Neutral Citation Number: [2022] EWHC 1177 (QB)

Case No: QA-2020-000222

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2022

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

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Between :

ABDUL MATEEN OMAR ALI	**Appellant**
- and -	
THE HOME OFFICE	**Respondent**

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Mr G Denholm (instructed by **Wilson Solicitors LLP**) for the Appellant
Mr B Seifert (instructed by Government Legal Department) for the Respondent

Hearing dates: 15 March 2022

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Approved Judgment

Mrs Justice Heather Williams:

1. This judgement addresses consequential matters arising from the main judgment in these proceedings which was handed down on 12 April 2022, [2022] EWHC 866 (QB). It relates to the Appellant's appeal from the Central London County Court's dismissal of his false imprisonment claim in respect of his immigration detention from 17 December 2014 – 24 March 2015. Reference should be made to the main judgment for the grounds of appeal, the material facts and circumstances, the legal framework, the judgment below and my conclusions on the grounds of appeal. In the main judgment I identified a number of outstanding issues that arose from my findings and I gave the parties the opportunity to make sequential written submissions. Subsequently I have received helpful submissions from Mr Denholm dated 29 April 2022 and from Mr Seifert dated 11 May 2022.

2. In the main judgment I concluded that HHJ Baucher ("the Judge") had erred: in her self-directions when concluding that the Respondent had made sufficient enquiries into the suitability of the Appellant's asylum claim for the Detained Fast Track ("DFT") ("Ground 1"); her approach to the Respondent's failure to comply with the Detained Fast Track Processes ("the DFT Policy") in respect of supporting documentation supplied by the Appellant ("Ground 2"); and in the basis for her finding that it was open to the Respondent to conclude that the claim was suitable for the DFT ("Ground 3"). I also found that the Judge's alternative conclusion that only nominal damages were payable if the detention was unlawful was flawed ("Ground 4"). I went on to find that the Judge had applied the wrong test in deciding that the order setting aside the dismissal of the Appellant's First-tier Tribunal appeal did not render his detention unlawful from the date of the appeal decision (Ground 6).

3. I invited written submissions from the parties on the following consequential issues in particular ("the outstanding issues"):

    i) Ground 1: if I could determine that insufficient enquiries had been made to enable a lawful assessment of whether the Appellant's asylum claim was suitable for the DFT, as opposed to remitting determination of the adequacy of the enquiries to the County Court; and if I did so determine, the impact on the legality of the Appellant's detention (para 80, main judgment);

    ii) Ground 2: if I could determine whether the breach of the DFT policy was material (as opposed to remitting this issue to the County Court); and, if I found that it was, the impact on the legality of the Appellant's detention (paras 85 and 90, main judgment);

    iii) Ground 3: if I could determine whether no reasonable decision-maker could have allotted the claim to the DFT (as opposed to remitting this issue to the County Court); and, if I so found, the impact on the legality of the Appellant's detention (paras 89 and 90, main judgment);

    iv) Ground 4: if I could determine whether the Appellant should only receive nominal damages (as opposed to remitting this issue to the County Court), if I found that the Appellant could not have been considered suitable for the DFT (paras 90, 95 and 97, main judgment); and

v) Ground 6: if I concluded that the Appellant's asylum claim was suitable for the DFT and his detention in respect of the first period was lawful, whether I could determine the nominal damages issue arising in respect of the period from 26 January 2015 (paras 114 – 118, main judgment).

4. Mr Denholm summarised his submissions as follows:

> "25. For the reasons set out above, the Appellant contends (a) first, that this Court is equipped to rule on the outstanding matters identified in the judgment on appeal, (b) second, that the findings on the appeal together with matters that are not in dispute or which cannot reasonably be disputed mean that the whole of the Appellant's detention was unlawful, and (c) third, that the Appellant is entitled to compensatory damages for the whole of his detention, alternatively, for the period beginning with the FTT's determination on 26 January 2015.
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> 26. If the point is reached that final findings on liability and on the compensatory / nominal damages issue have been made, it is submitted that the appropriate course at that juncture would be to stay the matter for three months to enable the parties to attempt to agree quantum without a hearing. Absent agreement, the matter could then be listed for an assessment of damages hearing in this Court or in the County Court as considered appropriate."

5. In response, Mr Seifert said:

> "2. Whilst the Defendant does not concede the fundamental issues of liability in relation to the grounds of appeal it is accepted that this Court can determine the case *in totum* and therefore that it is not necessary to remit the case to the County Court. To that extent the Defendant agrees with the Appellant that this Court is equipped to rule on any outstanding matters identified in the judgment.
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> 4. The Defendant agrees with the Appellant that the appropriate course is to stay the case for three months in order to enable the parties to agree quantum without a hearing and, in the absence of an agreement, the matter can then be listed for a damages hearing in this Court or the County Court."

Questions for this court to determine

6. In light of the parties' submissions, the absence of factual dispute about the key events (as opposed to the inferences to be drawn from them) and the fact that I have all the material documentary evidence and the outstanding issues are largely ones of law, I accept that I am in position to determine them. I also bear in mind that CPR 52.21 provides that the appeal court "may draw any inference of fact which it considers justified on the evidence".

7. In considering the outstanding issues I have applied the balance of probabilities standard of proof. As the fact of detention is not in issue, the onus is on the Respondent to justify the legality of the same, and the onus lies on the Respondent in respect of the alternative argument that only nominal damages should be awarded.

8. I agree with the parties' proposal that following my determination of the outstanding issues they should be permitted time to try and agree the quantum of the claim. I will stay the case for two months, rather than the suggested three months. In my view that affords plenty of time for these matters to be considered and resolved. Bearing in mind the time that has already elapsed since the material events occurred and the possibility of a future hearing on quantum (if agreement is not reached); it is important for matters to be progressed without delay. Indeed, two months appears to me to be quite generous, given the relatively narrow scope of the matters that will need to be discussed.

9. If the parties are unable to reach agreement, I consider that the case should be remitted to the County Court, rather than a quantum hearing taking place before me. I appreciate that this may lead to further delay. However, given that a hearing on quantum would likely require oral evidence to be called and factual findings to be made, this is the appropriate course. Unless the relevant facts are agreed, oral evidence will need to be given by the Appellant and, potentially, by the medical experts; as Mr Denholm submits, the Judge's obiter conclusions on quantum could not bind any future court considering that issue, so that fresh findings would need to be made on the medical evidence.

Conclusions on the outstanding issues

Ground 1

10. I conclude that it was not open to the Judge to find that sufficient enquiries had been made to enable a lawful determination of whether the Appellant's asylum claim was suitable for the DFT at the time when that decision was made. In this case the material before the decision-maker did not enable an informed assessment as to the likelihood of a fair and sustainable decision being reached within the DFT timescales (paras 26 and 78, main judgment). I concluded in the main judgment that for an informed assessment to be made it would have been "necessary for the decision-maker to have at least an outline understanding of *why* the Appellant said he was under threat from the Taliban" (para 76). This information was not apparent from the DFT Referral Pro Forma, which simply said "Fear of Taliban" (para 77, main judgment), nor from the interview form (assuming in the Respondent's favour, for present purposes, that this document was supplied to the decision-maker) (para 76, main judgment).

11. The Appellant relied on the propositions that: (i) he had supplied information to the Afghan intelligence services about the Taliban; and (ii) his actions had become known to the Taliban and they had threatened his life in consequence (para 76, main judgment). As the decision-maker did not know that this was the basis upon which the Appellant proposed to seek asylum, it was not possible for the likely timescale for resolution of the claim to be assessed. Yet, that timescale was the key determinant in assessing whether the case was suitable for the DFT (see the DFT Policy at para 26, main judgment).

12. In the circumstances there is only one answer; insufficient enquiries had been made to enable a lawful determination to be made under the DFT Policy as to whether the Appellant's asylum claim should be assigned to the DFT. I will consider the impact on the lawfulness of the Appellant's detention after I have addressed the outstanding issues in respect of Grounds 2 and 3.

Ground 2

13. I identified the correct question to be asked at para 82, main judgment. I conclude that the breach of policy was material in the sense that it was capable of bearing on the decision to detain the Appellant, as it was capable of impacting on whether the claim was suitable for the DFT. In consequence of the breach of the DFT Policy, the decision-maker was not aware of the nature of the documents supplied by the Appellant, the way in which they were said to support his asylum claim, or the need for some of the documents to be translated. These matters were undoubtedly capable of bearing on the timescales involved and thus on whether the case was suitable for the DFT (see the DFT Policy at paras 26 and 28, main judgment).

Ground 3

14. In my judgment no reasonable decision-maker could have concluded that the Appellant's asylum clam was suitable for the DFT once sufficient enquiries had been made. In all likelihood, proper enquiries would have elicited the way in which the Appellant put his asylum claim, as he articulated this at his substantive interview on 6 January 2015 and it remained the way he put the claim thereafter. Accordingly, proper enquiries would have elicited the core propositions that the Appellant relied upon (para 11 above) and the existence of potentially material documentation, some of which required translation. The questions of whether the Appellant had worked for civil society organisations in Afghan and whether he had been recruited by Afghan intelligence and had supplied information to them on the Taliban, plainly required investigation. The statement on the DFT Referral Form that "no further inquiries will be needed in order to decide" his asylum claim (page 9, main judgment) was simply wrong. Applying the criteria in para 2.2 of the DFT Policy (set out at para 26, main judgment) it was quite plain that this was not a "quick decision" case; further inquiries were needed and documents required translation. It was not a situation where it would be possible to "fully and properly consider the claim within normal indicative timescales".

15. Although I did not hear from Mr Gardner, he had no involvement in the Appellant's case and the decision I have expressed in the preceding paragraph is a conclusion of law, based on applying the DFT policy to the known circumstances. Mr Seifert did not suggest that it would be inappropriate for me to decide this issue because I had not heard Mr Gardner's evidence.

Impact on the lawfulness of the Appellant's detention

16. As I have determined that no reasonable decision-maker could have concluded that the Appellant's asylum claim was suitable for the DFT once sufficient enquiries had been made, it follows that the entirety of his detention pursuant to the DFT and the related appeals process was unlawful. I have already indicated that if this conclusion was

reached it would follow that the entirety of his detention was unlawful (para 90, main judgment). Mr Seifert has not taken issue with that proposition.

Ground 4

17. The question remains as to whether the Appellant is only entitled to nominal damages on the basis that he could and would have been lawfully detained by the Respondent outside of the DFT in light of the Respondent's then policy in Chapter 55 of the Enforcement Instructions and Guidance ("EIG 55") and the *Hardial Singh* principles (para 90, main judgment). As I have already emphasised, these questions fall to be considered in the counter factual context that the asylum claim was not within the DFT (para 95, main judgment).

18. I agree with Mr Denholm's submission that the Respondent's contention fails. At the point when the Appellant claimed asylum it would have been apparent that on a normal timetable, determination of his asylum claim and any subsequent appeal would take, at the least, a number of months and potentially significantly longer. There was no background of criminality in his case or any suggestion that the Appellant posed a risk to the public. Whilst the Appellant had not make his asylum claim at the earliest opportunity, he had approached the Respondent to claim asylum a matter of days after his arrival in the UK and he had returned for interview as instructed. Bearing in mind these factors and the material parts of EIG 55 set out in para 31 of the main judgment, I do not consider that the Respondent has shown that it could have lawfully detained the Appellant during the time of his false imprisonment. Furthermore, such detention would have been in breach of the third *Hardial Singh* principle, as it would have been quite apparent in such a situation that the Secretary of State was not in a position to deport him within a reasonable period of time. As the Respondent has failed to show that the Appellant *could* have been detained lawfully, the question of what *would* have been done does not arise.

Ground 6

19. In the circumstances it is unnecessary to determine the outstanding issue identified in respect of Ground 6, which would only arise if it was found that the Appellant's claim was lawfully within the DFT (para 98, main judgment).

Overall substantive conclusions

20. It follows from my conclusions that the whole of the Appellant's time in immigration detention was unlawful and he is entitled to compensatory damages in respect of the same. I will reflect these matters in my order and set aside the Judge's order dismissing the claim.

Costs

21. I will also set aside the Judge's order that the Appellant pay the Respondent's costs of the proceedings below. In light of my conclusions, the Appellant has plainly been the successful party and he is entitled to his costs of the appeal and his costs to date of the proceedings below, to be assessed on the standard basis if not agreed. Mr Seifert did not resist these propositions.