

89. This is, I suggest, what the common law requires. In this jurisdiction, this conclusion is, in any event, reinforced by constitutional considerations such as Article 5 (emphasizing the democratic nature of the State), Article 40.4.1° (the protection of personal liberty) and Article 40.3.1° and Article 40.3.2° (which require the judicial arm of the State to "vindicate" constitutional rights such as the right to liberty).

90. Provided, however, that the starting point in any award contains a sum sufficient to mark the inherently serious nature of illegal detention and is one which goes beyond any question of nominal damages – as the award in the present case did – then, just as in cases such as *McCord*, the High Court was entitled to reduce the award having regard to the unreasonable or unsatisfactory conduct of the plaintiff.

91. In these circumstances, I would dismiss both the appeal brought by the State defendants and the cross-appeal of the plaintiff.